

2021

## The Nexus of Law and Warfare in the Twenty-First Century, 53 UIC J. Marshall L. Rev. 513 (2021)

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# THE NEXUS OF LAW AND WARFARE IN THE TWENTY-FIRST CENTURY

DR. WASEEM AHMAD QURESHI\*

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## ***Abstract***

Although the law is supposed to restrict warfare, it is instead being used to justify aggressive and illegitimate interventions. It is interesting to note that the convoluted nature of law and warfare behaves differently in varying settings, and their relationship has kept philosophers occupied for centuries. According to Thomas Hobbes, humans' bloodthirstiness has no limits in wars, and the state of warfare is lawless; his argument has been refuted, most prominently by Hugo Grotius, who maintained that, in addition to the laws of individual states, there is also a law of nations that regularizes the behavior of state interaction. In fact, the regulation of wars by the "law of nations" has existed for thousands of years. The law of wars is a necessary restraint that limits violence in warfare and seeks to end wars. Hans Kelsen also sees law as a mechanism to pacify a society, by restricting violence. So, the law intends to enforce conditions that foster peace in the community. Today, sovereign states are regularized by a super-sovereign (the United Nations) by the concepts of *jus ad bellum*, enshrined in the UN Charter, which regulates who can use force and in what conditions, and *jus in bello* (international humanitarian law), encoded in the Geneva and Hague Conventions, which proscribe the ways in which force cannot be used, restricting the powers of sovereign states and protecting innocent people during warfare. However, recently, the volatile landscape of fighting terrorists and nonstate actors (NSAs) in modern warfare has transformed the dynamics of the international law of war. The line that marks the difference between aggression and self-defense has been blurred. Similarly, the excessive employment of NSAs and asymmetric warfare techniques have blurred the distinction between

combatants and noncombatants, making it difficult for the international community to regularize efficiently the methods of war and to restrict violence in warfare; and, thus, violence and warfare are again on the rise. Therefore, it can be argued that the Hobbesian theory of lawless war, though rebutted in theory, still holds its ground in practice. Accordingly, the scope of this Article is to disentangle the theoretical relationship between law and warfare, to explore why the law is unable to restrict violence in current times and how the law is being distorted to justify warfare. To do so, this Article will examine the main challenges faced by the international community to enforce the laws of war.

## I. INTRODUCTION

Whenever an armed conflict or warfare starts, the media and the international community begin to assess its legitimacy under the law. One side argues that the use of force is legal under international law, while the other side contends that it is illegitimate under the same rules because political understandings and interpretations of law vary. Likewise, in a similar way to the legitimacy of commencing a war, the lawfulness of individual incidents during it is also scrutinized and documented to regularize and humanize warfare, while protecting the innocent people caught up in violence. For instance, in the discussion on the legality of airstrikes in Syria, the aggressor alliance of U.K, U.S., and France argued that due to the presence of persistent veto obstruction at the Security Council, the airstrikes are justified to force Syria into compliance with international obligation to not use chemical weapons.<sup>1</sup> Opposed to this narrative, the defensive side of Russia maintained that in accordance with international law, this intervention flagrantly violated the prohibition on the use of force.<sup>2</sup> In both cases, the law and warfare are the common factors discussed in relation to each other. The international law of warfare completely prohibits all forms that resort to the use of force,<sup>3</sup> except defensively or with the authorization of the United Nations Security Council (UNSC) in situations where the peace and security of the world are threatened.<sup>4</sup> Moreover, international humanitarian law (IHL) regularizes warfare by protecting all civilians and innocent people from the horrors of warfare.<sup>5</sup> For example, it requires both

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1. Marc Weller, *Syria Airstrikes: Were They Legal?*, BBC NEWS, (Apr. 14, 2018) [www.bbc.com/news/world-middle-east-43766556](http://www.bbc.com/news/world-middle-east-43766556).

2. *Id.*

3. U.N. Charter art. 2, para. 4.

4. *Id.* arts. 2, para. 4; 51; 41–49.

5. Convention for the Pacific Settlement of International Disputes (Hague, I) art. X, July 29, 1899; Convention for the Laws and Customs of War on Land (Hague, II) art. X, July 29, 1899; Convention for the Opening of Hostilities

sides of a conflict to avoid deliberately targeting civilian objects,<sup>6</sup> to take precautions while executing military actions,<sup>7</sup> and to be proportional in the use of force.<sup>8</sup> While the law prohibits aggression<sup>9</sup> and protects the innocent during warfare through IHL,<sup>10</sup> warfare and associated atrocities never cease to exist. As a result, hundreds of thousands of people are dying in warfare,<sup>11</sup> and millions more are affected and dispersed by warfare.<sup>12</sup> As Grotius established, in accordance with the correct interpretation of international law,<sup>13</sup> one party to an armed conflict has to be in the wrong and the aggressor, because it cannot be the case that both sides have just cause.<sup>14</sup> Arguably, in all of this violence and warfare, where innocent people are being affected, there have to be perpetrators and war criminals responsible for disturbing and threatening the peace and security of this world. And, if the law is perfect, then why is there still violence, and why are innocent civilians affected? Why are violence and warfare not controlled by the law? Why is the law not able to regularize warfare properly? Why are aggressive wars

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(Hague, III) art. X, October 18, 1907; Convention for the Laws and Customs of War on Land (Hague, IV) art. X, October 18, 1907; *see also* Geneva Convention I: For the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, art. X, August 12, 1949; Geneva Convention II: For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. X, August 12, 1949; Geneva Convention III: Relative to the Treatment of Prisoners of War art. X, August 12, 1949; Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War art. X, August 12, 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. X, June 8, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. X, June 8, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III) art. X, Dec. 8, 2005.

6. Protocol I, *supra* note 5, art. 48 [hereinafter AP1].

7. *Id.* art. 57.

8. *Id.* art. 57(2).

9. U.N. Charter art. 2, para. 4.

10. *See supra* note 5.

11. *About the Syrian Refugee Crisis*, GLOBAL IMPACT, [www.syriarelieffcharity.org/?gclid=EAIaIQobChMI19TaqLzh5QIVBUTTCh3ilwFPEAAAYASAAEgIUbvD\\_BwE#Xcj3t1czbIU](http://www.syriarelieffcharity.org/?gclid=EAIaIQobChMI19TaqLzh5QIVBUTTCh3ilwFPEAAAYASAAEgIUbvD_BwE#Xcj3t1czbIU) (last updated May 29, 2020) (“More than 500,000 people have died since the war began.”).

12. *See Syria Emergency*, UNHCR: UN REFUGEE AGENCY, [www.unhcr.org/syria-emergency.html](http://www.unhcr.org/syria-emergency.html) (last updated Apr. 19, 2018) (“Over 5.6 million people have fled Syria since 2011, seeking safety in Lebanon, Turkey, Jordan and beyond. Millions more are displaced inside Syria and, as war continues, hope is fading fast.”); *see also Syria Regional Refugee Response*, OPERATIONAL PORTAL: REFUGEE SITUATIONS, [www.data2.unhcr.org/en/situations/syria](http://www.data2.unhcr.org/en/situations/syria) (last updated June 11, 2020) (emphasizing that “5,543,746 (5.5 million) Syrian refugees are hosted in Turkey, Lebanon, Jordan, Iraq, and Egypt”).

13. PETER PAVEL REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL* 120 (1960).

14. JOHN YOO, *POINT OF ATTACK: PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE* 57 (2014).

and illegal invasions continuously waged? Why is the law unable to protect civilians from the horrors of warfare? Why are sovereign states not sheltered against aggressions and illegitimate interventions?

To find answers to these questions, the scope of this Article is to explore the relationship between law and warfare. This Article intends to explore why there is a huge gap between war in practice and the law on paper. It is pertinent to mention here that the scope of this Article is not to list all the laws of war, to show how law regularizes warfare, or to assess how the law protects civilians during warfare. In short, this Article does not intend to investigate what international law says about the legality of the use of force. Instead, the scope of this Article is mainly to set out the theoretical relationship between law and warfare, to explore why there is a gap between what the international law of war states on paper and what states do on the battlefield; and that, too, will be touched upon in respect of academic theoretical reasons and arguments, and not to list all violations or document the size of the gap.

To do this, this Article is divided into four sections. Section 1 will explore the ideology of law in warfare. This section will discuss the theoretical aspects of the relationship between law and warfare, to explain how and when law is involved with armed conflicts. Then, Section 2 will discuss the concept of reciprocity in relation to the nexus between law and warfare. This section is divided into three subsections. Section 2.1 will discuss the law in relation to compliance in international relations, Section 2.2 will discuss the dilemma involved in the choice of reciprocity, and Section 2.3 will discuss reciprocity in warfare. Afterwards, Section 3 will explore the nature of the humanization of law in relation to warfare. This section is further divided into four subsections. Section 3.1 will discuss the challenges posed by non-state actors (NSAs) to the humanization of warfare by law. Section 3.2 will discuss the challenge of compliance in the international legal system. Section 3.3 will discuss the role of technology as a challenge to the humanization of warfare through law. Lastly, Section 3.4 will discuss the challenge of the heavy costs borne by one side in respecting international law. Then, Section 4 will discuss the regularization of warfare by law. This section has two subsections, Section 4.1 will discuss the challenge of misinterpretations of law regarding military targets and Section 4.2 will explore the challenge of enforcing the law during warfare.

## II. IDEOLOGY OF LAW IN WARFARE

According to Thomas Hobbes, humans' bloodthirstiness has no limits in wars, and the state of warfare is lawless.<sup>15</sup> He argues that

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15. Lawrence Douglas et al., *Law and War: An Introduction*, in LAW AND

law is the necessary restraint that limits violence in warfare and that seeks to end wars.<sup>16</sup> For Hobbes, the law is the exclusive domain of states, and therefore there can be no law if there is no state.<sup>17</sup> This essential convergence of “law and state” shows how states behave in the same way as individuals do within a society. Of course, states can agree on terms by signing a treaty, just as individuals sign contracts among themselves. But the contracts or treaties do not mean anything if there is no higher authority to enforce the terms of such agreements. In international law, the United Nations, particularly its Security Council, can be deemed such a super-authority on states as an enforcing agency, equivalent to a government for individuals. This super-authority is sovereign, and it limits the use of force among all states.

