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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**UNITED NATIONS ACCESS CHALLENGES AND NON-STATE  
ARMED GROUPS IN CONFLICT SITUATIONS: THE NEED FOR  
LEGAL REFORM**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

**By**

**Omneya Makhoulf**

**June 2016**

The American University in Cairo  
School of Global Affairs and Public Policy

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A Thesis Submitted by

*Omneya Makhoulf*

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June 2016

in partial fulfillment of the requirements for the  
LL.M. Degree in International and Comparative Law  
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## DEDICATION

This dissertation is dedicated to my grandfather, Ambassador Ismail Hassanein Makhlouf, God rest his soul, for being my motivation to move forward in this field. His brilliant achievements in both his career and personal life, being loved, admired, and respected by all those who surrounded him, have inspired and moved me to shine as bright as he did. I hope that if he could see me today, he would be proud.

## ACKNOWLEDGMENTS

First and foremost, I would like to thank Allah for blessing me with the opportunity to receive such a high standard of education and for helping me push through the toughest moments of writing this dissertation and the Master's program as a whole.

A significant thank you goes to Dr. Jason Beckett, my thesis supervisor, who guided and supported me immensely throughout the process of this dissertation. He absorbed my redundant questions and my state of panic on several occasions. He was critical of my work and commended it when it was deserved. He has ultimately shaped my understanding of my dissertation. I appreciate everything he has done for me. Furthermore, I'd like to thank Dr. Diana Van Bogaert, who has not only been a professor to me, but a much-needed friend throughout the Master's program.

I would like to thank my family members who have been my supporters since day one, whether it is moral or financial. I would like to thank my father, Mohammad Makhlof, for always believing in me and never doubting that I would be able to get through this program despite my age and relative lack of experience; my mother, Nahla El Baghdady, for pushing me on multiple occasions to put my priorities in line and consistently reminding me of how proud she is of me; my brother, Ismail Makhlof, who was always interested in what I was learning and constantly challenged me ultimately making me a better student and thinker.

I would also like to thank my friends and loved ones who have been supportive of me since my decision to apply to the LL.M program and are continuously expressive of their pride towards my humble achievements. A special thank you goes to my colleagues within the LL.M program; Rana Shafik, Youssef Nassar, Muhammad Mousa, and Mohammed Shoeeb for supporting me throughout the program and especially through my endeavors in writing this dissertation.

Finally, I'd like to thank my former employer, Anne Marie Faustino, who supported me in flexible working hours and understanding the level of stress I was under throughout the program. She also took the time to listen to my thesis proposal and gave me constructive feedback on my arguments, to which I'm very grateful.

Additional acknowledgments go to the donors who financed my fellowships throughout the past two years.

The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

UNITED NATIONS ACCESS CHALLENGES AND NON-STATE ARMED  
GROUPS IN CONFLICT SITUATIONS: THE NEED FOR LEGAL REFORM

Omneya Makhlouf

Supervised by Professor Jason Beckett

ABSTRACT

During situations of armed conflict, United Nations (UN) agencies have been consistently faced with challenges to access vulnerable populations in order to fulfill their humanitarian mandates. This is particularly true in countries such as Yemen, Libya, and Ukraine who have faced prolonged conflict situations from as early as 2010. During these conflicts, UN agencies have been frequently unable to enter areas that are controlled by non-state armed groups. There are several legitimate reasons for these access challenges, one of which includes the inadequate legal framework that governs non-state armed groups. This is not to neglect the operational and executive ineffectiveness of the UN or the political dynamics that shape these conflicts. In fact, this paper argues that these aspects complement the insufficiencies that are witnessed within the international legal system. The ineffectiveness of the UN, which is ultimately driven by the political interests of states, have not only been part and parcel to the genesis and influx of non-state armed groups in the respective countries, but have also played a major role in maintaining the legal positioning of non-state armed groups as a byproduct of the international system rather than main actors. The paper maintains that non-state armed groups have become significant players in international relations due to their increase in regional power and ability to affect politics. With this reality, the current legal framework that governs non-state armed groups has been proven to be an insufficient mechanism of enabling the interaction between UN agencies and non-state armed groups. In an attempt to ease such an interaction, the paper proposes some legal reforms, which are based on findings that prove the inconsistencies of that legal framework. It also offers policy suggestions for operational reforms within the UN system to facilitate the efficient implementation of the legal reforms.

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## I. INTRODUCTION

The United Nations was founded on a mandate of maintaining international peace and security. Within that mandate, there exists a diversity of activities that the United Nations (UN) undertakes ranging from facilitating peacemaking processes between states and combatting poverty. In that light, some UN agencies build their emergency operations on a humanitarian mandate, which is based on supporting populations in need through the distribution of aid. Other agencies have the intent of raising awareness about global issues while some are based on creating dialogue between states and other entities. Those that have the mandate to distribute humanitarian aid to populations in need, specifically in conflict situations, are now facing increased challenges in fulfilling that purpose.

The dynamics of global conflicts in the recent decade have proven to be more complex than conventional warfare. The current refugee crisis, the use of unconventional weaponry, and the increased presence of non-state actors in regions such as the Middle East and Eastern Europe have all contributed to the complexity of armed conflicts, specifically due to the influx of transnational armed groups.<sup>1</sup> These factors have posed significant obstacles for UN agencies and have brought about challenges to the scope within which they operate.

One of the obstacles that UN agencies face due to the current state of conflicts is the high level of security risks for staff deployed in conflict areas. Recent efforts have been made by UN agencies to increase security precautions for staff members on

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<sup>1</sup> See Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J TRANS LAW 1, (2004). Berman argues that although the identity of actors may change over time, historically, the issue of non-state actors has always shaped the laws of war. Their identities and labels may change over time, from the native to the rebel to the unlawful combatant and the nature of wars may change too, from the frontier wars to the war on terror, but the structure of legal argument was always responsive to the issue of non-state actors. However, what is now becoming a norm is the ‘transnational’ nature of armed conflict in light of the growing power and resources of non-state armed groups. Therefore, although Berman discusses the adaptive nature of international law to the malleable nature of non-state actors and war, the transnational nature of armed groups has now become a component of adaptation that international law is yet to adapt to. See generally Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, 6 HPCR OCCASIONAL PAPER SERIES, 25 – 28, (2006). The idea of ‘transnational’ armed conflicts will be further discussed in the legal analysis of this paper.



mission, although the risks are still undeniable. Another challenge that UN agencies face is the terms and conditions imposed by donors when a sum is given to a UN agency to fulfill a humanitarian goal.<sup>2</sup> Conflicts of interest arise when donors restrict the use of funds to a particular region and may limit the agency's interaction with particular groups or states.<sup>3</sup> UN agencies have been attempting to work around some of these challenges, albeit with some difficulty, by negotiating certain terms in order to expand their ability to interact with certain groups and enter certain regions to distribute aid to their populations. There are also situations where UN agencies have preferred taking loans from other countries or organizations that are less restrictive so as to attend to the needs for populations more freely.<sup>4</sup>

However, the primary challenge that this paper discusses is the access challenges that UN agencies face in particular areas within a state or region, whether they are controlled by the government or by non-state armed groups.<sup>5</sup> Access to non-government controlled areas (NGCAs)<sup>6</sup> has proven to be the more pressing challenge for UN agencies, particularly when the UN agency is required to request access from a non-state armed group, which involves an elongated process of negotiations. Such a process poses further challenges on UN agencies.

In order to successfully examine these access challenges, it is important to introduce the context under which UN agencies face access issues. Since the eruption of the Arab Spring in 2011, UN agencies have been attempting to attend to the needs of affected populations. This is especially significant with the influx or emergence of

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<sup>2</sup> Examples of humanitarian goals include, but are not limited to, distributing food, providing health care services, and providing protection for migrants and refugees.

<sup>3</sup> Claudia McGoldrick, *The Future of Humanitarian Action: An ICRC Perspective*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 965, 974 – 975, (2011).

<sup>4</sup> Information on the funding practices of the United Nations can be found here, ROMESH MUTTUKUMARU, THE FUNDING AND RELATED PRACTICES OF THE UN DEVELOPMENT SYSTEM, (May 2015), available at [http://www.un.org/en/ecosoc/qcpr/pdf/ie\\_muttukumaru\\_paper\\_funding.pdf](http://www.un.org/en/ecosoc/qcpr/pdf/ie_muttukumaru_paper_funding.pdf).

<sup>5</sup> The term “non-state actors” refers to all actors within a state that are not affiliated with any state entity. This includes, but is not limited to, non-governmental organizations, civil society, corporations, and non-state armed groups. For the purposes of this research, the term will be limited to non-state armed groups in order to illustrate the challenges that are faced by UN agencies due to the presence of non-state armed groups in conflict areas and their control over certain regions.

<sup>6</sup> Non-government controlled areas (NGCAs) is in reference to areas or regions within a state that are controlled by non-state armed groups such as rebel groups or opposition forces. This is in contrast with government controlled areas (GCAs).

non-state armed groups caused by civil unrest in the region. The contexts of Yemen, Libya, and Ukraine will be outlined in order to illustrate the severity of the access constraints faced by UN agencies as a result of non-state armed groups' control over certain areas of land. Limiting the countries focused on to Yemen, Libya, and Ukraine is because UN agencies, and their local nongovernmental partners, have become the primary humanitarian actors in these countries as a result of the severity of their conflicts.<sup>7</sup> This paper does not aim to provide a complete account of the obstacles faced by UN agencies, but rather it aims to exemplify the access challenges that the current legal framework poses on such agencies in these areas. Adding Ukraine to the cases discussed benefits the research in providing an account of a non-Arab country that faced a similar uprising but is outside the region. Thus, the purpose of providing this example is to show that the impediments faced by UN agencies are not restricted to the Middle East.

UN agencies' access challenges can be attributed to a plethora of factors. The primary factor that this paper intends to discuss is the insufficiencies imbedded within the legal framework governing non-state armed groups under which the UN operates. This is the common factor that is observed when examining the context under which access challenges are faced. It can be argued that the said obstacles are a result of the gaps in the current legal framework that governs non-state armed groups under the law of armed conflict, or international humanitarian law (IHL).<sup>8</sup> The lack of a comprehensive legal mechanism that governs the conduct between non-state armed groups and humanitarian agencies has impeded the UN's ability to access certain regions, specifically those controlled by non-state armed groups, or NGCAs.

Other explanations for the reasons behind UN agencies' access challenges exist and indeed complement the main argument of the ineffectiveness of the legal framework governing non-state armed groups. These arguments include that the nature of modern conflicts and political dynamics in the international world has caused challenges for the UN that cannot be surpassed through their humanitarian

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<sup>7</sup> This is also true for cases such as Syria and Iraq; however, both cases have been omitted from the study because of the political complexities of both conflicts as well as the inability to use inconsistent data collected in NGCAs.

<sup>8</sup> The area of law that governs the conduct of parties to the conflict during warfare is known as international humanitarian law (IHL).

mandate.<sup>9</sup> Other arguments go further than this by not only attributing these challenges to the fluctuation of political dynamics, but also emphasize that these political dynamics ensure that non-state armed groups remain within their current status as subsidiaries within the international legal system, rather than being considered main actors.<sup>10</sup> Given that the UN operates within this political dynamic, it can be argued that the UN has been unable to alleviate these challenges. This UN ineffectiveness can be attributed to both executive and organizational drawbacks, where the executive drawbacks are a result of the policy restrictions caused by the political interests of states. Organizational constraints include their lack of organizational effectiveness, where it is believed that with its current structure and capabilities, the UN has been unable to fulfill its declared goals simply because it does not have the capacity to do so.<sup>11</sup> The convergence of these constraints seems to be the most plausible illustration of reality, where the political dynamics of the international system in which the UN operates, leading them to become ineffective, can be considered reasons behind access challenges.<sup>12</sup>

This does not derogate from the argument that the current legal system is lacking in effectiveness in governing non-state armed groups. On the contrary, it can be argued that the inefficiencies of the current legal framework governing non-state armed groups is one of the outcomes of the UN's ineffectiveness within the political dynamics of the international system. More specifically, the continuous interests of states to maintain the current legal and political positioning of non-state armed groups contributes to the insufficiencies of the legal framework that currently governs non-state armed groups. Within that framework of state interests, the UN is unable to integrate non-state armed groups within the legal system.

Because the current legal framework governing non-state armed groups is insufficient in fulfilling of the UN's humanitarian mandate in conflict situations, it is important to assess the laws that govern the said groups, as they highly contribute to the UN's ability to gain access to all areas with affected populations. Most notably,

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<sup>9</sup> McGoldrick, *supra* note 3, at 967 – 972.

<sup>10</sup> *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (2011), at 48 – 52.

<sup>11</sup> See e.g. THORSTEN BENNER, STEPHAN MERGENTHALER & PHILIPP ROTMANN, *THE NEW WORLD OF UN PEACE OPERATIONS: LEARNING TO BUILD PEACE?* 12 – 50 (OUP Oxford, 2011).

<sup>12</sup> *International Humanitarian Law*, *supra* note 10, at 23 – 26.

the Geneva Conventions of 1949, their Additional Protocols, and customary international law have built a mechanism of governance of armed conflicts that is state-centric. This centrality has ultimately resulted in a framework that treats non-state armed groups simply as an illegitimate entity within the legal system. However, it has become apparent that non-state armed groups' increasing significance in international relations has created a legal importance for them, as they shape the dynamic of relations between other actors within the international system. Therefore, it is imperative that the legal framework governing non-state armed groups, specifically their relationship with humanitarian organizations, be revisited. Propositions will be made to further integrate these actors within the legal system so as to ensure that UN agencies are able to interact with them in a manner that holds both parties accountable as well as ensures that affected populations are receiving necessary aid. Simultaneously, policy reforms will be suggested to complement this legal reform to ensure the maximum effectiveness of the institutions that will implement them.

Within this paper, Part I introduces the narrative of access difficulties for UN agencies and attributes the cause to the legal framework governing non-state armed groups under IHL, whilst Part II provides an account of the humanitarian situation in the three mentioned states of Yemen, Libya, and Ukraine in order to contextualize the access challenges faced as a result of the current legal framework. Part III emphasizes the importance of recognizing non-state armed groups as a legitimate force in the international system, ensuring that although armed groups are not legally equivalent to a state, they remain significant actors in the international system. Part IV details and critiques the applicable laws within the context of non-state armed groups and access challenges, where the applicable laws are limited to international humanitarian law and customary international law. Part V briefly discusses the role of the United Nations at the executive and operational levels in causing access constraints for its agencies that can be attributed to the political dynamics within which the UN operates, which in turn affects the legal framework of international law and its application in governing non-state armed groups. In that light, Part VI finally argues for necessary changes in the law in order to accommodate the growing needs of populations in distress as a result of conflict through further integrating non-state armed groups within the international legal system. In addition, considering the role

of the UN in the international system, this part also acknowledges the need for operational and policy reform on the part of states and the UN.

## II. THE HUMANITARIAN SITUATION

The current humanitarian situation of the aforementioned countries of Yemen, Libya, and Ukraine has been one of grave concern to the international community. The situations assessed are currently among the most violent conflicts witnessed since the eruption of their respective uprisings beginning as early as 2010. Following the uprisings in all three crises, UN agencies such as the World Food Program (WFP), United Nations Children's Relief Fund (UNICEF), UN Women, United Nations Development Program (UNDP), United Nations High Commissioner for Refugees (UNHCR), among other humanitarian organizations, resorted to their emergency mandates and began strategizing to enter these regions in order to provide aid to the distraught populations.

Within this context, the role of other actors, aside from the legal framework governing non-state armed groups, is significant. The ineffectiveness of the UN at an executive and operational level has played a major role in prolonging the crises discussed.<sup>13</sup> In addition, the involvement of third party states, specifically the West, whether directly or indirectly, in these crises have not only caused further complications in attempting to resolve the conflicts, but they have also played a major role in the actual creation of non-state armed groups in the regions as well as provided them with weaponry and financial support on several occasions, leading to the violence witnessed.<sup>14</sup> Yet despite their involvement, they remain adamant on ensuring that non-state armed groups are maintained in their sidelined position under international law. Bearing this in mind, the three crises that will be discussed share resembling patterns in the genesis of non-state armed groups, whereby third parties are involved in the support, if not creation, of such groups but are unwilling to bear the legal or political responsibilities of such an outcome.<sup>15</sup>

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<sup>13</sup> See *UN's Pillay Slams Security Council 'Failure'*, AL JAZEERA, August 22, 2014; THE STATE OF THE WORLD'S HUMAN RIGHTS, AMNESTY INTERNATIONAL REPORT 2014/15, (Feb. 2015).

