

# Modern War, Nonstate Actors and the Geneva Conventions: No Longer Fit for Purpose?

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## ABSTRACT

Many enduring armed conflicts of the last couple of decades have displaced millions of civilians, giving rise to refugee predicaments around the globe. These wars caused many civilian casualties and the destruction of civilian objects, utterly disregarding the protection offered under the Geneva Conventions. Between the rise in violence and the underlying violations of humanitarian law, the Geneva Conventions have lost their significance. Thus, it must be considered whether the Geneva Conventions matter anymore with regard to their effectiveness and efficiency. If the Geneva Conventions are still relevant, then who is responsible for violations of humanitarian law? Further, when states fight, how can they avoid violations of humanitarian law? This Article scrutinizes the efficiency and effectiveness of the Geneva Conventions in protecting civilian lives and civilian objects from the devastation of warfare. This Article intends to list the major violations of the Geneva Conventions in modern times and investigate the shortcomings of the legal framework to explain the lacunae that are exploited by warring states and nonstate actors. Although this Article discusses the major challenges faced by the Geneva Conventions to protect civilians, it also provides a critical assessment of the crucial role of nonstate actors in hybrid and asymmetrical warfare in the context of its ramifications for the Geneva Conventions. Accordingly, this Article recommends ways to induce compliance among states and nonstate actors to better enforce humanitarian law and restore the efficacy of the Geneva Conventions in order to reduce human suffering and restore human dignity.

## I. INTRODUCTION

Though humanitarian practitioners argue that the Geneva Conventions (GCs) are invaluable in limiting violence during wars, questions regarding the GCs' effectiveness have been raised more prominently.<sup>1</sup> This is mainly because since 1990 armed forces in battle zones deliberately targeted civilians, most notably in internal conflicts in Yugoslavia, Rwanda, and Tajikistan.<sup>2</sup> This trend toward deliberately targeting civilians and property during

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1. NINA TANNENWALD, *Assessing the Effects and Effectiveness of the Geneva Convention*, in DO GENEVA CONVENTIONS MATTER? 1 (Matthew Evangelista & Nina Tannenwald eds., 2017).

2. See TANNENWALD, *supra* note 1, at 1.

wars has reached cataclysm in modern warfare too—as shown by the Syrian, Afghan, and Iraqi wars; the War on Terror; and the involvement of nonstate actors (NSAs) and mercenaries in internal and transnational armed conflicts.<sup>3</sup> The situation has escalated with terrorist organizations and guerilla warfare using asymmetric warfare tactics that rely heavily on blending with civilian populations and deliberately targeting innocent people.<sup>4</sup> Thus, there is doubt about the relevance of the GCs and international humanitarian law in restricting violence against civilians and constraining the behavior of states and NSAs.<sup>5</sup>

State forces weakened in the face of the asymmetric forces of nonstate actors.<sup>6</sup> Civil wars in Syria, Sri Lanka, Sierra Leone, and Libya show the GCs to be extraneous and their invocation hypocritical, to the extent that Iraq war veterans testified before Congress that the rules of engagement were “thrown out of [the] window.”<sup>7</sup> Iraq war veterans confessed that they witnessed and participated in unwarranted killings and the mistreatment of detainees—actions that were commended and encouraged by their commanders.<sup>8</sup>

This Article investigates the factors that impede the effectiveness of the GCs by discussing the behavior of states toward international humanitarian law, the effectiveness of the GCs, violations of the rules of war, and underlying challenges of the GCs. To that end, this Article is divided into five sections. Section II discusses the effects and effectiveness of the GCs and is divided into three subsections: Section II.A.1 explains the behavior of states toward the enforcement of and compliance with the GCs; Section II.A.2 explores the effects of violations of the GCs on civilian populations; and Section II.A.3 imagines a fictional world without GCs. Then, Section II.B lists the major violations of humanitarian law in contemporary warfare, detailing the major facts and figures on the devastation of civilian lives and objects caused during the Afghan, Iraqi, and Syrian wars. Section II.C discusses the major challenges of the GCs in their implied protection of

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3. Waseem A. Qureshi, *Applying the Principle of Proportionality to the War on Terror*, 22 RICHMOND PUB. INT. L. REV. 379, 407–08 (2019) [hereinafter *Principle of Proportionality*].

4. TANNENWALD, *supra* note 1, at 2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Iraq Vets Recount Concerns Over Rules of Engagement*, PUB. BROAD. SERV. (May 21, 2008, 6:30 PM), <https://www.pbs.org/newshour/show/iraq-vets-recount-concerns-over-rules-of-engagement> [<https://perma.cc/LLL4-JMES>].

civilian people and civilian objects. Particularly, this section explores the challenges faced by GCs due to the widespread use of large explosive weapons and the indiscriminate deployment of military practices during instances of siege. Afterwards, Section II.D examines the role of NSAs in modern warfare and their effect on the futility of the GCs. Section II.D also discusses the employment of mercenaries as an extension of NSAs, while discussing the argument for relaxing international humanitarian law for weak parties to a conflict or for parties fighting terrorists. Section II.E of this Article explores the applicability of the GCs to cyberwarfare. Finally, Section II.F discusses and recommends ways to induce the notion of compliance with and enforcement of the GCs.

## II. ANALYSIS

### A. *Effects and Effectiveness of the GCs*

The international community has a profound understanding of the principles of the GCs, yet the world is oblivious to, or has seemingly divided opinions on, the effectiveness of their reach. A great deal of literature on international humanitarian law discusses the gaps and vagueness in the GCs' laws, particularly dealing with their evolving nature and recommending ways to improve them.<sup>9</sup> While humanitarian organizations document violations

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9. See Morgan Kelley, Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare (Dec. 10, 2013) (unpublished independent study project, School for International Training Study Abroad) (on file with University of Texas at Austin), [https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2643&context=isp\\_collection](https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2643&context=isp_collection) [<https://perma.cc/6XC2-8XVW>] (discussing the problem of compliance related to IHL and GCs); Heiki Krieger, *A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood* (Collaborative Rsch. Ctr. SFB 700, Working Paper No. 62, 2013), <https://www.peacepalacelibrary.nl/ebooks/files/371505569.pdf> [<https://perma.cc/6PF6-WV3G>] (discussing the problem of compliance related to IHL and GCs); TANNENWALD, *supra* note 1 (discussing the effects and effectiveness of GCs); Marco Sassóli, *The Implementation of Humanitarian Law: Current and Inherent Challenges*, 10 YEARBOOK INT'L HUMANITARIAN L. 45, 48 (2007) (arguing that IHL "is not sufficiently understood, or conversely, it is well understood but manipulated"); Fritz Allhoff, *The War on Terror and the Ethics of Exceptionalism*, 8 J. MIL. ETHICS 265 (2009) (advocating for relaxation of humanitarian laws in GCs); ROUTLEDGE, ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE TWENTY-FIRST CENTURY 203–21 (Fritz Allhoff, Nicholas G. Evans & Adam Henschke eds., 2013); INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF COTEMPORARY ARMED CONFLICT 9–12 (2019) [hereinafter ICRC] (discussing contemporary challenges to IHL and GCs, including issues related to terrorism, counterterrorism, nonstate actors, artificial intelligence, sieges, and explosive weapons to enhance respect for IHL); Joseph Guay & Lisa Rudnick, *What the Digital Geneva Convention Means for the Future of Humanitarian Action*, UNHCR POL'Y LAB (June 25, 2017), <https://www.unhcr.org/innovation/digital-geneva-convention-mean-future->

of the laws of wars during armed conflicts, there is a lack of a consequential and existential assessment of whether the GCs matter. The scant literature that does exist is inconclusive, primarily because it is nearly impossible to assess the effects of the GCs on states' behavior and on the protection of civilian lives.<sup>10</sup> Instead, that would require an assessment of a fictional world, a world without the existence of the GCs.<sup>11</sup> When considering their effectiveness, although the GCs successfully ensured immensely improved conditions for prisoners of war and medical operations during armed conflicts, these successes are dwarfed by the scale of international humanitarian law violations during armed conflicts under the aegis of the GCs.<sup>12</sup> These violations produce questions as to the mindset and rationale of states in their behavior toward the GCs, such as why do states violate international humanitarian law and fail to comply with their obligations under the GCs?