Hans Kelsen also has a similar view. He believes that the law not only tries to prevent armed conflicts between states; it also restricts all forms of violence in the daily lives of individuals living in a civil society.<sup>18</sup> Criminal law and the states’ prohibition on individuals’ use of force are prime examples of these concords. To take murder as an example, the law prohibits the use of force to kill any person, and by this it restricts violence. But what about cases of revenge? Of course, killing in self-defense is allowed in criminal law to safeguard an individual’s sovereignty, just as the right to use defensive force in international law does.<sup>19</sup> However, killing in revenge is not permitted under criminal law.<sup>20</sup> In this way, a state ensures its monopoly on the use of force by prohibiting the use of force by individuals. Therefore, only a state has the authority to avenge a death under the law.<sup>21</sup> In a similar way to Hobbes, Kelsen sees law as a mechanism to pacify a society, by restricting violence.<sup>22</sup> So, the law intends to enforce conditions that foster peace in the community.<sup>23</sup>

Carl Schmitt also took a Hobbesian view of a state as a limitless sovereign.<sup>24</sup> Schmitt believed that a state is not constrained by the governing laws it has made; it is above them. Like Hobbes, he does not see governance as defining sovereignty,

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WAR 1, 4 (Austin Sarat et al. eds., 2014).

16. *Id.*

17. DAVID DAICHES RAPHAEL, *HOBBS: MORALS AND POLITICS* (1977), reprinted in *POLITICAL THINKERS* 50 (Geraint Parry ed., 2004).

18. HANS KELSEN, *PURE THEORY OF LAW* 91-99 (Max Knight trans., 2005); see also Douglas et al., *supra* note 15, at 6.

19. U.N. Charter art. 51.

20. See Douglas et al., *supra* note 15, at 6. (“[T]he state must punish the murderer to eliminate the prospect of retaliatory violence and blood vengeance . . .”).

21. *Id.*

22. See KELSEN, *supra* note 18, at 91–99; see also Douglas et al., *supra* note 15, at 6 (noting that Kelsen viewed the law “as an instrument that aims at the pacification of the legal community”).

23. KELSEN, *supra* note 18, at 36–39. Douglas et al., *supra* note 15, at 6.

24. Douglas et al., *supra* note 15, at 6.

but the state holds supremacy in governance within its territory.<sup>25</sup> For him, the sovereign is the one who “decides the exception [state of emergency] which cannot be subsumed.”<sup>26</sup> By this he meant that no self-codification or rule applies to a state in a state of emergency, defying the rule of law.<sup>27</sup> Schmitt’s definition helps us locate the sovereign as an entity who decides to apply the law, revoke it, and then reinstate it. Here, Schmitt’s so-called emergency is the state of war, where the powers of a sovereign are challenged. Because armed conflict/war is an existential threat, it provides the opportunity for a state to exercise its powers and do anything it deems reasonable for the sake of survival. So, in peacetime, law governs everything, whereas in the state of emergency during wars there is lawlessness. Yet, in both scenarios, the powers of a sovereign prevail as absolute authority.<sup>28</sup> But the Hobbesian argument that warfare is not ruled by any law has been refuted because war has been regulated by law for thousands of years.<sup>29</sup>

The best rebuttal to the Hobbesian notion of the lawlessness of war was pioneered by Hugo Grotius, who maintained that, in addition to the laws of individual states, there is also a law of nations, which regularizes the behavior of state interaction. He established that even the law of nations without sanctions is not wholly ineffective or meaningless.<sup>30</sup> Although Grotius’s works fuse morality and law, and they implicitly deem trade agreements to be legal norms, they still provide a strong foundation to refute Hobbesian arguments. Grotius adds that law must only be undertaken after conscientiously trying to avert it, and that the conduct of warfare should be strictly regularized by the law because he believed that people go to war for little or no reason, and use violence in the most barbaric ways.<sup>31</sup> So he introduced the notions of *jus ad bellum* and *jus in bello*. *Jus ad bellum* describes the requirements to judge the justification of a war, and *jus in bello* is the conduct of war, which regularizes military action with regard to humanitarian rules.<sup>32</sup>

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25. See Douglas et al., *supra* note 15, at 6–7 (recognizing that Schmitt “embraced Hobbes’s understanding of sovereign power as absolute and illimitable”).

26. CARL SCHMITT, *POLITICAL THEOLOGY II: THE MYTH OF THE CLOSURE OF ANY POLITICAL THEOLOGY* 4-16 (Michael Hoelzl & Graham Ward trans., 2008).

27. See Douglas et al., *supra* note 15, at 7 (providing that the invocation of a state of emergency “signifies the purest instance of the exercise of sovereign power”).

28. *Id.*

29. *Id.*

30. READINGS IN THE PHILOSOPHY OF LAW 472 (Keith C. Culver ed., 1999).

31. 3 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY: LATE MEDIEVAL AND RENAISSANCE PHILOSOPHY* 333 (2003); see also ARNOLD KRAMMER, *WAR CRIMES, GENOCIDE, AND THE LAW: A GUIDE TO THE ISSUES* 28 (2010); RELIGION AND INTERNATIONAL LAW 216 (Mark W. Janis & Carolyn Evans eds., 1999); Douglas et al., *supra* note 15, at 8–9.

32. Douglas et al., *supra* note 15, at 8–9.

Since then, the laws of nations have improved drastically, to incorporate both *jus ad bellum* and *jus in bello*. Today, sovereigns are regularized by the super-sovereign by the *jus ad bellum* enshrined in the UN Charter, which regulates who can use force and in what conditions;<sup>33</sup> and the humanitarian laws of war encoded in the Geneva and Hague Conventions proscribe the ways in which force cannot be used, restricting the powers of a sovereign state.<sup>34</sup> The UNSC, the International Criminal Court (ICC), and the International Court of Justice (ICJ) seek to enforce these international laws. The idea is to restrict violence among sovereign states and to humanize warfare while nurturing conditions to assure peace and security. In *jus ad bellum*, under the UN Charter, the law prohibits all forms of the use of force by sovereign states,<sup>35</sup> with the exception of the use of force in self-defense and with the authorization of the UNSC in cases where the peace and security of the international community is threatened.<sup>36</sup> In *jus in bello*, the principles of proportionality,<sup>37</sup> precaution,<sup>38</sup> and distinction<sup>39</sup> protect noncombatants from the excesses of violence, by restricting the methods of force in a humanitarian fashion.

However, recently, the volatile nature of fighting terrorists and NSAs has transformed the dynamics of modern international laws of war seeking to restrict violence. The line that marks the difference between aggression and self-defense has been blurred,<sup>40</sup> as has the distinction between combatants and noncombatants, through the excessive employment of NSAs and asymmetric warfare techniques.<sup>41</sup> This transformation is making it difficult for the international community to efficiently regularize war and to restrict warfare/violence; violence and warfare are again on the rise. Consequently, it can be argued that the Hobbesian theory of lawless war, though refuted in theory, still holds ground in practice.

More importantly, this paradigm shift in the methods of fighting a war has blurred the lines between wartime and

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33. See U.N. Charter art. 2(4), 41-51 (asserting that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

34. See *supra* note 5.

35. U.N. Charter art. 2, para. 4.

36. *Id.* arts. 41–49.

37. AP1, *supra* note 5, art. 57(2).

38. *Id.* art. 57.

39. *Id.* art. 48.

40. TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 107 (2010).

41. ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE TWENTY-FIRST CENTURY 203 (Fritz Allhoff, Nicholas G. Evans, & Adam Henschke eds., 2013); see also DANIEL BYMAN & MATTHEW WAXMAN, THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT 196 (2002).



peacetime,<sup>42</sup> making wars look like policing actions. Blum argues that this shift has shattered the foundational basis upon which the laws of war were constructed. She fears that the internalization of international policing can be domesticated as well.<sup>43</sup> Furthermore, this Article is concerned that such policing relaxes the conditions set for the international use of force, meaning that, even where the use of force or policing by liberal democracies is justified, the instigation of violence and war has become easier, lowering the legal standard for *jus ad bellum*.

Moreover, liberals saw the actions in the American war on terror under the Bush regime as illegal, owing to the excessive use of torture, and indefinite detention, while conservatives saw it as a “hypertrophy of law.”<sup>44</sup> Moyn established that both stances misrepresent the history of American warfare.<sup>45</sup> To him, unlike Grotius or the language used at the Nuremburg trials, *jus in bello* is more important than *jus ad bellum*. He quotes the literature on the Vietnam War, which greatly emphasizes its “undeclared, aggressive” and illegal nature, while ignoring carpet bombing and the behavior toward prisoners of war.<sup>46</sup> Nevertheless, he admits that too much emphasis on *jus in bello* “humanizes” warfare, and the law on warfare first focuses on *jus ad bellum* before coming to *jus in bello*.<sup>47</sup> Because, if there is no war at all, there can be no war crimes.

So, a possible new research question is: do the modern methods of fighting warfare affect the *jus ad bellum* criteria and justify illegal wars? Or is it the other way around: that aggressive states first develop new strategies to exploit the lacunas in the legal system of warfare, and then they employ or develop asymmetric tactics of warfare? Either way, the goal of this Article is to disentangle the relationship between law and warfare; it proposes that methods of warfare are cleverly designed to overcome the restriction on the use of force, for which vague customary international laws and state practices are developed and exploited to justify the illegal use of force or illegitimate interventions.

The international law of using force prohibits all kinds of use of force, with the exception of the use of force in self-defense and with authorization of the UNSC.<sup>48</sup> So, when neither of these

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42. BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); Douglas et al., *supra* note 15, at 14.

43. Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, in LAW AND WAR 48, 77 (Austin Sarat et al. eds., 2014).

44. See Douglas et al., *supra* note 15, at 16–17.

45. Samuel Moyn, *From Antiwar Politics to Anti-Torture Politics*, in LAW AND WAR, 178 (Austin Sarat et al. eds., 2014).

46. *Id.*

47. *Id.*; see also, Douglas et al., *supra* note 15, at 17-18 (noting that Moyn “regards this shift with ambivalence”).

48. U.N. Charter arts. 2, para. 4; 51; 41–49.

requirements is met under *jus ad bellum*, aggressive countries resort to establishing new norms through the opinions of scholars who support their aggressive warfare, or through the development of newly found customary international law. New principles or norms under international law of using force have to be developed because by the time a new war is waged, the legal reasoning previously used has been deconstructed or rebuffed by the international community. For instance, the principles of the responsibility to protect (“R2P”),<sup>49</sup> humanitarian intervention<sup>50</sup> (without UNSC authorization), and preventive self-defense<sup>51</sup> were wrongly used to justify illegal warfare by aggressive states. Indeed, over time, all uses of force based on these principles were rejected and deconstructed by the international community, if undertaken without self-defense and without UNSC authorization. In current times, the unwilling or unable test<sup>52</sup> is being used in the Syrian War to justify the use of force without an actual armed attack from the Syrian state.

