

Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups

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Most armed conflicts today are not between states, but are internal in nature. Since internal conflicts often involve non-state armed groups fighting for national liberation, religious beliefs, or political ideological goals, the conflicts are particularly violent. However, the traditional laws of armed conflict, called international humanitarian law (IHL), provide few regulations for internal conflicts. As a result, parties often evade humanitarian regulation of their conduct.

This paper first discusses the importance of engaging non-state armed groups in IHL processes. Through negotiations, states and armed groups can agree to apply IHL to a conflict, in whole or in part, providing greater protections to vulnerable groups and captured combatants.

Second, it is argued that states are reluctant to talk with armed groups due to a fear that non-violent engagement would legitimize the armed group. States have manifested their worries through less regulation of internal conflicts under IHL. States have traditionally argued that the bases of their worries are the legal consequences of bestowing legitimacy non-state actors.

Most important, this paper examines alternative motivations behind states' refusal to engage non-state armed groups. Although many states claim their worries are based on the legal consequences of recognition, this paper examines possible alternative bases for their fears.

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I. INTRODUCTION

Atrocities committed during internal armed conflicts are frequently in the international spotlight. The news media frequently reports stories of civilians massacred,¹ reporters taken hostage,² public-gathering places bombed,³ and humanitarian aid workers assassinated,⁴ all involving non-state armed groups.⁵ In

1. Chuck Sudetic, *Bosnian Soldiers Report Massacre by Serbs in a Schoolhouse*, N.Y. TIMES, Mar. 19, 1993, at A10.

2. John F. Burns, *The Reach of War: The Hostages; Taken at Gunpoint, U.S. Journalist and His Interpreter Are Missing in Iraq*, N.Y. TIMES, Aug. 17, 2004, at A10.

3. Judith Miller, *The Istanbul Synagogue Massacre*, N.Y. TIMES, Jan 4. 1987, § 6, at 14.

4. *Nine Militants Killed In an Afghan Clash*, N.Y. TIMES, Mar. 7, 2004, § 1, at 16.

5. Common terminology used to reference non-state armed groups includes: guerrillas, insurgents, rebels, irregular forces, belligerents, revolutionaries, and freedom fighters. However, there is no single definition of "non-state armed group." See, e.g., GERARD MC HUGH & MANUAL BESSLER, U.N. OFFICE

fact, since World War II, most armed conflicts have involved domestic hostilities between non-state armed groups and states.⁶ But the laws that regulate the conduct of the parties during conflicts, embodied in the Geneva Conventions⁷ and the Additional Protocols to the Geneva Conventions,⁸ still reflect the state-centric international system.⁹ Only portions of the laws of war, called international humanitarian law (IHL),¹⁰ apply to internal conflicts.¹¹ The parties to internal

FOR THE COORDINATION OF HUMANITARIAN AFFAIRS [OCHA], HUMANITARIAN NEGOTIATIONS WITH ARMED GROUPS: A MANUAL FOR PRACTITIONERS 87 (2006), *available at* <http://ochaonline.un.org/humanitariannegotiations/Documents/Manual.pdf> [hereinafter OCHA MANUAL ON NEGOTIATIONS WITH ARMED GROUPS] (defining armed groups as “groups that have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate”); INTERNATIONAL CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR: TOWARD A MINE-FREE WORLD: EXECUTIVE SUMMARY 77 (2008), *available at* <http://www.icbl.org/lm/2008/> (“[N]on-state armed groups include organizations carrying out armed rebellion or insurrection, as well as a broader range of non-state entities, such as criminal gangs and state-supported proxy forces.”); HARVARD UNIV. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH & GENEVA GRADUATE INST. OF INT’L STUDIES, EMPOWERED GROUPS, TESTED LAWS, AND POLICY OPTIONS 18 (2007) [hereinafter EMPOWERED GROUPS] (describing non-state armed groups as “armed groups—both transnational and national—that are not under direct control of the state” and “that use force, flow across state boundaries, utilize global communication and transportation networks, seek global influence and . . . communicat[ion] with a wider audience, and increasingly undertake military operations against dominant states”). In this paper, I use the term “non-state armed group” as broadly as possible. Here, “non-state armed group” means any group that is engaged in violence against a state or against another armed group and is not recognized by the international community as a state. The vast majority of non-state armed groups are involved in internal conflicts; thus, the discussion will focus on the status of non-state actors participating in internal conflicts. However, conflicts involving a sub-set of non-state groups known as national liberation movements are considered international conflicts.

6. From 2000 to 2007 there were approximately 264 armed conflicts, of which 225 were internal in nature, taking into account continuing conflicts. See Uppsala Conflict Data Program [UCDP] & International Peace Research Institute, Oslo [PRIO], UCDP/PRIO Armed Conflict Dataset (Version 4-2008), <http://www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/Armed-Conflicts-Version-4-2008> (last visited Oct. 7, 2008); see also The Secretary-General, *Reports of the Secretary-General on the Protection of Civilians in Armed Conflict, delivered to the Security Council*, para. 65, U.N. Doc. S/2001/331 (Mar. 30, 2001) (“The forms of conflict most prevalent in the world today are internal—communal violence, ethnic cleansing, terrorism, private wars financed by the international trade in diamonds or oil—and involve a proliferation of armed groups.”) [hereinafter 2001 Secretary-General Report on Civilians].

7. The Geneva Conventions are comprised of four treaties. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter, collectively, Geneva Conventions].

8. In 1977, there were two Protocols to the 1949 Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 [hereinafter Additional Protocol II].

9. By their nature, the laws of war favor states over armed groups. International treaties, including the Geneva Conventions and its Protocols, are treaties that can only be concluded between states—non-state actors are unable to become parties. LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 14 (2002).

10. References throughout the paper to the “laws of war” or “international humanitarian law” are synonymous. See EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND

conflicts often evade the laws of war, leaving vulnerable groups, such as civilians, aid workers, and the wounded, with few protections.¹²

Even if a conflict does not fall under the purview of IHL, the parties to the conflict can contract to apply all or part of the Conventions throughout the hostilities.¹³ States and non-state armed groups must engage each other or intermediaries to agree to applicable humanitarian provisions.¹⁴ The term “engaging” can refer to several types of contact with armed groups, including advocacy, negotiation, mediation, and liaison interaction.¹⁵ The scope of this engagement includes efforts initiated by a state, armed group, or intermediary “to explore, enable, instigate, or sustain opportunities for contact . . . with or between the parties” to the conflict.¹⁶ There are several ways of facilitating engagement, including: (1) a state or an NGO pursuing a special agreement with an armed group, such as a memorandum of understanding,¹⁷ (2) an armed group signing a unilateral declaration of its intent to adhere to IHL, and (3) the parties concluding a verbal agreement.¹⁸ The subject matter may include negotiating ground rules for humanitarian action,¹⁹ negotiating humanitarian access,²⁰ or organizing the protection

MATERIAL FIELDS OF APPLICATION 1 (1992) (“In its original conception, [international humanitarian law] referred to humanitarian or humane treatment given to victims of war, particularly non-combatants such as women and children. In its modern usage, however, ‘humanitarian law’ is coterminous with the ‘law of war’ or the ‘law of armed conflict.’”).

11. The whole of the Geneva Conventions and their protections only apply to armed conflicts between two or more “High Contracting Parties” (signatories to the Conventions). Geneva Conventions, *supra* note 7, art. 2. This paper will focus on the two main instruments applicable to internal conflicts: (1) Article 3 common to the four Conventions of 1949, Geneva Conventions, *supra* note 7, art. 3 [hereinafter Common Article 3]; and (2) Additional Protocol II, *supra* note 8.

12. It is debatable whether the only goal of IHL is to advance humanitarian concerns. See Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683, 687 (2009) (“Not all [participants in the 1974–1977 conferences about ratifying the two Additional Protocols to the Geneva Conventions] were motivated by a selfless desire to protect civilians from the devastation wrought by war.”); Adam Roberts, *Implementation of the Laws of War in Late-Twentieth-Century Conflicts*, in THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 359, 381 (Michael N. Schmitt & Leslie C. Green eds., 1998). However, it cannot be denied that one of the goals of IHL is to advance humanitarian goals. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (Jul. 8) (“[A] cardinal principle . . . of humanitarian law [is] the . . . protection of the civilian population . . .”). This paper sets forth ways to enhance this goal.

13. The Geneva Conventions include an express provision recommending that the parties agree to comply with the Conventions even if the conflict is not subject to IHL. Common Article 3, *supra* note 11 (“The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.”).

14. See generally OCHA MANUAL ON NEGOTIATIONS WITH ARMED GROUPS, *supra* note 5, at 5–7 (providing an overview of the process of engaging non-state armed groups).

15. *Id.* at 5. This paper will reference these types interchangeably, although in practice the method of engagement will vary with the context and intended outcomes. *Id.*

16. 16 CONCILIATION RESOURCES ACCORD: CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, glossary at 99 (Robert Ricigliano ed., 2005), available at <http://www.c-r.org/our-work/accord/engaging-groups/contents.php> [hereinafter CONCILIATION RESOURCES].