<sup>14</sup> See e.g., Ryan Timothy Jacobs, *A History of Conflict and International Intervention in Libya*, 6 GLOBAL SECURITY STUDIES, 5 (2015).

<sup>15</sup> Garikai Chengu, *America Created Al-Qaeda and the ISIS Terror Group*, GLOBAL RESEARCH: CENTER FOR RESEARCH ON GLOBALIZATION, (Feb. 2016), available at <http://www.globalresearch.ca/america-created-al-qaeda-and-the-isis-terror-group/5402881>.

In discussing the contexts of Yemen and Libya, it is important to understand that a large portion of the Middle East and North African (MENA) region was governed by absolutist regimes. This is important because the regional contexts feed directly into the two MENA cases of discussion. The eruption of uprisings throughout the region has led to an emergence of non-state armed groups performing cross-border operations that highly affect both Yemen and Libya. Since 2010, portions of Arab populations built dissenting responses against the despotic regimes whether for political, social, economic, or religious reasons. The Arab region as a whole witnessed a sequence of eruptions led by groups that formed during the reign of the respective dictators. To provide a brief background, the conflicts began with the Tunisian revolution in December 2010. Following this was the Egyptian Revolution in January 2011 alongside the Yemeni revolution, which paved the way for a Libyan revolution, which took place in February 2011 and is now known as the Libyan Civil War. Shortly after, protests erupted in Syria leading to the current civil conflict that began with religious segregation and oppression of the majority Sunni Muslims by the Alawite regime.<sup>16</sup> Because the Tunisian and Egyptian cases are now relatively stable in terms of civil conflict, they will not be assessed as part of this study. Furthermore, because of the complexity of the Syrian case, due to the religious, cultural, and ultimately political nature of the conflict, it will also be omitted. Limiting the cases to Yemen and Libya serves this paper because of their prolonged civil conflicts that involve non-state armed groups as primary actors within the conflicts.

On the Eastern European front, the Ukrainian crisis also faces similar conditions as that of the Yemeni and Libyan conflicts. The Ukrainian strife erupted in November 2013 where a civil conflict occurred highly based on political and ethnic beliefs, effectively segregating Ukraine into a Western front, which is government controlled, and an Eastern front, nongovernment controlled.<sup>17</sup> The Ukrainian conflict is added to

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<sup>16</sup>The facts presented regarding the Middle Eastern conflicts can be found at UNITED NATIONS PEACE KEEPING OPERATIONS, (2011), *available at* <http://www.un.org/en/peacekeeping/publications/yir/yir2011.pdf> (last visited Nov 4, 2015).

<sup>17</sup>The facts presented regarding the Ukrainian conflict can be found at *Humanitarian Response*, OFFICE FOR COORDINATION OF HUMANITARIAN ACTION [hereinafter 'OCHA'], *available at* <https://www.humanitarianresponse.info/en/operations/ukraine> (last visited Nov 5, 2015).

the case studies to ensure that the arguments presented regarding UN agencies' access challenges in emergency situations are not ethnocentric or specific to the MENA region, but rather are a global concern. Furthermore, the actions of non-state armed groups in Eastern Ukraine somewhat differ in nature than that of the Yemeni and Libyan situations in such that they are more limited to their region and rarely perform cross-border operations. This example serves as an asset to the study, as it illustrates the difficulties in the UN's interaction with non-state armed groups regardless of the location of their operations.

In order to understand the access challenges that UN agencies face when dealing with non-state armed groups, it is important to provide an account of the humanitarian situation of each of the three conflicts as well as outline the activities that UN agencies undertake as a method of fulfilling their humanitarian mandate and providing aid to affected populations.

#### **A. Yemen**

In 2011, Yemeni opposition groups were forming to combat the tyranny of its despotic government. Some of these groups became militia groups who were equally responsible for the bloodshed witnessed throughout the years. By November 2011, former President Ali Abdullah Saleh transferred his power to Vice President Abdrabuh Mansour Hadi who later became President through elections that took place in February 2012. However, this was faced with great dissent from a large ethnic group that descends from a Muslim sect of Shias called the Houthis, who were largely in support of the former President. This group became recognized as a non-state armed group, or a rebel group, which currently opposes the Yemeni government and performs large-scale armed attacks against government forces. The Hadi government has also gained considerable support by what are known as the anti-Houthi forces. In the process, Yemen's security forces have also been segregated with each party pledging their loyalties to the opposing sides. Both the Houthis and anti-Houthi forces are further faced with hostilities from the non-state armed group of al-Qaeda in the Arabian Peninsula (AQAP) that are mostly situated in the south and south-east of Yemen.

In 2014, Houthi forces officially took control of the government and overthrew the Hadi government. In response, anti-Houthi forces have been combatting the current Houthi government, and in their assistance, a Saudi-led



coalition is politically and militarily aiding them with airstrikes. Other factions consider both the Houthis and their opposition militia groups. The Islamic State (IS), who is labeled as a terrorist organization, also joined the conflict by opposing both the anti-Houthis and the Saudi-led coalition. Each of these actors is situated in a particular region in Yemen, where Houthi forces, who support the former President Saleh and are aided by the Islamic State, are mostly situated in the east. The anti-Houthi forces, supporting the allegedly legitimate President Hadi and are aided by the Saudi coalition, are situated in the south. Constant clashes between these groups in various areas around Yemen lead to assumption that control is quite arbitrary between each faction.

Nevertheless, a consistent pattern of control is observed, whereby the control of provinces is split between these coalitions. The Houthi forces are fighting the Saudi coalition in the Taiz in the southwest and Marib in the western region where each party is attempting to take control of towns and villages in those areas. The anti-Houthi forces and Saudi coalition are focused in Aden, where Hadi rallied supporters from the segregated national military in order to seize control of the province against the Houthi forces. By late 2015, the Saudi-led coalition was in fact able to take control over Aden and is currently based there. Meanwhile, the Houthi forces have taken control over a large portion of western Yemen including the capital city Sana'a and other major cities and ports such as Al-Hudaydah, Sa'dah, Amran, and Dhamar.<sup>18</sup> Other areas in the west are considered to have disputed control and consistent armed conflict such as Taiz, Ibb, Al-Bayda, and Marib. Mukalla in the south and Hadramawt in the east are largely controlled by AQAP fighting against both the Houthis and the Saudi coalition, whilst IS carries out arbitrary attacks throughout Yemen, specifically in the capital.<sup>19</sup>

With this in mind, it is clear that large portions of the western and southern regions of Yemen are facing severe conflict with violence extending from military facilities to civilian areas. According to the United Nations Office for the

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<sup>18</sup> Jeremy M. Sharp, *Yemen: Civil War and Regional Intervention*, CONGRESSIONAL RESEARCH SERVICE, Oct. 2015, at 2.

<sup>19</sup> *Id.*; Chronology of Events: Yemen, SECURITY COUNCIL REPORT (2016), available at <http://www.securitycouncilreport.org/chronology/yemen.php?page=1> (last visited Apr 24, 2016); Yemen Crisis: Who Is Fighting Whom? BBC (2015), <http://www.bbc.com/news/world-middle-east-29319423> (last visited Apr 24, 2016).

Coordination of Humanitarian Affairs (UNOCHA), only one year after the armed conflict in Yemen broke out, approximately 21.2 million people were in need of some form of humanitarian assistance. This comprises approximately 82 percent of the Yemeni population, which is already the least developed nation in the MENA region. In terms of food insecurity, 14.4 million people are food insecure, with 7.6 of these who are severely food insecure. In addition, 19.4 million people lack clean water and sanitation and 14.1 million are unable to be provided with adequate healthcare. An approximate 600 of the Yemeni health facilities have been forced to close down due to damage of infrastructure with a high shortage of critical health supplies. Of these facilities, about 220 facilities that provide treatment for acute malnutrition were forced to close. At least 2.7 million of the affected population is internally displaced, where internally displaced persons (IDPs) have left their homes and migrated to other provinces in Yemen or to neighboring countries such as Djibouti or Saudi Arabia. Finally, civilians are at risk of both physical and psychosocial well-being. Over 50 per cent of the population is in need of protection including 7.4 million children. There has been an average of 41 reports of human rights violations being verified every day since January 2016. Since mid-March 2015, more than 1.8 million children dropped out of school as a result of the conflict causing the total school dropout rate to reach more than 3.4 million students. By January 2016, 1,170 schools have become inadequate for use due to IDPs occupying schools for shelter or armed groups controlling the facility.<sup>20</sup>

Considering these staggering figures, and the fact that western and southern regions of Yemen consist of the highest population density, what with the inclusion of the capital city of Sana'a and large cities such as Al Hudaydah and Taiz, a large portion of the affected population that is most in need of humanitarian aid is currently under the control of non-state armed groups. Humanitarian organizations attempting to aid these populations have faced a significant challenge of access constraints. This is due to several reasons, which include the security hazards that may risk the lives of UN personnel. Another issue is the damaged infrastructure such as roads, warehouses, and highways that is caused by the conflict. Thirdly, there is the challenge of being granted access by the controlling authority in a particular region. Although the UN

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<sup>20</sup> Yemen Crisis Overview, OCHA, (2015), *available at* <http://www.unocha.org/yemen/crisis-overview> (last visited Apr 24, 2016).

should be granted access by the Yemeni government, there remains difficulties in accessing regions that are controlled by non-state armed groups, who in several cases restrict the access of humanitarian convoys for their own security or political reasons. Attempting to gain access without authorization from the designated authority poses a security hazard on the convoys attempting to reach affected populations. This brings us to the final challenge, which is the controversy in the recognition of a particular government as the legitimate authority of the state that should be granting access authorization to UN agencies. These challenges can largely be attributed to non-state armed groups' lack of adherence to international law principles, specifically those of IHL.

Complementing these practical and legal challenges, the situation in Yemen exhibits simultaneous political challenges that exacerbate the conflict and demonstrate the ineffectiveness of the UN at the executive level and the insufficiencies within the legal framework governing non-state armed groups. It is apparent that the involvement of the Saudi-led coalition has not deterred the threat of the rebel groups in Yemen. On the contrary, what is witnessed is that the involvement of a third party state made the conflict worse on the political front as well as on the ground. This involvement has led to the more violent emergence of non-state armed groups that have the aim of combatting foreign intervention.<sup>21</sup> Furthermore, the UN Security Council (UNSC) has been highly selective in condemning violations of international law, whether they are IHL violations or general principles of non-intervention.<sup>22</sup> Under international law, the principle of non-intervention should be adhered to in all conflict situations, except if this intervention is on behalf of the state and will potentially mitigate the intensity of the conflict or result in finding a political solution.<sup>23</sup> However, it is evident that this was not nearly the case in Yemen.

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<sup>21</sup> Zachary Laub, *Yemen in Crisis*, COUNCIL ON FOREIGN RELATIONS (2016), <http://www.cfr.org/yemen/yemen-crisis/p36488> (last visited Apr 19, 2016).

<sup>22</sup> Non-intervention is a principle that Article 3 of the Additional Protocol II of the Geneva Conventions provides, whereby third party states may not intervene in a conflict of non-international character. In practice, this provision is loosely applied if the third party state is intervening on behalf of the government of the state where the conflict is taking place.

<sup>23</sup> Security Council Demands End to Yemen Violence, Adopting Resolution 2216 (2015), with Russian Federation Abstaining, UNITED NATIONS, April 14, 2015, available at <http://www.un.org/press/en/2015/sc11859.doc.htm> (last visited Apr 19, 2016).

The intervention of the Saudi-led coalition, in addition to the overwhelming support given to Saudi Arabia by the US and UK in financing weaponry, both of which were approved by the UN, has led to the death and injury of far more civilians than anticipated.<sup>24</sup> This is where it is evident that the UN has been highly ineffective in ensuring that a peaceful resolution of the conflict is reached. It is also evident that the decisions of the UN were based highly on the political dynamics of the system, which is seen where states and the UN immediately resort to combatting non-state armed groups militarily. It seems that the rationale behind this kind of decision is that, under the current framework that governs non-state actors, a political solution may not be reached with such groups. This means that states are either attempting to use international law to combat non-state armed groups but are failing, or that international law itself has failed to provide a legitimate avenue for dealing with such groups. Either way, the laws, as they are today, are an inefficient mechanism of governing the interactions between non-state armed groups and other entities. Such a situation is replicated in the Libyan crisis, where the conflict has involved both a high level of violence posed by non-state armed groups and ineffectiveness of the UN as a result of the political dynamics of the international system.

## **B. Libya**

The Libyan conflict began in February 2011 with uprisings spreading throughout Benghazi and other cities in protest of the despotic regime ruled formerly by President Muammar Gaddafi. Anti-Gaddafi rebels and security forces engaged in violent clashes that lasted for several weeks. Just as the Yemen crisis involved a third party state, NATO was involved in the Libya crisis. The UN Security Council (UNSC) was highly involved in attempting to ensure the protection of civilians throughout Libya. In March 2011, the UNSC condemned the ongoing air strikes and authorized a no-fly zone over Libya to protect civilians. NATO was responsible for ensuring that this was enforced, hence their involvement in the conflict. Nevertheless, anti-Gaddafi rebels had begun seizing territories within Libya, but were constantly defeated by pro-Gaddafi forces that were better armed.

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<sup>24</sup> Ewen MacAskill, *UN Report into Saudi-led Strikes in Yemen Raises Questions Over UK Role*, THE GUARDIAN, January 27, 2016, available at <http://www.theguardian.com/world/2016/jan/27/un-report-into-saudi-led-strikes-in-yemen-raises-questions-over-uk-role> (last visited Mar 27, 2016).

In July 2011, the opposition forces gained enough manpower and weaponry to take over large segments of Libya. They became known as the National Transitional Council (NTC) and were then recognized as the legitimate government of Libya by the International Contact Group on Libya and 60 other countries as well as the African Union. At the beginning of 2012, however, the NTC had not fulfilled the promises it made when it assumed power and clashes erupted between former rebel groups as a result causing the deputy head, Abdel Hafiz Ghoga, to resign. Further tensions arose when the NTC was split between officials in Benghazi and those in the center, Tripoli. Those in Benghazi were attempting to reestablish autonomy for the region, causing a power struggle between authorities. Throughout the first half of 2012, violent clashes occurred between government forces and local militias. Elections were then held to appease the population, and the General National Congress (GNC) became the legitimate authority within Libya. Throughout this, local militia groups and opposition forces were emerging and increasing in numbers and support to combat other factions and the government.

By 2014, Libya had been witnessing countless factions emerging in the region, where different factions seized control of pockets of land throughout Libya, just as in the Yemen crisis. Several militia groups that had emerged to combat the Gaddafi regime remained in dissent, specifically towards the GNC, which refused to leave its post after its mandate had expired. The Libyan National Army emerges in the process to combat the Islamist groups that appeared in Libya at the beginning of 2014 to seize the opportunity of the power vacuum. A civil war erupts in Libya that causes raids on government buildings and facilities as well as civilian homes. This was made worse when a new parliament was elected and pro-GNC factions begin clashing with the supporters of the new parliament. The deterioration of the security situation led UN staff to be forced to evacuate from Libya and shut down their operations. Foreigners also evacuated Libya as embassies were forced to shut down. The international airport of Tripoli was also significantly damaged by the conflict, making it even more difficult for people to leave Libya. An Islamist group called Ansar al-Sharia then rose amidst the conflict to seize control of large portions of Benghazi, whilst the Islamist Libya Dawn militias controlled most of Tripoli. Other Islamist groups controlled ports such as the port of Derna in eastern Libya making it increasingly difficult for UN

convoys and shipments to be delivered into Libya.<sup>25</sup> Libya was effectively split between the east and the west causing an immense amount of displacement of people.

By 2015, the Islamic State established control over the port-city of Sirte, which is located along the coast of Libya between Tripoli and Benghazi. UN organizations that relied on shipments from Turkey were therefore blocked from sending aid to areas of northern Libya. The Libyan Army attempted to recapture seized regions but failed on multiple occasions. The new parliament and government had been forced, since 2014, to base their operations from Tobruk, as several militia groups captured and continue to clash in the largest two cities of Benghazi and Tripoli. Militia groups and Islamist militants also began to secure areas rich with resources throughout Libya. The IS attacked Ras Lanuf oil terminal and attempts to ensure that the Libyan government is unable to secure its own resources. The main cities and ports that are highly affected by the conflict and remain insecure are Benghazi, Tripoli, Misrata, Sirte, Sabha, and Darnah, which are spread out between the west and the east.