### 1. States' Behavior Toward the GCs

As for the compliance and enforcement of international humanitarian law (IHL), there are two major schools of thoughts: legalism and realism.<sup>13</sup> Under legalism, it is postulated that states are compliant to the GCs and only violate them in emergency situations.<sup>14</sup> Legalism assumes that almost all countries abide by all international law "as a matter of routine."<sup>15</sup> In contrast, realism offers a counterargument that all countries follow their self-interest, and thus international law has no role in shaping policy.<sup>16</sup> Eric Posner attempts to strike a balance between these two divergent approaches, which grossly exaggerate their arguments by taking extremely polarized positions.<sup>17</sup> Posner posits that "states comply with international

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humanitarian-action [<https://perma.cc/336J-BBE5>] (calling for a new Digital Geneva Convention).

10. See generally MATTHEW EVANGELISTA & NINA TANNENWALD (eds.), *DO GENEVA CONVENTIONS MATTER?* (Oxford Univ. Press 2017) (collecting literature on the effectiveness of the Geneva Conventions).

11. TANNENWALD, *supra* note 1, at 5.

12. *Id.*

13. MATTHEW EVANGELISTA, *How the Geneva Conventions Matter*, in *DO GENEVA CONVENTIONS MATTER?* 324 (Matthew Evangelista & Nina Tannenwald eds., 2017).

14. Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. STATE U. L. REV. 797, 798 (2005).

15. EVANGELISTA, *supra* note 13.

16. Posner, *supra* note 14.

17. *Id.*

law when doing so enhances their security and wealth, but not otherwise.”<sup>18</sup> Evangelista takes this argument one step further by hypothesizing that state behavior toward the observation of law is reciprocal in nature.<sup>19</sup> For instance, if both parties to an armed conflict certainly know that no prisoner of war (POW) will be taken, and all soldiers will be killed even if they surrender, then both parties in an armed conflict will fight ferociously.<sup>20</sup> Though the Hague Convention of 1907 prohibits “giving no quarter,”<sup>21</sup> in a situation of not taking POWs, as a matter of reciprocity, both legalists and realists would agree that both sides should abide by the convention regardless of legal obligations.<sup>22</sup> So, if countries violate the GCs in their self-interest, then who pays the price of these violations? Does increased violence in warfare mean more civilian casualties?

## 2. *Effects of Violations of the GCs on the Civilian Population*

It is undoubtedly difficult to assess the effects of IHL violations during armed conflict on civilian populations. Tannenwald explains that, owing to the magnitude and sophistication of the means of using force, the effects of wars on civilian populations are harsher in modern warfare when comparing the history of civilian treatment before and since the GCs.<sup>23</sup> Indeed, it cannot be denied that civilians were calamitously affected during the World Wars and civil wars before the advent of the GCs.<sup>24</sup> Statistical analysts examined the extent to which civilians were the foremost victims of armed conflict.<sup>25</sup> Several, including Randolph Martin, believe that “civilian population displacement and casualties have increasingly become the purpose rather than a by-product of war.”<sup>26</sup> Statistically speaking, since the 1990s, 80% to 90% of victims of wars have been civilians, compared

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18. *Id.* at 803.

19. EVANGELISTA, *supra* note 13.

20. *Id.*

21. Laws and Customs of War on Land (Hague, IV), art. 23, Oct. 18, 1907, 36 Stat. 2277.

22. See James D. Morrow, *When Do States Follow the Laws of War*, 101 AM. POL. SCI. REV. 559, 570 (2007).

23. See TANNENWALD, *supra* note 1, at 5.

24. See Christoph Eder, *Missing Men: World War II Casualties and Structural Change* 14 (Austrian Ctr. for Lab. Econ. & the Analysis of the Welfare State, Working Paper No. 1403, 2014), <https://www.labormrn.at/wp/2014/wp1403.pdf> [<https://perma.cc/CK6L-RNJK>] (providing statistics on WWII casualties); Nadege Mougel, *World War I Casualties*, EUROPEAN CTR. ROBERT SCHUMAN 1–6 (2011), <http://www.centre-robert-schuman.org/userfiles/files/REPERES%20%E2%80%93%20module%201-1-1%20-%20explanatory%20notes%20%E2%80%93%20World%20War%20I%20casualties%20%E2%80%93%20EN.pdf> [<https://perma.cc/NCW4-JZWT>] (providing statistics on WWI casualties).

25. See TANNENWALD, *supra* note 1, at 6.

26. *Id.*

to only 5% during World War I.<sup>27</sup> However, according to a more detailed data analysis of civilian victims of wars by the Human Security Report, the 9:1 civilian-to-military ratio of casualties stands on shaky ground—the report dubs it an “urban myth.”<sup>28</sup> The statistics are uncertain and inaccurate for a number of factors, such as underreporting by aggressors and not taking into account the aftereffects of wars (deaths caused by war-borne diseases and malnutrition).<sup>29</sup>

Notwithstanding debates over the accuracy of collecting data on war victims, the number of civilians affected by wars since World War I has risen from 5%.<sup>30</sup> According to some analysts’ claims, the numbers of civilian and military deaths during World War II were equal, and the international community agrees that since then, the number of civilian victims has exceeded the military casualties.<sup>31</sup> If we were to see the effects of the GCs on the protection of civilians during armed conflicts, this trend of increasing numbers of civilian victims coincides with the advent of the GCs, which implies that the GCs had a counterproductive effect.<sup>32</sup> So, have the GCs had no positive effect at all? Why have civilian victims increased in number under the aegis of the GCs? Or would the results have been even more catastrophic if the civilians had not been shielded by the GCs’ protection? Adam Roberts believes that in order to see the effectiveness of the GCs, there should be a focus on the individual events of wars since statistical analysis is inaccurate when it relies heavily on the deeply flawed ratio of military to civil casualties.<sup>33</sup> Does this mean that we cannot even deliberate over the inclusive result-oriented military-civilian casualty ratio? No, it only means that, instead of broad-spectrum statistical analysis, separate events should be covered individually because no two events are identical in their results. Nevertheless, if the overall effectiveness of the GCs is to be examined, the result-oriented approach based on the military-civilian casualty ratio is more cognitively sound than a focused analysis of single events. It is the nearest possible way to explore our world with or without the GCs, because—unless we discussed the actual world before

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27. *Id.*

28. *Id.*; see also Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 115 (2010).

29. TANNENWALD, *supra* note 1, at 6.

30. *Id.*

31. *See id.*

32. *See id.*

33. Roberts, *supra* note 28, at 115–36; see also TANNENWALD, *supra* note 1, at 6.

the GCs came into being—any other examples of a world without GCs would have to rely on a fictional world with the same timeline as our own, while theorizing on all the infinite relevant factors included in our world’s reality. Therefore, to reasonably scrutinize the effectiveness of the GCs, the world must be viewed as before the GCs and compared with the world since the GCs.