17. OCHA MANUAL ON NEGOTIATIONS WITH ARMED GROUPS, *supra* note 5, at 5.

18. *Id.* at 53 (claiming that many armed groups are hesitant to sign written agreements); but see Churchill Ewumbue-Monono, *Respect for International Humanitarian Law by Armed Non-State Actors in Africa*, 864 INT’L REV. RED CROSS 905, 911–13 (2006) (observing that special agreements between armed groups and states or the International Committee of the Red Cross (ICRC) are a mechanism used to ensure African armed groups’ compliance with IHL; for instance, during the Rwanda genocide, the ICRC signed an agreement with the Rwanda Patriotic Front (RPF) for the safe return of war victims).

19. OCHA MANUAL ON NEGOTIATIONS WITH ARMED GROUPS, *supra* note 5, at 63 (giving the

of civilians.²¹ For the purposes of this paper, engaging can be any formal or informal talks, including bilateral formal negotiations or mid-level commanders negotiating with State officials.

While some states have negotiated with armed groups,²² most states have been reluctant to embrace discussions.²³ This paper examines how states' fears of contributing to non-state armed groups' legitimacy have shaped the states' willingness of states to talk with armed groups. Legitimacy influences many state decisions, from whether to adhere to the rules of international law²⁴ or to recognize a new state.²⁵ In the context of this paper, legitimacy refers to the degree to which the international community acknowledges a state or armed group's authority and status.²⁶ When a member of the international community recognizes²⁷ a state or armed group, this recognition can be a declaration of the entity's legitimacy.²⁸ Although legitimacy is distinguishable from legality, legitimacy influences the legal authority of an armed group within IHL.²⁹ After providing an overview of the importance of engaging armed groups and the ways states have manifested their

example of an agreement between an armed group, Sudan People's Liberation Movement/Army, and a humanitarian organization, Operation Lifeline Sudan).

20. *Id.* at 65–66.

21. *Id.* at 67 (noting that while parties cannot negotiate the protections afforded to civilians, they can negotiate the methods of implementing those protections).

22. See U.N. Office for the Coordination of Humanitarian Affairs (OCHA), Humanitarian Negotiations with Armed Groups, Breakdown of Relevant Documents by Country, <http://ochaonline.un.org/humanitariannegotiations/Documents/Bibliography%20docs/AnnexII.htm> (last visited Sept. 7, 2009) (providing a list of the countries in which negotiations with armed groups have taken place: Afghanistan, Angola, Bosnia and Herzegovina, Burma/Myanmar, Burundi, Colombia, Democratic Republic of Congo, Liberia, Sierra Leone, Sri Lanka, Sudan, Tajikistan, Turkmenistan, Uganda, and Uzbekistan).

23. See Dieter Fleck, *The Law of Non-International Armed Conflicts*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 605, 605 (Dieter Fleck ed., 2d ed. 2008) (“If it was ever realistic to expect during armed conflict that warring parties generally treat each other equally, voluntarily accept rules of fair fighting and make effective efforts to minimize suffering, the opposite is often shown in internal wars.”). States and insurgents alike often use odious means and methods during internal conflicts. Some examples include when Yugoslav/Serbian forces bombarded residential neighborhoods, when Saddam Hussein used poison gas against Kurdish dissidents, and when the IRA planted a bomb in a hospital. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 251 (1994).

24. See, e.g., Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (arguing that the perceived legitimacy of international law influences state compliance with its rules).

25. See Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 110–11 (2002) (“Political recognition confers a venire of legitimacy on governments and states.”).

26. CONCILIATION RESOURCES, *supra* note 16, glossary at 99 (“In situations of civil war and insurgency, contested legitimacy may be at the heart of the conflict.”).

27. Any reference to “recognition” in this paper is to *political* recognition, by which a state acknowledges the governance of an armed group and indicates its willingness to enter into relations with the group. Hans Kelson, *Recognition in International Law*, 35 AM. J. INT'L L. 605, 605 (1941). Political recognition does not represent a concrete legal obligation. *Id.*

28. However, recognition and legitimacy are distinct concepts. A state may recognize an armed group through engagement without conferring legitimacy on the group. But in the long term, formal recognition tends to reinforce perceptions of legitimacy. Sloane, *supra* note 25, at 111.

29. For example, an illegitimate regime cannot enter into a formal treaty with states. Cf. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 736 (1988) (“[T]he new state or government acquires legitimacy, which, in turn, carries entitlements and obligations equal to those of other such entities.”).

concerns over legitimacy in IHL, this paper seeks to explore the motivations behind states' fears and whether they are valid or should be abandoned.

But engagement with armed groups may not be appropriate in every conflict. A wide range of factors influence whether a state, non-governmental organization, or the international community negotiates with such groups.³⁰ Negotiating with armed groups may actually negatively impact humanitarian conditions or legitimize the group's illegal acts.³¹ The purpose of this analysis is to examine the option of non-violent engagement of armed groups.

II. THE NEED TO ENGAGE NON-STATE ARMED GROUPS

To understand the consequences when a state does not engage an armed group, this paper will discuss the various benefits of negotiations. In addition, the success of an international humanitarian organization that has been at the forefront of engaging armed groups will serve as an example of the potential positive results.

A. *Why Negotiate with Non-State Armed Groups?*

There are countless reasons why a state may choose to talk with an armed group, but this section focuses on general principles of IHL and the nature of internal conflicts. The positive aspects of negotiations are set forth below.³²

30. Some factors include the length of the conflict, the goals of the armed group, and the status of the group within the international community. For example, a group fighting for national liberation may be more attuned to the international community's perception of it and, thus, eagerly adhere to humanitarian norms to increase its credibility. *See* BEST, *supra* note 23, at 251 ("Groups engaged in violent struggles within States sometimes try to observe humanitarian norms and more often criticize opponents for disregarding the same."); OCHA MANUAL ON NEGOTIATIONS WITH ARMED GROUPS, *supra* note 5, at 40 ("Some armed groups may have aspirations to pursue political approaches to achieving their objectives (whether in parallel with or following an approach based on the use of force). In these cases, armed groups may be more sensitive to the perception of the group among national and international actors."). Such a situation may increase the likelihood of negotiations because of the group is willing to negotiate, but it may also decrease the likelihood if a state does not want to give the group the opportunity to increase its credibility. *Id.*

31. CLAUDE BRUDERLEIN, THE ROLE OF NON-STATE ACTORS IN BUILDING HUMAN SECURITY: THE CASE OF ARMED GROUPS IN INTRA-STATE WARS 14 (May 2006), <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/pre/2000-may-hd.pdf> ("Organizations should remain cautious when engaging with armed groups on cultural grounds and avoid providing legitimacy to practices that are considered illegal under international law.").

32. This is not to say that there are no valid doubts about the possibility and success of engaging non-state armed groups. Some criticisms include: if negotiations fail, the conflict may be prolonged, intermediaries may be marginalized, and the armed group will be further radicalized; the group may use negotiations as an opportunity to re-organize their effort; and failed negotiations may confirm to the group that violence is the only way to achieve their mission. EMPOWERED GROUPS, *supra* note 5, at 40–41. However, this paper assumes that any talks are better than no talks since "[a]rmed groups will not disappear if we ignore them" Marco Sassòli, *Engaging Armed Non-State Actors with International Humanitarian Law*, 6 HUM. SEC. BULL. 15, 16 (2008), available at <http://www.humansecurity.info/#/armedgroups/4527372429>.

1. To Protect Civilians

The protection of vulnerable groups in armed conflicts is the focus of humanitarian law.³³ Additionally, states have an obligation to protect their population from abuses by other individuals and groups.³⁴ Even though the Geneva Conventions safeguard civilians in all conflicts, including internal conflicts,³⁵ the non-compliance of armed groups render these provisions virtually useless. During conflict, the individuals who are most severely impacted are not the combatants, but the civilian population.³⁶ Moreover, civilians are often the principal targets of armed groups, rather than incidental victims of the internal conflict.³⁷ Since the main victims of twenty-first-century conflicts are civilians, it should not be a matter of whether the actor agreeing to adhere to IHL norms is a state or armed group. The UN Secretary-General has repeatedly encouraged negotiations with armed groups to protect and provide access to civilians during armed conflicts.³⁸ In 2001, Kofi Annan called on states to embrace negotiations, stating:

Whereas Governments are sometimes concerned that . . . engagements might legitimize armed groups, these concerns must be balanced against the urgent need for humanitarian action. It is the obligation to preserve the physical integrity of each and every civilian within their jurisdiction,

33. Georges Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols*, in 165 RECUEIL DES COURS 363, 365 (Académie de Droit International ed., 1979); see also Jakob Kellenberger, *The Challenges Facing the International Committee of the Red Cross in the Twenty-First Century*, in MAKING THE VOICE OF HUMANITY HEARD 5, 8 (Liesbeth Lijnzaad et al. eds., 2004) (“IHL shares with human rights law and refugee law the common objective of protecting human life, safety and dignity.”).