In the Syrian War, the Syrian state did not use armed force against the U.S. or launch any armed attack on the U.S., and the UNSC did not authorize the use of force. So the U.S. cannot use force in self-defense or rely on UNSC authorization. The U.S., therefore, used force in Syria by arguing that the NSAs in Syria carried out armed attacks in Iraq, so the U.S. is only using force in Iraq’s collective self-defense.<sup>53</sup> This seems quite straightforward. But does international law allow the defensive use of force in cases of armed attacks by NSAs, such as the defensive use of force in reaction to the 9/11 attacks and the subsequent war on terror? In this regard, the major instrument of international law (the UN Charter) is silent. But the ICJ explicitly provides an effective control test. If it can be established that the use of force by NSAs is used under the effective control of a state, then the defensive use of force in response to an armed attack by NSAs is justified.<sup>54</sup> But

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49. David Chandler, *Unravelling the Paradox of the Responsibility to Protect*, 20 IRISH STUDIES IN INTERNATIONAL AFFAIRS 27–39 (2009).

50. Jana Dadova, *The Legality of Humanitarian Intervention Without UN Security Council Authorization* (May 22, 2016) (unpublished manuscript) (on file with the University of Southern Denmark).

51. Kevin Jon Heller, *Why Preventive Self-Defense Violates the UN Charter*, OPINIOJURIS (Mar. 7, 2012), [www.opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter](http://www.opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter) [hereinafter Heller].

52. Waseem Ahmad Qureshi, *International Law and the Application of the Unwilling or Unable Test in the Syrian Conflict*, 11 DREXEL L. REV. 61 (2018) [hereinafter Qureshi, *International Law*]; see also Waseem Ahmad Qureshi, *Examining the Legitimacy and Reasonableness of the Use of Force: From Just War Doctrine to the Unwilling-or-Unable Test*, 42 OKLA. CITY U. L. REV. 221 (2018).

53. Qureshi, *International Law*, supra note 52, at 85.

54. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 61-65 (June 27) (utilizing the effective control test).

what about situations where the NSAs are not under the effective control of a state? Should there be no action or law enforcement against such terrorists? Using this argument, Ashley Deeks comprised a new test, called the “unwilling or the unable test,” in which a victim state can use defensive force in response to armed attacks by NSAs if the host state where the NSAs reside is either unwilling or is unable to deal with the perpetrators.<sup>55</sup> When the law is subjugated and bent in such a fashion, it is used as a tool to authorize aggressive wars, and when the law is used to humanize and regulate warfare through humanitarian rules, it is used as a restraint.

### III. RECIPROCITY

#### A. *Reciprocity and Compliance in International Relations*

While domestic legal systems enforce obligations involving individuals, the notion of reciprocity in international law, especially in the law of warfare, is concerned with the legal obligations between states.<sup>56</sup> Reciprocity is used in international agreements to enforce cooperation and to deter violations,<sup>57</sup> by levying reciprocal state obligations. Empirical data has shown evidence of reciprocity even in state practice in international relations.<sup>58</sup> But states’ responses become disproportionate and irregular when it is difficult to monitor a subject’s compliance. This difficulty in monitoring is known as the “noise.”<sup>59</sup> The noise is directly proportional to the irregularity in the reciprocity of responses in international relations. The higher the noise is, the higher the irregularity in reciprocity, and vice versa.<sup>60</sup> Compared to reciprocity, legal obligations have less effect on compliance; reciprocity is statistically proven to be more efficient in deterring violations and ensuring states’ compliance.<sup>61</sup> Does this mean that developing laws of reciprocal responses will help in shaping an international legal

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55. Ashley S. Deeks, *“Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012).

56. For more detailed analyses of how the principle of reciprocity manages obligations between states in the laws of war, see Sean Watts, *Reciprocity and the Laws of War*, 50 HARV. INT’L L.J. 365 (2009) (furnishing a detailed overview on reciprocal obligations in the Geneva Conventions, the Hague Conventions, customary international law, and other laws of war).

57. ROGER HOPKINS BURKE, CRIMINAL JUSTICE THEORY: AN INTRODUCTION 137 (2012).

58. JOSHUA S. GOLDSTEIN & JOHN R. FREEMAN, THREE-WAY STREET: STRATEGIC RECIPROCITY IN WORLD POLITICS 26-29 (1990).

59. *Id.* at 27

60. JAMES D. MORROW, ORDER WITHIN ANARCHY: THE LAWS OF WAR AS AN INTERNATIONAL INSTITUTION 128 (2014).

61. *Id.* at 131, 144.

system where states are more prone to comply and less likely to violate their obligations?

### B. Reciprocity Dilemma in Compliance

If we see the laws of war in general, it is clear that the governing rules of *jus ad bellum* are in themselves in line with reciprocity. For instance, we start with the prohibition on the use of force and its only exception in self-defense. *Jus ad bellum* does not allow any sort of use of force against other states, but it does allow the right to use reciprocal force to all states in self-defense if they are victim to an armed attack.<sup>62</sup>

The problem with reciprocity is similar to the prisoner's dilemma, in which two rational beings are likely not to cooperate with each other because both of them are better off by not cooperating at the expense of each other.<sup>63</sup> So, to take an example of states, suppose the U.S. and China agree to exchange x and y. If x and y are exchanged successfully, both are better off. But, if the U.S. cooperates and China does not, then China will end up with x and y, which is better for it than the ideal exchange, where it will only get x or y. It suits the interest of both parties to not cooperate. But if both parties do not cooperate, they are worse off. So how should we induce compliance or cooperation between states in this situation? Here, reciprocity plays its role. If one state does not cooperate, the next time the other state will not cooperate. This is the classic example of "tit for tat." After reaching the lowest levels of noncooperation, states will start to comply with each other, knowing that noncooperation will only damage their interests in the long run and that the short-term benefits of noncooperation are inadequate.<sup>64</sup> Here, the law can play the role of reciprocity by levying punishments for violations to induce compliance. This will maintain the long-term ethical work relationship and will proportionally affect both parties. But the practice is not as plain and simple as this model.

So, let us add some noise within this model. In real life, one party is aware of the cooperation or compliance of the other party. An error can also come that seems like a violation but is not. In response, a party with a skeptical mind, or by error, might imagine that the agreement is violated and choose to violate the agreement in response. The other party, not having broken its obligation, will see this behavior as a violation, and the prisoner's dilemma continues again down the same spiral we started with. In this regard, the law can set trigger levels of violations with appropriate

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62. U.N. Charter art. 51.

63. See MORROW, *supra* note 60, at 290 (referring to his Chapter 2 discussion on Prisoner's Dilemma Nash Equilibria & Pareto Optimal).

64. For a more thorough analysis on the game theory, prisoner's dilemma, and reciprocity with mathematical equations, see *id.* at 23-57.

reciprocal levels of punishments. However, increasing the trigger levels would mean that the uncertainly period is larger, and the chances of noncooperation are higher; by contrast, reducing trigger levels would translate into small violations and disproportionate responses, because, if one side violates one little obligation, the response can be a major deviation from cooperation. So, the law also needs to make certain that the punishments and violation trigger levels are proportionate and equally applicable to both sides, regardless of how much the other party deviated. This means that cooperation can be induced by levying punishments individually, irrespective of the violations of the other party.<sup>65</sup> But it does not make sense that one party would comply and cooperate fully when the other party is violating its obligations. The legal system or agreement can incorporate the kind of individual response or cooperation that is expected from the other party at which stage, to nullify the dilemma of noncooperation and to impose punishments accordingly. Here, law, particularly the international legal system, has a duty to form “bright lines” for cooperation, punishments, and violations. Treaty law, for example, forms binding rules that states agree with, after ratification. Moreover, international law also forms principles for such dealings that can be used in the event of dispute/conflict between states.<sup>66</sup>

### C. Warfare

The concept of reciprocity in law and warfare can be tested by the international laws of war. As has been seen, individual soldiers in armed conflicts reciprocate and respond to the actions and violations of their enemies, such as the treatment of wounded soldiers and prisoners of war.<sup>67</sup> But reciprocity is not very useful in international laws of neutrality during warfare, IHL during occupation, or in cases of terrorism and the use of biological/chemical weapons. As Morrow argues, if one state has violated the law of neutrality or IHL, the other is not likely to respond by violating the rights of neutrality of the other state, or by violating international humanitarian laws; and, during occupation, one state may not possess the capabilities to effect a reciprocal occupation.<sup>68</sup> However, it is not necessary that a state will exactly mirror a violation or adversity. It is also possible to reciprocate violations through other forms of retaliation. For instance, if one weak state has been attacked by a cruise missile and it does not possess the capability to respond in kind, it will retaliate by using other kinds of force, such as by using rocket launchers. But

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65. *Id.* at 290.

66. *Id.*

67. *Id.* at 73, 196.

68. *Id.* at 148.

reciprocity in the form of retaliation is guaranteed.<sup>69</sup>

Adding noise to the state of individual behavior in violations of international laws of using force makes the matter of reciprocity more complicated. For instance, during the Second World War Japanese used perfidy to fight enemy forces.<sup>70</sup> Similarly, terrorists use suicide bombs and other forms of asymmetric means during armed conflicts and in peacetime. Since states do not publicly announce their intention to violate IHL, and terrorist activities are so unpredictable, are gross violations of humanitarian law, and are committed through clandestine means, it is nearly impossible for victim states to respond and reciprocate. However, this does not mean that a victim state cannot retaliate against such actions by any other means, for instance by using force while respecting humanitarian law, by litigation, or by enforcement of punishments against war crimes. While such retaliation cannot be truly considered reciprocal, it can still be perceived as a weaker form of reciprocity in warfare, because, as discussed earlier, a slap in response to a punch is a form of reciprocity. It does not matter that the form and technique of a response are different.

For instance, a drone attack on a group of terrorists hiding in a cave that results in the deaths of ten terrorists can be considered a reciprocal response to a suicide attack that killed numerous innocent people and was planned and executed by those terrorists. It can be argued that the deaths of terrorists are worth less than the casualties of innocent people, so it is not proportional or reciprocal in a true sense. Likewise, it can also be argued that the innocent people did not commit any wrong, while the terrorists wronged those innocent people, so justice is still not reciprocal even if the death toll on both sides is the same. But this is the case with every mass murder; if A murders B and C, and A is subsequently captured and executed, there is still injustice. In this example, both A and B die equally, and, even if the deaths are reciprocated in a similar manner, what about the injustice to C committed by A? While Hitler killed millions of Jews, in reciprocity he only died once; what about the justice for the remaining millions of people who died at the hands of Hitler? Only religious beliefs, such as the notions of heaven and hell, and life after death, can reciprocate for mass murders in a true sense.

This discussion only makes two major points: One, that the international law of using force including law pertaining to the war crimes, IHL, and *jus ad bellum*, are reciprocal in nature; and, two, that reciprocity does not mean exactly mirroring a situation in response; rather, in the relationship of law and warfare, reciprocity is a form of retaliation that is proportional and responsive in nature.

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69. See *id.* at 139 (recognizing a 95% chance of retaliation in face of violations from other side).

70. *Id.* at 228.