### 3. *A World Without the GCs*

A fictional world without the GCs can be imagined to determine whether IHL offers any worthy function. That is, how would countries act and behave during armed conflicts if civilians were no longer protected from the ravages of war? The present legal paradigm of international humanitarian law under the GCs protects civilians by implementing treaty obligations.<sup>34</sup> But what if war crimes are no longer attributable to an antagonist? Would the protection of the GCs matter if perpetrators cannot be prosecuted?

Modern warfare is orchestrated with this idea of consciously avoiding blame for war crimes.<sup>35</sup> For this purpose, states routinely employ nonstate actors and mercenaries so that retaliatory action and the attribution of war crimes can be avoided.<sup>36</sup> So the recent hybrid warfare and asymmetric tactics of using NSAs gives the effect of a world where there are no GCs, which explains the increase in the number of civilian victims in recent wars.<sup>37</sup> The reason for this is that terrorists and the asymmetric tactics of NSAs deliberately target civilians to compensate for the imbalance of power in numerical strength and resources.<sup>38</sup> A world where the execution of war crimes is avoided by employing nonstate actors is the same as a

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34. See ICRC, *supra* note 9, at 13.

35. See Andrés B. Muñoz Mosquera & Sascha Dov Bachmann, *Understanding Lawfare in a Hybrid Warfare Context*, 37 NATO LEGAL GAZETTE 5, 11–15 (Oct. 2016), [https://www.act.nato.int/images/stories/media/doclibrary/legal\\_gazette\\_37a.pdf](https://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_37a.pdf) [<https://perma.cc/R48Q-EAWZ>] (discussing the implications of Israel’s interactions with Hamas) [hereinafter NATO]; see also Nadeem Ashraf, *The Pursuit of Hybrid Warfare: Muddling Towards Clarity and Implementation* (Jan. 4, 2017) (unpublished strategy research report) (on file with the U.S. Army War College) (discussing NATO’s use of “hybrid warfare”).

36. Waseem Ahmad Qureshi, *Applicability of International Humanitarian Law to Non-State Actors*, 17 SANTA CLARA J. INT’L L. 1, 22 (2019) [hereinafter *IHL to Non-State Actors*].

37. Waseem Ahmad Qureshi, *The Rise of Hybrid Warfare*, 10 NOTRE DAME J. INT’L & COMPAR. L. 174, 192 (2020) [hereinafter *Hybrid Warfare*].

38. David Rodin, *The Ethics of Asymmetric War*, in *THE ETHICS OF WAR: THE SHARED PROBLEMS IN DIFFERENT PROBLEMS* 154–55 (Richard Sorabji & David Rodin eds., 2006).



fictional world where civilians have no protection from the GCs—if the GCs cannot be enforced, they are as good as nonexistent.<sup>39</sup>

Nevertheless, it would not be absolutely accurate to construe that the unenforceability of some violations of the GCs is equivalent to a world without the GCs. Positive compliance with the GCs must be considered too when evaluating the effectiveness of the GCs. In addition to the violations and loopholes of the GCs as the gap in humanitarian law and the inefficiency of the GCs, states' laudable compliance with the GCs also needs proper commendation. An interesting research question could be whether states that do not violate IHL would remain nonviolent toward civilians without their obligations under the GCs. If so, would that be because of their pacifistic and passive nature or the reciprocity of other states' behavior, since violent and aggressive states continue to cause civilian casualties, civilian displacement, and the destruction of civilian objects with or without the GCs? Therefore, to measure the ineffectiveness of the GCs, it is pertinent to first list the major violations of IHL and the relevant effects of these violations on global peace.

### B. Violations of GCs in Modern Times

The War on Terror destabilized and destroyed a number of countries, including Afghanistan, Libya, Syria, and Iraq.<sup>40</sup> It destroyed essential civilian

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39. *IHL to Non-State Actors*, *supra* note 37, at 7–9; *see also* Mosquera & Bachmann, *supra* note 35, at 11, 15–16, 25; *see also* Ashraf, *supra* note 35; *see also* European Commission Press Release IP/16/1227, Security: EU Strengthens Response to Hybrid Threats (Apr. 6, 2016) [hereinafter European Commission].

40. Michel Chossudovsky, *Al-Qaeda and the "War on Terror,"* GLOB. POL'Y F. (Jan. 20, 2008), <https://archive.globalpolicy.org/component/content/article/154-general/26821.html?tmpl=component&print=1&page=1> [https://perma.cc/GPY5-8JEX]; Simon Tisdall, *The US Has Ruined Afghanistan. It Can't Just Walk Away Now*, GUARDIAN (Feb. 8, 2019), <https://www.theguardian.com/commentisfree/2019/feb/08/us-afghanistan-civil-war-fundamentalist> [https://perma.cc/RS6R-X2XR] (“A rapid descent into civil war, involving government forces, jihadist groups and rival warlords, in a rerun of not-forgotten 1990s anarchy, is a strong possibility. Last year saw record civilian deaths, caused by terror bombings, intensified fighting and increased U.S. airstrikes.”). *See* Seumas Milne, *Coups and Terror Are the Fruit of NATO's War in Libya*, GUARDIAN (May 22, 2014), <https://www.theguardian.com/commentisfree/2014/may/22/coups-terror-nato-war-in-libya-west-intervention-boko-haram-nigeria> [https://perma.cc/2CG9-5UVE]; *see also* Mara Karlin, *After 7 Years of War, Assad Has Won in Syria. What's Next for Washington?*, BROOKINGS (Feb. 13, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/02/13/after-7-years-of-war-assad-has-won-in-syria-whats-next-for-washington/> [https://perma.cc/2TYT-34TH]; *see also* Michael Knights, *Infrastructure Targeting and Postwar Iraq*, WASH. INST.

services, such as electric grids, roads, and markets.<sup>41</sup> Millions of civilians died and the cost has reached more than \$4.4 trillion by 2015.<sup>42</sup> The results of this war have been counterproductive, as evident from increased violence and terrorism in the Middle East and heightened insecurity in the West.<sup>43</sup> Shockingly, overall, terrorism increased by an enormous 4500% due to the War on Terror.<sup>44</sup>

### 1. *Afghan War*

The Afghan War is noted as an unjust war without authorization from the United Nations Security Council (UNSC).<sup>45</sup> It cost more than \$1 trillion, amounting to about \$100 million per day.<sup>46</sup> The Afghan War claimed the lives of 6,800 U.S. soldiers, 30,000 innocent people, and a total of 210,000 casualties.<sup>47</sup> Essential civilian services, including electric grids, schools, roads, and hospitals are dysfunctional due to the war, the economy is dwindling, and violence and terrorism are on the rise.<sup>48</sup> Due to violations of IHL under the GCs, more than 1.17 million war crimes have been reported to the International Court of Justice (ICJ) in the Afghan War alone.<sup>49</sup>

The Afghan War violates the principle of proportionality laid down by the GCs.<sup>50</sup> The principle of proportionality is calculated by weighing the

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FOR NEAR E. POL'Y (Mar. 14, 2003), <https://www.washingtoninstitute.org/policy-analysis/view/infrastructure-targeting-and-postwar-iraq> [<https://perma.cc/EK23-EVY8>] (analyzing infrastructure destruction in Iraq).

41. Knights, *supra* note 40.

42. Nafeez Ahmed, *Unworthy Victims: Western Wars Have Killed Four Million Muslims Since 1990*, MIDDLE E. EYE (Apr. 18, 2016), <https://www.middleeasteye.net/opinion/unworthy-victims-western-wars-have-killed-four-million-muslims-1990> [<https://perma.cc/6D6S-JVK9>]; Al Jazeera English, *UpFront-Reality Check: The Failure of the 'War on Terror,'* YOUTUBE (Sept. 12, 2015), [https://www.youtube.com/watch?v=-X\\_lBovik\\_w&lc=Ugh03hvwe52Qc3gCoAEC&ab\\_channel=AlJazeeraEnglish](https://www.youtube.com/watch?v=-X_lBovik_w&lc=Ugh03hvwe52Qc3gCoAEC&ab_channel=AlJazeeraEnglish) [<https://perma.cc/27Y6-D4EZ>].