34. The Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, para. 3, delivered to the Security Council, U.N. Doc. S/PRST/2008/18 (May 27, 2008) (The “parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians”); Lori Hosni, *The ABCs of the Geneva Conventions and their Applicability to Modern Warfare*, 14 NEW ENG. J. INT’L & COMP. L. 135, 166 (2007) (citing Hannes Berts, *Non-State Armed Groups under International Law: Some Legal Aspects of Engaging with Non-State Armed Groups* 55 (Spring 2005) (unpublished LL.M. thesis, Uppsala University) (on file with author)).

35. All non-state armed groups must respect individuals who are no longer armed and those not participating in hostilities. Common Article 3, *supra* note 11 (“Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.”); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 114, para. 218 (June 27) (indicating that Common Article 3 embodies the general principles of humanitarian law and apply regardless of whether the actor is a party to the Conventions).

36. See The Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, para. 3, delivered to the Security Council, U.N. Doc. S/PRST/2009/1 (Jan. 14, 2009) (“[C]ivilians continue to account for the majority of victims of acts of violence committed by parties to armed conflicts.”).

37. See 2001 Secretary-General Report on Civilians, *supra* note 6, para. 3.

38. See *id.*, para. 15 (“Access negotiations during a conflict must be understood as a humanitarian necessity.”); The Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, para. 3, delivered to the Security Council, U.N. Doc. S/2002/1300 (Dec. 20, 2002) (“[T]he Security Council recognizes the importance of the comprehensive framework agreements based on agreed standards and mechanisms to improve access; and encourages the ongoing work by United Nations agencies to prepare a manual of field practices of negotiations with armed groups to better assist coordination and to facilitate more effective negotiations.”).

regardless of gender, ethnicity, religion or political conviction, that should guide Governments in exercising their sovereign responsibility.³⁹

Part of providing protection for civilians is ensuring the safety of humanitarian workers who travel into the conflict zone to provide aid. Armed groups may view humanitarian operations and assistance to vulnerable individuals as political tools of the government, rather than acts by a neutral third party.⁴⁰ As a result, humanitarian staff and operations become targets.⁴¹ In response, humanitarian agencies scale back on relief efforts and desperate civilians lose their supply of clean water, food, and medical care.⁴²

a. Isolated and Brutal Nature of Internal Conflicts

Since internal conflicts often involve non-state armed groups fighting for national liberation, religious causes, or political goals, the conflicts are particularly violent. Due to the brutal nature of attacks by armed groups, states often feel justified employing harsh military measures to retaliate and are reluctant to consider alternative responses.⁴³ Thus, the protection of vulnerable groups is particularly necessary. When states do not engage armed groups in dialogue, then those “in need of the greatest protection” are “deprived of efforts aimed at their protection.”⁴⁴

Moreover, both armed groups and states isolate areas of hostilities in efforts to claim territory, preventing civilians from escaping and aid from entering. Armed groups often take control of part of a country’s territory and population.⁴⁵ A state may forbid aid workers from entering rebel territory to ensure no aid gets to the insurgents, regardless of the demands of any civilians in need.⁴⁶ As a result, civilians are at the whim of the insurgent group.

39. 2001 Secretary-General Report on Civilians, *supra* note 6, para. 20.

40. See BEST, *supra* note 23, at 238 (“Relief carried beneath [a humanitarian] banner can be, and in our own time often is, politically partial and militarily helpful . . . which the belligerent on the other side would be entitled to object to and to prevent.”).

41. Attacks on humanitarian workers have been on the rise. In 2008, 260 humanitarian workers were attacked in 155 incidents, compared with 143 victims and 63 attacks in 2003. Abby Stoddard et al., *Providing Aid in Insecure Environments: 2009 Update—Trends in Violence Against Aid Workers and the Operational Response*, HPG POLICY BRIEF 34, at 3, (2009), <http://www.cic.nyu.edu/internationalsecurity/docs/HPG%20Briefing%2034crc.pdf> (last visited Oct. 9, 2009).

42. Jan Egeland, *Comment: Aid Workers, Armed Only with Their Principles, Are Paying with Their Lives*, GLOBE & MAIL (Toronto), Apr. 6, 2009, <http://www.theglobeandmail.com/news/world/article842446.ece> (last visited Sept. 20, 2009).

43. EMPOWERED GROUPS, *supra* note 5, at 22.

44. Sassòli, *supra* note 32, at 17.

45. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 81 (1986).

46. A recent example of this state tactic occurred in Darfur, where the Sudanese government refused aid workers access to refugee camps. Lydia Polgreen, *Aid to Darfur is Imperiled, Officials Say*, N.Y. TIMES, Mar. 27, 2007, at A8.

2. To Facilitate Armed Groups' Compliance with International Humanitarian Law

Both states and armed groups are more likely to breach the laws of war in an internal conflict.⁴⁷ In general, armed groups do not have the same strength and resources as states, precluding them from following regulations on the means and methods of fighting.⁴⁸ Armed groups also lack a traditional military command and structure; informal training leads to lack of knowledge and a lack of discipline that may lead to violations of the laws of war.⁴⁹ In addition, the groups do not expect to be accountable for non-compliance.⁵⁰

Engagement is a mechanism by which non-state armed groups can participate in humanitarian norm building.⁵¹ Unlike customary laws, which apply to armed groups through the territorial state, the group consents to the norms of special agreements when negotiating.⁵² If an armed group is involved in negotiating the conduct that it will eventually adhere to, it could “create a sense of ownership over the law” and lead to greater compliance.⁵³ Humanitarian provisions that protect the armed groups' members may also encourage compliance with the laws of war.⁵⁴ Moreover, once a non-state armed group voluntarily adopts IHL provisions, the international community may be more likely to support a state in prosecuting any violations of the laws.

a. Lessons Learned from Geneva Call

Geneva Call is a Swiss-based international humanitarian organization committed to engaging non-state armed groups on humanitarian norms.⁵⁵ After passage of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,⁵⁶ Geneva Call created a parallel instrument called the “Deed of Commitment for

47. See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 749 (1997–1998) (“[T]he high level of [civilian] victimization indicates an almost generalized practice of non-compliance by both governmental forces and non-state actors.”).

48. *Id.* at 714–15 (contending that the asymmetry between states and armed groups actually leads groups to use unconventional and unlawful means and methods of fighting).

49. *Id.* at 715.

50. *Id.*

51. See BEST, *supra* note 23, at 7 (“Much international law of the contemporary age . . . is ‘normative.’ Normative means standard-setting; adding to established State practice, the aspirational concept of State practice as it is expected, intended, or hoped to become at some future date.”).

52. ZEGVELD, *supra* note 9, at 28.

53. EMPOWERED GROUPS, *supra* note 5, at 34–35.

54. Ewumbue-Monono, *supra* note 18, at 915 (“An important strategy in ensuring compliance with international humanitarian law by armed non-state actors is to include provisions relating to the fair treatment of prisoners of war, respect for IHL and the delivery of humanitarian assistance in the various ceasefire and peace agreements concluded with them.”).

55. Geneva Call, <http://www.genevacall.org/home.htm> (last visited Sept. 10, 2009).

56. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211, *available at* <http://www.icbl.org/treaty/text> (providing the text of the mine ban treaty).

Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action.”⁵⁷ While only states could ratify the mine ban treaty, Geneva Call sought to create a mechanism by which non-state armed groups could adhere to the humanitarian norm of a total ban on anti-personnel mines.⁵⁸ This mechanism was especially important since more non-state actors than governments were using land mines.⁵⁹

Geneva Call translates the rules of IHL so that it can realistically expect armed groups to comply.⁶⁰ Since its efforts started, thirty-eight armed groups have committed to banning land mines.⁶¹ Most of the signatories comply with the terms of

57. Geneva Call, Anti-personnel mines and armed non-State actors, <http://www.genevacall.org/Themes/Landmines/landmines.htm> (last visited Sept. 10, 2009) (“Under the *Deed of Commitment*, NSA signatories commit themselves:

- To a total prohibition on the use, production, acquisition, transfer and stockpiling of AP mines and other victim-activated explosive devices, under any circumstances.
- To undertake, to cooperate in, or to facilitate, programs to destroy stockpiles, clear mines, provide assistance to victims and promote awareness.
- To allow and to cooperate in the monitoring and verification of their commitments by Geneva Call.
- To issue the necessary orders to commanders and to the rank and file for the implementation and enforcement of their commitments.
- To treat their commitment as one step or part of a broader commitment in principle to the ideal of humanitarian norms.”).

58. Soliman M. Santos, Jr., *A Critical Reflection on the Geneva Call Instrument and Approach in Engaging Armed Groups on Humanitarian Norms: A Southern Perspective* 1–2 (Oct. 31, 2003), http://www.armedgroups.org/sites/armedgroups.org/files/santos_paper.pdf (last visited Oct. 9, 2009).

59. GENEVA CALL, ENGAGING ARMED NON-STATE ACTORS IN A LANDMINE BAN: THE GENEVA CALL PROGRESS REPORT (2000–2007) 11 (2007) [hereinafter GENEVA CALL PROGRESS REPORT], available at <http://www.genevacall.org/resources/publications.htm>.