The humanitarian situation in Libya is not all that different from that of Yemen. The armed conflict has affected more than 3 million people throughout Libya. Approximately 2.4 million, around 80 percent of the affected population, are in need of protection and humanitarian assistance. These largely include IDPs, refugees, asylum-seekers, migrants, and those non-displaced but remain affected by the conflict. In terms of health care, there is a major shortage in medical supplies and health care systems. With the remaining supplies, there is still minimal access to such services. Infrastructure is highly damaged, causing difficulties in transportation for those trapped amidst the conflict. IDPs are the most affected and vulnerable as a result of the conflict due to their lack of coping capacity and their loss of assets such as homes, transportation methods, and basic supplies. Those who are severely affected are populations situated in the east and south of the country.<sup>26</sup>

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<sup>25</sup> Libya Profile - Timeline, BBC (2016), *available at* <http://www.bbc.com/news/world-africa-13755445> (last visited Mar 27, 2016); David Poort & Ismaeel Naar, *Timeline: Three Years After Libya's Uprising*, AL JAZEERA, May 19, 2014, *available at* <http://www.aljazeera.com/indepth/interactive/2014/02/timeline-three-years-after-libya-uprising-201421691755192622.html>.

<sup>26</sup> Libya, OCHA, *available at* <http://www.unocha.org/romena/about-us/about-ocha-regional/libya> (last visited Mar 20, 2016).

Although the Libyan situation is similar to that of Yemen, it is more severe in terms of access constraints. It is increasingly difficult to estimate the exact number of those affected in Libya because until today, UN presence in Libya is highly limited. There are only a handful of missions that go into Libya to assess the security situation without being able to administer concrete needs assessments. UN agencies currently operate mostly from Tunisia and through their cooperating partners within the borders of Libya. Yet, these partners are limited in their capacity of distribution of aid and are also unable to access certain regions due to safety concerns and the presence of non-state armed groups. The largest issue facing humanitarian agencies is these groups' unpredictability and lack of adherence to international law principles. Their attacks are arbitrary and take little, if any, consideration of civilian life. Much like Yemen, large portions of the affected population in need of humanitarian assistance is under the control of non-state armed groups such as in Tripoli and Benghazi. Access constraints make the situation all the more difficult as well as the issue of damaged infrastructure and authorization to enter insecure areas, both from the UN and from non-state state armed groups. Of the most difficult challenges is the controversy in recognition of the legitimate authority, as is the case of Yemen. In some cases, militia groups may simply reject authorization to access an area because the UN recognizes an authority that the militia group opposes. The result is that affected populations are unable to receive the required assistance. In many instances, there are cases of civilians dying of starvation, illness, and disease because assistance was not received. This is where the importance of adhering to the principles of international law presents itself.

Much like the Yemeni situation, international law has been unable to mitigate the impact of the conflict. Again, this is highly attributed to the political dynamics between states as well as the inability of the UN to separate itself from those dynamics. This has ultimately affected the way in which international law as applied to the Libyan conflict just as in the Yemeni conflict. There are two main elements in this context: the first is the significance of government recognition and the second is the controversy of foreign intervention, both of which affect the application of international law. Regarding the former, there are a number of factors that affect the conflict whether operationally or legally depending on which government in Libya is

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recognized as the legitimate government. The significance of government recognition under international law lies ultimately within the applicability of laws on the different groups. It also affects the latter, where foreign intervention can be permitted on behalf of the government in the case of a non-international armed conflict.

With regards to government recognition, the situation is quite tricky and controversial. Although the Tobruk-based House of Representatives<sup>27</sup> elected in 2014 is the internationally recognized as the government of Libya with considerable support from the European Union (EU), Egypt, and the UAE,<sup>28</sup> the GNC based in Tripoli is also considered the legitimate government for other entities such as Qatar, Sudan, Turkey, and Islamist coalitions such as the Muslim Brotherhood.<sup>29</sup> Nevertheless, the political recognition of the House of Representatives has given this legitimate government the rights and obligations of a state under international law. Whereas the government based in Tripoli has not been afforded the same rights or obligations. In fact, this government has been treated similar to, or considered legally and politically equal to the Islamist militia groups located within Libya. Furthermore, a ruling from the Libyan Supreme Court in Tripoli deemed the House of Representatives unconstitutional and illegal, yet was still recognized internationally despite any legitimacy that the Supreme Court may hold.<sup>30</sup> This is because the GNC, on many occasions, has expressed its support to Islamist groups such as Ansar al-Sharia and ISIS.<sup>31</sup> In this case, the political recognition of the Tobruk government has

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<sup>27</sup> This is also known as the Council of Deputies.

<sup>28</sup> Rebecca Murray, *Libya: A Tale of Two Governments*, AL JAZEERA, April 4, 2015, available at <http://www.aljazeera.com/news/2015/04/libya-tale-governments-150404075631141.html>.

<sup>29</sup> Stephen, Chris, *War in Libya - The Guardian Briefing*, THE GUARDIAN, August 29, 2014, available at <http://www.theguardian.com/world/2014/aug/29/-sp-briefing-war-in-libya>; Bashir says Sudan to work with UAE to control fighting in Libya, AHAM ONLINE, February 23, 2015, available at <http://english.ahram.org.eg/NewsContent/2/0/123755/World/0/Bashir-says-Sudan-to-work-with-UAE-to-control-figh.aspx>, (last visited Mar 22, 2016).

<sup>30</sup> Murray, *supra* note 28.

<sup>31</sup> Hadi Fornaji, *Omar Al-Hassi in "beautiful" Ansar row while "100" GNC members meet*, LIBYA HERALD, November 18, 2014, available at <https://www.libyaherald.com/2014/11/18/omar-al-hassi-in-beautiful-ansar-row-while-100-gnc-members-meet/>; Jason Pack & Mattia Toaldo, *Why Picking Sides in Libya Won't Work*, FOREIGN POLICY, March 6, 2015, available at <http://foreignpolicy.com/2015/03/06/libya-civil-war-tobruk-un-negotiations-morocco/>. (Noting, "One is the internationally recognized government based in the



superseded the recognition of the Tripoli government, although the GNC was elected far before the eastern government was founded. It can be argued that this recognition is a result of the GNC's political affiliations with internationally recognized militia groups, not because of any substantial sovereignty given to the House of Representatives. Therefore, this political reality has ultimately led to the imposition of theoretically differentiated laws between the two governments. The legality of such a situation will be further elaborated on in Chapter IV.<sup>32</sup> Although the UN has made efforts to reconcile the two factions through putting forth unity treaties and attempting to create a unified government, it is quite clear that the UN's affiliations are directed more to one entity rather than the other. This ultimately negates the alleged neutral ideologies of the UN simply because certain states refuse to recognize entities that are affiliated with so-called militia groups. Such is also proven with the second element discussed here; the approval of foreign intervention on behalf of an internationally recognized faction over the other.

Foreign intervention has directly resulted in the worsening of the Libyan conflict, according to a UN representative.<sup>33</sup> There are a number of factors at play, all of which are caused by political dynamics. Some would argue that the NATO and US intervention in Libya can be considered a war, in which case the American administration has been blamed for their reserved attitude towards the whole intervention. Furthermore, the administration has also been blamed for the financial burden that this intervention has created on the US economy. The debates surrounding the rightfulness of the US's intervention primarily focus on the lack of economic benefit that the US gained from such a move. Many speculate that considering the British and US oil companies had begun to control Libyan oil under the Gaddafi

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eastern city of Tobruk and its military wing, Operation Dignity, led by General Khalifa Haftar. The other is the Tripoli government installed by the Libya Dawn coalition, which combines Islamist militias with armed groups from the city of Misrata. The Islamic State has recently established itself as a third force”).

<sup>32</sup> This refers to the differences in legal obligations imposed and rights granted based on the nature of the entity, i.e. states, non-state armed groups, international organizations, etc. under the provisions of international humanitarian law in armed conflicts.

<sup>33</sup> Jason Kaplan, *Libya War Update: Foreign Military Intervention Will Worsen Humanitarian Crisis, UN Envoy Warns*, IBTIMES, February 28, 2016, available at <http://www.ibtimes.com/libya-war-update-foreign-military-intervention-will-worsen-humanitarian-crisis-un-2328775>.

regime that their intervention was primarily inclined towards protecting their investment.<sup>34</sup> What this means is that this intervention, under international law, was not motivated by the need to mitigate the impact of the conflict, but rather was driven primarily by politically and economically strategic interests of the NATO alliance. Even if it was to be assumed that the purpose of the intervention was aligned with the principles of international law, the effect of the intervention was detrimental to the Libyan population in several ways, some of which include that they have worsened the overall humanitarian situation in Libya and have increased the presence as well as level of violence posed by non-state armed groups in the country.<sup>35</sup>

In addition, ideally NATO's intervention should have been made to restore peace in Libya, hence the UNSC's authorization of the intervention with Resolution 1973. Considering that NATO is a regional organization, it technically does not fall under Chapter VII of the Charter, and the intervention is therefore considered "legally dubious"<sup>36</sup> yet was still authorized by the UNSC. NATO's involvement was not an act of self-defense and the organization should have been forbidden from taking collective offense action in Libya. Therefore, it is clear that the political dynamics of the international system not only resulted in an unnecessary and purely political foreign intervention effectively questioning the UN's effectiveness in restoring peace in Libya, but also caused an influx of violence as a result of the intervention through the further emergence of non-state armed groups in the region causing further distress. This is slightly different from the situation witnessed in Ukraine, as the controversy of government recognition and foreign intervention are not the main issues.

### **C. Ukraine**

The Ukrainian crisis consists of two main dimensions; the ethnic front and the political front. The conflict erupted in November 2013 where the Ukrainian government abandoned their original intent to improve their economic ties with the EU and resorted to seeking closer ties with Russia. The Ukrainian capital Kiev witnessed a high number of demonstrations. Russia then provided financial aid to

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<sup>34</sup> Jacobs, *supra* note 14, at 5.

<sup>35</sup> Christopher S. Chivvis & Jeffrey Martini, *Libya After Qaddafi*, RAND CORPORATION - NATIONAL SECURITY RESEARCH DIVISION, 2014, at 13 – 16.

<sup>36</sup> Ademola Abass, *Assessing NATO's involvement in Libya*, UNITED NATIONS UNIVERSITY, October 27, 2011, available at <http://unu.edu/publications/articles/assessing-nato-s-involvement-in-libya.html>.

Ukraine to relieve Ukraine of its economic debt and simultaneously decreased the prices of Russian gas supply to Ukraine. In response to the protests, the parliament passed anti-protest laws that were ineffective in dealing with the opposition. Instead, protesters raided governmental offices and buildings. Any governmental attempts to appease the Ukrainian population were met with further opposition. Ukrainian President Yanukovich began to negotiate with opposition forces and signed a compromise with them in 2014, yet the clashes remained violent. The parliament then voted to remove the president from power and moved to rally for new elections. Anti-Russian sentiments were extended throughout the country both politically and socially, whilst pro-Russian supporters began to rally as well, mostly in the Eastern Ukrainian region.

To make matters worse, the Russian parliament approved Russia's use of force in Ukraine as a form of protecting Russian interests in Ukraine. Shortly after, Crimea was annexed to Russia through a referendum and was effectively split from Ukraine. In the process, protests erupted in Eastern Ukraine demanding independence of the oblasts of Donetsk and Luhansk, also known as the Donbas region. Acting President Turchynov began an anti-terrorist campaign against the pro-Russian separatists in the Eastern Ukrainian region. The conflict then became largely situated in Eastern Ukraine where ethnic militia groups took control of the Donbas region. These militia groups considered themselves separate from the Ukrainian ethnicity. Although these are not necessarily intending to join Russia as Crimea did, their sentiments remained pro-Russian. Militia groups in both regions then declared independence through a public referendum in attempts to create a separate entity. Ukraine proceeded to hold presidential elections where Petro Poroshenko was elected while the east was not involved much in this process. Ties with the EU and Ukraine were then reinstated and the separatists in Eastern Ukraine continued to act in violence against Ukrainian forces. Meanwhile, Russia retracted its forces in Ukraine and the EU and US imposed new sanctions on Russia. Russia remained in support of the eastern Ukrainian sentiment to secede from Ukraine and considering the lack of access to aid in eastern Ukraine, the Russian government delivered a large convoy to Luhansk without authorization from the Ukrainian government.

This political dynamic has been a cause of challenges faced by UN agencies, including Russia's empowerment of the separatist groups making it far more difficult to treat these groups as rebels as opposed to legitimate forces in the international

system, who have become both militarily and economically powerful. Russia's political and financial support to these groups have created a power struggle between the government and these entities, which has in turn hindered the ability to restore peace in Ukraine.

There were several attempts at ceasefire throughout 2014, which were allegedly finalized when the Ukrainian government and the pro-Russian separatists signed a truce. To that end, Russian troops withdrew themselves from eastern Ukraine. Human Rights Watch has shown evidence that the Ukrainian government violated the truce by attacking areas in Donetsk that are largely populated with civilians. Finally, separatists in eastern Ukraine elected new leaders with the support of Russia effectively creating the Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR). In the peace process attempt, eastern Ukraine has been deadlocked in a situation of limited resources and access to aid. Russian aid has been highly compromised due to the sanctions and lack of access to the territory has left thousands of people insecure well into 2016.<sup>37</sup>

This made the humanitarian situation quite severe in the whole of Ukraine. Although the conflict itself is mainly focused in the Eastern region, the attacks on other parts of Ukraine have caused large displacement and a lack of access to basic services. This is specifically true in regions that are surrounding the contact line between GCAs and NGCAs. As of February 2016, there are approximately 3.7 million people affected by the conflict and an additional 1.75 million who are IDPs.<sup>38</sup> There are approximately 300,000 people at risk of death due to the lack of access to clean water.<sup>39</sup> Considering Ukraine is more developed than Libya and Yemen, the humanitarian situation is somewhat less detrimental to the livelihoods of those living at a far distances from the physical clashes. However, there is a spillover effect in

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<sup>37</sup> Ukraine Crisis: Timeline, BBC WORLD, November 13, 2014, *available at* <http://www.bbc.com/news/world-middle-east-26248275> (last visited Mar 29, 2016); Minsk Contact Group Reaches Agreement on Easter Ceasefire, THE UKRAINE CRISIS TIMELINE, *available at* <http://csis.org/ukraine/index.htm> (last visited Mar 28, 2016).

<sup>38</sup> UKRAINE HUMANITARIAN SITUATION REPORT #43, UNITED NATIONS INTERNATIONAL CHILDREN'S RELIEF FUND [hereinafter UNICEF], 1 (1 – 29 February 2016), *available at* [http://www.unicef.org/ukraine/UNICEF\\_Ukraine\\_Sitrep\\_43\\_1-29\\_February\\_2016.pdf](http://www.unicef.org/ukraine/UNICEF_Ukraine_Sitrep_43_1-29_February_2016.pdf).

<sup>39</sup> HUMANITARIAN BULLETIN: UKRAINE, ISSUE 08, OCHA, 1 (1 – 31 March 2016), *available at* [http://reliefweb.int/sites/reliefweb.int/files/resources/bulletin\\_march\\_16\\_v1\\_eng.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/bulletin_march_16_v1_eng.pdf).

several parts of Ukraine due to the massive numbers of displaced persons and the lack of access to areas with resources that affects the livelihoods of individuals who would otherwise be secure. Furthermore, the constant closure of checkpoints between GCAs and NGCAs, specifically the Zolote checkpoint, which is an essential yet volatile crossing between the two areas, has led to a mass displacement of people attempting to flee the conflict. Other motives for crossing the checkpoint include the attempt to seek refuge in the GCAs, considering that on several occasions the government of Ukraine has suspended social payments to IDPs and created an elongated process of verification for IDP status. Records show that over 720,000 people in March 2016 have crossed through the five main checkpoints across the contact line between the GCAs and NGCAs. This is a 76 percent increase than the number of people crossing in February 2016, which amounted to 410,000 crossings.<sup>40</sup> It is therefore evident that the humanitarian situation throughout Ukraine, whether it is in the GCAs or the NGCAs, is highly concerning.