States' behavior is not solely administered through the concept of reciprocity, in that state A is afraid to use force against state B for fear of responsive force from state B. Although reciprocity plays an important role in the international relations of using force, states' responsibilities and legal obligations also determine and affect their actions.<sup>71</sup> This explains why, in cases of violations of IHL, states do not choose to reciprocate with violations, since the legal obligations to humanize warfare are internalized in states' behaviors.<sup>72</sup> However, it would be interesting to see how the addition of noise with regard to violations of IHL affect the internalization of legal obligations: does an increase in violations of IHL decrease the sense of internalized legal obligations?

#### IV. HUMANIZATION

The law of war intends to humanize warfare by imposing humanitarian principles that restrict the use of violence toward civilians and innocent people. The progressive international law community, therefore, keeps on refining the legal principles to humanize warfare.<sup>73</sup> Contrary to these efforts, the international law of warfare is becoming less relevant every day because, firstly, the powerful states that aggressively use force do not respect their legal obligations in international law. For instance, the interventions and wars commenced by the U.S. (which is the major global actor in all aspects) have hardly been affected by any international law of war, both in terms of civilian casualties<sup>74</sup> and in terms of initiations of wars.<sup>75</sup> Secondly, NSAs, and the terrorist organizations that employ

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71. *Id.* at 131.

72. *Id.*

73. Sarah Sewall, *Limits of Law: Promoting Humanity in Armed Conflicts*, in *LAW AND WAR 23* (Austin Sarat et al. eds., 2014).

74. To see humanitarian violations and United States conduct during the Iraq War, see *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, HUM. RTS. WATCH (Dec. 11, 2003), [www.hrw.org/report/2003/12/11/target/conduct-war-and-civilian-casualties-iraq](http://www.hrw.org/report/2003/12/11/target/conduct-war-and-civilian-casualties-iraq).

75. For support that the United States initiated the Iraq War on false grounds, see *Cheney Blasts Media on Al Qaeda-Iraq Link*, CNN (June 18, 2004), [www.edition.cnn.com/2004/ALLPOLITICS/06/18/cheney.iraq.al.qaeda](http://www.edition.cnn.com/2004/ALLPOLITICS/06/18/cheney.iraq.al.qaeda); see also Andy McSmith & Charlie Cooper, *Chilcot Report: Blair Didn't Tell Truth About WMDs, the Deal with Bush or the Warnings of Fallout – How Britain Went to War in Iraq*, INDEP. (July 6, 2016), [www.independent.co.uk/news/uk/politics/chilcot-report-inquiry-tony-blair-iraq-war-weapons-of-mass-destruction-evidence-verdict-a7122361.html](http://www.independent.co.uk/news/uk/politics/chilcot-report-inquiry-tony-blair-iraq-war-weapons-of-mass-destruction-evidence-verdict-a7122361.html); Aaron Rugar, *60 Minutes: CIA Official Reveals Bush, Cheney, Rice Were Personally Told Iraq Had No WMD in Fall 2002*, THINK PROGRESS (Apr. 24, 2006), [www.thinkprogress.org/60-minutes-cia-official-reveals-bush-cheney-rice-were-personally-told-iraq-had-no-wmd-in-fall-2002-9d3bf033c619](http://www.thinkprogress.org/60-minutes-cia-official-reveals-bush-cheney-rice-were-personally-told-iraq-had-no-wmd-in-fall-2002-9d3bf033c619); Sean Lengell, *Durbin Kept Silent on Prewar Knowledge*, WASH. TIMES (Apr. 27, 2007), [www.web.archive.org/web/20070429045319/http://washtimes.com/national/20070427-124842-1706r.htm](http://www.web.archive.org/web/20070429045319/http://washtimes.com/national/20070427-124842-1706r.htm); *White House Warned over Iraq Claim*, BBC NEWS, [www.new.s.bbc.co.uk/2/hi/americas/3056626.stm](http://www.new.s.bbc.co.uk/2/hi/americas/3056626.stm) (last updated July 9, 2003); Dave Moniz

them, also do not abide by the humanitarian legal principles that protect civilians, and they violate all the basic legal principles without any fear.<sup>76</sup> So there is both the non-compliant attitude of NSAs and superpowers toward their legal obligations under IHL and the UN Charter and a lack of law enforcement to punish war crimes or aggressors. The extent of this issue can be understood by the U.S. attitude toward war crimes and respect for international law: the U.S. threatened to arrest ICC judges if they tried to pursue cases of American war crimes.<sup>77</sup> The legal system that ensures peace and deters violence is useless when it comes to superpower aggressor states: even if it is known that a war was initiated on the wrong premises, and even if the aggressor itself acknowledges its mistake, the superpower perpetrators are not held accountable by the international community. For instance, in the Iraq War, the U.S. admitted that the war was initiated on false intelligence and forged documents of weapons of mass destruction.<sup>78</sup> Yet, the Bush administration was never held accountable, and there were no sanctions levied on the U.S. for its complete disrespect for the UN Charter and war crimes. Had it been a weaker state, such as Iran, hundreds of sanctions, plus a full-fledged American invasion with dozens of allies against Iran, would have been inevitable. Therefore, the international community should now not focus on the progression or refinement of the legal obligations in international law. Instead, a more sensible goal should be to work toward the practicality of legal obligations, and toward compliance, enforcement,<sup>79</sup> and punishment for war crimes. Only then will the law have any sort of value; law without enforcement is just ink on paper. If the law forbids the aggressive use of force, and superpowers can get away with it every time, then why would other states or NSAs respect the law?

### A. *Nonstate Actors*

There are a number of challenges that lay the foundations of a non-compliant and disrespectful attitude toward IHL. The first is the existence of NSAs, who not only threaten states' monopoly on the use of force but have also always been outside legal control in

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& Peronet Despeignes, *O'Neill: Iraq Planning Came Before 9/11*, USA TODAY (Jan. 12, 2004), [www.usatoday30.usatoday.com/news/washington/2004-01-11-oneill-iraq\\_x.htm](http://www.usatoday30.usatoday.com/news/washington/2004-01-11-oneill-iraq_x.htm); Daniel Schorr, *The Downing Street Memos*, NPR (June 19, 2005), [www.npr.org/templates/story/story.php?storyId=4709618](http://www.npr.org/templates/story/story.php?storyId=4709618).

76. *Id.*

77. *US Threatens to Arrest ICC Judges if They Pursue Americans for Afghan War Crimes*, FRANCE24, [www.france24.com/en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes](http://www.france24.com/en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes) (last updated Sept. 11, 2018).

78. *See supra* note 75.

79. *See* Sewall, *supra* note 73, at 25 (noting complications in prosecuting U.S. war criminals to enforce humanitarian law).



international law.<sup>80</sup> It is expected that, in the future, the numbers of NSAs in warfare will only grow, so this problem will definitely deteriorate. Nonstate organizations such as the Taliban, Al Qaeda, ISIS, insurgents, drug cartels, and rebel groups routinely violate all their IHL obligations, by deliberately targeting civilian people.<sup>81</sup> These organizations are illegal from the start, explicitly fighting their own and other states, so they do not respect any law, whether domestic or international, and this frees them from all sorts of legal obligations. Agreements can be drafted and signed with these organizations to oblige them under IHL to use humane force, but doing so would translate into admitting that their resorting to the use of force is legitimate, and it would threaten the monopoly of the state to use force. And, even if ISIS-like organizations agree to not target civilians, the law enforcement problems will remain if they ultimately breach that agreement: with or without agreements, they should not be violating IHL. Therefore, the focus of the law and warfare relationship should not be on tightening the legal obligations but on enforcing existing IHL requirements. By way of analogy, if a criminal comes and robs a bank, believing he is not obliged by state laws, there is little advantage in the state responding by signing agreements with the criminal not to rob banks again, because the law already says that robbing banks is illegal. Now, his arrest and punishment are required. So the argument here is that NSAs are already bound by IHL requirements, as the customary international law of IHL is universal with regard to its jurisdiction.<sup>82</sup> But, if it is so simple that only law enforcement is left, then why are NSAs thriving and not being arrested or punished by their host states or the international community? Despite the U.S. spending billions of dollars<sup>83</sup> fighting NSAs, terrorism is growing exponentially in Afghanistan, Iraq, Syria, and Yemen. Does this mean that the methods used to fight terrorism are ineffective? Or is there something more to it? Terrorism is increasing because the so-called enemies of terrorism are also fueling it behind their backs. For instance, while the U.S. is fighting ISIS, Al Qaeda, and the Taliban, it is at the same time fighting the system that deters terrorism, by destabilizing states and by sponsoring and aiding NSAs,<sup>84</sup> whether in the form of U.S.

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80. *Id.* at 23, 25.

81. *Id.*

82. ROBERT KOLB, *ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 65 (2014).

83. Reality Check Team, *Afghanistan War: What Has the Conflict Cost the US?*, BBC NEWS (Feb. 28, 2020), [www.bbc.com/news/world-47391821](http://www.bbc.com/news/world-47391821).

84. *House Approves US Arms for Syrian Rebels*, AL JAZEERA AM. (Sept. 17, 2014), [www.america.aljazeera.com/articles/2014/9/17/congress-arming-syriarebels.html](http://www.america.aljazeera.com/articles/2014/9/17/congress-arming-syriarebels.html); see also Mark Hosenball, *Exclusive: Obama Authorizes Secret US Support for Syrian Rebels*, REUTERS (Aug. 2, 2012), [www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801](http://www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801); Mark Mazzetti, Adam

support to NSAs and indirect flow of weapons to terrorist organizations<sup>85</sup> or by arming rebel and insurgent groups against the host state. For instance, in Syria, the U.S. is supporting rebel groups to change the Assad regime; American arms support to Syrian rebels ends up in the hands of terrorists.<sup>86</sup> Similarly, Western support to rebel factions in Syria to topple the Assad regime is also destabilizing Syrian state capabilities in their fight against terrorist groups. So Western political tactics are not efficient in fighting terrorism; in fact, they are the complete opposite, as they are counterproductively increasing terrorism by providing them with support.

In conclusion, the biggest challenge in the enforcement and compliance of IHL is the involvement of NSAs in armed conflicts, used by both superpowers and weak states as proxies to affect their political will. And, since NSAs act outside all legal obligations, the law is not enforced against them. NSAs are exploited and used by states for various reasons, the most significant of which is to avoid attribution or retribution against the actions undertaken by NSAs. Aside from this, NSAs are used by states for their cost-effectiveness and their effective armed attacks. Since NSAs do not respect any IHL, their actions are highly effective in fighting a targeted state. A simple solution to all this disarray would be a complete ban on the use of NSAs and on the clandestine use of armed forces without uniforms. Any sort of help, support, and training provided to NSAs by any state should not only be banned; it should be considered a war crime that should be enforced by and deterred by imposing high sanctions and punishments.