60. Sassöli, *supra* note 32, at 15.

61. Geneva Call, Signatory Groups, <http://www.genevacall.org/signatory-groups/signatory-groups.htm> (last visited Sept. 9, 2009) (Signatories include: Conseil National pour la Défense de la Démocratie-Forces pour la Défense de la Démocratie (CNDD-FDD) (faction of Pierre Nkurunziza), Banadirri (Chairman Mohamed Osman Maye), Hiran Patriotic Alliance (HPA)/Somalia Reconciliation and Restoration Council (SRRC) (Chairman Hasan Abdulle Qalad), Jowhar Administration (Chairman Mohamed Omar Habeb “Dhere”), Jubba Valley Alliance (JVA) (Chairman Col Barre Aden “Hiirale”), Puntland State of Somalia (President Abdullahi Yusuf), Rahanweyn Resistance Army (RRA)/SRRC (faction of Chairman Col. Hassan Mohamed Nur “Shatigudud”), Rahanweyn Resistance Army (RRA) (faction of Chairman Sheikh Adan Madobe), Somali African Muki Organisation (SAMO)/SRRC/Nakuru (Chairman Mowlid Ma’ane Mohamud), Somali National Front (SNF)/SRRC (Chairman Mohamed Sayid Aden), Somali Patriotic Movement (SPM)/SRRC (Chairman Gen. Aden Abdullahi Nur, “Gabyow”), Southern Somali National Movement (SSNM)/BIREM (Chairman Abdullahi Sheikh Ismail), Southern Somali National Movement (SSNM)/SNA/SRRC (Chairman Abdulaziz Sheikh Yusuf), Transitional National Government (TNG), United Somali Congress (USC)/Somali National Alliance (SNA/SRRC) (Chairman Hussein Farah Aideed), USC/North Mogadishu/SRRC (Hilowle Imam Omar), USC/SNA/SRRC/Nakuru (Chairman Osman Hassan Ali “Ato”), USC/Somali Salvation Army (SSA) (Chairman Omar Mohamoud Mohamed “Finnish”), Sudan People’s Liberation Movement/Army (SPLM/A), Popular Front for the Liberation of Saguia el Hamra and Rio de Oro, Polisario Front, Arakan Rohingya National Organisation (ARNO), Chin National Front (CNF)/Chin National Army (CNA), Lahu Democratic Front (LDF), National United Party of Arakan (NUPA), Palaung State Liberation Front (PSLF), Pa’O Peoples Liberation Organisation (PPLO) / Pa’O Peoples Liberation Army (PPLA), Kuki National Organisation (KNO) of Northeast India, National Socialist Council of Nagalim (NSCN-IM) (Isaac/Muivah faction), Zomi Re-unification Organisation (ZRO), Moro Islamic Liberation Front (MILF), Revolutionary Proletarian Army—Alex Boncayao Brigade (RPA-ABB), Revolutionary Workers Party of Mindanao (RPM-M), Kurdistan People’s Congress (Kongra Gel)/People’s Defence Forces (HPG), also known as the Kurdistan Workers’

the mine ban, no longer use mines,⁶² and cooperate with Geneva Call in victim assistance in their territories.⁶³ Geneva Call's efforts testify to the willingness of armed groups to negotiate and voluntarily adhere to humanitarian norms. Moreover, now that these armed groups have been exposed to humanitarian norms, Geneva Call's success provides a basis for similar agreements or negotiations about other humanitarian issues.⁶⁴

3. To Promote Resolutions to Conflicts

While forceful state responses may be detrimental to humanitarian efforts, opening channels of communication may help resolve the conflict. Refusing to talk with an armed group could fuel support for the group, force the group to turn inwards, and create a culture of violence that ignores humanitarian standards.⁶⁵ However, during talks, an armed group may learn the limits of what it can expect to achieve and decide to cease hostilities. For example, "it may become clear during negotiations that, while full independence may not be acceptable to the international community, autonomy might be and the international community could be willing to play a role in supporting this goal if an [armed group] continues to pursue non-violent means."⁶⁶ The results of Geneva Call's efforts to engage non-state actors is proof that aspects of conflicts which may harm civilians can be resolved through negotiations—numerous signatories to the mine-ban treaty are no longer considered non-state actors, having either joined the state government, dissolved, or abandoned their struggle.⁶⁷

4. States' Obligation to Ensure Respect of IHL

Under Common Article 1 of the Geneva Conventions, states have a duty to ensure respect of IHL and enforce its terms, both in international and non-

Party (PKK), Democratic Party of Iranian Kurdistan (PDKI), Komala Party of Iranian Kurdistan, Komala Party of Kurdistan, Komalah—The Kurdistan Organization of the Communist Party of Iran, Kurdistan Regional Government-Erbil (led by the Democratic Party of Kurdistan), Kurdistan Regional Government-Sulaimanyia (led by the Patriotic Union of Kurdistan)).

62. *See Mine Ban Treaty steadily gaining ground*, IRIN NEWS, Sept. 16, 2009, <http://www.irinnews.org/Report.aspx?ReportId=86174> (last visited Sept. 29, 2009).

63. *See* GENEVA CALL PROGRESS REPORT, *supra* note 59, at 1, 17.

64. OCHA MANUAL ON NEGOTIATIONS WITH ARMED GROUPS, *supra* note 5, at 57.

65. Hosni, *supra* note 34, at 164.

66. EMPOWERED GROUPS, *supra* note 5, at 40.

67. GENEVA CALL PROGRESS REPORT, *supra* note 59, at 7 (reporting that from 2001 to 2007 thirteen signatories had changed their status and were no longer considered non-state actors). *See also, e.g.*, IMMIGRATION AND REFUGEE BOARD OF CANADA, BURUNDI: INSECURITY THAT FOLLOWED THE RELEASE OF FORMER HUTU REBELS OF THE NATIONAL COUNCIL FOR THE DEFENCE OF DEMOCRACY (CONSEIL NATIONAL POUR LA DÉFENSE DE LA DÉMOCRATIE, CNDD); OCCUPATIONS OF THESE FORMER REBELS AFTER BEING RELEASED, BDI102764.FE (Mar. 3, 2008), *available at* <http://www.unhcr.org/refworld/docid/4804c0dec.html> (stating that the CNDD-FDD has become incorporated into the government of Burundi); *Historic Sudan Peace Accord Signed*, CNN, Jan. 9, 2005, <http://edition.cnn.com/2005/WORLD/africa/01/09/sudan.signing> (last visited Sept. 15, 2009) (reporting on a peace treaty between the Sudanese government and the SPLA/M); Kurdistan Regional Government, About the Kurdistan Regional Government, <http://www.krg.org/articles/detail.asp?anr=48> (last visited Sept. 15, 2009) (stating that the KRG-KDP and KRG-PUK have joined the government).

international armed conflicts.⁶⁸ Armed groups often lack a sophisticated military doctrine and the means to incorporate principles of IHL into their operations.⁶⁹ The International Committee of the Red Cross (ICRC) stresses the importance of raising awareness about humanitarian law among these groups, aiming to reduce deadly consequences rather than solve underlying problems.⁷⁰ One way states can fulfill their duty under the Conventions is by negotiating with armed groups to ensure that the full breadth of the Conventions apply to conflict.

III. THE RELUCTANCE OF STATES TO RECOGNIZE ARMED GROUPS: LEGITIMACY

Despite the possible benefits, engaging armed groups is not a customary practice among states.⁷¹ States often argue that engagement will confer legitimacy on the armed group. The fear that legitimacy will lead to legal ramifications has driven states to ensure that internal conflicts are not subject to the same rules as international conflicts.

A. *State Legitimacy Concerns Manifested*

The inimical attitude of states toward armed groups has manifested itself throughout history and, more recently, with the drafting of the Geneva Conventions. Under both the historical framework and current international humanitarian law provisions for recognizing internal conflicts, states are the ultimate decision-makers as to whether the conflict rises to the level of a “belligerency” or “non-international armed conflict.” By weighing state sovereignty and humanitarian concerns, states shape these decisions.

68. Geneva Conventions, *supra* note 7, art. 1. Common Article 1 requires that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” *Id.* States also have an obligation to “end impunity and to prosecute those responsible for genocide, war crimes, crimes against humanity and serious violations of humanitarian law.” The Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, para. 3, *delivered to the Security Council*, U.N. Doc. S/PRST/2003/27 (Dec. 15, 2003).

69. 2001 Secretary-General Report on Civilians, *supra* note 6, recommendation 10.

70. INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), HUMANITARIAN LAW: YOUR QUESTIONS ANSWERED 18, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/\\$File/ICRC_002_0703.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open) (last visited Sept. 10, 2009). The UN Secretary-General similarly stressed the importance of awareness. 2001 Secretary-General Report on Civilians, *supra* note 6, recommendation 10 (“I therefore urge Member States and donors to support efforts to disseminate information on international humanitarian and human rights law to armed groups and initiatives to enhance their practical understanding of the implications of those rules.”).

71. Rather, the increasing trend over the last quarter-century has been for states to brand dissenters as “terrorists” and refuse to talk with them. Ricigliano, *supra* note 16, at 13. For example, Turkey has designated the Kurdish Workers Party a “terrorist organization” and refuses to engage with the group as a “non-state actor.” Santos, Jr., *supra* note 58, at 14. This can thwart these groups from engaging in international discourse and complying with humanitarian standards.