Considering the difficulties on the ground, UN agencies have faced a significant access constraint in both the GCAs and the NGCAs. Overall, this is a result of the conflict between the separatist non-state armed groups, also referred to as the de facto authorities of LPR and DPR, and the Ukrainian forces. In specific to the NGCAs, UN agencies are facing a stringent accreditation process imposed by the de facto authorities, which makes it severely challenging for humanitarian aid to be distributed to the affected populations. Also noting that the situation within the GCAs has deteriorating and as a result, there is an influx of IDPs entering the NGCAs, it makes it even more difficult for UN agencies to attend to the growing needs of such populations. Furthermore, there is a consistent closing and reopening of checkpoints that is a reflection of the political tension between the Ukrainian government and the de facto authorities. Most recently, the de facto authorities have closed checkpoints to limit the number of GCA civilians entering their areas. This is because they claim that the opening of the checkpoint was not coordinated with them by the government.<sup>41</sup>

The de facto authorities are also limiting the number of cooperating partners, mostly local nongovernmental organizations (NGOs) or international NGOs, that are granted accreditation in the NGCA. This is largely due to the authorities' need to

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<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.* at 3.

control the goods entering their territory to ensure maximum supervision. It is also due to the fact that the authorities have requested on multiple occasions for the UN's recognition of their independence. Considering UN agencies' mandates, they are bound by the UN's executive recognition of the state, which is usually derived from Security Council or General Assembly resolutions, and which does not exist in this case. UN agencies are also bound by their ties and agreements with the Ukrainian government, which will potentially be severed if a UN agency recognizes the de facto authorities. This would also harm the UN's reputation and could also face a restriction in UN presence in the GCAs of Ukraine, which would defeat the purpose of providing aid to their populations.

In conclusion, all three crises in Yemen, Libya, and Ukraine face highly concerning humanitarian situations with their populations having little access to health care, supplies, food, clean water, among other necessities. They are each experiencing a high level of IDPs, migrants, and refugees, although the issue of refugees and migrants is not as pressing in Ukraine; however, the Ukrainian IDP crisis has resulted in the escalation of the severity of the crisis. UN agencies face access issues to certain regions within these countries due to the existence of non-state armed groups that do not adhere to the principles of IHL, which has been made worse as a result of the political dynamics surrounding the three conflicts. This reality has caused the access restraints for UN agencies because of safety hazards as well as non-state armed groups' reluctance to ensure access for humanitarian organizations to aid the respective states' affected populations. This is highly attributed to the gaps in the laws that govern non-state armed groups as well as the political interests of states that expand the gap even further.

### III. NON-STATE ARMED GROUPS IN INTERNATIONAL RELATIONS

In the three crises of Yemen, Libya, and Ukraine, it is evident that non-state armed groups are of the main actors in each of the conflicts. Their presence and activities play key roles in the countries' political and strategic dynamics. They are also decisive in curtailing UN access to regions controlled by these groups. It is important to determine how significant these actors really are in the international system, whether politically or legally and to assess the extent of the impact that non-state actors have on the international system. In other words, it is necessary to determine if the presence of non-state armed groups in armed conflicts and the challenges they pose to UN agencies are in fact worth the trouble of reforming the international legal system.

Scholars differ on non-state armed groups' significance and the perspectives on their role in international law are diverse. Looking at the significance of non-state actors in general, there is a general view that the role of the state is diminishing with the emergence of international organizations, NGOs, and non-state armed groups.<sup>42</sup> This is because they have increased in numbers and political influence throughout the past decades leading them to become an important part of the decision-making processes of states.<sup>43</sup> The inclusion of international organizations and NGOs has become more necessary and significant. Although there has been a relative statistical reduction in worldwide extreme poverty in the past half-decade and access to healthcare has improved,<sup>44</sup> there is a still need for such organizations to ensure the sustainability of those who are subject to falling back into poverty or being faced with

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<sup>42</sup> See *Non-State Actors in the International System of States* in ASHGATE RESEARCH COMPANION 1, (Bob Reinalda ed., Ashgate Publishing) (2011).

<sup>43</sup> See THOMAS G. WEISS, D. CONOR SEYLE, AND KELSEY COOLIDGE, *THE RISE OF NON-STATE ACTORS IN GLOBAL GOVERNANCE* (One Earth Future Foundation) (2013).

<sup>44</sup> World Bank Forecasts Global Poverty to Fall Below 10% for First Time; Major Hurdles Remain in Goal to End Poverty by 2030, THE WORLD BANK (2016), available at <http://www.worldbank.org/en/news/press-release/2015/10/04/world-bank-forecasts-global-poverty-to-fall-below-10-for-first-time-major-hurdles-remain-in-goal-to-end-poverty-by-2030> (last visited May 7, 2016); for a detailed report on the 2015 poverty statistics, refer to Marcio Cruz et al., *Ending Extreme Poverty and Sharing Prosperity: Progress and Policies*, WORLD BANK GROUP, 2015; Max Roser, *World Poverty*, OUR WORLD IN DATA, (2016), available at <https://ourworldindata.org/world-poverty/>.

health care deprivation.<sup>45</sup> Furthermore, with the global increases in war and conflict, the implications of the refugee, migrant, and displacement crises have also led to a growing need for these organizations to assist the international community in alleviating these challenges.<sup>46</sup> Their significance is therefore rising in order to aid populations in need specifically if their respective governments are not willing or able to do so. More specifically, the significance of non-state armed groups must be addressed, as they have a direct role in shaping the politics of the international system and pose unprecedented challenges for development.<sup>47</sup> Further to this, the deterioration of the state's role in international relations has caused a cyclic effect, resulting in an increase in the number of non-state armed groups further challenging the existence of the state.

However, considering that non-state armed groups are yet to be involved in the decision-making processes of state relations specifically in conflict situations, this view is somewhat flawed. Conversely, NGOs and international organizations have been much more involved in decision-making processes than non-state armed groups.<sup>48</sup> This is evident in situations of conflict where states will form peace agreements with other states and cooperation agreements with international organizations to ensure that these organizations are able to access the populations in need. In this instance, states are relying on humanitarian organizations, to some extent, to ensure the livelihoods of their people are preserved specifically in conflict situations, and are therefore involved in the decision-making process. The same is not true for such processes with regards to non-state armed groups. Although it is valid to argue that non-state armed groups have increased in significance in the international scene, this does not necessarily decrease the centrality of states within the system of

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<sup>45</sup> PAT GIBBONS & HANS-JOACHIM HEINTZE, *THE HUMANITARIAN CHALLENGE: 20 YEARS EUROPEAN NETWORK ON HUMANITARIAN ACTION*, 43 – 44 (Springer, 2015).

<sup>46</sup> See Weiss, Seyle, and Coolidge, *supra* note 43.

<sup>47</sup> This is not to say that NGOs and international organizations, including international financial institutions (IFIs), have not played a critical role in the creation of poverty and lack of development in several countries. However, some have also played a role in alleviating the challenges that affected populations face through humanitarian aid and policymaking. See Robert Pinkney, *International NGOs: Missionaries or Imperialists?* in *NGOS, AFRICA, AND THE GLOBAL ORDER*, (Springer, 2009); Edward A. Fogarty, *States, Nonstate Actors, and Global Governance: Projecting Politics*, 19 *ROUTLEDGE ADVANCES IN INTERNATIONAL POLITICAL ECONOMY*, (Routledge, 2013).

<sup>48</sup> Weiss, Seyle, and Coolidge, *supra* note 43, at 9 – 11.



international relations in conflict situations. The mere existence of non-state armed groups follows the same pattern of increasing numbers as that of NGOs and international organizations; however, the difference is that these non-state armed groups are armed and may represent a particular dissenting belief towards a state. This is why states are resistant to including non-state armed groups in the decision-making processes; because they threaten the legitimacy of the regime.<sup>49</sup> Thus, there is a requirement of state consent under international law to incorporate non-state armed groups into the political process, which effectively still qualifies the state as the main actor under international law.<sup>50</sup>

Noting a different view, some scholars argue that non-state armed groups are simply a byproduct of the international system and their existence is of little consequence amidst a system governed by states.<sup>51</sup> They believe that the international system will continue to be governed by states, as one of the pinnacles of international law is the protection of state sovereignty and territorial integrity, which must be safeguarded by the international community regardless of the existence of non-state armed groups.<sup>52</sup> The establishment of state sovereignty and its protection were further codified through the creation and implementation of the UN Charter in 1945, which was founded by states to protect states. International law was further developed through custom to protect states against non-state armed groups, specifically those with terrorizing nature.<sup>53</sup> This is assuming that the state is consistently more powerful both politically and militarily than a non-state armed group. However, since the eruption of the Arab Spring, it is evident that non-state armed groups have had the

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<sup>49</sup> Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 THE YALE J INT'L LAW 1, 107 – 152 (2012).

<sup>50</sup> *Id.*; Nehal Bhuta, *The Role International Actors Other Than States Can Play in the New World Order* in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW (Antonio Cassese, Oxford Scholarship Online, 2012).

<sup>51</sup> DIRK PULKOWSKI, *THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT*, (OUP Oxford, 2014); MATTHEW HAPPOLD, *INTERNATIONAL LAW IN A MULTIPOLAR WORLD* IN ROUTLEDGE RESEARCH IN INTERNATIONAL LAW (Routledge, 2013).

<sup>52</sup> U.N. Charter, art. 2, para. 1; U.N. Charter, art. 2, para. 4.

<sup>53</sup> *See* S.C. Res. 1373, U.N. Doc.S/Res/1373 (Sept. 28, 2001) on Iraq War taken as precedence to create a custom of condemning protecting states from the threat of terrorism. *See* The War on Terrorism and Iraq, COLUMBIA LAW SCHOOL, *available at* [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2005\\_older/2003/june\\_news/columbiatowar](http://www.law.columbia.edu/media_inquiries/news_events/2005_older/2003/june_news/columbiatowar), (last visited Apr 1, 2016).

ability to mobilize and gain support more vigorously than expected. They have also had access to technology and weaponry that is unprecedented, some of which have been financed and endorsed by Western countries, effectively causing a more complex political dynamic that requires serious attention.<sup>54</sup> In that light, the growing, if not resurgent,<sup>55</sup> power of non-state armed groups cannot be neglected, as their presence and power has affected state sovereignty on more than one occasion.

Non-state armed groups specifically, and NGOs and international organizations generally, are therefore equally significant in the international relations as states are, as they play a major role in creating the political, economic, and social dynamics between states. Each of the roles of non-state armed groups and states must be acknowledged and dealt with according to their particular structure and demands. This is not to say that the violent acts of non-state armed groups should be met with appeasement, but rather it must be acknowledged that their ability to affect international politics and compromise state sovereignty is becoming increasingly alarming. The attitude that states have towards non-state armed groups as simply a byproduct of the system or a violent group that should be met with violence is no longer the most effective method of dealing with the present reality. Both parties must interact with one another in light of the rising importance of non-state armed groups.<sup>56</sup>

Therefore, this coordination and integration is essential for the continued functioning of the international system and the ability for all entities to have some sort of relationship with one another, including humanitarian organizations and non-state

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<sup>54</sup> See e.g., PATRICK COCKBURN, *THE RISE OF ISLAMIC STATE: ISIS AND THE NEW SUNNI REVOLUTION* (Verso, 2015); J.M. BERGER & JESSICA STERN, *ISIS: THE STATE OF TERROR* (Harper Collins, 2015); HASSAN HASSAN & MICHAEL WEISS, *ISIS: INSIDE THE ARMY OF TERROR (UPDATED EDITION)* (Simon and Schuster, 2016).

<sup>55</sup> Resurgent is used here to depict that the current situation of the emergence of non-state armed groups is not all that different from those of liberation movements that swept across Africa in the mid-20<sup>th</sup> century. See International Committee of the Red Cross [hereinafter ICRC], *Understanding Armed Groups and the Applicable Law*, 93 INT'L REV. RED CROSS 882, (2011); See generally ANDREA J. DEW AND RICHARD H. SHULTZ, *INSURGENTS, TERRORISTS, AND MILITIAS: THE WARRIORS OF CONTEMPORARY COMBAT* (Columbia University Press, 2009); *Armed Non-State Actors: Current Trends & Future Challenges*, (DCAF & Geneva Call, Working Paper No. 5, 2015).

<sup>56</sup> Trevin Stratton, *Power Failure*, 1 INFINITY J 1, (2008); Pierre Calame, *Non-State Actors and World Governance in World Governance*, (2008), available at <http://www.world-governance.org/rubrique37.html?lang=en>.

armed groups. Because humanitarian organizations are only able to function through state consent, it is imperative that states be willing to integrate non-state armed groups within the system so as to achieve that end. The alternative would be to impose upon states a reformed system that acknowledges non-state armed groups' presence without requesting their consent. However, this would prove to be an immensely difficult task. Therefore, approaching the rise of non-state armed groups through the lens of reciprocity between them and humanitarian organizations will support the process of reassessing the legal framework governing non-state armed groups.

#### IV. INTERNATIONAL HUMANITARIAN LAW

International law has proven to be a double-edged sword in governing the operations of UN agencies. On the one hand, it has given agencies the ability to perform their operations in crisis situations in the hopes of fulfilling their humanitarian mandate. Within this particular context, IHL has provided UN agencies with the platform to form agreements with states in order to enter their borders and provide humanitarian assistance to their people during times of conflict. It has also granted certain protections and immunities for UN agencies and their personnel such as ensuring their safety and mobility throughout the conflict areas. More often than not, international law has therefore obliged both states and UN agencies to adhere to the provisions that regulate their conduct in conflict situations, although there are the rare situations where responsibility can be evaded.<sup>57</sup>

In other circumstances, however, international law has impeded the operating ability of UN agencies. Although there exists a framework that allows humanitarian agencies to operate within a state-centric system, it has failed to provide a sufficient legal framework governing the conduct of non-state armed groups and their interaction with humanitarian agencies. As a result, UN agencies have faced access difficulties in areas that are controlled by non-state armed groups.

##### A. Non-State Armed Groups under International Law

After establishing the significance of non-state armed groups in international relations and determining the level of effectiveness the UN has in terms of humanitarian aid in crisis situations, it is equally important to assess the significance of non-state armed groups under the framework of international law. Understanding where international law situates non-state armed groups within its provisions will allow for the identification of the gaps in the framework that will in turn create a platform for the implementation of a reform process. These gaps are identified through the rather

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<sup>57</sup> There were allegations made of the UN being responsible for the cholera epidemic in Haiti, while the UN claimed sovereign immunity to evade responsibility. Jacqueline Charles, *United Nations Top Official Goes to Haiti to Promote Cholera Elimination, Elections*, MIAMI HERALD, July 13, 2014, available at <http://www.miamiherald.com/news/nationworld/world/americas/haiti/article1975427.html>; Ctr. for Econ. & Policy Res. (CEPR), *High-Level Donor Conference on Cholera in Haiti Fails to Secure Much Needed Funding*, HAITI: RELIEF & RECONSTRUCTION WATCH BLOG; Convention on the Privileges and Immunities of the United Nations § 29, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15.

pragmatic approach of determining the laws that apply to a particular situation or conflict and if there is a significant amount of controversy between legal scholars surrounding the law in that context,<sup>58</sup> then there is effectively a gap in the system. Understanding how international law defines non-state armed groups will support this process.

There is the view that non-state armed groups, under the provisions of international law, remain subject to state actions and state jurisdiction under international law.<sup>59</sup> This means that non-state armed groups should not fall under the jurisdiction of international law unless an international crime is committed where the act can be attributable to a state. Otherwise, the domestic laws of a state should govern the actions of non-state armed groups belonging to that state. This is considered a classical view that assumes that non-state armed groups are not active in cross-border conflicts. However, in light of the cases of Yemen and Libya specifically, the trend that is being witnessed is quite the contrary. Non-state armed groups have become an international entity that is generally not attributable to one particular state.<sup>60</sup> If this narrow definition were used, it would be problematic to situate non-state armed groups under the provisions of international law considering that several states would be held accountable for the actions of one group of people, which seems illogical to say the least. Furthermore, more often than not, the non-state armed group that emerges from one state actually opposes that state or is demanding independence and became a de facto state, such as in the case of Ukraine, making it also unreasonable to hold the contracting state accountable for its actions. Therefore, situating non-state armed groups under domestic jurisdiction unless an international crime is committed (which is governed by a different set of laws than those of IHL) seems implausible.