43. *Principle of Proportionality*, *supra* note 3, at 407–08.

44. Al Jazeera English, *supra* note 42.

45. *Principle of Proportionality*, *supra* note 3, at 409.

46. *Economic Costs*, WATSON INST. FOR INT'L & PUB. AFFS. (Jan. 2020), <https://watson.brown.edu/costsofwar/costs/economic> [<https://perma.cc/5JCA-47NK>]; SIMON REICH & PETER DOMBROWSKI, *THE END OF GRAND STRATEGY: US MARITIME OPERATIONS IN THE TWENTY-FIRST CENTURY* 36 (Cornell Univ. Press 2017).

47. *Principle of Proportionality*, *supra* note 3, at 410.

48. *Id.*; *Why Afghanistan Is More Dangerous Than Ever*, BBC NEWS (Sept. 13, 2018), <https://www.bbc.com/news/world-asia-45507560> [<https://perma.cc/Y3UK-R9HD>].

49. Kathy Gannon, *Afghans Submit 1.17 Million War Crimes Claims to International Court*, INDEPENDENT (Feb. 17, 2018), <https://www.independent.co.uk/news/world/middle-east/afghanistan-war-crimes-claims-victims-millions-submitted-court-isis-taliban-a8214301.html> [<https://perma.cc/ZR43-6XJP>].

50. *See Principle of Proportionality*, *supra* note 3, at 408–11.

overall military objective achieved against the harm caused.<sup>51</sup> The military objective of the Afghan War was to decrease terrorism and increase U.S. security by using force against the perpetrators of the 9/11 attacks.<sup>52</sup> In a diversion from the main objective, the United States supported rebel groups and warlords as it tried to topple the Afghan regime, and extended its military occupation for nearly two decades.<sup>53</sup> This war proved to be counterproductive, and instead increased terrorism, destabilized Afghanistan, and inadvertently decreased U.S. security at the cost of billions of dollars, millions of lives, the destruction of essential services in Afghanistan, and more than one million war crimes.<sup>54</sup> Therefore, since the harm caused by Afghan War surpassed the trivial good achieved by it, the war is disproportionate to its military objectives.<sup>55</sup>

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51. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(4), June, 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Conventions Protocol I].

52. See S.J. Res. 23, 107th Cong. (2001).

53. Austin Bodetti, *How the US Is Indirectly Arming the Taliban*, DIPLOMAT (June 13, 2018), <https://thediplomat.com/2018/06/how-the-us-is-indirectly-arming-the-taliban> [https://perma.cc/KT8N-J9XT]; see *US Invaded Afghanistan Largely to Restore Heroin Industry: Scholar*, PRESSTV (Nov. 21, 2017), <https://www.presstv.com/Detail/2017/11/20/542871/US-invaded-Afghanistan-largely-to-restore-heroin-industry> [https://perma.cc/EQU4-NY2X]; see also Johnny Dwyer, *The U.S. Quietly Released Afghanistan's Biggest Drug Kingpin from Prison. Did He Cut a Deal?*, INTERCEPT (May 1, 2018, 3:25 PM), <https://theintercept.com/2018/05/01/haji-juma-khan-afghanistan-drug-trafficking-cia-dea> [https://perma.cc/6W2F-ZZ3R]; see also Massoumeh Torfeh, *No End in Sight 17 Years After US Invasion of Afghanistan*, TRT WORLD (Oct. 11, 2018), <https://www.trtworld.com/asia/no-end-in-sight-17-years-after-us-invasion-of-afghanistan-20818> [https://perma.cc/YXV6-3HEF]; see also Matthew Fay, *The War in Afghanistan Is 17*, NISKANEN CTR. (Oct. 11, 2018), <https://www.niskanencenter.org/the-war-in-afghanistan-turns-17/> [https://perma.cc/8UJP-CA95].

54. REICH & DOMBROWSKI, *supra* note 46, at 36; Al Jazeera English, *supra* note 42; Neta C. Crawford, *Update on the Human Costs of War for Afghanistan and Pakistan*, WATSON INST. INT'L & PUB. AFFS. 1, 2–9 (2016), [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/War%20in%20Afghanistan%20and%20Pakistan%20UPDATE\\_FINAL\\_corrected%20date.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/War%20in%20Afghanistan%20and%20Pakistan%20UPDATE_FINAL_corrected%20date.pdf) [https://perma.cc/VSB3-HCQL] (discussing the costs of war for Afghanistan); *General Security Situation in Afghanistan and Events in Kabul*, EURO. COUNTRY ORIGIN INFO. NETWORK (Jan. 18, 2019), <https://www.ecoi.net/en/document/2002268.html> [https://perma.cc/QH6Y-WAL6] (discussing the state of Afghanistan after decades of war); see also *Why Afghanistan Is More Dangerous Than Ever*, *supra* note 48; Gannon, *supra* note 49.

55. *Principle of Proportionality*, *supra* note 3, at 411–12.

## 2. Iraq War

The Iraq invasion of 2003 was believed to be started on the pretext of Kuwaiti defense, United Nations Security Council (UNSC) authorization for the Iraq invasion of Kuwait in 1990, and the Disarmament Resolution of 2002.<sup>56</sup> The invading coalition of the United States, the United Kingdom, Australia, and other states based the Iraq invasion on the pretense of preventive self-defense in the face of Iraq's alleged possession of weapons of mass destruction (WMDs).<sup>57</sup> In fact, Iraq posed no imminent threat to the United States or to the coalition partner states, and the alternative peaceful resolutions were not exhausted.<sup>58</sup> In the aftermath of the Iraq War, no WMDs were found in Iraq, and the intelligence documents that reported those weapons were forged.<sup>59</sup> Therefore, the international community, including prominent international legal scholars and global leaders, condemned the Iraq invasion as illegal and unjust and deemed it an act of pure aggression.<sup>60</sup> Without a new UNSC resolution, and without an armed attack, the Iraq War was illegal and failed to conform with the U.N. Charter.<sup>61</sup> Further, the Iraq invasion was devised to change a regime, which is not a legal basis for full-fledged war under IHL.<sup>62</sup>

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56. Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002); Press Release, John D. Negroponte, U.S. Ambassador, U.S. Permanent Representative to the U.N., Explanation of Vote Following the Vote on the Iraq Resolution (Nov. 8, 2002); *see also* Press Release, Jeremy Greenstock, U.K. Ambassador, Sec. Council, United Kingdom Explanation on Vote on U.N. Security Council Resolution 1441 (Nov. 8, 2002); *See* S.C. Res. 1441, ¶¶ 2–3 (Nov. 8, 2002).

57. Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002); *Powell Presents US Case to Security Council of Iraq's Failure to Disarm*, U.N. NEWS (Feb. 5, 2003), <https://news.un.org/en/story/2003/02/58372-powell-presents-us-case-security-council-iraqs-failure-disarm> [<https://perma.cc/CUE7-VQD4>] [hereinafter *Iraq's Failure to Disarm*].

58. RICHARD N. HAASS, *WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS* 222–23 (Simon and Schuster, 2010).

59. TRT World, *9/11 Anniversary: Seventeen Years Since Deadly Sept 11 Attacks*, YOUTUBE (Sept. 10, 2018), <https://www.youtube.com/watch?v=JKqjLLS99Vk>.