1. Roots: The Doctrine of Belligerency

The historical application of the laws of war to internal conflicts illustrates states' concerns about providing an avenue for legitimacy to non-state actors. Throughout history, states have determined the rules of engagement in armed conflict. As a result, the rules were based on state actors.⁷² Any non-state group was considered within the realm of domestic law and not a legal international actor.

Official recognition of belligerency was the traditional doctrine applicable to internal conflicts.⁷³ The laws of war did not apply to internal conflicts unless a state decided to observe the laws of war by recognizing the insurgent group.⁷⁴ Once belligerency status was in effect, the insurgents received broader protections than those generally given to parties of internal conflicts.⁷⁵ Upon recognizing an insurgent group, states could no longer use any means necessary to dispel an uprising through implementation of domestic criminal laws. Because their options became limited, states often felt there was little to be gained by extending recognition.⁷⁶ Meanwhile, extension of recognition could increase the power of the insurgent groups and may lead to others viewing the groups as having rights equal to those of a state.⁷⁷ The humanitarian benefits that recognition could convey, including improved treatment of the state's armed forces at the hands of insurgents, were overlooked.⁷⁸

a. Third-Party States May Not Interfere with Internal Conflicts

In line with the "nation's rights" attitude of states, the international community treated internal conflicts as matters of domestic security in which third-party states had no right to interfere.⁷⁹ If a third-party state recognized an armed group, it was essentially declaring war on the territorial state and giving the armed group a legal character. The United Nations enshrined this concept in its Charter, expressly stating that the Organization could not intervene in the domestic affairs of a state except to counter threats to peace, breaches of peace, or acts of aggression.⁸⁰

72. For instance, only states could formally declare war. See ROBERT E. GOODIN, *WHAT'S WRONG WITH TERRORISM?* 17 (2006).

73. See LINDSAY MOIR, *LAW OF INTERNAL ARMED CONFLICT* 5–18 (2002) (providing a detailed overview of the doctrine of recognition of belligerency).

74. See *id.*; JAMES E. BOND, *THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR* 51 (1971) ("Once the rebels had achieved the status of belligerents, however, they had become in effect a *de facto* state; as a state they were entitled to all the incidents of that privileged status, one of which was being accorded the benefits of the laws of war.").

75. Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 *MIL. L. REV.* 109, 110 (2000) (giving examples of the protections afforded to belligerents, including prisoner of war status and admittance of their ships to ports).

76. MOIR, *supra* note 73, at 10.

77. *Id.*

78. *Id.*

79. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 343 (Manchester U. Press, 3d ed. 2008) (referring to non-intervention as "[o]ne of the longest and best established principles of international law").

80. U.N. Charter art. 2, para. 7, art. 39; The United Nations has violated this principle by prematurely dealing with groups as legitimate state organs and acquiescing to regulations of combat zones. See GREEN, *supra* note 79, at 350; *but see* Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and*

Similarly, the Geneva Conventions recognized the principle. Under the Geneva Conventions, the nature of the conflict does not change from internal to international if the territorial state government invites the third-party state to intervene.⁸¹ However, the character of the conflict changes if a third-party state intervenes on behalf of the insurgent group.⁸²

Even though states no longer adhere to the doctrine of belligerency,⁸³ the model is still followed. The legal consequences of recognizing an insurgent group are vague.⁸⁴ As such, states are still concerned that recognizing armed groups will grant legal character.

2. Modest Protections Under the Geneva Conventions

Concern about the legal consequences of extending recognition has resulted in the extension of fewer IHL protections under the current legal scheme for the laws of war. If states choose to admit that an internal conflict exists, IHL only provides modest protections. Only Common Article 3 and Protocol II apply to non-international conflicts—not the Conventions as a whole.⁸⁵ The scope of the material and personal fields of application have been the most controversial. Under the Conventions and Protocol II, most members of armed groups are not considered combatants or prisoners of war (POWs).⁸⁶ The threshold of application for the Conventions is ambiguous, and in some cases hard to reach.⁸⁷

a. Disagreements on the Framework

The debates concerning Common Article 3 and the Additional Protocols demonstrate states' concerns about the consequences of applying the laws of war to non-international armed conflicts. In the end, the conferences developed different

Failing States, in LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD 653, 653 (Chester A. Crocker et al. eds., 2007) (stating that “[a]lthough frequently violated in practice, the fundamental rules of conventional sovereignty . . . have rarely been challenged in principle.”).

81. Fleck, *The Law of Non-International Armed Conflicts*, *supra* note 23, at 605; *but see* Lotta Harbom & Peter Wallensteen, *Armed Conflict and Its International Dimensions: 1946–2004*, 42 J. OF PEACE RES. 623, 634 (2005) (providing a conflicting point of view, that “[i]nternationalized internal armed conflict occurs between the government of a state and internal opposition groups, with intervention from other states in the form of troops.”).

82. Fleck, *supra* note 23 at 606 (“Interventions by states in support of armed opposition groups in another state will internationalize the armed conflict if the intervening state is itself conducting military operations or controlling operations performed by the armed opposition group.”).

83. Lootsteen, *supra* note 75, at 110 (stating that while the Spanish Civil War was the last internal conflict where belligerency status was debated, the most recent conflict in which the doctrine was applied was the American Civil War).

84. *See* KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING 148 (1984) (discussing the conflict between Third World countries and the West regarding how to treat liberation movements).

85. Moreover, the provisions of these two instruments are few and simple. As such, they often do not address the complex realities of internal conflicts. *See* ZEGVELD, *supra* note 9, at 34 (citing an argument that because of the lack of internal regulation, the international community has been narrowing the legal distinction between international and internal conflicts).

86. *See infra* § IIA2c.

87. *See infra* § IIA2b.

legal regimes for both international and non-international armed conflict, as well as sub-regimes within non-international conflicts.⁸⁸ However, the application of the regimes varies depending on the legal characterization of the conflict.⁸⁹

i. Common Article 3

In response to the Spanish Civil War and the Second World War, the international community sought to develop humanitarian legal regulations to apply to all conflicts, regardless of whether the conflicts were internal or interstate.⁹⁰ As the first piece of international law requiring states to treat their own nationals according to humanitarian standards, Common Article 3 was revolutionary in its scope.⁹¹ However, during the Diplomatic Conference to draft the Geneva Conventions, states split on the applicability of international laws of war to internal conflict.⁹² One group argued that a state's right to repress insurgents must take precedence over applying the conventions; the other stressed broad humanitarian protections.⁹³ A compromise led to the following: the parties to internal conflicts were only bound by the basic humanitarian principles of the four Conventions, embodied in Common Article 3, but the parties were encouraged to form special agreements to apply the provisions of the Conventions.⁹⁴ The final provision in the article,⁹⁵ which had universal agreement and was central to the Convention's adoption, affirmed that the legal status of the parties was not affected.⁹⁶

ii. Additional Protocols I and II

The drafting of the Additional Protocols also brought many state sovereignty issues to the forefront of debate. Article 1(4) of Additional Protocol I extended the applicability of international humanitarian law so that the whole of the Conventions applied to conflicts for national liberation.⁹⁷ Wars previously considered to be internal conflicts were in effect reclassified as international conflicts, even though the actors remained non-state armed groups.⁹⁸ "Classifying armed conflict according to

88. Bassiouni, *supra* note 47, at 731.

89. *Id.*

90. Abi-Saab, *supra* note 33, at 368.

91. David P. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT'L L. 272, 274 (1978).

92. See BEST, *supra* note 23, at 169–79 (1994) (providing a detailed overview of the Diplomatic Conference, including individual states' concerns).

93. *Cf. id.* at 171 (relating the disagreement over the definition of "armed conflict").

94. MOIR, *supra* note 73, at 28–29.

95. The final provision of Common Article 3, *supra* note 11, states, "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

96. See BEST, *supra* note 23, at 178 ("The theory of Common Article 3, however, as the delegates in 1949 read it, was satisfactorily explicit; insurgents who abided by its rules could look for no rewards other than, first, decent treatment by the regime in the event of their falling into their hands, and, second, the satisfaction of a clear conscience.").

97. Article 1(4) of Additional Protocol 1, *supra* note 8, defined international armed conflict to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination."