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<sup>58</sup> Kelsen argues that there is no situation where no law is applicable. If there is a situation where no law seems applicable, this is in reference to a gap purposely created in the system that grants permissions or exonerations to particular parties. Hans Kelsen, *On the Theory of Interpretation*, 10 *LEGAL STUDIES* 2, 127 – 135, (1990).

<sup>59</sup> Dayana Jadarian, *International Humanitarian Law's Applicability to Armed Non-State Actors*, UNIVERSITY OF STOCKHOLM, (2007), at 46; *See e.g.* Roberts & Sivakumaran, *supra* note 49; Frederic Megret, 'War?' *Legal Semantics and the Move to Violence*, *EJIL*, 2002.

<sup>60</sup> Héloïse Ruaudel, *Armed Non-State Actors and Displacement in Armed Conflict*, GENEVA CALL, 2013, at 23.

The more convincing approach dictates that non-state armed groups are governed by different laws than that of the state's if they meet certain conditions stipulated in the Geneva Conventions of 1949 along with their Additional Protocols, which govern their responsibilities.<sup>61</sup> However, these responsibilities differ according to the context of the conflict. The Geneva Conventions will differentiate between armed conflicts that are international and those that are non-international. There is an importance here to qualify these conflicts as international or non-international because this will allow us to determine which laws generally apply to these conflicts, which will only apply to all those who are parties to the Geneva Conventions and their Additional Protocols.<sup>62</sup>

### **B. International and Non-International Armed Conflicts**

International armed conflicts (IAC) are governed by a different set of laws than non-international armed conflicts (NIAC). Common Article 2 of the Geneva Conventions governs IACs and is considered the traditional type of conflict. It is defined as “declared war or any other armed conflict” with “two or more of the High Contracting Parties”.<sup>63</sup> This also includes armed conflict within occupied territories. Additional Protocol I of 1977 adds another scenario to what would qualify as an IAC, which is the resistance of national liberation movements against a state under Article 1(4), if such a state is party to the treaty.<sup>64</sup> The Geneva Conventions as a whole then govern the conduct of states in IACs after the conflict has been qualified as such.

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<sup>61</sup> *Expert Meeting on the Right to Light in Armed Conflicts and Situations of Occupation*, THE UNIVERSITY CENTRE FOR INTERNATIONAL HUMANITARIAN LAW, September 2005, at 28; Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. RED CROSS, 881, (2011); Geneva Conventions, common art. 3, Aug. 12, 1949, U.N.T.C. [hereinafter Common Art. 3]; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), June 8, 1977, U.N.T.C. [hereinafter APII].

<sup>62</sup> For the purposes of this study, the next section will assume that the Geneva Conventions are not considered customary international law for the purposes of analyzing the law as treaty law. Following this section, the Geneva Conventions will be treated as customary international law and analyzed through that lens.

<sup>63</sup> Geneva Conventions, *supra* note 61, at common art. 2.

<sup>64</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I) [hereinafter API], art. 1, para. 4, June 8, 1977.

The governance of NIACs is much more limited, as only Common Article 3 governs the conduct of parties to the conflict. Additional Protocol II should also govern the NIAC if this law applies, which is based on very particular conditions. Thus, there is a need to understand if a conflict with one or more of the parties is a non-state armed group that performs cross-border operations is considered an IAC or a NIAC.

### **C. Treaty Law**

Looking at the sources of IHL, the Geneva Conventions of 1949 and their Additional Protocols have created a mechanism for governing IACs and NIACs. For these laws to apply to a conflict, the parties to the conflict must be parties to the Conventions and their Protocols individually. In all three conflicts, the states are State Parties to the Geneva Conventions and Additional Protocols I and II, with Ukraine also being a State Party to Additional Protocol III, and are therefore all applicable to this analysis.<sup>65</sup> It must be noted, however, that the analysis presented is not restricted to these examples, but presents a general understanding of the relationship between international law, non-state armed groups, and humanitarian organizations under the provisions that apply to State Parties.

These sources of law have governed the relationship between the state and non-state armed groups in certain instances, where combat between both parties is regulated. In other instances it has governed the relationship between the law and non-state armed groups, where non-state armed groups must adhere to a particular set of laws governing their behavior on the ground, although there is yet to be an applicable mechanism for holding these groups accountable for violations.<sup>66</sup> The issue

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<sup>65</sup> Treaties, States Parties, and Commentaries on the Geneva Conventions of 1949, INTERNATIONAL COMMITTEE OF THE RED CROSS, *available at* <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp>, (last visited Mar 25, 2016).

<sup>66</sup> Although an applicable mechanism of accountability is quite a vague concept and is ineffective at times, there is evidence that states, and organizations operating within the system of governance of states, have occasionally been held accountable for their actions under international law. Because they operate within that system, it is possible to impose economic sanctions on states violating international law principles, impose legal restrictions on their interactions with other states, and, in several cases, are met with legal military action as approved by the United Nations Security Council. Judicial mechanisms are also available based on jurisdiction such as in the International Court of Justice (ICJ) or the International Criminal Court (ICC), which I

of state-centricity here is important because in both cases, the stipulations presented in such frameworks feature the state as the primary actor in the international system. International law's main focus and theoretical inclination towards non-state armed groups is two-fold: firstly, it focuses on attributing the acts of non-state armed groups to a state<sup>67</sup> and secondly, it expects non-state armed groups to adhere to international law principles without providing them with the same privileges provided to states.<sup>68</sup> This is not to say that non-state armed groups should be legally equated to states; however, it is important to note that international law's expectation that non-state armed groups should be obligated and held accountable under the same conditions as those of states is unreasonable, to say the least. That said, these two factors that international law has focused on have ultimately directed its attention away from improving the framework that governs non-state armed groups in the international legal system.

Regarding the recognition of non-state armed groups under IHL, within the general spirit of the Geneva Conventions in both IACs and NIACs,<sup>69</sup> it is evident that the status of non-state armed groups can only be elevated to insurgents or belligerents so as to be granted any legal character, and therefore legal obligations and rights. However, these rights are in fact not granted to non-state armed groups. The

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must say, are not the most effective mechanisms. However, their existence can be seen as a viable mechanism of holding states accountable to their actions. Conversely, this mechanism is entirely nonexistent for non-state armed groups. *See e.g.*, WOUTER VANDENHOLE, *CHALLENGING TERRITORIALITY IN HUMAN RIGHTS LAW: BUILDING BLOCKS FOR A PLURAL AND DIVERSE DUTY-BEARER REGIME*, (Routledge: 2015); MALCOLM LANGFORD, *GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW*, (Cambridge University Press, 2013).

<sup>67</sup> International law focuses on attributing the actors of non-state armed groups to the state in order to hold accountable a recognized actor under international law. Math Noortmann, August Reinisch, and Cedric Ryngaert, *Non-State Actors in International Law*, in *STUDIES IN INTERNATIONAL LAW*, (Bloomsbury Publishing, 2015).

<sup>68</sup> Privilege in this context refers to privileges that states acquire when they choose to become a part of the international legal system. The system will protect their sovereignty, allow for immunities from jurisdiction, provide for the protection of the state's civilians, and protect the state's territorial integrity, among other aspects. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823, (2002).

<sup>69</sup> In this context, because only the general principles of the Geneva Conventions are being analyzed and are therefore not limited to the three mentioned conflicts, the provisions that govern non-state armed groups in an IAC are also being included.



foundation of international law is based on consent and reciprocity,<sup>70</sup> which means that states give their consent to be bound by international law principles and in return, they receive protections and guarantees under international law. In contrast, international law obliges non-state armed groups to adhere to some international law principles without their expressed consent and does not provide them with the same protections and guarantees. Prior to the enactment of the Geneva Conventions and its Additional Protocols, non-state armed groups, or rebels, were considered international subjects depending on the contracting state's recognition of them as either insurgents or belligerents. Depending on the type of recognition, the group's international rights and obligations were clear under international law: they "became assimilated to a state actor with all the attendant rights and obligations which flow from the laws of international armed conflict."<sup>71</sup> With the subsequent enactment of the Geneva Conventions and their Protocols, non-state armed groups then became automatically bound by international obligations under IHL independent of their recognition as belligerents.<sup>72</sup>

On the other hand, the laws that govern NIACs will bind non-state armed groups in situations where the state does not recognize them as insurgents or belligerents. If the state were to recognize non-state armed groups as belligerents, they would be granted combatant status under the provisions of the Geneva Conventions, which they are now reluctant to do. States avoid admitting that they have lost control over certain areas of land within the state leading them to refuse to admit that the conflict is an IAC and grant groups with the status of belligerency under international law.<sup>73</sup> This is because in IACs, there is an obligation for all parties to the conflict to protect civilians and grant prisoners of war their rights under IHL. Under the framework of NIACs, there is no privilege for prisoners of war or combatant privilege. An individual from a non-state armed group is simply treated as

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<sup>70</sup> LON. L. FULLER, *THE MORALITY OF LAW*, (Yale University Press, 1977). Lon L. Fuller discusses the importance of reciprocity in any moral exchange. He explains that the existence of duties can partly depend on others' behaviors. The absence of reciprocity in any system, whether it is political or legal, leads ultimately to the collapse of that system. This is a reflection of the importance of having a reciprocal system when dealing with non-state armed groups in the international legal system.

<sup>71</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 *INTERNATIONAL REVIEW OF THE RED CROSS* 491, 492, (2006).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, at 493.

a criminal and tried under national courts. Common Article 3 only provides limited protection of these groups.<sup>74</sup> This becomes problematic when international obligations should be adhered to but rights are not granted to these groups. This lack of reciprocity effectively creates a gap in the system, as there can be no obligation on a non-state armed group to discriminate between civilian and combatant when targeting the opposition without creating the same combatant privilege for the members of such a group. Therefore, not only are the laws insufficient but, given the current structure of the international legal system, their application is almost impossible, hence the non-state armed groups' lack of adherence to such principles.

Nevertheless, it is important to assess the laws that govern non-state armed groups under the provisions that govern both IACs and NIACs. Specifically regarding the provisions that govern IACs, the assessment will be limited to those that address "each party to the conflict"<sup>75</sup> in the case that the conflict is qualified as an IAC but involves a non-state armed group. Provisions that do not address each party to the conflict are primarily addressed to states and, for the purposes of this research, it is only significant to address articles that apply to non-state armed groups.

#### **D. The Applicability of the Laws of a NIAC**

Both Common Article 3 and potentially Additional Protocol II may be applied in this type of armed conflict.

##### **a. Common Article 3 of the Geneva Conventions**

Addressing Common Article 3 of the Geneva Conventions regarding conflicts not of an international character, or in other words a NIAC, the article binds "each Party to the conflict" to apply provisions regarding the protection of persons who no longer take part in the hostility and treat them in a humane manner without discrimination.<sup>76</sup> It prohibits particular acts that both parties must refrain from committing, among other provisions. The importance of this article is that it binds all parties to the conflict, to which states have consented to being bound by. There are several issues with the applicability of this article. The first is, as mentioned, the conventional nature

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<sup>74</sup> GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR*, 152 – 154, (Cambridge University Press, 2010)

<sup>75</sup> These are found in several provisions of the Geneva Conventions. Only the relevant provisions will be mentioned within this context.

<sup>76</sup> Geneva Conventions, *supra* note 61, at common art. 3.

of the article, which assumes that the NIAC will be contained within the state and will thus only include a government in conflict with a militia group. This disregards the possibility of the non-state armed group emerging from another state, or several groups combatting several governments. The second issue is that non-state armed groups, as opposed to states, have not given their consent to be bound by such a provision and because the Geneva Conventions are state-centric, there is no accountability clause that applies to non-state armed groups. It can be assumed that non-state armed groups would only adhere to international law principles if they were being granted rights under these laws, or if they were to be held accountable for violations through some sort of penalizing mechanism. Both of these options are not present in the current legal system. Any sort of penalizing such as the imposition of sanctions will ultimately affect the state in which the non-state armed group resides and its population, causing harm on the state and its people who may not even be involved in the conflict.

With regards to Common Article 3(2), the provision binds all parties to the conflict to allow “an impartial humanitarian body”<sup>77</sup> to offer its services to the wounded and sick of the parties to the conflict. Although this article is quite vague, this means that both states and non-state armed groups should allow the humanitarian organization to support populations in need. However, as mentioned, it is unlikely that the non-state armed group would adhere to such a provision, as it has not consented to being bound by such laws. Furthermore, the article provides that the parties to the conflict should attempt to “bring into force, by means of special agreements, all or part of the other provisions of the present Convention”. It also adds “The application of the preceding provision shall not affect the legal status of the Parties to the conflict.” This is quite contradictory of the idea of a NIAC, where the non-state armed group is not considered a legitimate force and is therefore unable to enter into agreements. This is further reaffirmed by the fact that applying these provisions will not alter the non-state armed group’s legal personality. The law is therefore insisting that non-state armed groups will remain illegitimate and unrecognized as an entity other than an illegal combatant. Hence, it is not surprising that non-state armed groups would not adhere to such a provision.

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<sup>77</sup> *Id.*, at common art. 3, para. 2.

### **b. Additional Protocol II of the Geneva Conventions**

Regarding the application of Additional Protocol II (AP II), there are stringent laws that allow for the applicability of the Protocol. Firstly, the state where the NIAC is taking place should be a State Party to AP II. Secondly, the non-state armed group or rebel group must be in control of a significant portion of the territory within the state. In all three conflicts discussed, the three states are all State Parties of the Protocol.<sup>78</sup> Furthermore, as presented, non-state armed groups in all three conflicts have significant control over territories within the state. Therefore, AP II's provisions would apply to all three conflicts. It is important to note that AP II attempts to impose all of the regulations of an IAC in a NIAC with several exceptions that do not apply to a NIAC because of its nature as a predominantly domestic conflict.

Under Article 3 of the Protocol, there is a provision of non-intervention by other states in order to protect the sovereignty and territorial integrity of the state in which the conflict is taking place. This article is quite controversial because it assumes that there is no justification for intervention in the conflict. However, as will be discussed in the coming section, there are situations where a state may intervene in a NIAC with the consent of the government. The idea for non-intervention is for the third party state to refrain from impeding the contracting state's sovereignty; therefore, if the contracting state provides its consent for the third party state to intervene, it is therefore willingly giving up its sovereignty to the other state.<sup>79</sup>

The same is not true if the third party state is intervening on behalf of the non-state armed group because, in this case, the non-state armed group is combatting the state and if the third party state is intervening on its behalf it is, therefore, also combatting the state. This would turn the conflict into a conflict between two states and would eventually be qualified as an IAC. It must be noted that this situation assumes a strict identity between the regime and the state. During a civil war, this identity is necessarily challenged. Therefore, this situation would be controversial when assessing a case such as Libya's, where there is a divide regarding the

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<sup>78</sup> Yemen and Ukraine ratified Additional Protocol II to the Geneva Conventions in 1990 and Libya ratified it in 1978. This can be found at, *Treaties, State Parties, and Commentaries, Protocol Additional to the Geneva Conventions, INTERNATIONAL COMMITTEE OF THE RED CROSS, available at* [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475) (last visited Mar 18, 2016).

<sup>79</sup> *APII, supra* note 61, at art. 3.

recognition of the legitimate government. Again, there is a further gap in the legal system, whereby it is assumed that the differentiation between state and rebel groups will be clearly identified as such, which the situation in Libya has proven is rarely the case. International law, therefore, does not attend to a situation where the legitimacy of the regime is challenged and the identity of the state is skewed. Therefore, this provision somehow results in the protection of the internationally recognized regime (which in the Libya case is the Western-recognized) and its sovereignty as it is identified as the contracting state, effectively disregarding the rights of the non-state armed group and making it biased towards the state. This further affirms the argument of the state-centricity of international law, which should be reformed to incorporate the rights of non-state armed groups in order to facilitate fairness in the application of the laws. This would benefit UN agencies in such that it may provide incentives for non-state armed groups to begin adhering to such principles.

Article 4 of the Protocol imposes fundamental guarantees on the parties to the conflict to ensure that those who are not taking part in the hostilities should be treated humanely. Both the state and non-state armed groups should adhere to this provision; however, in all three crises, both parties violate this provision incessantly by undertaking violent acts against those who are not directly taking part in hostilities and do not provide children with the care and aid that they require. The issue here is that there is no method of accountability to hold non-state armed groups to.<sup>80</sup> If the state adheres to this principle, the non-state armed group may not reciprocate. This reinstates the idea that non-state armed groups have not consented to being bound by such a provision. Instead, the provisions that the contracting state has consented to are applied to non-state armed groups who are criminalized for violating them. Through a human rights perspective, this is of course ideal, considering that these provisions should always be upheld in order to safeguard the lives of individuals who are not considered combatants. However, from a legal perspective, the system does not entitle non-state armed groups to the same rights as that of the state and should therefore is unrealistic for assuming that the same obligations should be adhered to. In this case, UN agencies are unable to receive their right to attend to the needs of affected populations because the system does not provide the state's rights to non-state armed groups and their theoretical obligations are therefore not adhered to.