### *B. Compliance*

The second problem with the enforcement of law of warfare and IHL is with the compliance by states, mainly those at the extreme ends of military strength. Weak states use asymmetric tactics to

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Goldman & Michael S. Schmidt, *Behind the Sudden Death of a \$1 Billion Secret C.I.A. War in Syria*, N.Y. TIMES (Aug. 2, 2017), [www.nytimes.com/2017/08/02/world/middleeast/cia-syria-rebel-arm-train-trump.html](http://www.nytimes.com/2017/08/02/world/middleeast/cia-syria-rebel-arm-train-trump.html); Mark Mazzetti, *C.I.A. Study of Covert Aid Fueled Skepticism About Helping Syrian Rebels*, N.Y. TIMES (Oct. 14, 2014), [www.nytimes.com/2014/10/15/us/politics/cia-study-says-arming-rebels-seldom-works.html](http://www.nytimes.com/2014/10/15/us/politics/cia-study-says-arming-rebels-seldom-works.html); C.J. Chivers & Eric Schmitt, *Arms Airlift to Syria Rebels Expands, with Aid from C.I.A.*, N.Y. TIMES (Mar. 24, 2013), [www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html](http://www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html).

85. Brian Castner, *Exclusive: Tracing ISIS' Weapons Supply Chain—Back to the US*, WIRED (Dec. 12, 2017), [www.wired.com/story/terror-industrial-complex-isis-munitions-supply-chain](http://www.wired.com/story/terror-industrial-complex-isis-munitions-supply-chain); see also Tara McKelvey, *Arming Syrian Rebels: Where the US Went Wrong*, BBC NEWS (Oct. 10, 2015), [www.bbc.com/news/magazine-33997408](http://www.bbc.com/news/magazine-33997408).

86. See *supra* note 84.

overcome their weaknesses in military power,<sup>87</sup> while superpowers argue they have not violated the standards of their international legal obligations by finding new lacunas in the system.<sup>88</sup> In both cases, such states do not comply with their chief legal obligation not to use the aggressive use of force. Weak states employ asymmetric means to avoid retribution and attribution<sup>89</sup> and superpowers invent new legal rules to stay in the business of using force. Weak states use terrorists and NSAs as asymmetric tactics to avoid legal obligations.<sup>90</sup> NSAs ignore all IHL obligations; therefore, in modern warfare, as more NSAs become involved, IHL is losing its relevance. This shows why civilians are more vulnerable in modern warfare, and if the goal of IHL altogether is to humanize warfare, then clearly it is failing to reach this goal.<sup>91</sup>

Superpowers have also started to use asymmetric tactics of employing NSAs and other means of supporting rebels and insurgent groups as proxies of war and to avoid retribution.<sup>92</sup> Moreover, powerful states such as the U.S. develop new legal rules, such as, the “unwilling or unable test,”<sup>93</sup> “humanitarian intervention,”<sup>94</sup> the “war on terrorism,” and “preventive self-defense”<sup>95</sup> to circumvent their international legal obligations in warfare. For example, Israel relied on pre-emptive self-defense to attack the Osirak nuclear plant in Iraq, by arguing that Israel was in imminent danger of being attacked by Iraq’s weapons of mass

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87. David Rodin, *The Ethics of Asymmetric War*, in *THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS* 155 (Richard Sorabji & David Rodin eds., 2006).

88. See Sewall, *supra* note 73, at 25–26 (referring to the use of new technologies or by publicly rejecting the law).

89. Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 *EUR. J. INT’L L.* 563 (2017); see also Andres B. Munos et al., *Understanding Lawfare in a Hybrid Warfare Context*, 37 *NATO LEGAL GAZETTE* 5, 11, 25 (2016), [www.act.nato.int/images/stories/media/doclibrary/legal\\_gazette\\_37a.pdf](http://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_37a.pdf) [hereinafter NATO]; Nadeem Ashraf, *The Pursuit of Hybrid Warfare: Muddling Towards Clarity and Implementation*, *UNITED STATES ARMY WAR COLLEGE* 7 (Jan. 4, 2017), [www.publications.armywarcollege.edu/pubs/3384.pdf](http://www.publications.armywarcollege.edu/pubs/3384.pdf); Press Release, European Comm’n, Security: EU Strengthens Response to Hybrid Threats (Apr. 6, 2016), [www.ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_1227](http://www.ec.europa.eu/commission/presscorner/detail/en/IP_16_1227) (having been cited in Ashraf *supra*, at 7) [hereinafter European Commission].

90. Rodin, *supra* note 87, at 155.

91. Sewall, *supra* note 73, at 25–26.

92. NATO, *supra* note 89; Ashraf, *supra* note 89; European Commission, *supra* note 89.

93. See Deeks, *supra* note 55 (arguing that states can use defensive force in response to attacks by NSAs without any involvement or control of host state, if the host state is unwilling or unable to counter NSAs).

94. See Dadova, *supra* note 50, (noting that humanitarian intervention advocates use of force without any self-defense or without UNSC authorization).

95. See Heller, *supra* note 51 (noting that the notion of preventive self-defense under which states can use force without occurrence of an armed attack violates international law).

destruction.<sup>96</sup> The U.S. also justified its use of aggressive force by relying on the same reasoning—that the aggressive use of force against a non-materialized or non-crystalized threat of weapons of mass destruction or imminent threat was justified—without any basis in international law.<sup>97</sup> Later on, it turned out that the intelligence used to justify these attacks was forged, false, and baseless.<sup>98</sup> Thus, the powerful keep on using aggressive force without being held accountable and without complying with their major international legal obligations. So, arguably, the most pressing issue with law and warfare is compliance with and enforcement of the international law of war. It is not the case that there is no law that can stop all of this warfare and violence. The law that prohibits all use of force is in place; the problem is with compliance and enforcement. Though international law is easily enforced by imposing big sanctions on weak states, such as the U.S. did by imposing them on Iran,<sup>99</sup> superpowers stay out of its reach. Had it been Pakistan or Iran using pre-emptive force on Israel to take out its nuclear reactors, the world would have invaded Iran or destroyed the whole of Pakistan and Iran in reaction. But, since it was Israel and the U.S., no action or punishment was pursued. The same applies to other aggressions by superpowers, the Libyan War, the Syrian War, and the Yemeni War: whole countries have been destroyed and destabilized and no action has been taken against the superpowers for their war crimes and aggressions.

### *C. Technologies*

The third challenge with the enforcement of international law in warfare is the advancing technologies and their subsequent unexplored implications on the law of war. With the advancement in technologies, aggression in warfare is shifting toward new ways to wage wars against targeted victims. This includes cyberwarfare,<sup>100</sup> where public and military systems are hacked as a tactic of warfare to wound the enemy or targeted state.<sup>101</sup> For

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96. M.J. WILLIAMS, NATO, SECURITY AND RISK MANAGEMENT: FROM KOSOVO TO KHANDAHAR 96 (2009).

97. SUSAN BREAU, QUESTIONS & ANSWERS: INTERNATIONAL LAW 2013 AND 2014 at 175 (2013).

98. *See supra* note 75.

99. *See also Iran Sanctions*, U.S. DEP'T TREAS., [www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx](http://www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx) (last visited March 20, 2020) (noting U.S. sanctions on Iran to enforce international law). *See generally* RICHARD NEPHEW, THE ART OF SANCTIONS: A VIEW FROM THE FIELD (2017).

100. MICHAEL SCHMITT, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO THE CYBER WARFARE (2013); *see also* PAUL DUCHEINE, THE NOTION OF CYBER OPERATIONS IN RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBER SPACE 2119–228 (Nicholas Tsagourias & Russell Buchan eds., 2015).

101. *Id.*

instance, Israel used cyberattacks on 200 nuclear centrifuges in Iran.<sup>102</sup> Similarly, in another instance, Israel incapacitated the Syrian defense system so as not to be able to detect Israeli fighter plane movements and attacks in Syria.<sup>103</sup> The new technologies used for such attacks make it nearly impossible to detect the perpetrators of aggression, which in turn makes it difficult to enforce international laws of war. Likewise, advancement in biological weapons is creating new avenues for aggression in warfare. For instance, lab-created viruses can be used as weapons of tactics of warfare to destroy the economy of a country and to completely shut down whole countries. Recently, it has been seen that the coronavirus, for example, has the potential to shut down whole countries, and the Chinese Ministry of Foreign Affairs is of the view (without one iota of proof) that the U.S. military has purposefully used this biological weapon to incapacitate the growing Chinese economy,<sup>104</sup> as a geopolitical tactic and as an aggressive tactic of war. International law in this regard has no methods to detect and realize the reality in such situations, which is a lacuna that needs to be filled. It is therefore believed that the advancement in technologies is creating this gap in the international laws of warfare,<sup>105</sup> which can be exploited by aggressive states.

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102. NICHOLAS FALLIERE ET AL., W32. STUXNET DOSSIER: VERSION 1.4 (FEB. 2011); *see also Update 2 - Iran Says Cyber Foes Caused Centrifuge Problems*, REUTERS (Nov. 29, 2010), [www.reuters.com/article/iran-ahmadinejad-computers-idAFLDE6AS1L120101129](http://www.reuters.com/article/iran-ahmadinejad-computers-idAFLDE6AS1L120101129); *Iran Says Nuclear Programme Was Hit by Sabotage*, BBC NEWS (Nov. 29, 2010), [www.bbc.com/news/world-middle-east-11868596](http://www.bbc.com/news/world-middle-east-11868596); Christopher Williams, *Israeli Security Chief Celebrates Stuxnet Cyber Attack*, TELEGRAPH (Feb. 16, 2011), [www.telegraph.co.uk/technology/news/8326274/Israeli-security-chief-celebrates-Stuxnet-cyber-attack.html](http://www.telegraph.co.uk/technology/news/8326274/Israeli-security-chief-celebrates-Stuxnet-cyber-attack.html); Kim Zetter, *Did a U.S. Government Lab Help Israel Develop Stuxnet?*, WIRED (Jan. 15, 2011), [www.wired.com/2011/01/inl-and-stuxnet](http://www.wired.com/2011/01/inl-and-stuxnet); DAVID ALBRIGHT, PAUL BRANNAN, & CHRISTINA WALROND, *ISIS REPORT: STUXNET MALWARE AND NATANZ: UPDATE OF ISIS DECEMBER 22, 2010 REPORT* (2011); Kim Zetter, *Report Strengthens Suspicions that Stuxnet Sabotaged Iran's Nuclear Plants*, WIRED (Dec. 27, 2010), [www.wired.com/2010/12/isis-report-on-stuxnet](http://www.wired.com/2010/12/isis-report-on-stuxnet).

103. FRED KAPLAN, *DARK TERRITORY: THE SECRET HISTORY OF CYBER WAR*, 161 (2016); *see also* Lior Tobanksy, *Basic Concepts in Cyber Warfare*, 3 *Mil. & Str. Aff.* 75, 77–78 (2011); RUSSELL BUCHAN, *CYBER ESPIONAGE AND INTERNATIONAL LAW*, *IN RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBER SPACE* 171-72 (Nicholas Tsagourias & Russell Buchan eds., 2015).