98. Bassiouni, *supra* note 47, at 743.

the objectives of the parties was highly controversial, and seen by many as an attempt by Third World States to strike a political blow against Western imperialism.”⁹⁹

Since Protocol I already achieved the drafters’ goal of covering colonial wars, some Third World States, such as India and Iraq, did not want to adopt another Protocol on non-international armed conflict, which was the center of discussion for Protocol II.¹⁰⁰ The Indian delegation’s statements regarding the adoption of Protocol II convey the concerns about further regulation: “[T]he provisions of Protocol II will only militate against the sovereignty of States and will interfere in their domestic affairs. The internal law and order situations are the sole concern of sovereign States and these problems are to be dealt with according to the domestic laws of the country.”¹⁰¹

In the end, the groups compromised with a “gentlemen’s agreement,” by which the original draft proposed by the ICRC was reduced in scope in return for the votes of Third World States.¹⁰² The committee removed phrases, such as “the parties to the conflict” and “legal status of the parties to the conflict,” to ensure that there was no suggestion that rebels would be considered to have the equivalent status of states.¹⁰³ Also rejected was a provision that would allow the ICRC to supervise the implementation of the Protocol. That provision was rejected on the basis that it was an infringement on national sovereignty and it could allow dissident forces to ask the ICRC to interfere without the government’s consent.¹⁰⁴ As one observer of the sessions stated: “In sum, the Protocol provides third parties few rights in internal war.”¹⁰⁵

b. Threshold of Application

Although both Common Article 3 and Protocol II regulate internal conflicts, they do not universally apply to internal conflicts. Rather, they require certain characteristics be present to trigger the legal regimes. Some of the requirements are ambiguous or unrealistic. The lack of a clear line allows states to interpret the laws of war in their favor. Conflicts that do not satisfy the requirements of Common Article 3 or Protocol II are not subject to IHL, but to another legal regime—International Human Rights Law.¹⁰⁶

99. MOIR, *supra* note 73, at 90.

100. See Forsythe, *supra* note 91, at 279–82 (discussing the four different views held by states during the drafting of Protocol II: “the maximalists, the moderates, the minimalists, and the monkey-wrenchers.” The maximalists wanted extensive law on internal conflict, the moderates wanted states to reconcile “humanitarianism with national sovereignty,” the minimalists wanted to give state sovereignty priority over humanitarian concerns, and the monkey-wrenchers did not want any more regulation of internal conflicts).

101. FEDERAL POLITICAL DEPARTMENT, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977) at 81, CDDH/SR. 49, Annex, 7–8 (1978).

102. Forsythe, *supra* note 91, at 278, 284.

103. *Id.* at 283.

104. *Id.* at 287–88 (reporting that India, Iraq, Mexico, and South Korea were among the states expressing concerns about national sovereignty and about dissident forces asking the ICRC to interfere without the government’s consent).

105. *Id.* at 289.

106. Bassiouni, *supra* note 47, at 731 (noting that International Human Rights Law lacks a coercive enforcement mechanism); Forsythe, *supra* note 91, at 278, 289.

i. Common Article 3

Common Article 3 explicitly applies to internal armed conflicts, but it does not define the threshold level of “armed conflict.”¹⁰⁷ The point at which domestic hostilities turn into an “armed conflict” is unclear,¹⁰⁸ resulting in problems classifying the character of the disturbance.¹⁰⁹ States have embraced the ambiguity, often defining the term narrowly¹¹⁰ or denying a conflict exists in order to avoid the application of IHL.¹¹¹ Since recognizing a non-international armed conflict gives the armed group an international “legal personality” with rights and obligations, states fear that accepting Common Article 3 will send the message that the state cannot maintain order and that insurgents have achieved an international status.¹¹²

Regardless of whether a state subjectively believes it is at war with an armed group, the objective legal question of whether the state is involved in an armed conflict according to the laws of war is determinative. International bodies, such as the International Court of Justice, the UN Security Council, and the UN Commission on Human Rights, have served as a decision-maker as to whether an armed conflict exists under Common Article 3.¹¹³ However, until an objective body determines whether a conflict exists and states accept that decision, the states determine the status of the conflict.¹¹⁴ As long as states have some control over the criteria of the recognition process, they will be able to claim the criteria have not been met and the process will remain highly subjective.¹¹⁵ As such, a state is likely to disregard IHL, unless it is in its own interest to apply it.¹¹⁶

107. See Common Article 3, *supra* note 11, at 1.

108. See Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2468–70, 2475 (2008) (noting that there is no settled definition of the term “armed conflict,” but that the International Criminal Tribunal for the Former Yugoslavia’s definition of the term in the *Tadi* case is most frequently used). In *Tadi*, the court stated that “armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

109. See Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 10–14 (2003) (discussing the problems of classifying Al Qaeda’s September 11 attacks on the World Trade Center as an internal armed conflict).

110. See GREEN, *supra* note 79, at 343–45 (discussing recent conflicts arguably classified as non-international armed conflicts in everyday language, but which states did not recognize as such, including hostilities in Bosnia, Afghanistan, and Lebanon).

111. MOIR, *supra* note 73, at 36 (“Nonetheless, there is no question of the application of Article 3 being dependent upon any criteria other than the existence of an armed conflict in the territory of a High Contracting Party.”).

112. *Id.* at 65–66.

113. See ZEGVELD, *supra* note 9, at 10–13. However, the views of some of these bodies are not binding on the states. *Id.* Moreover, there is no body capable of compelling a state to account for its conduct. Alex G. Peterson, *Order out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 67 (2002).

114. Bassiouni, *supra* note 47, at 730.

115. See MOIR, *supra* note 73, at 45; see also Richard R. Baxter, *Ius in Bello Interno: The Present and Future Law*, in LAW AND CIVIL WAR IN THE MODERN WORLD 518, 523 (J. N. Moore ed., 1974).

116. This is the benefit and danger of a consent based system. MOIR, *supra* note 73, at 45.

ii. Additional Protocol II

Additional Protocol II supplements Common Article 3, but the scope of application is much narrower. In fact, the threshold of application for Protocol II is at a level that many armed groups cannot reach. The conflict must not be covered in Protocol I, the territorial state must be party to the Convention, and the armed group must have sufficient command, control of territory, and ability to carry out sustained and concerted operations.¹¹⁷ As a result of the stringent requirements, often Protocol II does not apply because the conflict does not meet all of the requirements.¹¹⁸

c. No Prisoner-of-War Status

Prisoners-of-war (POWs) are entitled to protection when captured and are immune from liability for acts committed according to the laws of war.¹¹⁹ To qualify for POW status, one must (1) be a combatant or a person with equal status that has put down arms, and (2) fall into the hands of the enemy.¹²⁰ In international armed conflicts, which include national liberation movements,¹²¹ these captured enjoy POW status if they meet the requirements set forth in Article 4 of the Geneva Prisoners of War Convention. Members of resistance movements must be commanded by a responsible person, wear a distinctive emblem, carry arms openly, and respect the laws of war.¹²² The actual number of resistance movements that satisfy these requirements is likely low due to the nature of the rebel organizations and their tactics.¹²³ States also determine whether armed groups qualify for combatant and POW status,¹²⁴ giving rise to the same subjective issues that occur 'when a state decides whether the conflict is within the scope of IHL.

While national liberation groups may be entitled to POW status, members of armed groups that are parties to internal conflicts are not entitled to the status in any circumstances.¹²⁵ The Geneva Conventions do not define combatant status in non-international armed conflicts. Rather, Common Article 3 expressly states that it

117. Additional Protocol II, *supra* note 8, art. 1, para. 1.

118. JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 129 (1993).

119. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 7, art. 13, 99.

120. Hort Fischer, *Protection of Prisoners of War*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 367, 383 (Dieter Fleck ed., 2d ed., 2008).

121. See generally DANIEL MORAN, WARS OF NATIONAL LIBERATION (2006) (providing a survey of national liberation conflicts in the twentieth century).

122. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 7, art. 4, para. 2.

123. See George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 769 (1981) (noting that most insurgent fighters are part-time soldiers, and as such, displaying a distinguishing emblem at all times will make them outlaws and easy targets); Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 327-28 (1951) (observing that conformity to the Geneva Convention standards will frequently fail "since secrecy and surprise are the essence of such warfare").

124. Bassiouni, *supra* note 47, at 743.

125. *Id.* at 727 ("Thus, a person who would otherwise qualify as a lawful combatant in a conflict of an international character becomes a common criminal in a conflict of non-international character and in an internal conflict.").

“shall not affect the legal status” of the armed group.¹²⁶ Since there is no combatant status in non-international armed conflict, members of non-state armed groups captured in internal conflicts are not entitled to POW status.¹²⁷ States included this provision to prevent armed groups from claiming belligerent status and the applicability of POW rules.¹²⁸ If international law conferred a protected legal status on belligerents, then states could no longer prosecute belligerent acts according to their domestic laws.¹²⁹ Members would be immune from domestic prosecution for acts committed during the hostilities as long as they complied with the laws of war. However, since there is no POW status in internal conflicts, the opposite is true. When the state captures an opponent in an internal conflict, the state can still treat the individual according to its laws of treason,¹³⁰ even if the individual did not violate the laws of war.¹³¹ Consequently, many insurgent fighters forfeit significant humanitarian protections¹³² in lieu of domestic criminal prosecution or indefinite military detention.

d. Relaxation of Combatant Status in Additional Protocol I

The distinction between combatant and non-combatant is determinative of an individual’s legal status and treatment during hostilities.¹³³ The First Additional Protocol closed existing gaps between the categories of combatant and non-combatant in international armed conflicts, including wars of national liberation. It minimized the combatant category and maximized the civilian category by declaring that everybody who is not a combatant is a civilian and presuming civilian status in cases of doubt.¹³⁴ Thus, “all members of armed forces are combatants, and all combatants are legitimate combatants,” subject to a few exceptions.¹³⁵ Some states,

126. Common Article 3, *supra* note 11.

127. Bassiouni, *supra* note 47, at 735.

128. J.S. PICTET, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 44 (1958); *see also* Bassiouni, *supra* note 47, at 729 (asserting that states maintain the imbalance between the POW status of state and non-state fighters to deny their armed group opponents combatant legitimacy).