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<sup>80</sup> *See supra* note 65 for examples on mechanisms for state accountability.

Looking at Article 5 of the Protocol, it imposes guarantees for those who have been deprived of their liberty as a result of the armed conflict. It also adds in Article 1(b) that affected persons should “be provided with food and drinking water and be afforded safeguards as regards health and hygiene...” and in Article 1(d) “they shall be allowed to receive individual or collective relief”. Because the article does not specify who should be providing this type of aid, it insinuates that humanitarian organizations could be those undertake this responsibility. They should therefore be granted access to provide relief to those whose liberties have been restricted, and this should apply to both the state and non-state armed groups.

Part IV of the Protocol, specifically Articles 13 – 18, ensures the protection of the civilian population. It is essentially an emulation of the Fourth Geneva Convention on the protection of civilians. This article should apply to both the state and the non-state armed group; therefore, the non-state armed group should ensure that it is adhering to the principle of distinction between civilian and combatant. In reality, specifically in the three crises discussed, this does not happen. Both states and non-state armed groups, more often than not, violate the principle of distinction and do not protect civilians, much like their violations of Article 4. As a member state, there is a mechanism of accountability regarding their actions, which includes being sanctioned by the Security Council as they see fit. However, there is no method of international accountability for non-state armed groups under the Protocol. Although sanctions could greatly harm a non-state armed group within a particular territory, these sanctions would be imposed on the state as a whole, which, as mentioned in the previous section, would affect the entire population and is therefore not an effective mechanism of accountability. Ideally, the state’s national courts should try them; however, when the conflicts become so severe as those in Yemen, Libya, and Ukraine, and in light of the groups’ rising power, it becomes very difficult to try criminals in domestic courts. Therefore, this element within the governance of the conduct of non-state actors should be revisited. The adherence of non-state armed groups to the principle of distinction would benefit UN agencies in such that it would ultimately alleviate the severity of the conflict on affected populations, which would highly support the UN’s mandate. In addition, regarding access, if a non-state armed group is adhering to the principle of distinction in order to protect civilians, it can be assumed that they will be inclined to provide access to UN agencies to attend to the needs of their populations.

Article 18 specifically addresses relief societies and relief actions, whereby it states in clause 1 that humanitarian organizations “may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict”. Furthermore, Article 18(2) states that:

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.<sup>81</sup>

This article is directly applicable to the issue being discussed. It explicitly mentions that humanitarian organizations should be granted access to the territory for the purposes of attending to the medical and nutritional needs of the affected civilian population. This is limited to the consent of the contracting party without taking into account a scenario where the non-state armed group may be in control of a particular part of that territory. Theoretically, the humanitarian agency should not be requesting access to any part of the territory from any actor other than the government because of this particular provision. However, this has proven to cause several practical challenges for UN agencies including access. This is not to assume that the situation is uncontroversial; on the contrary, legal provisions restrict UN agencies’ ability to recognize non-state armed groups let alone obtain consent to enter their territory. At the same time, it is impractical to assume that UN agencies will not request access from non-state armed groups in order to distribute their aid. In that situation, UN agencies are still limited by this provision and all other provisions specifically ensuring state sovereignty is not impeded. This is a clearly identifiable gap in the system whereby the law does not explicitly bind non-state armed groups to adhere to granting access to UN agencies and UN agencies are simultaneously bound by the principles of maintaining state sovereignty.

Bearing these provisions in mind, it must be noted that there is a significant gap in the applicability of the law that governs NIACs with regards to the conduct of non-state armed groups. This is because the law is predominantly state-centric and therefore disregards the rights that the non-state armed groups should be entitled to if they are to be bound by the same obligations. It is also important to note that non-state

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<sup>81</sup> *APII*, *supra* note 61, at art. 18, para. 2.

armed groups have not consented to be bound by these provisions and it is therefore not surprising that they have not consistently adhered to them. Finally, UN agencies must adhere to a set of obligations that restricts their interaction with non-state armed groups outside of the state-centric setting. This becomes even more difficult in a conflict where Additional Protocol II does not apply. This would mean that Common Article 3 is the only article that governs the NIAC, which is quite limited by essence. UN agencies are still bound in principle to a state-centric system, but non-state armed groups are then bound to generic provisions that insist that their legal personality will not change.

After addressing the gaps in the legal system that governs NIACs, and considering that it is possible for an armed conflict involving a non-state actor to be considered an IAC, it is important to assess the legal framework that governs non-state armed groups in an IAC.

#### **E. The Applicability of the Laws of an IAC**

All of the provisions of the Geneva Conventions should apply to IACs. However, considering that the study is limited to the applicability of non-state actors, as mentioned, only the articles that address all parties to the conflict will be studied. But first it is important to understand if the involvement of non-state armed groups in a conflict may still qualify as an IAC.

Looking at the applicability of Common Article 2 that governs IACs, the article restricts the definition of such a conflict to states, so it must be determined whether non-state armed groups would be given the same legal characteristics as the state. Under the general provisions of the Geneva Conventions, non-state armed groups are simply persons carrying arms. The terminology of the law does not specifically distinguish between civilians and non-state armed groups, but distinguishes between those carrying arms and those not carrying arms. Those not carrying arms during an armed conflict should be protected by IHL, whilst persons carrying arms who are not part of the state security apparatus are considered illegal combatants and are given the status of insurgents or belligerents depending on the state's recognition of the group as previously mentioned. The status of belligerency is also governed under international law. But, as noted, the status of belligerency is only



limited to IACs.<sup>82</sup> Hence, it is evident that the criterion for an IAC is not applicable to non-state armed groups in this instance and specifically within the three cases presented. They are therefore not granted the status of belligerency. Furthermore, Common Article 2 is not applicable to these groups, as they are not considered state parties for several reasons, which include that they do not fit the criteria of statehood and they have not signed or ratified any treaties that would grant them the same rights or obligations as a state.

With regards to provisions that govern IACs that bind each party to the conflict, Article 45 of the First Geneva Convention and Article 46 of the Second Geneva Convention state, “Each Party to the conflict, acting through its commanders-in-chief, shall ensure the detailed execution of the preceding Articles...” However, the preceding articles with the Geneva Conventions do not all apply to non-state armed groups, even if the conflict is classified as an IAC. For example, Article 17 of the Third Geneva Convention binds each party to the conflict with regards to the questioning of prisoners insofar as the conflict is international. This is because it assumes that any prisoners of war are captured combatants of the opposing state’s armed forces. This is not the case in a conflict that involves non-state armed groups, as the armed group is not classified as a state. Any captured prisoners from a non-state armed group would not be considered a prisoner of war considering they do not qualify as such under Common Article 4. Although under Common Article 4(2), prisoners of war may be classified as those who are “members of other militias and members of other volunteer corps”, they must be attributed to a party to the conflict and fulfill stringent conditions, most notably the conditions of “having a fixed distinctive sign recognizable at a distance”<sup>83</sup> and “conducting their operations in accordance with the laws and customs of war”.<sup>84</sup> These conditions are in many cases not applicable to the particular conflict, which is in fact the case in several conflicts studied. Regardless of the applicability of such a provision, the adherence to such an article (or lack thereof) will not affect the access constraints that UN agencies face. They are simply a reflection of the inapplicability of a significant number of laws to a conflict that involve non-state armed groups.

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<sup>82</sup> Solis, *supra* note 74, at 150 – 152.

<sup>83</sup> Geneva Conventions, *supra* note 61, at common art. 4, para. 2b.

<sup>84</sup> *Id.*, at common art. 4, para. 2d.

Because it has become difficult to categorize the conflict, it is equally difficult to apply the relevant laws. Even if the conflict qualified as an IAC, this would only be the case because of the involvement of another state within the conflict, and the provisions of IHL would apply to the two states and not the non-state armed group. Thus, there could actually be two conflicts simultaneously occurring: a NIAC between the rebels and the government, and an IAC between two states. The laws that govern the NIAC would theoretically be the only laws that the non-state armed group would be bound by.

However, we are still faced with difficulty in applying the laws of a NIAC when a non-state armed group practices cross-border operations, or its activities become so extensive that it involves more than one non-state armed group within several territories and international personalities. At the same time, it is inaccurate to apply the laws of an IAC on non-state armed groups because they are not considered states and are therefore not afforded similar rights or obligations. The inability to qualify such a conflict is what leads to the inability to apply the correct laws. The Tadić case of the International Criminal Tribunal of the former Yugoslavia (ICTY) provides a reference for the qualification of conflicts that involve non-state armed groups.<sup>85</sup> It is evident that a conflict will be considered a NIAC if it involves the government of a state and rebels within the territory of the state. If a second state intervenes in a NIAC, it can only do so with the consent of the government. The conflict will remain a NIAC because both states will become one party to the conflict against a rebel group. This is the mainstream opinion of scholars who believe that this type of conflict is still a NIAC because it involves non-state actors who do not qualify as states and therefore may not possess their international character.<sup>86</sup> On the other hand, if a state intervenes on behalf of the rebel group, the conflict becomes an IAC with dual nature,<sup>87</sup> because the second state intervened without the consent of the state where the conflict is occurring. In this case, there are two states in conflict and the laws of an IAC apply. This type of qualification accurately illustrates the ways in

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<sup>85</sup> United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), Tadić (IT-94-1), (1995).

<sup>86</sup> Solis, *supra* note 74.

<sup>87</sup> This refers to an IAC that has NIAC characteristics because of the involvement of non-state armed groups. *ICRC, supra* note 55.

which the system of international law is greatly state centric. The qualification of the conflict is predominantly based on where the state is situated within the conflict.

#### **F. The Applicability of Both Doctrines**

In a situation where a non-state armed group is intervening in a conflict between a state and another non-state armed group, such as in Libya, international law is unable to qualify such a conflict. Or if the scenario includes that more than one non-state armed group originate from different states and are in conflict with rebel groups and the government of another state, international law is still unable to qualify this conflict. The Ukrainian conflict may be qualified as an IAC, considering Russia intervened on behalf of the rebels against the Ukrainian government; however, when Russian troops withdrew and the conflict continued between the rebels and the Ukrainian government, it is still difficult to qualify the conflict as a NIAC. This is because the separatists continue to receive political and financial assistance from Russia<sup>88</sup> and some states recognize the separatists to be independent.<sup>89</sup>

Consequently, it is more convincing to consider a conflict that involves several non-state armed groups and a group of states both a NIAC and an IAC. Some interpretations have assumed that these types of conflict are called “transnational

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<sup>88</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment. I.C.J. Reports 181, 1986, at 14, where “effective control” meant that there should be direct control over the group. This is contrasted with the ICTY Tadić case (*supra* note 85) of “overall control” without being specific to the type of control, meaning financial support could be a method of legitimate control. However, in 2003, the ICJ revisited the definition of control in the case of the Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, where they reinstated the idea of “effective control” applied in Nicaragua. Therefore, it is questionable in this case whether financial assistance from Russia would qualify the conflict as an IAC or a NIAC.

<sup>89</sup> There is an importance in differentiating between recognizing the separatists as independent and providing them with the title of statehood. The separatists are not recognized as separate states, as they do not qualify as states under international law according to the Montevideo Convention of 1933: Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. 881. However, Russia and South Ossetia recognize the separatists as independent and no longer a part of Ukraine, hence the controversy in considering the conflict an IAC or a NIAC. South Ossetia recognizes Donetsk People's Republic. KYIVPOST. Jun 27, 2014. <http://www.kyivpost.com/article/content/ukraine/south-ossetia-recognizes-donetsk-peoples-republic-353815.html>, (last visited May 8, 2016); Carol J. Williams, *Russia Recognizes Ukraine Separatists, Provoking New Sanctions Threat*. LOS ANGELES TIMES. Nov 3, 2014. <http://www.latimes.com/world/europe/la-fg-ukraine-russia-separatists-recognized-20141103-story.html>.

armed conflicts”,<sup>90</sup> where there is armed conflict between non-state actors across borders. In this case, international law could attempt to apply both the laws of IACs and NIACs simultaneously; however, there are several issues with applying doctrines simultaneously. The first is that some laws may contradict one another because the parties will be operating at different standards.

For example, states are bound by the protection of civilians under the Fourth Geneva Convention whilst if Additional Protocol II does not apply in a particular conflict, the non-state armed group may not be equally bound by the same provisions. The clearest example is the one that this paper discusses, whereby states are bound by ensuring humanitarian access for organizations, and while international law theoretically binds non-state armed groups to certain provisions in an IAC or a NIAC, ensuring humanitarian access for organizations is not one of them. As mentioned, under Article 18 of APII, the High Contracting Party is the party that provides consent for the humanitarian organization to enter the territory and provide assistance to the civilian population. The law mentions nothing about the territory that falls under the control of a non-state armed group. Although this is technically still considered the territory of the state, it is unwise to assume that the non-state armed group will adhere to the provisions directed towards the state that effectively empowers the state during conflict. Practically and realistically, there remains areas of state territory controlled by non-state armed groups and because of the structure of the law being state-centric, it does not provide for any regulations that theoretically or practically bind non-state armed groups to provide access to humanitarian organizations. In any event, even if such a law exists, there is difficulty in binding non-state armed groups to it considering, again, the nature of the system that involves a lack of reciprocity with non-state armed groups whether the laws applied are those of an IAC or a NIAC. For these reasons, it is even more difficult to consider the conflict both an IAC and a

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<sup>90</sup> See e.g., Geoffrey Corn & Eric T. Jensen, *Transnational Armed Conflict: A ‘Principled’ Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 46 (2009); Geoffrey Corn, *Hamdan, Lebanon, and the Regulation of Hostilities—The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT J INT’L LAW 295 (2007); Sassòli, *supra* note 1; Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT’L L. STUD. 696, 700 – 705 (2013); Andreas Paulus and Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 873, 99 – 100 (2009).

NIAC. This shows that the doctrine for governing non-state armed groups under IHL is both insufficient and practically inapplicable.

While there are several modes of attempting to govern non-state armed groups, they have not been successful in ensuring that UN agencies are able to access populations in NGCAs in order to fulfill their mandate. In particular to all three cases of Yemen, Libya, and Ukraine that were previously discussed, militia groups control certain pockets of land in their countries and are either asking for independence, control of the government, or are fighting for a particular cause or belief. When international law classifies these cases as IACs and/or NIACs based on the criteria stipulated in the Geneva Conventions, certain laws will apply to each case where there are benefits and responsibilities for all parties, including humanitarian agencies. Under IHL, the state has obligations towards humanitarian agencies, whereas the provisions of IHL only govern non-state armed groups' relations with the state or with the law, and even then, these regulations are insufficient. At the same time, humanitarian agencies are strictly bound by international law principles making it difficult for them to interact with non-state armed groups in a legal setting, as non-state armed groups are not reciprocally bound.<sup>91</sup> This is because humanitarian agencies are in a position of institutional constraints, whereby there is high importance in maintaining the reputation of a humanitarian agency and ensuring that their mandate remains neutral and by the book of international law so as to ensure that as many states as possible cooperate with them. This constrains them from being able to interact with non-state armed groups, as in several situations the state may sever its ties with the organization claiming that it possesses political affiliations with the enemy of the state.<sup>92</sup>

This is where the obstacle of access presents itself in international law. Through these case studies, these obstacles are portrayed and have allowed for a clearer perception of what needs to be amended in the legal framework that governs non-state armed groups in order to make it more applicable to crisis situations. The ultimate goal of these amendments is to provide an avenue for UN agencies to legally interact with non-state armed groups whilst somehow ensuring that non-state armed

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<sup>91</sup> Fuller, *supra* note 70.

<sup>92</sup> CLAUDIA HOFMANN, *ENGAGING NON-STATE ARMED GROUPS IN HUMANITARIAN ACTION. STATE ACTOR AND NON-GOVERNMENTAL APPROACHES*, (German Development Institute, 2004).

groups will adhere to some, if not all, IHL principles. Reaching this goal would allow for UN agencies to be granted access to NCGAs and would also hold non-state armed groups accountable for their actions towards UN agencies. This would be for the purposes of protecting UN agencies and their personnel in NCGAs whilst simultaneously allowing them to access populations in need, hence the importance of the reciprocity of the system.