104. Ryan Pickrell, *Chinese Foreign Ministry Spokesman Pushes Coronavirus Conspiracy Theory that the US Army "Brought the Epidemic to Wuhan,"* BUS. INSIDER (Mar. 14, 2020), [www.businessinsider.com/chinese-official-says-us-army-maybe-brought-coronavirus-to-wuhan-2020-3](http://www.businessinsider.com/chinese-official-says-us-army-maybe-brought-coronavirus-to-wuhan-2020-3).

105. Sewall, *supra* note 73, at 26.

#### *D. Cost of Respecting Law*

The final challenge with the enforcement of international laws of war is the cost of being obliged by the law when the other side is not.<sup>106</sup> If one side to a conflict chooses not to abide by its IHL obligations when the other side chooses to do so, then the latter will bear a far heavier cost. For instance, if Side A uses NSAs and terrorism tactics to fight Side B, and Side B only employs conventional means to fight Side A, it will be very costly for Side B to respect all of IHL, because Side A will be deliberately targeting civilians to bring Side B to its knees. This is the problem the world is facing in fighting terrorists, that while terrorists hide behind civilians by using them as human shields, and targeting innocent children by deliberately attacking schools, the state fighting such terrorists has to incur a lot of costs by respecting the rules of IHL, in the form of higher military expenditure costs and lower fighting efficiency. So the law is enforceable against law-abiding states in IHL and unenforceable against noncompliant NSAs.<sup>107</sup> This gap in compliance between states and NSAs makes it attractive for aggressive and weak states to employ more NSAs and use asymmetric warfare tactics. This is why we are seeing an increase in the employment of different kinds of NSA in modern warfare. The international law of warfare needs to look at the issue of noncompliance mainly in relation to NSAs in order to uphold global peace and security. Because, as discussed above, most of the enforcement issues with international laws in warfare are mainly related to the use of NSAs. The law of war cannot humanize the use of violence when both the weakest and the most powerful states are using NSAs to violate IHL and to avoid retribution and attribution. The simple employment of mercenaries as NSAs absolves a state from all legal obligations and responsibilities, which in turn enables aggressive states to violate as many humanitarian contingencies as they desire.

#### V. REGULARIZATION

The U.S., as the superpower and the most aggressive state in the world, sees IHL in a very minimalistic manner by relying mainly on state practice.<sup>108</sup> Relying heavily on state practice is advantageous in bringing about the formation and development of customary international practices, and therein help with the development of customary international law. But it can also be a concern because it can be steered in every direction by cherry-

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106. *Id.* at 26–27.

107. *See id.* at 27 (noting that a non-compliant attitude towards international law is threatening the legal regime).

108. *Id.* at 29.

picking state practices that suit the aggressive state's narrative. For instance, though international law explicitly prohibits all sorts of use of force without self-defense, powerful states have routinely relied upon ill-founded customary international law by quoting examples of past and present practices. These rules derived by state practices include the unwilling or unable test<sup>109</sup> and the likes of anticipatory self-defense,<sup>110</sup> which conveniently avoid the UN Charter's prohibition on the use of force and the need for UNSC authorization. The argument is that state practices can be used to justify any aggression. For instance, U.S. aggressions can demonstrate that customary state practices allow aggression in oil-rich countries even when done in reliance on false or forged pretenses. The U.S. alone has been a major aggressor by invading Afghanistan, Iraq, Libya, and the likes of Syria through illegitimate, false, and forged reasons. For instance, the U.S. invaded Iraq without any actual armed attack against it<sup>111</sup> by arguing that it was undertaken in anticipated self-defense supported by state practice. The U.S. claimed that Iraq had weapons of mass destruction, which later proved to be based upon forged and false intelligence documents.<sup>112</sup> Similarly, Israel did the same to attack an Iraqi nuclear plant, by relying on an anticipated armed attack.<sup>113</sup> So, if we see such state practices of aggression, it can be argued that any state can be attacked under anticipated self-defense, without worrying about any actual armed attack<sup>114</sup>—which is needed under the UN Charter<sup>115</sup>—while relying on forged or false claims or documents. But, would be right to invade a country without an actual armed attack, and that too upon false intelligence? Relying on state practices says, yes, it would be justified, because such state practices have existed in the past. So, the argument this Article is making here is that relying on state practice leaves a lot of gray areas that can avoid the basic international laws enshrined in the UN Charter that are responsible for global peace and security. Aggressive states, therefore, find ways to avoid their international legal obligations by circumventing the legal requirements.

### A. *Military Targets*

In the principle of distinction, only military targets can be

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109. Deeks, *supra* note 55.

110. Heller, *supra* note 51.

111. *See supra* note 75.

112. *Id.*

113. *See WILLIAMS, supra* note 94 at 96 (noting that Israel attacked on Iraq's nuclear project in anticipation of its future use).

114. Heller, *supra* note 51.

115. U.N. Charter art. 51.

attacked to further military objectives, to safeguard civilian lives.<sup>116</sup> Similarly, the principle of precaution also hinges upon the lawfulness of a target.<sup>117</sup> But aggressive states interpret “military targets” so vaguely and broadly that it can also cover civilian targets. The Geneva Conventions define military targets as objects of “an effective contribution to military action,” and the destruction of such objects must offer “a definite military advantage.”<sup>118</sup> By contrast, civilian targets are objects that offer no military advantages.<sup>119</sup> Direct military forces and their assets are plain and simple to understand, but the problem with defining military objectives starts with the indirect military objectives that provide support and sustenance to military forces and objectives. The international community defines and interprets military objectives narrowly to humanize war and to protect civilian lives and objectives. By contrast, the U.S. defines and interprets military objects broadly to include general infrastructure and civilian objects during wars.<sup>120</sup> This broader definition or interpretation of military targets can be linked to the U.S.’s desire to effectively fight a war, by crippling a targeted state. Scholars with broad interpretations sometimes argue that electricity grids or transportation grids can be considered military targets because they are also used by military forces, but this has to serve a military advantage and be constrained by other IHL requirements.<sup>121</sup> On the other hand, progressive scholars who take a narrow interpretation do not believe that roads, transportation, and electricity grids should be targeted during wars, because they adversely affect civilian lives.<sup>122</sup> However, the bigger problem arises when civilian objects are considered military objects.

On the one hand, the progressive view of the international law holds that a reasonable expectation or a nexus should be there to prove that a civilian object contributes to the military objectives.<sup>123</sup> On the other hand, the U.S. believes that a mere future possibility without any actual nexus or expectation is enough to consider a civilian object a military target.<sup>124</sup> The U.S. specifically asserts that “some plausible future military purpose would be sufficient to render a normally civilian media facility a military objective.”<sup>125</sup> In the Iraq War, for instance, the U.S. considered Iraqi media firms to be military targets and attacked them, loosely arguing that the songs played on those channels were used to direct Iraqi forces.

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116. AP1, *supra* note 4, at art. 49.

117. *Id.* art. 57.

118. *Id.* art. 52(2).

119. *Id.* art. 52(3).

120. Sewall, *supra* note 70 at 33.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*



Human Rights Watch refuted such claims and asserted that there was no evidence to suggest that the Iraqi media outlets that were attacked by the U.S. were in any way used to direct Iraqi military forces.<sup>126</sup>

The U.S.'s broad interpretation of military targets, and its desire to include civilian targets of national importance under military targets upon loose relations, is also clearly reflected in the U.S. Operational Law Handbook, which states that classifying a civilian object as a military target "is dependent upon its value to an enemy nation's war fighting or war-sustaining effort including its ability to be converted to a more direct connection . . . , and not solely to its overt or present connection or use."<sup>127</sup> This U.S. interpretation of military targets is too broad and relies on future unreasonable possibilities. Therefore, the international community believes that the U.S.'s interpretation of military targets is too broad and easily includes civilian objects as military targets.<sup>128</sup> The ICRC commented that, with the U.S.'s broad interpretation of military targets, "every object could *in abstracto*, under possible future developments, e.g., if used by enemy troops, become a military objective."<sup>129</sup>

There is a similar problem in the U.S. definition of civilian objects. While Additional Protocol 1 ("AP1") to the Geneva Conventions defines non-civilian objects as objectives that "effectively contribute in military action,"<sup>130</sup> the U.S. describes non-civilian objects as ones that contribute to "war sustaining capability."<sup>131</sup> Critics of US regularization of warfare see the US version of non-civilian objects as a wider interpretation of what is meant in AP1, meaning that "war sustaining objects" include more civilian objects than objects with "effective military contribution."<sup>132</sup> This broadening of classifying non-civilian objects, in the ICRC experts' opinion, is mainly "to abandon the limitation to military objectives and to admit attacks on political, financial (e.g. main export industry, the stock market or taxation authorities) and psychological targets as long as they include the possibility or the

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126. *See supra* note 74.

127. LCDR DAVID H. LEE, JAGC, USN, *ET AL.*, OPERATIONAL LAW HANDBOOK: INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT 22 (MAJ TEMI ANDERSON ET AL. EDS., 2015). Janina Dill, *The 21st-Century Belligerent's Trilemma*, 26 THE EUROPEAN J. INT'L L. 83, 95 (2015) (punctuation and emphasis omitted).

128. Sewall, *supra* note 71 at 33–34.

129. Marco Sassòli, *Legitimate Targets of Attacks Under International Humanitarian Law: Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law*, INT'L HUMANITARIAN L. RESEARCH INITIATIVE (Jun. 2004). [hereinafter Sassòli].

130. Sewall, *supra* note 71 at 33–34.

131. *Id.* at 34.

132. *Id.* at 34.

decision (which are two different things) of the enemy to continue war. Those who suggest a large interpretation of the concept of military objectives mention that targeting of bank accounts, financial institutions, shops, and entertainment sites may prove in the long run more destructive than attacks on dual-use targets.”<sup>133</sup> In practice, the U.S. used this broad interpretation of non-civilian objects by targeting industries and economic factions in Kosovo, mainly attacking Milosevic’s political allies. While AP1 clearly does not allow the targeting of economic and financial civilian factions during warfare by principle of distinction, the U.S. relied on the sustainability of war: that it did what it did to cripple Kosovo’s ability to continue war.<sup>134</sup>

This broad categorization of civilian objects is fairly similar to the approach of terrorist organizations. Terrorists also target civilian objects such as mosques, schools, and hospitals to be able to cripple a state and exhaust its resources in the security and restoration of its infrastructure. For instance, in Pakistan, Balochi insurgents used to blow up gas pipelines using rocket attacks to exhaust Baluchistan’s<sup>135</sup> budget and law enforcing/sustaining capabilities. In a similar fashion, the U.S. is also using civilian targets to destabilize a state only to win the war. And, if the criterion of success in war is to win—a “contribution to a military objective” that translates into winning—then *in abstracto* everything is fair in war. The losing side can always argue that it did what it did to win, and it will always be right,<sup>136</sup> whereas the winning side will always argue that what it did, in fact, was contribute to the success. In both cases, everything can be done to win, even violations of humanitarian laws. This explains why modern warfare includes so much devastation of civilian objects: both parties to a conflict, including NSAs and aggressors (but not the victims of aggression), are trying to win a war by any means possible. They can legally justify their actions by arguing that their actions have indeed contributed to military objectives.