129. CASSESE, *supra* note 45, at 77–79.

130. GREEN, *supra* note 79, at 346. This is not a change from the way in which states dealt with insurgents in past conflicts. For example, during the Second World War, the United Kingdom prosecuted captured members of the Japanese-sponsored Indian National Army under treason laws. *Id.*

131. Bassiouni, *supra* note 47, at 729.

132. POWs are entitled to many protections, including combatant immunity. *See* Baxter, *So-Called ‘Unprivileged Belligerency’*, *supra* note 123, at 343 (claiming that those lacking POW status are “virtually at the power of the enemy”); *but see* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 368 (2004) (arguing that the denial of POW status only results in the loss of two humanitarian protections: assimilation into the detaining state’s legal regime and combatant immunity).

133. One’s status triggers many of the conventions and treaties in international humanitarian law. For example, civilian status entitles one to all of the protections afforded under the Geneva Civilian Convention. *See* BEST, *supra* note 23, at 227 (“In no area of international law is the status of an ‘actor’ more important to establish than that of the law of war. With status and recognition go rights and responsibilities: what law-of-war observances may be expected of the party or group in question, and what it may itself expect.”).

134. *Id.* at 255.

135. Aldrich, *supra* note 123, at 772–73.

including the United States, have refused to ratify Additional Protocol I¹³⁶ because Article 44 relaxes the requirements to achieve combatant status and provides POW status for those who are not combatants.¹³⁷

B. *Legal Consequences of Legitimacy*

Ultimately, the effect that recognition has on an insurgent's legal status can be determinative of a state's decision of whether to engage an armed group. The legal character of a group affects its members' liability under domestic laws, determines its level of equality with the state, and perhaps grants the group a place at the international table.

1. Effects on Armed Groups' Legal Status Due to Engagement

States have consistently voiced the fear that applying IHL to all internal conflicts will limit their ability to quell insurgents.¹³⁸ This fear was not based on states' desire to use harsh methods or means of combat, but on the law's implications for the legal status of the armed group.¹³⁹ As previously discussed, POW legal status grants the fighter immunity from domestic prosecution. Recognition could also signal that the armed group fulfills many of the conditions of an international legal subject.¹⁴⁰ State sovereignty issues successfully influenced the scope of IHL. Many states did not acquiesce to the Conventions until a provision was added stating that the applicability of the Conventions did not alter the legal status of the parties in internal conflicts.¹⁴¹

By encouraging states to engage armed groups, the same concerns about the implication of legal status arise. States almost always refuse to negotiate with armed groups in order to avoid granting the group a platform for legitimacy.¹⁴² Similarly, states may contest the validity of an agreement between an armed group and a humanitarian organization if it views the negotiations as having granted the group equal status with the state.¹⁴³ States will likely refuse to engage armed groups until it

136. For a more detailed overview of the U.S. decision not to ratify AP I, see Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987); and Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784, 784 (1988).

137. Bassiouni, *supra* note 47, at 782; Matheson, *supra* note 136, at 425.

138. Fleck, *supra* note 23, at 612.

139. *Id.*

140. CASSESE, *supra* note 45, at 79.

141. Common Article 3, *supra* note 11, para. 4 (providing that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict"). Although short, this provision was a deal-breaker for many states during the Diplomatic Conference. It was necessary to ease states' fears that the Conventions would not interfere with their capacity to suppress internal revolt. MOIR, *supra* note 73, at 65.

142. If the whole of IHL were to apply to internal conflicts, the group would gain legal status as combatants and POWs. Rein Mullerson, *Int'l Humanitarian Law in Internal Conflicts*, 2 J. CONFLICT SECURITY L. 109, 121 (1997).

143. Ewumbue-Monono, *supra* note 18, at 921. For instance, South Africa contested the UN Committee on Namibia's (UNCON) accession to the Geneva Conventions.

can be assured that there are no legal implications, or it is in their best interest for some other reason.

IV. THE REAL BASIS OF LEGITIMACY CONCERNS: PERHAPS NOT LEGAL?

Although the issues with legitimacy have been framed as legal concerns, states' hesitancy to non-violently engage armed groups may not really be grounded solely in concerns regarding legal status. State claims about the legal consequences of recognition may in fact be a cover for the pursuit of political objectives or the maintenance of the status quo. State apprehensions concerning engagement are more likely due to the legitimacy implications of concrete features of the IHL legal regime or a perceived need for the state to maintain its hegemony in the international system.

A. *Legal Worries as a Façade*

A state's claim that granting a belligerent entity legal status will impair the state's ability to prosecute and squash armed rebellions is typically a façade to mask its true fears of the collateral consequences of recognition. That some members of the international community want to engage non-state armed groups shows that legal implications are not necessarily critical impediments to all non-violent engagement.¹⁴⁴ States' claims that negotiating with groups undermines their authority are undercut by the fact that they still communicate with and trust the ICRC, which regularly negotiates with groups.¹⁴⁵ National governments, inter-governmental institutions, and the UN have even provided funding for non-governmental organizations that have the sole mission to engage armed groups.¹⁴⁶

Moreover, there is no need for a legal distinction between international and internal conflicts. Both states and non-state armed groups have the capacity to comply with humanitarian norms.¹⁴⁷ From a humanitarian perspective, there is no reason to treat the atrocities of internal conflicts more leniently than international conflicts.¹⁴⁸ The rights and protections extended to civilians and combatants should not vary based on the legal character of the conflict.¹⁴⁹

144. Cf. Ricigliano, *supra* note 16, at 56 (discussing the general characteristics of diplomacy with armed groups).

145. See ICRC, *DISCOVER THE ICRC 3* (2d ed., 2007) (discussing the ICRC maintains a constant dialogue with states but remains independent), 47 (discussing all the organizations that work with the ICRC), and 50 (discussing the ICRC's funding and demonstrating that governments still provide the most funds), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/p0790>.

146. See GENEVA CALL PROGRESS REPORT, *supra* note 59, at 10 (highlighting the increase in the international community's support of Geneva Call's efforts to engage armed groups regarding mine bans). Only one state, Turkey, has refused to grant Geneva Call access to regions where non-state actors operate. *Id.* at 22.

147. ZEGVELD, *supra* note 9, at 34. The many examples of armed groups voluntarily acceding to humanitarian norms and implementing them further support this point.

148. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561 (1995).

149. Bassiouni, *supra* note 47, at 731.

Sometimes, the line between the legal characterizations of similar conflicts is very fine, leaving no justification for different treatment under the laws of war. For example, if a group seeking self-determination meets all of the elements of Protocol I, the legal status of the conflict is an international conflict subject to the full Geneva Conventions.

Armed groups with the same military structure and territorial control but with different goals may not be subject to the Geneva Conventions at all if their conflict does not meet the elements of Protocol I or II.¹⁵⁰ However, the differences between these and other types of conflicts are not so great that a government must have different legal mechanisms available to combat the groups.¹⁵¹ For instance, once a state has captured insurgents, it makes little difference to the ultimate outcome of the conflict whether or not the person is a POW.¹⁵² Since legal distinctions between international and internal conflicts are unnecessary,¹⁵³ the legal disparities in IHL must be based on states' desire to avoid the incidental effects of the laws of war.

B. *Collateral Consequences of Recognition*

Arguments highlighting the potential legal consequences of engaging groups may act as a cover for a state's pursuit of a political agenda. The political legitimacy that an insurgent group gains from legal recognition can be more harmful to a state than any loss in the state's ability to apply domestic laws. International legal protections may imply that the insurgents earn political rights when they gain legal recognition. For example, once an insurgent member is entitled to POW status, the local population may view him as a warrior. Likewise, states cannot prevent the gain in political or moral legitimacy that a group may achieve through adherence to humanitarian norms.¹⁵⁴

It may be that legal concerns are rarely an issue, but that states are hiding under those concerns because they do not want to lose the political battle. Armed groups challenge many sources of a state's legitimacy. They "often develop [and thrive] in states in which there is a power vacuum or in which states already fail to provide economic and physical security for some portion of the population."¹⁵⁵ As a result, groups often challenge a state's political legitimacy and its monopoly over the use of force within its territory.¹⁵⁶ A state's willingness to engage an armed group is likely bounded by the degree to which it considers the group a threat to its territorial integrity,¹⁵⁷ not the potential impact engagement will have on the group's legal status.

150. Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 61 (2003). Sometimes the line between legal characterizations is so blurred that the conflict changes back and forth between international and non-international as it evolves. Bassiouni, *supra* note 47, at 744.

151. Bassiouni, *supra* note 47, at 731.

152. SUTER, *supra* note 84, at 164.

153. ZEGVELD, *supra* note 9, at 34.

154. See Santos, Jr., *supra* note 58, at 5 (explaining that although Geneva Call's Deed of Commitment does not affect legal status, adherence to the deed "would add to the moral status" of a group).