However, there is an argument made by some international lawyers that the laws that govern armed conflicts as a whole are considered customary international law and should apply to all conflicts, whether it is international or non-international. This also means that these laws should bind all parties, including non-state armed groups.<sup>93</sup> Other scholars argue the contrary. In the next section, several views will be presented on whether considering these laws custom will resolve the issue of their insufficiency and inapplicability.

### **G. Customary International Law**

There exist several perspectives regarding non-state armed groups' obligations under the framework of customary international law. It suggests that the current legal framework that governs armed conflicts applies to non-state armed groups, as it falls under customary international law principles that non-state armed groups are required to adhere to.<sup>94</sup> This insinuates that access challenges faced by UN agencies exist due to the lack of adherence of non-state armed groups to the general principles enshrined under customary international law and not because these principles do not exist. Some of these principles include that all parties to the conflict should ensure the protection of civilians, adhere to the principle of distinction, and ensure access and safety to

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<sup>93</sup> *Should the Obligations of States and Armed Groups Under International Humanitarian Law Really Be Equal?* 93 INTERNATIONAL REVIEW OF THE RED CROSS, 425 – 436, (Marco Sassòli & Yuval Shany eds., 2011).

<sup>94</sup> Roberts and Sivakumaran, *supra* note 49, at 108; Geneva Conventions, *supra* note 61, at common art. 3; Common Article 3 reflects the obligation of “each Party to the conflict shall be bound to apply, as a minimum, the following provisions...” Whether they are combatants or military personnel should adhere to the principle of protection of civilians, among other principles. The ICRC considers Common Article 3 as customary international law, and according to this provision, non-state armed groups are therefore bound. Non-state armed groups are also therefore bound by all the Geneva Conventions where “all parties to the conflict” are referred to under customary international law.

humanitarian agencies and their personnel, among other principles.<sup>95</sup> In other words, non-state armed groups do not necessarily have to be bound by the treaties that govern IHL because customary international law itself holds them accountable. The violations of such principles are therefore a reflection of the bad conduct of non-state armed groups rather than a measurement of the effectiveness of the current framework governing their behavior.<sup>96</sup> This is similar to the view of those discussing UN effectiveness, where it is argued that the obstacles of UN agencies are attributable to the conduct of non-state armed groups themselves rather than the level of UN effectiveness. Regardless of this attribution, this perspective maintains that the framework governing non-state armed groups' conduct falls under customary international principles, and the obstacles faced by UN agencies are a result of bad politics and not gaps in the law.<sup>97</sup>

However, the practical situation of UN operations has proven that although there are attempts to bind non-state armed groups to international law principles through customary international law, there remains an access issue for UN agencies in conflict areas. There are a majority of non-state armed groups that are currently not adhering to principles that grant UN agencies access. This perspective takes on a more pragmatic approach and suggests that the reason that non-state armed groups do not adhere to the principles of customary international law is because they were not involved in the process of creating them.<sup>98</sup> Customary international law is created through state practice and *opinio juris*,<sup>99</sup> which disregards the practices of non-state armed groups. Therefore, non-state armed groups do not feel a sense of obligation towards these laws and are consequently not inclined to follow them.

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<sup>95</sup> *Id.*

<sup>96</sup> Noortmann, Reinisch, and Ryngaert, Non-State Actors, *supra* note 67, at 6.

<sup>97</sup> Nathaniel Berman, *In the Wake of Empire*, 14 AM. U. INT'L L. REV. 1515 (1999). This theoretical framework of the Restater-Renewer that Berman constructed illustrates the concept of international law being sufficient but it is bad politics that lead to inefficiencies in the international system. The satirical nature of Berman's reference to the Restater-Renewer presents an ideology that exists, but that the writer believes is inconsequential and inherently flawed.

<sup>98</sup> Heike Krieger, *A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood* 23, (SFP-Governance Working Paper Series, Paper No. 62, 2013).

<sup>99</sup> Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT'L LAW J, 36, (2013).

Again, this assumes that the cohesiveness of the identity of the regime and the state. However, the regimes that were involved in the negotiations of the Geneva Conventions in 1949 are no longer the same actors today, yet the state remains bound by such provisions. Therefore, the actions of the regimes nowadays can be considered customary international law and will change over time, which may or may not involve non-state armed groups' actions. But the most prevalent aspect that has consistently been a challenge to the application of law on non-state armed groups is the absence of reciprocity of obligations and rights for non-state armed groups. The same applies to non-member states, where the provisions of custom are theoretically applied to states who are not party to the treaties. In this case, the same contradictions apply to non-member states, where their involvement in creating custom in this context is inexistent and there is therefore no reciprocity in the system where obligations imposed on non-member states will be faced with rights granted to them.

Looking at the situation on the ground, if one could argue that the general principles that apply to an IAC should apply to non-state armed groups because they are considered customary law principles, in practice non-state armed groups would not adhere to international law principles specifically those of an IAC if they were not being granted the same rights as states in exchange for obligations. This is where it is reasonable to say that there is a gap in the system of governance of non-state armed groups, which need to be reassessed.<sup>100</sup> In addition, non-state armed groups are considerably unaware of these principles, as they have not been integrated into the system of the knowledge of international law.<sup>101</sup> Thus, the existence of customary international law's governance of the conduct of non-state armed groups is of little consequence to the reality of their actions and therefore the reality of the access challenges that UN agencies face.

Despite this seemingly pessimistic reality, non-state armed groups could potentially adhere to the principles of customary international law if there was a legal framework that integrated them within the system. This ultimately means that they

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<sup>100</sup> DAVID D. CARON, MICHAEL J. KELLY, AND ANASTASIA TELESITSKY, *THE INTERNATIONAL LAW OF DISASTER RELIEF*, Cambridge University Press, (2014); Mohammad Zarei & Azar Safari, *The Status of Non-State Actors Under the International Rule of Law: A Search for Global Justice*, in *CULTURAL DIPLOMACY*, at 1 – 25.

<sup>101</sup> McGoldrick, *supra* note 3, at 907.



should become recognized actors in global affairs.<sup>102</sup> This does not mean that non-state armed groups should be equated to states in responsibility and obligation, but rather there should have their own separate framework that is tailored to their needs and the needs of the international system. Therefore, what is suggested is a system of reciprocity between international law and the non-state armed groups, whereby international law grants non-state armed groups particular rights and non-state armed groups are required to adhere to fundamental principles in international law.

Although this paper argues that the reason for the UN's access challenges to certain regions in conflict is due to the insufficiencies of the current legal framework governing non-state armed groups, it is equally important to assess the role of the UN as an organization in conflict situations. It must be recognized that there lies a complementary argument for their challenges, which suggests that a reason for agencies' access drawbacks is the level of the UN's ineffectiveness as an organization. The UN's executive and operational role in conflict situations has been shaped by the political dynamics of the international system and has therefore played a major role in causing access challenges for agencies. This is because such political dynamics have greatly affected the current state-centric structure of international law and the way in which it is being implemented on the ground. As a result, this has caused several inefficiencies in interacting with non-state armed groups, eventually causing a gap in the system.

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<sup>102</sup> See e.g., Roozbeh B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L., 173, 173–74, 198–99 (2010).

## V. THE ROLE OF THE UNITED NATIONS

As has been generally discussed in the case studies aforementioned, the role of the United Nations in the issue of UN agencies' access challenges is quite significant. The UN has proven to have both a positive and negative impact on the ability for UN agencies to access populations in need. Its role has also affected the implementation of international law principles and the stagnancy of the laws that govern non-state armed groups. UN effectiveness on the executive and operational levels have been continuously questioned in crisis situations. There are those who believe that the UN has failed in effectiveness due to its executive structure, what with the UNSC's permanent five members spearheading any and all matters related to conflict situations. In addition, the UN faces operational challenges, which have failed to eradicate the most pressing global issues including humanitarian needs in conflict situations. Both these extremes are valid on several accounts and are flawed in others. Nevertheless, it is important to examine the ways in which the UN's benefits and drawbacks affect the challenges that are faced by UN agencies in addition to the political influence of states that affect the UN's impact on the legal framework that govern non-state armed groups.

### A. Challenges of the United Nations System

There is a variety of scholarly work on the challenges of the UN system, each with a different perspective on the reasons behind the challenges that face UN agencies. One perspective on this issue is that UN agency operations have been ineffective in dealing with crisis situations due to their inherent operational challenges, which can be argued are independent of the scope of international law frameworks.<sup>103</sup> It is believed that UN agencies are inefficient within themselves due to their management system and their general strategies that constrain them from being able to attend to all those in need, which is irrespective of the current legal framework governing non-state armed groups. Like any organization, UN agencies are led by the expertise of individuals, who are not free from committing errors in judgment such as prioritizing certain global issues over others or deciding to approach an operational challenge in

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<sup>103</sup> See generally BRETT D. SCHAEFER, UNITED NATIONS: URGENT PROBLEMS THAT NEED CONGRESSIONAL ACTION, The Heritage Foundation, (2011).

an incorrect manner.<sup>104</sup> There are also structural challenges that the UN faces including overlapping mandates within several agencies causing a large number of inefficiencies.<sup>105</sup> Furthermore, it cannot be neglected that in the both the higher and lower level bodies of the UN there are concerns of wastefulness, inefficiencies, corruption, inefficient management structures or promotion strategies, and in some cases, sexual abuse of vulnerable populations.<sup>106</sup>

On the executive level, the mere structure of the UNSC alone causes stagnancy in the provisions of the governance of non-state armed groups, let alone the authorization of intervention leading to the intensification of conflicts on the hands of the UNSC. On several occasions, the UNSC has authorized interventions in conflict situations that have resulted in the worsening of the conflict as opposed to restoring peace and security. Furthermore, the General Assembly has proven to be less than effective in situations where there is a deadlock between members of the UNSC. Despite several of these disadvantages that the UN possesses, there are a number of benefits that the UN has brought about the international system.

## **B. Benefits of the United Nations System**

Considering the UN's track record in attending to the needs of affected populations in conflict situations,<sup>107</sup> it is evident that although the mentioned inefficiencies may exist, the UN's protocols for dealing with such situations have proven more effective

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<sup>104</sup> UN agencies are subject to logistical errors such as using particular corridors in insecure areas to transport goods or inefficiencies in needs assessments for populations in Libya and other conflicts. This information was derived from the writers' own experiences working at the United Nations World Food Programme in the Cairo Regional Bureau. More information on errors that the UN are subjected to can be found here, THORSTEN BENNER, STEPHAN MERGENTHALER & PHILIPP ROTMANN, *THE EVOLUTION OF ORGANIZATIONAL LEARNING IN THE UN PEACE OPERATIONS BUREAUCRACY*, (German Foundation for Peace Research, 2011).

<sup>105</sup> UN AGENCIES' OVERLAPPING MANDATES: MANDATE REVIEW: 'EFFECTIVE COORDINATION OF HUMANITARIAN ASSISTANCE,' UNITED NATIONS, <http://www.un.org/ga/president/62/issues/resolutions/PreliminaryAnalysis.pdf>, (last visited Apr 25, 2016).

<sup>106</sup> Harriet Grant, *UN agencies "broke and failing" in face of ever-growing refugee crisis*, THE GUARDIAN, September 6, 2015; and regarding sexual abuse, Muna Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions*, 27 BERKELEY J. INT'L LAW. 127 (2009).

<sup>107</sup> ANDREAS RASCHE AND GEORG KELL, *THE UNITED NATIONS GLOBAL COMPACT: ACHIEVEMENTS, TRENDS, AND CHALLENGES*, (Cambridge University Press, 2010).

than many other actors. UN agencies' operational strategies take into account the potential structural or institutional inefficiencies that may arise through the implementation of contingency plans and risk registers.<sup>108</sup> Furthermore, UN agencies have been of the most effective international organizations to address the needs of populations with regards to health, nutrition, protection, and displacement.<sup>109</sup> The argument of UN ineffectiveness is heavily based on executive inefficiencies from the part of the UNSC or the General Assembly in effectively ending a conflict or holding a particular party accountable for violations under IHL. These are mostly based on political interests that govern the highest level of bodies in the UN. This is not necessarily true for lower level bodies that simply aid populations in needs whilst attempting to be as neutral and impartial as possible.<sup>110</sup> Although there have been situations where humanitarian workers have caused irreparable damage to affected populations,<sup>111</sup> this is yet to be proven as the norm in such a setting.

Furthermore, there is the argument that places the burden of UN agencies' challenges completely on international law alone. It claims that international law is responsible for crippling the ability for humanitarian agencies to execute their operations in several ways including the issue of the governance of non-state armed groups.<sup>112</sup> This view insists that the single reason for the challenges that UN agencies face is the current legal framework that they operate in and that this framework is insufficient in providing gateways for humanitarian agencies to support conflict-affected populations. However, this perspective is ultimately flawed in such that it assumes that international law is applied perfectly as prescribed by the books. But

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<sup>108</sup> See e.g., CONTINGENCY PLANNING GUIDE, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, (2012), <http://www.ifrc.org/PageFiles/40825/1220900-CPG%202012-EN-LR.pdf>, (last visited Apr 30, 2016); Inter-Agency Risk Register for January to June 2016, HUMANITARIAN RESPONSE, (2016), <https://www.humanitarianresponse.info/en/operations/afghanistan/document/inter-agency-risk-register-january-june-2016>, (last visited May 1, 2016). Humanitarian organizations' contingency plans and risk registers implemented in country offices to take into account potential risks and miscalculations that agencies may make.

<sup>109</sup> Rasche and Kell, *supra* note 107.

<sup>110</sup> Denise Plattner, *ICRC Neutrality and Neutrality in Humanitarian Assistance*, 311 INT'L REV. RED CROSS, (1996).

<sup>111</sup> See e.g., Rasche and Kell, *supra* note 107.

<sup>112</sup> Marten Zwanenburg, *United Nations and International Humanitarian Law*, OXFORD PUBLIC INTERNATIONAL LAW, May 2013.

international law does not operate in a vacuum and human errors are bound to occur. This is why it is important to balance both the view of partial ineffectiveness of UN agencies with the idea that international law limits the UN's ability to access certain regions governed by non-state armed groups.

In that light, international law has in many ways protected humanitarian agencies on the ground through providing stipulations that ensure that states provide the necessary access and protection for humanitarian personnel and their convoys in situations of conflict, although there are several incidents where this has not been the case. It also demands that parties to the conflict ensure that humanitarian organizations are not targeted during armed conflict. The access challenges can also be attributed to the violent conduct of non-state armed groups themselves. It is therefore the responsibility of the agencies to ensure the cooperation of non-state armed groups within the limits of international law.<sup>113</sup>

The independent views on the effectiveness of both the UN and international law, while valid on several accounts, are not sufficient alone. Through analyzing the propositions, elements of each can be combined to provide an accurate perception of the reality concerning the reasons behind UN agencies' inability to pursue their access strategies to the fullest. Inefficiencies are bound to happen; yet UN agencies in their operational capacity have shown, strictly through their operations to distribute humanitarian aid, considerable effort in attempting to alleviate these inefficiencies. At the same time, international law has not provided the best of platforms for UN agencies to operate within specifically when they are forced to interact with non-state armed groups under laws that do not articulate a detailed method of how their mandate can be fulfilled. UN agencies have somewhat relied on their own expertise and negotiation skills to be granted access to restricted areas, all within the limits of the law. However, the unpredictability and fluctuation of gaining access to restricted regions, specifically those in the mentioned conflict areas, is what leads UN agencies to facing these drawbacks. This unpredictability is a result of the lack of comprehensive legal framework needed to consistently maintain a certain standard of interaction between humanitarian organizations and non-state armed groups.

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<sup>113</sup> Robert Francis B. Garcia, *Not Only the State: Torture by Non-State Actors*, THE REDRESS TRUST, 11 (2006).

## **VI. LEGAL REFORM**

There is an urgent need for legal reform in IHL. Presenting a system of reciprocity between international law and non-state armed groups would greatly benefit UN agencies in fulfilling their mandates. Legal reform would offer a plausible solution to the lack of adherence to customary international law by non-state armed groups. This necessitates that non-state armed groups are granted a mechanism to become decision-makers within the legal system and in return will be held accountable for violating the principles they have agreed to, inclusive of customary principles. Under this view, it can be argued that if this mechanism is implemented, UN agencies will be given more opportunities to create dialogue with non-state armed groups and will be granted further access to NGCAs. Current customs have not yet taken this reality into account and should therefore adapt to the changing nature of the international system, which is the principle argument of this research. It is equally important to implement operational reforms in the UN, which would run parallel with the legal reforms. Creating an environment with a higher level of accountability for UN agencies, alongside the reformation of the current legal and political structures that govern non-state armed groups would ultimately alleviate the access challenges that these agencies face. Such a process is a significantly difficult task and requires a change in the way that politics and international law approach non-state armed groups.