60. *See Principle of Proportionality*, *supra* note 3, at 413–14.

61. Letter dated Nov. 8, 2002 from the representatives of China, France and the Russian Federation to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2002/1236 (Nov. 8, 2002); *see also* Poorvi Chitalkar & David M. Malone, *The UN Security Council and Iraq* 6 (United Nations Univ., Working Paper No. 1, 2013), [https://collections.unu.edu/eserv/UNU:5/wp01\\_theunscandiraq1.pdf](https://collections.unu.edu/eserv/UNU:5/wp01_theunscandiraq1.pdf) [<https://perma.cc/B6RZ-Z5UQ>] (indicating the deadlocked nature of the UNSC); *Lessons of Iraq War Underscore Importance of UN Charter – Annan*, U.N. NEWS (Sept. 16, 2004), <https://news.un.org/en/story/2004/09/115352-lessons-iraq-war-underscore-importance-un-charter-annan> [<https://perma.cc/6V3L-SA82>] [hereinafter *Lessons of Iraq War*].

62. *Chilcot Report: Tony Blair's Iraq War Case Not Justified*, BBC NEWS (July 6, 2016), <https://www.bbc.com/news/uk-politics-36712735> [<https://perma.cc/5GPM-RHJJ>];

Not only was the commencement of the Iraq War unlawful under the U.N. Charter, it also grossly violated IHL laid down by the GCs.<sup>63</sup> For instance, if the military objective of the Iraq War was to eradicate the imminent threat posed by Iraqi WMDs,<sup>64</sup> then the fact that Iraq had no WMDs makes any harm caused in excess of eradicating WMDs *ab initio* disproportionate.<sup>65</sup> The Iraq War cost \$190 million per day, caused the deaths of half a million people, displaced more than three million people, destroyed Iraqi infrastructure and governance, and increased violence.<sup>66</sup> The military occupation of Iraq without any justification has still not ended after seventeen years of constant war, and there seems no end to this brutal violation of the U.N. Charter and the GCs.<sup>67</sup> Owing to the destruction caused by the Iraq War, and because no military objective was achieved to eliminate the nonexistent WMDs, the Iraq invasion is disproportionate, and it grossly violates the GCs.<sup>68</sup>

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*Report on the Dutch Committee of Inquiry on the War in Iraq*, 57 NETH. INT'L L. REV. 81, 81–83 (2010).

63. *Lessons of Iraq War*, *supra* note 61; *Principle of Proportionality*, *supra* note 3, at 412–16.

64. *Iraq's Failure to Disarm*, *supra* note 57; Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

65. TRT World, *supra* note 59; *Principle of Proportionality*, *supra* note 3, at 413–16.

66. REICH & DOMBROWSKI, *supra* note 46, at 36; *Costs of War*, WATSON INST. FOR INT'L & PUB. AFFS. (2019), <https://watson.brown.edu/costsofwar/> [<https://perma.cc/2Y7F-M55P>]; Amnesty Int'l, *Amnesty International Report 2017/2018: The State of the World's Human Rights*, AI Index POL 10/6700/2018 (2018), <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> [<https://perma.cc/CQ4S-CHUJ>]; see JOËLLE GARRIAUD-MAYLAM, NATO PARLIAMENTARY ASSEMBLY, THE WAR IN SYRIA AND IRAQ: HUMANITARIAN ASPECTS 5, 9 (2017); see also U.N. High Commissioner for Refugees, UNHCR Position on Returns to Iraq, at 19 (Nov. 14, 2016) [hereinafter UNHCR Returns to Iraq]; see also Jeff McMahan, Vice Admiral James B. Stockdale Ctr. for Ethical Leadership, What Makes an Act of War Disproportionate?, at 18 (Mar. 25, 2008) (transcript available at U.S. Naval Academy); Al Jazeera English, *supra* note 42.

67. Torfeh, *supra* note 53; *Principle of Proportionality*, *supra* note 3, at 413–16.

68. *Principle of Proportionality*, *supra* note 3, at 416.

### 3. Syrian War

The Syrian civil war started in 2011.<sup>69</sup> The United States, along with its coalition partners, commenced the Syrian invasion in 2015.<sup>70</sup> The justification to start this war was the “preventive self-defense of Iraq” against the threat posed by NSAs and terrorists from Syria.<sup>71</sup> Fighting ISIL and terrorism under the War on Terror became a second justification, linking ISIL with the 9/11 attacks and Al-Qaeda.<sup>72</sup> Later, the U.S. White House publicly admitted that its goal was to change the Assad regime in Syria by supporting Syrian rebel groups.<sup>73</sup> Under international humanitarian law, the legality of preventive self-defense has long been contested and refuted,<sup>74</sup> so the first justification of defending Iraq is inapplicable. Second, the ICJ in the *Nicaragua* case established that there is no self-defense against NSAs that perpetrated an armed attack without proving that they were under direct state control.<sup>75</sup> This means that there is no legal basis in international humanitarian law for the United States to fight the War on Terror against ISIL.<sup>76</sup> Third, regime change is not an exception to the prohibition on the use of force under the U.N. Charter.<sup>77</sup> Only self-defense and UNSC

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69. *A Look at US Involvement in Syria*, NATIONAL (Apr. 14, 2018), <http://www.the.national.ae/world/mena/a-look-at-us-involvement-in-syria-1.721352> [<https://perma.cc/RHL8-B8AJ>].

70. *A Look at US Involvement in Syria's Civil War*, MIL. TIMES (Dec. 19, 2018), <http://www.militarytimes.com/news/your-military/2018/12/19/a-look-at-us-involvement-in-syrias-civil-war> [<https://perma.cc/88AV-A6RJ>].

71. Kevin Jon Heller, *The Invention of the Khorasan Group and Non-Imminent Imminence*, OPINIO JURIS (Sept. 29, 2014), <http://opiniojuris.org/2014/09/29/invention-khorasan-group-non-imminent-imminence> [<https://perma.cc/TEP4-GSG3>]; Federica D'Alessandra, *Jus ad Bellum in Syria: The Meaning of the US Airpower Campaign*, HUM. RTS. L. WORKING GROUP NEWSLETTER (Int'l Bar Ass'n: Pub. & Prof'l Interest Div.), Mar. 2015, at 38.

72. Zeke J. Miller, *White House: Iraq War Vote: Obama Opposed Could Be Used for ISIS Strikes*, TIME (Sept. 13, 2014, 6:03 PM), <https://time.com/3362683/obama-isis-iraq-syria-war-aumf/> [<https://perma.cc/W3FK-QLK6>].

73. *A Look at US Involvement in Syria*, *supra* note 69; Hannah Allam, “Assad Must Go” Demand Should Go, Ex-White House Official Says, MIA. HERALD (May 12, 2016, 6:57 PM), <https://www.miamiherald.com/news/nation-world/world/article77313747.html> [<https://perma.cc/7ZEN-PY6C>]; Scott Wilson & Joby Warrick, *Assad Must Go, Obama Says*, WASH. POST (Aug. 18, 2011), [https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ\\_story.html?utm\\_term=.cd5b98800339](https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ_story.html?utm_term=.cd5b98800339) [<https://perma.cc/T6PZ-3YRG>].

74. See U.N. Secretary-General, *A More Secure World, Our Shared Responsibility: Report of the Secretary-General on the High-Level Panel on Threats, Challenges and Security*, 54–55, U.N. Doc. A/59/565 (Dec. 2, 2004).

75. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 32 (June 27) [hereinafter *Nicaragua*].

76. *Principle of Proportionality*, *supra* note 3, at 416–21.