What if, instead, we apply the same criterion of a military objective, and the requirement of sustaining war capabilities, to the U.S. or other aggressors of war? If the targeting of civilian financial factions such as bank accounts, industries, electric grids, transportation systems, dual-purpose systems, and stock exchanges is allowed during war in the hope of ending or winning the war or

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133. Sassòli, *supra* note 124.

134. Sewall, *supra* note 71 at 34.

135. *Militants Blow up Gaspipe Line in Dera Bugti*, DAWN (Jan. 27, 2014), [www.dawn.com/news/1083050/militants-blow-up-gas-pipeline-in-dera-bugti](http://www.dawn.com/news/1083050/militants-blow-up-gas-pipeline-in-dera-bugti).

136. PAUL CHRISTOPHER, *THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES* 171 (2d ed., 1999). Thomas Nagel asserted that “[I]n situations of deadly conflict, particularly where a weaker party is threatened with annihilation or enslavement by a stronger one, the argument for resort to atrocities can be powerful, and the dilemma acute”.

merely stopping a war as a military objective, then would it be okay for Syria to target equivalent civilian objects in New York or Washington to win the Syrian War and to end American atrocities and illegal intervention in Syria? When compared to the Syrian perspective, the American stance used during illegal and aggressive interpretations, based on flimsy justifications, such as the Iraqi War, which relied on false intelligence of weapons of mass destruction,<sup>137</sup> is less justified: the U.S. is fighting for its political interests,<sup>138</sup> creating violence, and disturbing global peace and security. Syrian use of force against the U.S. would be in self-defense, and its actions would be as a last resort for the sake of its survival against illegitimate aggression. In theory, Syrian use of defensive force, if for the sake of survival, is more legitimate than the illegitimate and aggressive use of force by the U.S. to change the Assad regime.<sup>139</sup> But, under international law, if the survival of Syria is not in imminent danger, then the Syrian defensive use of force on civilian objects in the U.S. is unlawful.<sup>140</sup> Sewall is of the view that the reinterpretation or development of IHL is unlikely to change the US's behavior or views.<sup>141</sup>

### B. Enforcement

Though progressive IHL is shifting more toward humanizing violence and warfare, in practice noncompliance with and nonenforcement of these laws is increasing. By contrast, more civilians and civilian objects are being affected and destroyed in modern warfare.<sup>142</sup> The international community is trying to protect civilian lives through the law, and by interpreting law to a greater extent, but the real problem lies with the enforcement of and compliance with the existing laws. Of course, there is an issue

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137. *See supra* note 75.

138. Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, Nat'l Sec. & Def., (THE WHITE HOUSE, Apr. 8, 2017), [www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate](http://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate).

139. To see a war with interest of regime change *see* Miriam Valverde, *Why Tulsi Gabbard Calls the War in Syria a Regime Change War*, POLITIFACT (Oct. 16, 2019), [www.politifact.com/truth-o-meter/article/2019/oct/16/why-tulsi-gabbard-calls-war-syria-regime-change-wa](http://www.politifact.com/truth-o-meter/article/2019/oct/16/why-tulsi-gabbard-calls-war-syria-regime-change-wa). *See also* Krishnadev Calamur, *The Trump Administration Appears to Embrace Regime Change in Syria in an About-Face, Secretary of State Rex Tillerson Said of Bashar al-Assad: It Would Seem There Would be No Role for Him to Govern the Syrian People*, THE ATLANTIC (Apr. 6, 2017), [www.theatlantic.com/international/archive/2017/04/u-s-syria-policy/522117](http://www.theatlantic.com/international/archive/2017/04/u-s-syria-policy/522117).

140. AP1, *supra* note 5, at art. 48; *see also* *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996), ICJ, at ¶ 96–97 (noting that nuclear weapons are only allowed in cases where the existence of a state is under a threat).

141. Sewall, *supra* note 73, at 36.

142. Sewall, *supra* note 73, at 38–39.

with the interpretation of laws and their continual interpretations, which are being used to justify war crimes and aggressions. But, even where the law is self-explanatory, it is proven to have been violated by superpowers by waging illegitimate interventions in weak countries; the legal system that is supposed to protect the weak from aggression seems to be ineffective. For instance, even after being proved that the Iraqi invasion was fought on flimsy and false justifications,<sup>143</sup> no action against the U.S. has been taken to prosecute war crimes, and the Bush administration was not held responsible for its illegal aggression in Iraq. Had it been Iran or North Korea, the international media and the international community would be so quick to enforce the law of war, and to prosecute aggressors. So, arguably, it may sound clichéd, but the law of war is only good and efficient against self-complying states and weak states; it is ineffectual against superpowers, chiefly the U.S..

It is primarily the ICC that is responsible for enforcing violations of war crimes and the prohibition on the use of force. The ICC can enforce the international law of warfare, and it can make states comply with international legal obligations while deterring violations and violence, but powerful political leaders and war criminals are indicted by the ICC even at the same time that they are violating international law. The scope of this Article does not allow going into greater detail to examine the successes and failures of the ICC. In short, ICC has indicted thirty war criminals and other powerful political leaders who have committed heinous war crimes.<sup>144</sup> The extent of this issue can be understood by the U.S.'s attitude toward war crime, in which the U.S. threatened to arrest ICC judges if they tried to pursue cases of American war crimes.<sup>145</sup> Despite the increase in gross violations of IHL and the prohibition on the use of force, the international community in the response is more concerned with writing new laws, interpreting the existing laws through conferences and research papers, and making new agreements. This may seem satisfactory, but it is not effective in controlling the abuse of law in warfare. Nonetheless, international watchdogs like Amnesty International and Human Rights Watch play their unparalleled role in documenting violations of the international law of warfare. However, the international community is not concentrating on the great need to enforce the

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143. See *supra* note 75; see also Sean Lengell, *Durbin Kept Silent on Prewar Knowledge*, WASH. TIMES (Apr. 27, 2007), [www.web.archive.org/web/20070429045319/http://washtimes.com/national/20070427-124842-1706r.htm](http://www.web.archive.org/web/20070429045319/http://washtimes.com/national/20070427-124842-1706r.htm) (noting that Durbin had pre-war knowledge of Iraqi invasion, suggesting that Iraq war was pre-planned).

144. Sewall, *supra* note 73, at 39.

145. *US Threatens to Arrest ICC Judges if They Pursue Americans for Afghan War Crimes*, FRANCE24, [www.france24.com/en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes](http://www.france24.com/en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes) (last updated Sept. 11, 2018).

international law of warfare.<sup>146</sup>

This is not because of weak domestic prosecution systems; the U.S. possesses the most highly trained legal profession and internal rule of law. Then why is there no enforcement of war crimes through dedicated prosecution systems in the U.S.? In hundreds of military campaigns by the U.S., where international organizations have reported gross violations of IHL, only a handful of cases have come to the limelight. Is it because most cases do not reach international attention? Is it because the U.S. leadership does not want to press charges against its comrades who violate IHL? Or is it because the U.S. armed forces are intentionally protected by the U.S. leadership against possible prosecutions? The U.S. threat to arrest ICC judges in relation to the prosecution of American war criminals<sup>147</sup> suggests that the American leadership does not wish to prosecute war criminals.

A unique case gives us some perspective on this issue. In 2005, during the Haditha incident in Iraq, U.S. military forces went door to door in civilian houses and murdered dozens of innocent children at point-blank range and killed an old man in a wheelchair.<sup>148</sup> This war crime did not come to the world's attention through the chain of command in the U.S. armed forces or through the U.S. prosecution system but through journalism. In fact, the U.S. armed forces' chain of command tried to suppress this information, which raises the question: how many such incidents go below the radar?<sup>149</sup>

Even when the U.S. prosecution system catches and prosecutes violations of IHL, it is not a typical prosecution of a war criminal. Instead, it is merely a legal process that punishes violations of the Uniform Code of Military Justice. This means that the American judicial system that prosecutes IHL violations does not punish war crimes per se; it merely considers them small violations of the Uniform Code, by giving minimal punishments against heinous war crimes. For instance, in 1968, Lt. William Calley was found to have killed hundreds of Vietnamese and only one soldier at My Lai village, for which he only served a measly three-and-a-half-year house arrest.<sup>150</sup> Similarly, in the Haditha killing incident in Iraq, most of the military officers found guilty only faced pay cuts, dismissals, or reductions in rank; no jail time or serious punishment was imposed.<sup>151</sup> This only shows the level of U.S. commitment toward the enforcement and respect for international humanitarian

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146. Sewall, *supra* note 73, at 39–40.

147. *US Threatens to Arrest ICC Judges if They Pursue Americans for Afghan War Crimes*, FRANCE24 (last updated Sept. 11, 2018), [www.france24.com/en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes](http://www.france24.com/en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes).

148. Sewall, *supra* note 73 at 40.

149. *Id.*

150. *Id.* at 40–41.

151. *Id.*

laws as a global leader and a superpower. If the Haditha incident does not deserve any serious punishment, such as life imprisonment or the death penalty, then what incident or level of abuse of IHL does? In incidents where military targets are closely related to civilian lives, prosecuting war criminals is difficult. So, incidents like Haditha are the benchmark of the seriousness of war crimes. The Haditha incident and related law enforcement show the level of commitment the world holds toward respect for IHL and the protection of civilian lives. It clearly shows the relation between law and warfare. It proves that the enforcement of the international law of warfare is ineffective and unenforceable. The Haditha incident may be merely a small incident in eyes of many, but what about the prosecution of perpetrators who have violated all the laws of war by illegitimately invading victim states, killing millions of innocent people, and dispersing millions more? What about the prosecution of war crimes against aggressors of war who not only devastated many countries but also destabilized whole regions?

## VI. CONCLUSION

Law is the necessary restraint that limits violence in warfare and that seeks to end wars.<sup>152</sup> It intends to enforce conditions that foster peace in the community.<sup>153</sup> Today, sovereigns are regularized by the super-sovereign by the *jus ad bellum* enshrined in the UN Charter, which regulates who can use force and in what conditions,<sup>154</sup> and by the humanitarian laws of war encoded in the Geneva and Hague Conventions, which proscribe ways in which force cannot be used, restricting the powers of a sovereign.<sup>155</sup> However, recently, the volatile nature of fighting terrorists and NSAs has transformed the dynamics of the modern international laws of war seeking to restrict violence. The line that marks the difference between aggression and self-defense has been blurred,<sup>156</sup> as has the distinction between combatants and non-combatants through the excessive employment of NSAs and asymmetric warfare techniques.<sup>157</sup> This transformation is making it difficult for the international community to efficiently regularize the ways of

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152. *Id.*

153. KELSEN, *supra* note 18 at 36–39. Douglas et al., *supra* note 15 at 6.

154. *See* U.N. Charter Art. 2(4) & 41-51 (asserting that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

155. *See supra* note 5.