### **A. Changing the Approach**

The proposition of reform is not only based on amending the laws and creating new customs, which requires an elongated process of state practice and cooperation, but rather it is also based on attempting to revolutionize the approach that states, scholars, and lawyers take when addressing non-state armed groups in an armed conflict. The immediate classification instilled on non-state armed groups who demand independence or cessation is a reactionary one, which assumes that there is a threat on the regime's legitimacy, state sovereignty, or territorial integrity that must be contained. This kind of approach should be reformed for many reasons including that the result of this exclusion is that UN agencies face obstacles when dealing with non-state armed groups. This is not to say that changing the way in which the international community approaches the legal or political position of non-state armed groups is an easy task. On the contrary, it is much more difficult than changing state

or organizational policies or interpretations of law. Altering the provisions of IHL as a whole and its general principles in order to create a balance of centrality between the state and non-state armed groups is hardly among popular thought in state ideologies or within international organizations. However, because international law should ideally be the foundation of state actions and the actions of the international community, it is imperative that this reform be considered at minimum. Policy alterations, while effective in particular situations, are still only effective inasmuch as the situation allows. Policies can be frequently changed and are somewhat arbitrary according to the time and place they are being applied. They also greatly differ between states and are therefore quite heterogeneous. The idea of altering the approach to the way in which non-state armed groups are governed would create a homogenous structure that should be adhered to by entire international community, although this process would prove to be more difficult considering the potential need for state consent. Furthermore, because of the frequency of policy alterations, they hold less accountability than a change in law.

However, Thomas Franck would argue that the formal status of the law is the least aspect that determines the behavior of individuals and institutions,<sup>114</sup> which is understandable considering the immense violations of international law that both individuals and institutions commit, as is seen by the examples of Yemen, Libya, and Ukraine, among others. Yet, these violations are also a factor of the ways in which law is constructed to benefit those who use it as a tool to further political and economic gains. Therefore, the purpose of altering the legal framework that governs non-state armed groups aims to diminish the ability for institutions to utilize, if not manipulate, the principles of international law to further their benefits and in the process create an unfairness in international law. However, as mentioned, legal reform would be best complemented with policy and operational reform to enhance the ability for UN agencies to approach non-state armed groups in an effort to alleviate access constraints.

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<sup>114</sup> THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS*, (Oxford Scholarship Online, 2012) (1998).

## B. Policy Reform

Policy suggestions may include alterations in the UN's operational effectiveness through streamlining policies within UN agencies so as to create a more efficient approach to crisis situations. It can also be supported by a culture of transparency, which has not been the case thus far within the UN considering the example of the investigations made regarding humanitarian workers sexually assaulting vulnerable populations in peacekeeping missions, among other examples.<sup>115</sup> In addition, the culture of absolute impunity of their institutions and agencies, which the UN so adamantly clings to, should be completely eliminated. It seems that UN institutions are not held accountable for their errors and ineffectiveness as they should be. Preaching a culture of fairness and justice whilst providing impunity to humanitarian personnel and their respective institutions in an effort to lessen reputational hazards is hypocritical to say the least.<sup>116</sup> This particular policy suggestion is difficult to implement but not impossible if other institutions were to demand justice from the UN using the limits of the law as their gateway for that justice. Finally, and what may be a realistically implementable policy reform, UN organizations should consider disempowering donor demands. This was briefly mentioned in the first chapter; however, creating a framework where donors would be subjected to the mandate of the organization, as opposed to state policies, would effectively expand the outreach of UN organizations to affected populations. It would also grant these organizations the freedom to implement their own needs assessments for these populations and act accordingly.

From a legal perspective, and to further reinstate the importance of effectiveness for UN agencies, it would be highly beneficial to ensure the adherence of the International Law Commission's Draft Articles on the Responsibilities of International Organizations.<sup>117</sup> This would be with the intent to ensure accountability and transparency of international organizations as a whole. However, these provisions only deal with legal responsibility of organizations and do not involve issues such as

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<sup>115</sup> Ndulo, *supra* note 106.

<sup>116</sup> See e.g., Claude Bruderlein & Pierre Gassmann, *Managing Security Risks in Hazardous Missions: The Challenges of Securing United Nations Access to Vulnerable Groups*, 19 HARVARD HUM. R. J., 63 – 93, (2006).

<sup>117</sup> International Law Commission, *Articles on the Responsibility of International Organizations, With Commentaries*, 63<sup>rd</sup> Session, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 2, (2011).



governance, accountability, or criminal responsibility, such as in situations of sexual offences.<sup>118</sup> Therefore, it would be beneficial to revisit the articles in order to incorporate such concepts within legal framework. However, we are once again faced with the issue of binding organizations to such provisions without their consent, hence the reasoning behind suggesting policy reform as opposed to legal reform. Nevertheless, this is a suggestion worth exploring, perhaps in later research.

Looking at reforming the conduct of non-state armed groups, the presented policy suggestions would be paralleled with a process of legal reform. If implemented correctly, this would ensure that humanitarian organizations are able to interact with non-state armed groups under different conditions so as to ensure that their access constraints on affected populations are alleviated. In an effort to close the gap between international law and humanitarian organizations' interaction with non-state armed groups, some humanitarian agencies have recently taken it upon themselves to attempt to develop agreements with non-state armed groups in order to tackle the issue of access constraints, among other challenges that they face because of the groups' lack of adherence to international principles. They have created what are known to be "Rules of Engagement" that are a form of code of conduct created to invite non-state armed groups to adhere to international principles in exchange for providing them with an international personality.

### **C. Rules of Engagement**

The Rules of Engagement that the humanitarian community has attempted to implement as a form of agreement with non-state armed groups are essentially the principles enshrined in IHL and customary international law. These rules are formulated to ensure the least amount of damage caused to civilians during conflict, ensuring the protection of humanitarian organizations, aid, and convoys, and finally attempting to ensure that there is an adherence to the principles of armed conflict. The non-state armed groups are therefore required to uphold their agreements with humanitarian organizations, and in return, these organizations facilitate national and

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<sup>118</sup> Monika Hlavkova, *Legal Responsibility of International Organizations in International Law*, in INTERNATIONAL LAW DISCUSSION GROUP, 2 – 3 (Chatham House, 2011).

international dialogues between states and non-state armed groups in order to give them a form of recognition in the international system.<sup>119</sup>

The effectiveness of these Rules, however, must be assessed in order to determine whether such a strategy should be incorporated within the law. It can be argued that the Rules have been far more effective than international law has been in educating non-state armed groups on the principles of IHL and customary principles. They have also been effective in incentivizing non-state armed groups to adhering to these principles by adopting a method of inclusion in international and national dialogues. Through these dialogues, non-state armed groups are able to voice their concerns to the international community and their cooperation is then reciprocated.<sup>120</sup> Furthermore, the monitoring bodies that administer these Rules actively perform investigations through their missions to assess the certain actors' level of adherence to international law principles. The ICRC and Human Rights Watch are of the organizations that perform such missions and have attempted to improve non-state armed groups' adherence to international principles in the past, including in both Libya and Yemen.<sup>121</sup>

The drawback to the implementation of the Rules of Engagement is that they are only effective inasmuch as states are willing to participate in the process of dialogue and reciprocity with non-state armed groups. While these rules may be effective in principle, they are highly subjective to the context in which they are applied. Each state will react differently to the possibility of roundtable discussions with a non-state armed group, specifically if that group threatens the effectiveness of the ruling regime in order to gain their own sovereignty.<sup>122</sup> Agreeing to the process of dialogue would mean that the state is recognizing the non-state armed group and is entering into discussions with the group based on that recognition. Therefore, it is argued that the Rules could be very effective or completely ineffective depending on the state's intentions towards the process.<sup>123</sup> It is also believed that these Rules have not been effective because they are yet to change the reality on the ground. Some

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<sup>119</sup> Roberts and Sivakumaran, *supra* note 49, at 126; Krieger, *supra* note 98.

<sup>120</sup> *Rules of Engagement: Protecting Civilians Through Dialogue with Armed Non-State Actors*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, 2011; Hofmann, *supra* note 92.

<sup>121</sup> *Id.*

<sup>122</sup> Roberts and Sivakumaran, *supra* note 49, at 136 – 7; *See* Krieger, *supra* note 98.

<sup>123</sup> McGoldrick, *supra* note 3, at 893.

scholars have the perspective of these Rules being idealistic and that because most states would not cooperate in such a process, the non-state armed groups would lose incentive towards adhering to such principles. It is argued by one scholar that this is precisely the reality; humanitarian organizations are continuously facing challenges because the state-centric system is unwilling to integrate non-state armed groups within the system, effectively losing all potential cooperation with the non-state armed group.<sup>124</sup> Although Rules of Engagement may be effective in principle, non-state armed groups remain in violation of their principles because of the lack of reciprocity of state actors.

However, it can equally be argued that the Rules are convincing enough to have non-state armed groups cooperate with humanitarian organizations in order to further the benefits of both parties.<sup>125</sup> Although states may not be in full cooperation as of yet, the involvement of humanitarian organizations to further their own interests in terms of fulfilling their mandate is a method of ensuring that populations in need are receiving their required assistance.

There is a potential for humanitarian organizations to be granted access to NGCAs through such rules in the event that the state is willing to cooperate with them. This is taken as a method of mitigating the access constraints faced by UN agencies, as it seems to be the starting point for improving the legal system. The idea is to emulate the structure of the Rules of Engagement, which should be incorporated within the laws of IHL. Currently, IHL is restricted to a state-centric system that does not allow humanitarian agencies to engage with non-state armed groups outside the limits of the law. The incorporation of the Rules of Engagement within the IHL will allow for an expansion of that doctrine, which will have a greater effect on the mandates of humanitarian organizations by allowing them to extend their outreach to populations of besieged areas. Furthermore, applying such a structure would create a process of accountability whereby non-state armed groups would be bound by principles of IHL in exchange for being recognized as non-state armed groups with a legal personality that does not equate a state but should have similar rights in warfare. In addition, their involvement in international and regional dialogues as political actors will be a form of granting these rights, which may be stripped from them if violations were to occur.

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<sup>124</sup> *Id.* at 108; Jadarian, *supra* note 59, at 20.

<sup>125</sup> *See generally Id.*; Rules of Engagement, *supra* note 120.

This should provide them with incentives to adhere to the Rules. However, under the current state-centric structure of international law, once again, this is highly dependent on the state's willingness to involve non-state armed groups in such a process considering the system will still maintain the importance of protecting state sovereignty. If this is reached, states will have a platform of discussion with non-state armed groups facilitated by UN agencies, which will allow for the betterment of access strategies in times of conflict so as to improve outreach to affected populations. A more effective method would be to alter the system as a whole to remove the idea of state-centricity in order to allow international organizations to bypass the state and legally recognize non-state armed groups in order to create a more regional involvement for these actors. However, this task would be exceptionally difficult, though not impossible in the long-run.

## VII. CONCLUSION

International humanitarian law as a whole, whether it is in reference to international or non-international armed conflicts, has been incapable of dealing with the idea that non-state armed groups are an entity worth recognizing as a part of the international system.<sup>126</sup> Instead, the focus of international law is on attempting to bind non-state armed groups to current international law principles, which has not been a successful strategy thus far.<sup>127</sup> This is especially true after the events of the Arab Spring of 2011 occurred, when an influx of non-state armed groups appeared in the Middle Eastern region and international law was unsuccessful in implementing a framework that deals with non-state armed groups as a legal entity.<sup>128</sup> Under international law, the creation of non-state armed groups is not prohibited. Prohibitions against the creation of non-state armed groups fall under domestic law of certain states. Yet, international law seems to criminalize non-state armed groups without prohibiting them but have not yet implemented a constructive method of interacting with them. Therefore, relying on the current system of governance of non-state armed groups causes there to be a gap between the law and its implementation.

Not only does this gap pose theoretical dilemmas in the legal sphere, but it also leads to obstacles faced by UN agencies in attempting to execute their operations. As mentioned, considering the events of the Arab Spring and their effects post-2011, UN agencies were necessary in providing assistance in areas where conflicts arose. The Middle Eastern countries used as examples to depict the challenges faced by UN agencies as a result of the insufficiencies of the current legal framework governing non-state armed groups were Yemen and Libya subsequent to the 2011 Arab Spring, as both consist of the presence of several non-state armed groups as parties within the same conflict ultimately subjecting UN agencies to several access challenges. This is also true in Eastern Europe where the Ukrainian civil conflict has presented complications for UN agencies to effectively implement their mandate. This again is due to the inefficiencies of the existing legal framework of IHL that governs non-state

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<sup>126</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 863, 492 – 3 (2006); Jadarian, *supra* note 59, at 36 – 39.

<sup>127</sup> *Id.*

<sup>128</sup> Israel Office, *The New Terrorism-Governance Nexus: Areas of Limited Statehood, Non-State Armed Groups and the Transformation of the Middle East*, KONRAD ADENAUER STIFTUNG, Panel 3 (2014).

armed groups' conduct during conflict. Such inefficiencies are also a result of the fluctuating political dynamics of the system, whereby the UN's ineffectiveness and state interests have played a major role in determining the political and legal position of non-state armed groups. This furthers the difficulty in treating non-state armed groups as an entity worth interacting with during conflict situations.

The situation in all three conflicts is as follows: non-state armed groups are emerging and are becoming of great significance in the international system. Some non-state armed groups are seeking independence whilst others are considered terrorist organizations, although some may overlap. International law does not currently have a mechanism to qualify conflicts with the complexity of those such as Yemen, Libya, or Ukraine whereby the non-state armed group is strong enough to demand secession and the state is unable to contain it. International law is also lacking a mechanism for binding these non-state armed groups to the principles outlined in the Geneva Conventions and their Protocols or customary law. This includes ensuring the safety of civilians and authorizing assistance from humanitarian organizations. An incentive for non-state armed groups to adhere to international law principles would be to allow for their independence, grant them recognition, or incorporate them in a political decision-making process. But, the current international legal system does not recognize non-state armed groups as more than belligerents under the legal framework of an IAC.<sup>129</sup> This perspective is important in explaining where the challenge lies for UN agencies to execute their operations.

The intent here was not to provide a new comprehensive framework for non-state armed groups. On the contrary, through the research, a conclusion is made that there is simply a need to develop the current framework without having to formulate a new methodology of dealing with non-state armed groups. There is no need to completely recreate the legal framework for non-state armed groups but simply to improve its provisions on governing the interaction between humanitarian agencies and non-state armed groups. However, it must be understood that there is a need to reassess the way the current framework of non-state armed groups is approached. It must be recognized that non-state armed groups are no longer an exception to the

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<sup>129</sup> See generally *Id.*; Megret, *supra* note 59; Julian M. Lehmann, *All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus In Bello and the Jus Ad Bellum*, in *J CONF. & SEC. LAW*, (Oxford University Press, 2012).

norm of international law. Their numbers and significance are becoming an integral part of the international system and should therefore become systemized within international law.<sup>130</sup> This was also illustrated through analyzing the drawbacks of the absence of a comprehensive framework that have led to impediments on UN operations in the three conflicts. Therefore, there is a need to introduce policy and operational reform to the UN structure as well as state policies in order to lessen the impact that such dynamics have on the international legal system. More specifically, incorporating the Rules of Engagement doctrine, as an example, into the provisions of IHL would serve the creation of an explicit relationship between non-state armed groups and humanitarian organizations. It would bind non-state armed groups to a set of principles in exchange for being involved in international and regional dialogues. This could provide incentive for the non-state armed group to adhere to such principles and creates an implicit accountability mechanism that is currently nonexistent. If this is applied, UN agencies would be granted access to NGCAs with the consent of both the state and non-state actors, a process of accountability would be in place to ensure non-state armed groups' adherence to IHL principles, and finally, affected populations would be able to receive the aid they deserve in both a theoretical and practical sense under IHL and human rights law.

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<sup>130</sup> See Weiss, Seyle, and Coolidge, *supra* note 43.