77. See U.N. Charter 1945, art. 2, ¶¶ 4, 39–51.

authorization for force are proper legal bases for using force against other states.<sup>78</sup> Thus in Syria, which neither used force against another country nor directly used NSAs to attack another country, the United States and its coalition partners could not use force without first acquiring UNSC authorization.<sup>79</sup>

U.S. support for armed rebel forces in Syria increased violence and terrorism in Syria.<sup>80</sup> Additionally, this support destabilized the entire region, left two million people injured, and caused millions more to be killed, kidnapped, and tortured.<sup>81</sup> More than five million Syrians have become registered refugees and 7.6 million—almost half of the Syrian population—have been displaced internally and internationally.<sup>82</sup> As a consequence of this war, all the essential services of food, water, healthcare, infrastructure, economy, and governance in Syria have collapsed.<sup>83</sup> International humanitarian law under the GCs is also violated by NSAs that are backed by coalition forces, terrorists, and the government of Syria.<sup>84</sup>

The Syrian civil war by the Western coalition has no legal basis or just cause under the international law of using force.<sup>85</sup> The military objective set by the coalition to fight and eradicate terrorism has counterproductively increased violence and terrorism.<sup>86</sup> Experiences from Iraq and Afghanistan made it foreseeable that supporting rebels increases violence and terrorism in

78. *Id.* art. 2(4), 51.

79. William Partlett, *Does It Matter That Strikes Against Syria Violate International Law?*, PURSUIT (Apr. 16, 2018), <https://pursuit.unimelb.edu.au/articles/does-it-matter-that-strikes-against-syria-violate-international-law> [https://perma.cc/9UNK-SS2S]; see Tess Bridgeman, *When Does the Legal Basis for U.S. Forces in Syria Expire?*, JUST SEC. (Mar. 14, 2018), <https://www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire> [https://perma.cc/DX8W-SDYS].

80. GARRIAUD-MAYLAM, *supra* note 66, at 4–5.

81. *Id.* at 1, 4; U.N. High Commissioner for Refugees, International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic: Update V, at 14–15 (Nov. 2017) [hereinafter UNHCR International Protection].

82. GARRIAUD-MAYLAM, *supra* note 66, at 4; UNHCR International Protection, *supra* note 81, at 24; Al Marsad, *The Syrian Situation - International Humanitarian Law Violations and the Call for Justice: A Summary*, ARAB HUM. RTS. CTR. IN GOLAN HEIGHTS, <http://golan-marsad.org/wp-content/uploads/The-Syrian-Situation-International-Law-Violations-and-the-Call-for-Justice-A-Summary.pdf> [https://perma.cc/8L46-P2GE].

83. UNHCR International Protection, *supra* note 81, at 28.

84. *Id.* at 15–23.

85. Partlett, *supra* note 79; *Principle of Proportionality*, *supra* note 3, at 419.

86. Michael Shank & Kate Gould, *Let's Keep Syria's Blood Off America's Hands*, USA TODAY (July 23, 2013, 1:06 PM), <https://www.usatoday.com/story/opinion/2013/07/23/arming-syrian-rebels-civil-war-column/2578667> [https://perma.cc/QDV8-PR8W].

a region.<sup>87</sup> Furthermore, no benefit was achieved with respect to the military objectives in Syria. Instead, infrastructure, governance, and essential services were destroyed, in addition to civilian casualties and displacement.<sup>88</sup> Moreover, the regime change agenda pursued in Syria exceeded the direct military objectives and violated international law.<sup>89</sup> Therefore, the harm done in Syria by violations of humanitarian law under the GCs—the destruction of civilian objects and displacement of civilians—exceeds the direct military objectives, which makes the Syrian civil war disproportionate under the GCs.<sup>90</sup>

In all the endless modern wars discussed above, millions of civilians have been grossly affected by violations of the GCs. Thus, it is relevant to note the challenges that the GCs face in protecting civilian lives and objects. What factors are compounding the inefficacy of the GCs in protecting civilians from warfare?

### *C. The GCs' Challenges in Protecting Civilians*

With the advent of global urbanization, armed conflicts have also urbanized and civilians suffer the impacts of wars.<sup>91</sup> When cities are sieged during warfare and explosive weapons are used in populated areas, not only do civilian casualties and injuries surge but essential services, such as food, water, sewerage, and electricity, are also severed by direct and indirect attacks.<sup>92</sup> As a consequence, prospects of disease outbreaks are heightened, mass populations are displaced, and people are unable to return to their homes when the conflict is over.<sup>93</sup>

In an urbanized war, it is challenging for militaries to avoid civilian harm.<sup>94</sup> In this regard, the laws of the GCs prohibit direct targeting of civilians and civilian objects under the principle of distinction.<sup>95</sup> Any incidental civilian harm that exceeds the anticipated direct military objective is also prohibited under the principle of proportionality.<sup>96</sup> The GCs require that precautions be taken to minimize incidental foreseeable civilian harm under the principle of precaution.<sup>97</sup> Despite these protections for civilian populations under the GCs, parties to conflicts deliberately and routinely

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87. *Principle of Proportionality*, *supra* note 3, at 419.

88. *Id.*

89. *Id.*

90. *Id.*

91. ICRC, *supra* note 9, at 7.

92. *Id.* at 7–11.

93. *Id.*

94. *Id.*

95. Geneva Conventions Protocol I, *supra* note 51, art. 48.

96. *Id.* art. 51(4) & 57(2)(a).

97. *Id.* art. 57(2); ICRC, *supra* note 9, at 11.



endanger civilian lives to gain military advantage, such as by using civilians as human shields and taking warfare into densely populated areas.<sup>98</sup> Using civilians as human shields is absolutely prohibited under the GCs, and all parties to a conflict must take precautions to not endanger civilians by the use of force, which includes the use of explosive weapons.<sup>99</sup> However, the use of explosive weapons and the sieges of territories are to blame for the increasing number of civilians affected by armed conflicts. Accordingly, Sections II.C.1 and II.C.2 discuss the implications of sieges and explosive weapons on the protection of civilians and civilian objects under the GCs.

### 1. Unguided/Heavy Explosive Weapons

The use of explosive weapons is not inevitably problematic in open battlegrounds, but use of explosives creates significant danger and causes enormous harm to civilians when used against military targets situated in urban territory.<sup>100</sup> Civilian harm in urban areas occurred during the Syrian, Afghan, Iraqi, Yemini, Somali and Libyan wars.<sup>101</sup> The use of explosive weapons caused casualties, injuries, the destruction of civilian property, schools, hospitals, infrastructure, and other essential services.<sup>102</sup> Such destruction has widespread reverberating effects since all these essential services in urban areas are tightly interconnected.<sup>103</sup> Furthermore, populations are displaced, people are exposed to outbreaks of deadly diseases, and sexual violence against women is intensified by destruction in populated areas.<sup>104</sup>

The GCs do not specifically prohibit the use of explosive weapons in populated areas. Instead, this is regulated by humanitarian law that prohibits indiscriminate and disproportionate attacks while requiring that precautions be implemented.<sup>105</sup> Even if these regulations are followed, if a military target is situated in a populated area, then civilian harm as collateral damage is likely to occur because of the massive footprint of explosive weapons

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98. ICRC, *supra* note 9, at 11.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 10–11.