155. EMPOWERED GROUPS, *supra* note 5, at 24.

156. *Id.*

157. *Id.*

C. *State-Centric International System*

States are the foundation of the international system,¹⁵⁸ and they decide when a new state exists.¹⁵⁹ As such, state-to-state relations are what count in the international community.¹⁶⁰ In an effort to maintain the state-centric international system, states rarely recognize insurgent groups as equals.¹⁶¹ States only accept insurgent groups into the international arena if groups prove they exercise similar sovereign rights as states.¹⁶² Perhaps refusing to negotiate with armed groups is based on a statewide campaign to preserve the hegemonic status of states in the international community. By refusing to negotiate with these groups so that the Geneva Conventions apply, the treaty system remains a state-only club.

D. *Has Legitimacy Overshadowed Humanitarian Goals?*

It is necessary to consider whether the humanitarian benefits of engaging armed groups ever outweigh the legitimacy concerns. In other words, at what point should legitimacy concerns submit to humanitarian goals? The answer likely varies from the standpoint in which the balancing test is assessed. One can conceptualize the scale as one with state sovereignty on one side and humanitarian norms on the other.¹⁶³ In the eyes of the state, the only time humanitarian concerns trump state sovereignty is when the state's power is inadequate to successfully fight the insurgent group. In this case, the state may be willing to give some legitimacy to the group in exchange for greater protection of its soldiers and civilians. From the international community's point of view, the scale is likely tipped towards humanitarian concerns.¹⁶⁴ The community of states and NGOs may be willing to recognize an armed group in return for more humanitarian protection from the group. Finally, certain NGOs that aim to increase awareness of humanitarian norms and that have no territorial sovereignty to protect will value humanitarian norms quite highly.

158. See CASSESE, *supra* note 45, at 74 (“[States] possess paramountcy because they are the only international entities controlling territory in a stable and permanent way. All other subjects either exercise effective authority over territory for a limited period of time only, or they have no territorial basis whatsoever.”); SHIRLEY V. SCOTT, *INTERNATIONAL LAW IN WORLD POLITICS* 21 (2004) (“States are the most important actor in the system of international law.”); J.D. van der Vyver, *Statehood in International Law*, 5 *EMORY INT’L L. REV.* 9, 10 (1991) (“Traditionally, states were perceived to be the only subjects of international law.”).

159. See van der Vyver, *supra* note 158, at 22 (acknowledging that although the international community has attempted to form a precise definition of statehood, the reality is that an entity joins the international political system when other states accept it as being a state).

160. Krasner, *supra* note 80, at 655.

161. *Venezuela Recognizes Independence of Breakaway Georgian Provinces*, DALLAS MORNING NEWS, Sept. 11, 2009, available at http://www.dallasnews.com/sharedcontent/dws/news/world/stories/DN-chavez_11int.ART.State.Edition1.4bba0ce.html (stating that only Russia, Nicaragua, and Venezuela recognize the breakaway provinces of Georgia).

162. Krasner, *supra* note 80, at 655.

163. When deciding to adopt humanitarian rules applicable to war, states surrender some state sovereignty.

164. See 2001 Secretary-General Report on Civilians, *supra* note 6, para. 20 (a government's fear of legitimizing armed groups ought to be balanced with the obligation each government has to protect the physical integrity of its citizens).

Regardless of the point of view, humanitarianism should be the focus because humane treatment of combatants will lead to less civilian and non-combatant casualties, as well as better treatment of POWs.¹⁶⁵ To maximize humanitarian goals, legitimacy should not be a concern when engaging a group. Still, it must be accepted that engaging these groups will legitimize the group in some way. If a state chooses to engage an armed group in dialogue, the state will essentially meet with criminals and legitimize their leadership. Also, if the meeting is to negotiate terms of engagement for when the group can legally kill combatants under IHL, then the state to some degree may be condoning murder. However, in order to achieve international humanitarian protections for all sides of a conflict, it is necessary to legitimize some aspects and functions of an armed group.

Furthermore, since states may legitimize armed groups' actions through many other means, states should not be concerned about bestowing legitimacy when deciding whether or not to apply the humanitarian-based laws of war to a conflict. There are many other ways that states confer legitimacy upon armed groups, such as formally declaring war against the group or even responding to the group with state military forces.¹⁶⁶ Also, international legal recognition may be the motivation behind an armed group's willingness to abide by IHL.¹⁶⁷ Removing avenues to gain legitimacy removes the incentive for groups to comply with IHL.¹⁶⁸ Although a state traditionally is the sole decision-maker as to whether it engages an armed group,¹⁶⁹ perhaps this should change. In our integrated world, the way that a state reacts to an armed group affects the entire international community.¹⁷⁰ Because of this, a state's legitimacy concerns should not be determinative of whether a member of the international community engages an armed group.

V. CONCLUSION

Concerns over legitimacy lead states to deny legal status to non-state armed groups, which hinders the protections of vulnerable groups during conflicts. This

165. See Part I, *supra*, for a discussion of the humanitarian benefits of engaging armed groups, including less civilian and non-combatant casualties. See 2002 Secretary-General Report on Civilians, *supra* note 36, para. 17 (“Carefully negotiated humanitarian access does much to improve the protection of civilian populations in the short term and to improve prospects for a successful transition to reconciliation.”).

166. While a formal declaration of war or state military action may confer legitimacy upon armed groups, governments frequently find ways around this. For example, it is a common practice to declare such groups “terrorists” in an effort not to legitimize them. This provides the government a basis for acting under the rubric of domestic law without any international consequences. Cf. Bassiouni, *supra* note 47, at 782–83.

167. *Id.* at 737, 749. In fact, some humanitarian organizations use a group's desire for recognition to sell the idea of negotiations.

168. *Id.* at 737.

169. See GREGORY H. FOX, HUMANITARIAN OCCUPATION 1 (2008) (positing that the principle of autonomy guarantees states the right to direct their own political, social, and economic policies).

170. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 530 (1993) (“Complete autonomy may have been acceptable in the past when no state could take actions that would threaten the international community as a whole. Today, the enormous destructive potential of some activities and the precarious condition of some objects of international concern make full autonomy undesirable, if not potentially catastrophic.”); see EMPOWERED GROUPS, *supra* note 5, at 22 (while Al Qaeda maintains a local infrastructure in Afghanistan, sometimes the group coordinates terrorist attacks in the Sudan and Pakistan).

paper has explored state concerns about engaging armed groups and the motivations behind those concerns. Before addressing the lack of engagement between states and armed groups, the article explored the reasons that give rise to states' concerns that legitimacy will be granted to non-state actors. Overall, this article presented three plausible explanations for states' concerns regarding legitimization: legal, collateral consequences, and preservation of the state-centric system.

Based on my analysis, I concluded that states are mostly concerned about collateral consequences rather than the direct legal effects of the laws of war. Although states have claimed that their worries are grounded in the legal consequences of recognition, these claims may be hiding the states' true motivations: to uphold state sovereignty despite a possibly high human cost. However, consequences of bestowing legitimacy on armed groups will need to be accepted if states hope to move forward with humanitarian negotiations that will increase an armed group's compliance with humanitarian norms.

At this point, it is necessary to evaluate the results of recent internal conflicts in which states or NGOs have engaged groups. Since empirical data is limited in this area, a two-part empirical investigation must take place. First, there must be a detailed analysis as to whether recognizing an armed group affords tactical advantages in the conflict. There may be ways to engage armed groups without affecting the outcome of a conflict. Second, it is important to consider whether engaging armed groups increases compliance with humanitarian norms. Further issues for study include:

- (1) Identify situations in which armed groups have been engaged. Did states or NGOs engage the group? If the motivation for engaging the group can be discerned, what was the motivation?
- (2) Identify the result of engaging the group. Did the group gain legal recognition? Did the group ultimately dissolve despite recognition?
- (3) Identify whether engaging the group resulted in greater compliance with humanitarian norms.
- (4) Whether and to what extent the length of the conflict has an impact on engaging the group (i.e., the longer the conflict, the more likely a state will agree to negotiations).
- (5) Does the international community's input impact a state's willingness to engage?
- (6) Whether and to what extent the amount of carnage that has resulted from hostilities impacts a state's choice to engage a group.
- (7) Identify the point at which states are willing to engage groups (based on length of conflict, amount of deaths, international pressure).

The answers to these questions and data collected from research will give insight into the true source of legitimacy concerns and identify the point at which humanitarian concerns outweigh state sovereignty. If the group gains increased tactical advantage while adhering to humanitarian norms, then states may have an

increased incentive to engage these groups. An empirical study could calm state fears and promote engagement with these groups. It can also determine whether states have been hiding behind claims of legal consequences when the true issue is one of a political struggle. Using empirical data, the international community can pressure a state to engage an armed group or at least permit a humanitarian group to do so.¹⁷¹

171. Some sources of empirical data may found in the interactions between Pakistan and the Tehrik-i-Taliban Pakistan (TTP) forces, the U.S. Marines and Iraq, and Sudan and the Janjaweed. *See, e.g.*, ASHLEY J. TELLIS, PAKISTAN AND THE WAR ON TERROR: CONFLICTED GOALS, COMPROMISED PERFORMANCE 7 (2008), available at http://www.carnegieendowment.org/files/tellis_pakistan_final.pdf (Pakistan).