156. RUYNS, *supra* note 40, at 107.

157. ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE TWENTY-FIRST CENTURY 203 (Fritz Allhoff, Nicholas G. Evans, & Adam Henschke eds., 2013). *See also*, DANIEL BYMAN & MATTHEW WAXMAN, THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT 196 (2002).

war and to restrict warfare/violence, and violence and warfare are again on the rise. Therefore, it can be argued that the Hobbesian theory of lawless war, though refuted in theory, still holds ground in practice.

In modern warfare, methods of warfare are cleverly designed after much thought to overcome restrictions on the use of force, for which vague customary international law and state practice have been developed and exploited to justify illegitimate interventions. For instance, the principles of the responsibility to protect (R2P),<sup>158</sup> humanitarian intervention<sup>159</sup> (without UNSC authorization), and preventive self-defense<sup>160</sup> were wrongly used to justify illegal warfare by aggressive states. But, with the passage of time, all uses of force justified by these principles were rejected and deconstructed by the international community if undertaken without self-defense or UNSC authorization. In current times, the unwilling or unable test<sup>161</sup> has been used in the Syrian War to justify the use of force without an actual armed attack from the Syrian state. When the law is subjugated and bent in such a fashion, it is used as a tool to authorize aggressive wars, and when the law is used to humanize and regulate warfare through humanitarian rules, it is used as a restraint.

While domestic legal systems enforce obligations involving individuals, the notion of reciprocity in international law, especially in the law of warfare, is concerned with the legal obligations between states.<sup>162</sup> Reciprocity is used in international agreements to enforce cooperation and to deter violations,<sup>163</sup> by levying reciprocal state obligations. Empirical data has shown evidence of reciprocity even in state practice in international relations.<sup>164</sup> Reciprocity has been statistically proven to be more efficient in

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158. David Chandler, *Unravelling the Paradox of the Responsibility to Protect* 20, IRISH STUDIES IN INT'L AFFAIRS 27–39 (2009).

159. See Dadova, *supra* note 47 (noting that humanitarian intervention advocates use of force without any self-defense or without UNSC authorization).

160. See Heller, *supra* note 51 (noting that the notion of preventive self-defense under which states can use force without occurrence of an armed attack, violates international law).

161. Qureshi, *supra* note 52; Waseem Ahmad Qureshi, *Examining the Legitimacy and Reasonableness of the Use of Force: From Just War Doctrine to the Unwilling-or-Unable Test*, 42 OKLA. CITY U. L. REV. 221 (2018).

162. To see more detailed analyses on how the principle of reciprocity manages obligations between states in the laws of war, see work of Watts, who has furnished a detailed overview on reciprocal obligations in the Geneva Conventions, the Hague Conventions, customary international law, and other laws of war. See Sean Watts, *Reciprocity and the Laws of War*, 50 HARV. INT'L L.J. 365 (2009).

163. ROGER HOPKINS BURKE, CRIMINAL JUSTICE THEORY: AN INTRODUCTION 137 (2013).

164. JOSHUA S. GOLDSTEIN & JOHN R. FREEMAN, THREE-WAY STREET: STRATEGIC RECIPROCITY IN WORLD POLITICS 26-29 (1990). See Morrow, *supra* note 60, at 1.

detering violations and ensuring states' compliance.<sup>165</sup> It is similar to the prisoner's dilemma, where two rational beings are likely not to cooperate with each other because both are better off by not cooperating at the expense of each other.<sup>166</sup> However, it is not necessary that a state will exactly mirror a situation in response to any violation or adversity. It is also possible to reciprocate violations with other forms of retaliation, perceived as a weaker form of reciprocity in warfare. Reciprocity is a form of retaliation, which is proportional and responsive in nature. Moreover, in cases of violations of IHL, states do not choose to reciprocate such actions with violations, since the legal obligations to humanize warfare are internalized in states' behaviors.<sup>167</sup>

The progressive international law community, therefore, continues to refine the legal principles to humanize warfare.<sup>168</sup> Contrary to these efforts, the international law of warfare is becoming less relevant every day. Firstly, powerful states that aggressively use force do not respect their legal obligations in international law. Secondly, the use of NSAs, and terrorist organizations that employ them, also do not abide by the humanitarian legal principles that protect civilians, and they violate all the basic legal principles without fear.<sup>169</sup> So there is the non-compliant attitude of both NSAs and superpowers toward the legal obligations of IHL and the UN Charter, and there is no law enforcement that punishes the war crimes or aggressors of war. Even if it is known that a war was initiated on the wrong premises, and the aggressor itself acknowledges its mistake, superpower perpetrators are not held accountable by the international community. Therefore, the international community should now not focus on the progression or refinement of the legal obligations in international law. Instead, a more sensible vision should be to work toward the practicality of legal obligations, and toward compliance, enforcement,<sup>170</sup> and the punishment of war crimes. Only then does the law have any sort of value, because law without enforcement is just ink on paper.

There are a number of challenges that lay the foundations of the non-compliant and disrespectful attitude toward IHL. The first is the existence of NSAs. Terrorism is increasing, because the so-called enemies of terrorism are also fueling it behind their backs, by sponsoring and aiding NSAs,<sup>171</sup> whether in the form of support to

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165. MORROW, *supra* note 60 at 131, 144.

166. *See* MORROW, *supra* note 60, at 290 (referring to his Chapter 2 discussion on Prisoner's Dilemma Nash Equilibria & Pareto Optimal).

167. BRYAN PEELER, *THE PERSISTENCE OF RECIPROCITY IN INTERNATIONAL HUMANITARIAN LAW* 12 (2019).

168. Sewall, *supra* note 73 at 23.

169. *Id.*

170. *See id.* at 39-41 (noting complications in prosecuting U.S war criminals to enforce humanitarian law).

171. *House Approves US Arms for Syrian Rebels*, AL JAZEERA AM. (Sept. 17,



NSAs and indirect flow of weapons to terrorist organizations<sup>172</sup> or by arming rebel and insurgent groups against the host state. A simple solution to all this disarray would be a complete ban on the use of NSAs and on the clandestine use of armed forces without any uniforms. Any sort of help, support, and training provided to NSAs by any state should be not only banned but also considered a war crime, which should be enforced and deterred by imposing hefty sanctions and punishments.

The second problem with the enforcement of law of warfare and IHL is with states' compliance. Weak states use asymmetric tactics to overcome their weaknesses in military power,<sup>173</sup> while superpowers argue they have not violated their international legal obligations by finding new lacunas in the system.<sup>174</sup> Aggressive states develop new legal rules such as the "unwilling or unable test,"<sup>175</sup> "humanitarian intervention,"<sup>176</sup> the "war on terrorism," and "pre-emptive self-defense"<sup>177</sup> to circumvent the international legal obligations of warfare. The third challenge with the enforcement of international law on warfare is of advancing technologies and its subsequent unexplored implications on the law of war. The final challenge with the enforcement of international laws of war is the cost of complying with the laws when the other side does not.<sup>178</sup> So the law is enforceable against law-abiding states in IHL, and it is

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2014), [america.aljazeera.com/articles/2014/9/17/congress-arming-syriarebels.html](http://america.aljazeera.com/articles/2014/9/17/congress-arming-syriarebels.html). See also Mark Hosenball, *Exclusive: Obama Authorizes Secret US Support for Syrian Rebels*, REUTERS (Aug. 2, 2012), [www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801](http://www.reuters.com/article/us-usa-syria-obama-order/exclusive-obama-authorizes-secret-u-s-support-for-syrian-rebels-idUSBRE8701OK20120801); Mark Mazzetti, Adam Goldman & Michael S. Schmidt, *Behind the Sudden Death of a \$1 Billion Secret C.I.A. War in Syria*, N.Y. TIMES (Aug. 2, 2017), [www.nytimes.com/2017/08/02/world/middleeast/cia-syria-rebel-arm-train-trump.html](http://www.nytimes.com/2017/08/02/world/middleeast/cia-syria-rebel-arm-train-trump.html); Mark Mazzetti, *C.I.A. Study of Covert Aid Fueled Skepticism About Helping Syrian Rebels*, N.Y. TIMES (Oct. 14, 2014), [www.nytimes.com/2014/10/15/us/politics/cia-study-says-arming-rebels-seldom-works.html](http://www.nytimes.com/2014/10/15/us/politics/cia-study-says-arming-rebels-seldom-works.html); C.J. Chivers & Eric Schmitt, *Arms Airlift to Syria Rebels Expands, With Aid from C.I.A.*, N.Y. TIMES (Mar. 24, 2013), [www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html](http://www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html).

172. Brian Castner, *Exclusive: Tracing ISIS' Weapons Supply Chain—Back to the US*, WIRED (Dec. 12, 2017), [www.wired.com/story/terror-industrial-complex-isis-munitions-supply-chain](http://www.wired.com/story/terror-industrial-complex-isis-munitions-supply-chain). See also Tara McKelvey, *Arming Syrian Rebels: Where the US Went Wrong*, BBC NEWS (Oct. 10, 2015), [www.bbc.com/news/magazine-33997408](http://www.bbc.com/news/magazine-33997408).

173. RODIN, *supra* note 87, at 155.

174. See Sewall, *supra* note 73 at 25–26 (referring to the use of new technologies or by publicly rejecting the law).

175. See Deeks, *supra* note 55 (arguing that states can use defensive force in response to attacks by NSAs without any involvement or control of the host state if the host state is unwilling or unable to counter NSAs).

176. See Dadova, *supra* note 50 (noting that humanitarian intervention advocates use of force without any self-defense or without UNSC authorization).

177. See Heller, *supra* note 51 (noting that the notion of preventive self-defense under which states can use force without occurrence of an armed attack violates international law).

178. Sewall, *supra* note 73 at 26–27.

unenforceable against noncompliant NSAs.<sup>179</sup> This gap in compliance between states and NSAs makes it attractive for aggressive and weak states to employ more NSAs and use asymmetric warfare tactics. This is why we are seeing an increase in the employment of different kinds of NSA in modern warfare. The international law of warfare needs to look at the issue of noncompliance mainly in relation to NSAs in order to uphold global peace and security. Because, as discussed above, most enforcement issues with international laws in warfare are mainly related to the use of NSAs.

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179. *See id.* at 27 (noting that non-compliant attitude towards international law is threatening the legal regime).