105. 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. 51(4), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Conventions Protocol II]; ICRC, *supra* note 9, at 12; Geneva Conventions Protocol I, *supra* note 51.

and the interconnected dependency of civilians on essential services. This requires a serious reinterpretation and application of the laws of wars in urban areas.<sup>106</sup>

In 2019, the International Committee of the Red Cross (ICRC) reported that certain types of ammunitions are highly inaccurate and therefore cause serious problems when used in populated urban areas.<sup>107</sup> These weapons include mortars, rocket launchers, artillery and unguided missiles, rockets, and munitions.<sup>108</sup> The use of these weapons openly abuses the prohibition on indiscriminate attacks because they are bound to hit civilians and civilian objects along with military objects without distinction.<sup>109</sup> For instance, harassing, interdiction, suppressive, bracketing, and walking fire techniques are normally employed by armed forces even in populated areas while using munitions and mortars as indirect engagement with military targets to hamper their undertakings.<sup>110</sup> It is highly probable that these adjustment techniques will more likely harm civilians.<sup>111</sup> Under IHL, attacks must be directly targeted against military targets.<sup>112</sup> However, this is often not followed, putting the lives of innocent people at risk.<sup>113</sup>

One way to overcome this problem is by increasing the accuracy of weapons, such as by using guided missiles and rockets instead of unguided ones.<sup>114</sup> Yet, the problem of hitting civilians and civilian objects is still not completely solved because large explosive weapons have a massive footprint and large radius of destruction, which take civilians, civilian objects, and military objects when used in urban settings.<sup>115</sup> For example, the use of drones is supposedly highly efficient in taking out military targets. However, for every drone attack that targets one person, on average ten innocent people are killed.<sup>116</sup> Moreover, due to the inaccuracy and massive footprint of explosive weapons, civilians' interconnected essential services also get destroyed, which makes it impossible for populations to inhabit war-torn cities or consider returning to such places once the wars are over.<sup>117</sup> These

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106. ICRC, *supra* note 9, at 12.

107. *Id.*

108. *Id.*

109. *Id.* at 7–13.

110. *Id.* at 13.

111. *Id.*

112. Geneva Conventions Protocol II, *supra* note 105, art. 13.

113. See ICRC, *supra* note 9, at 13.

114. *Id.* at 12.

115. *Id.*

116. NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA'S POST-9/11 WARS 209 (Oxford Univ. Press 2013); Waseem Ahmad Qureshi, *The Legality and Conduct of Drone Attacks*, 7 NOTRE DAME J. INT'L & COMPAR. L. 91, 96 (2017) [hereinafter *Drone Attacks*].

117. ICRC, *supra* note 9, at 7–12.

interconnected essential services include water, electricity, sewage, and supply networks—all of which are essential for the sustenance of a society.<sup>118</sup>

To avoid impact on civilians, explosive weapons should not be used in urban regions because of their inaccuracy and massive footprint, which unavoidably affect civilians and civilian objects. As discussed, using guided missiles such as rockets to discount the problem of inaccuracy is not enough and contradicts the law under the GCs, because the radius of large explosive weapons is independently detrimental for civilian life.<sup>119</sup> If it is vitally important to take out a military target in a city, then taking precautions and not using indiscriminate and disproportionate attacks are prerequisites under the GCs.<sup>120</sup> To not violate the GCs in urban settings, such attacks should ideally not use large explosive weapons, and they should be absolutely precise without a large footprint of destruction.

Ordinarily, the argument of the self-defense of armed forces is used to justify the use of explosive weapons and indiscriminate attacks in urban areas.<sup>121</sup> However, the humanitarian law of using force under the GCs, such as the prohibition on indiscriminate and disproportional attacks, is equally applicable to both offensive and defensive instances.<sup>122</sup> In the ICRC's view on the situation of defending own forces in urban settings, even the defensive use of force should foreseeably take precautions, and must be direct and concrete such that the use of heavy explosive weapons do not exceed the incidental civilian harm, balancing the humanitarian considerations with military advantage.<sup>123</sup> In all cases of using force in urbanized regions, the attacking forces should be prepared to concede a high risk to military life if they place high risk on their civilian subjects. In any event, a fear of exposure to a higher risk to a state's own armed forces can never justify violations of the GCs/IHL,<sup>124</sup> which means that armed forces subject to the GCs cannot use self-defense as an excuse to undertake indiscriminate attacks on civilians.

Despite there being no prohibition on the use of explosives in populated areas, the ICRC suggests that the use of big explosive weapons should be

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118. *Id.* at 12–13.

119. *Id.*

120. Geneva Conventions Protocol I, *supra* note 51, art. 11, 48, 51(4), 57(2); Geneva Conventions Protocol II, *supra* note 105, art. 13.

121. ICRC, *supra* note 9, at 12–14.

122. *Id.*; Geneva Conventions Protocol I, *supra* note 51, art. 48, 51(4), 57(2)(a); Geneva Conventions Protocol II, *supra* note 105.

123. ICRC, *supra* note 9, at 12–14.

124. *Id.* at 13.

banned in urbanized regions during armed conflict for three main reasons.<sup>125</sup> First, there is a pattern of high civilian harm from the use of explosive weapons in urbanized regions.<sup>126</sup> Second, it is unfeasible to respect the principles of proportionality and distinction while using explosive weapons in populated areas.<sup>127</sup> Third, there is no regularity in the application and employment of explosive weapons in populated areas.<sup>128</sup> To avoid using explosive weapons in populated areas, states should eagerly participate in ICRC armed forces training on weapons adaptability in accordance with the urbanized settings of armed conflicts to vigorously consider the vulnerabilities of civilians and civilian objects.<sup>129</sup>

## 2. *Siege of Territories*

The concept of a siege or encirclement is not defined under the GCs. It can be described as a tactic to surround armed enemy forces in an area to restrict their movement and supplies.<sup>130</sup> The idea of a siege is to filter the area to defeat an enemy by restricting them in a confined space.<sup>131</sup> Sometimes an enemy's defeat is achieved by starving them out, and in other instances civilians are evicted to expose enemies hiding in an urban setting, to be able to fight them with minimum civilian harm.<sup>132</sup> This way, enemy forces are isolated from civilians in small, targeted pockets for conventional armed fighting.<sup>133</sup> This latter technique of not assaulting to capture is advantageous for the besieging party, and also avoids excessive harm to civilians.<sup>134</sup>

The GCs do not outlaw besieging an area to fight enemy forces.<sup>135</sup> Blocking supplies and food in a besieged area is also not prohibited.<sup>136</sup> The besieging party can use armed force to attack a military target in an urban area if it conforms with the principles of proportionality, precaution, and distinction under the GCs.<sup>137</sup> Through these principles, the GCs offer protection to civilians and civilian objects that remain trapped in a besieged

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125. *Id.*

126. *Id.*

127. *Id.* at 14.

128. *Id.*

129. *Id.*

130. *Id.* at 15.

131. *Id.* at 14–16.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.*

136. *See id.*

137. *Id.* at 15.

area.<sup>138</sup> Before this protection, stopping civilians from leaving a besieged area was deemed harsh but it was not prohibited under the Nuremberg trials.<sup>139</sup> Since then, the efficacy of protecting civilians during sieges has improved drastically under the GCs, and vulnerable people in a besieged area have a series of protections.<sup>140</sup> First, under the principle of distinction, directly targeting civilians fleeing a besieged area is strictly outlawed.<sup>141</sup> Second, under the principle of precaution civilians are to be evacuated and warned by besieging forces before commencing full-throttle attacks on enemy forces, so that incidental harm or collateral damage to civilian lives and objects is minimized.<sup>142</sup> Both the besieging party and the besieged party should allow civilians to evacuate a besieged area when possible.<sup>143</sup> However, besieged parties tend not to allow civilians to escape conflicted urban settings, so as to gain the advantage of immunity of that location from military operations. This practice is strictly prohibited under the GCs, and is referred to as human shielding.<sup>144</sup>

Similarly, starvation as a weapon of war targeting civilian people is also prohibited under the GCs.<sup>145</sup> Both parties to a siege must allow civilians to evacuate the besieged area.<sup>146</sup> Civilians can be forcibly evacuated by a besieging party.<sup>147</sup> Evicting civilians is safe when both parties to a siege agree to do so.<sup>148</sup> After evacuation, evicted civilians must be provided with shelter, food, hygiene, and health and safety services.<sup>149</sup> During eviction, the besieging party can screen civilians to filter out enemy combatants disguised as civilians.<sup>150</sup> However, the successful eviction of civilians from a besieged area does not mean that civilians left in a besieged area no longer have the protection offered by GCs.<sup>151</sup> No armed attacks can deliberately

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138. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949 [hereinafter Geneva Convention IV].

139. ICRC, *supra* note 9, at 15.

140. *Id.* at 16; *see* Geneva Convention IV, *supra* note 138.

141. JEAN-MARIE HENCKAERTS & LOUISE DOSWAL-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 3–4 (2005).

142. ICRC, *supra* note 9, at 16.

143. *Id.*

144. *Id.*

145. Geneva Conventions Protocol I, *supra* note 51.

146. *See* Geneva Convention IV, *supra* note 138, art. 49.

147. ICRC, *supra* note 9, at 17.

148. *Id.*

149. *See* Geneva Convention IV, *supra* note 138, art. 49.

150. ICRC, *supra* note 9 at 17.

151. *Id.*

or directly target remaining civilians in a besieged area,<sup>152</sup> even after the evacuation of civilians. Similarly, both parties to a siege must allow neutral parties of humanitarian workers to help affected people, such as the wounded and sick, during and after an armed conflict in a besieged area.<sup>153</sup> Of course, the besieging party has the right to screen and control these humanitarian relief operations.<sup>154</sup> Wounded and sick people are protected under the GCs.<sup>155</sup> The humanitarian conditions are exacerbated when a territory is controlled or sieged by NSAs.

#### *D. Role of NSAs in the GCs' Futility*

The protections offered to civilians, women and children, the wounded and sick, civilians caught in a siege, civilian objects, and prisoners of war under humanitarian law in the GCs were either not present or less refined in preceding humanitarian law.<sup>156</sup> Arguably, the protection offered by GCs to safeguard civilians and civilian objects have remarkably increased over the course of time, by refining laws and by increasing safeguards. The present legal framework of IHL has been refined and improved with the advent of the GCs and its additional protocols. However, has the increased protection under law decreased the effects of war on civilian life and civilian objects? If the protection of law to safeguard civilians and civilian objects has been improved, it must mean that—with time—civilians are less affected by armed conflicts. Does the ground reality of armed conflicts and modern warfare reflect this?

After the September 11 attacks, a series of wars started to target NSAs, such as terrorist organizations.<sup>157</sup> These wars were disproportionate and unjust toward victim states and their civilians.<sup>158</sup> Moreover, the War on Terror has a designated enemy (i.e., terrorists) that cannot be defeated by

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152. Geneva Conventions Protocol II, *supra* note 105, art. 13.

153. ICRC, *supra* note 9, at 17–18.

154. *Id.* at 18.

155. *Id.*

156. Geneva Conventions Protocol I, *supra* note 51, art. 1, 25, 48; Geneva Conventions Protocol II, *supra* note 105, art. 13, 18, 44; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 12, *ratified on* Aug. 2, 1955, 6 U.S.T. 3114 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 12, *ratified on* Aug. 2, 1955, 6 U.S.T. 3217; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 12, *ratified on* Aug. 2, 1955, 6 U.S.T. 3217; Geneva Convention IV, *supra* note 138, art. 16, 27, 49; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) art. 4(A), December 8, 2005, 2404 U.N.T.S. 261.

157. *IHL to Non-State Actors*, *supra* note 36, at 5; *Hybrid Warfare*, *supra* note 37.

158. *IHL to Non-State Actors*, *supra* note 36, at 5.

military means.<sup>159</sup> Instead of decreasing terrorism, the effect of the War on Terror has counterproductively increased terrorism and violence in the Middle East and insecurity in the West.<sup>160</sup> Robert Pape noted that the War on Terror has increased terrorism and not decreased it.<sup>161</sup> Sixteen intelligence agencies in the “National Intelligence Estimate of 2006” report also concluded the same.<sup>162</sup> Accordingly, Cornelia Beyer believes that Western economic policies are to blame for the recent rise in terrorism.<sup>163</sup> In addition, Anthony Richards, Peter Kornbluh, and Marc Warren noted that the United States indirectly supports terrorists by providing them with a safe haven and protecting terrorist organizations from the GCs.<sup>164</sup>

Similar to the problem of supporting terrorist groups, the use of rebels in an armed conflict, such as the use of mercenaries, is seen as the main cause of the increase in violence and terrorism.<sup>165</sup> Rebels and mercenaries are partners in the War on Terror; oftentimes, they are designated as terrorists and work together to help destabilize a region.<sup>166</sup> They are employed

159. Todd Richissin, “War on Terror” *Difficult to Define*, SEATTLE TIMES (Sept. 2, 2014), <https://archive.seattletimes.com/archive/?date=20040902&slug=russanal02> [https://perma.cc/98PU-YXWJ].

160. A. Trevor Thrall & Erik Goepner, *Step Back: Lessons for U.S. Foreign Policy from the Failed War on Terror*, CATO INST. (June 26, 2017), <https://www.cato.org/publications/policy-analysis/step-back-lessons-us-foreign-policy-failed-war-terror> [https://perma.cc/A2ZF-NKSS]; see Shirley Williams, *The Seeds of Iraq’s Future Terror*, GUARDIAN (Oct. 27, 2003), <https://www.theguardian.com/world/2003/oct/28/iraq.politics> [https://perma.cc/67BP-YSAM].

161. ROBERT A. PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM 103 (2006).

162. Mark Mazzetti, *Spy Agencies Say Iraq War Worsens Terrorism Threat*, N.Y. TIMES (Sept. 24, 2006), <https://www.nytimes.com/2006/09/24/world/middleeast/24terror.html> [https://perma.cc/J89C-M9NT].

163. See CORNELIA BEYER, VIOLENT GLOBALISM: CONFLICT IN RESPONSE TO EMPIRE 80 (2008).

164. ANTHONY RICHARDS, THE IMPORTANCE OF AN AGREED DEFINITION OF TERRORISM 25 (Oxford Uni. Press 2015); see Peter Kornbluh, *A Safe Harbor for Luis Posada Carriles*, N. AM. CONG. ON LATIN AM. (Sept. 25, 2007), <https://nacla.org/article/safe-harbor-luis-posada-carriles> [https://perma.cc/C3NH-NVLG]; see also Mallory Shelbourne, *Study Shows US Weapons Given to Syrian Rebels Ended Up in ISIS Hands*, HILL (Dec. 14, 2017, 12:45 PM), <https://thehill.com/policy/defense/364917-study-shows-us-weapons-given-to-syrian-rebels-ended-up-in-isis-hands> [https://perma.cc/KXU4-2GYA].

165. Shelbourne, *supra* note 164.

166. See *id.*; see also Will Todman, *Syria Is Forcing Former Rebels to Fight Their Friends*, DEF. ONE (Sept. 6, 2018), <https://www.defenseone.com/ideas/2018/09/syria-forcing-former-rebels-fight-their-friends/151039/> [https://perma.cc/36FF-NJN8].

by states in armed conflict chiefly to fight proxy wars and change regimes, essentially for political interests while avoiding attribution and retribution.<sup>167</sup>

The vacuum left by a regime change or the use of NSAs to change a regime as insurgents and rebels, gives rise to violence, terrorism, and destabilization.<sup>168</sup> Iraq, Syria, and Libya are noteworthy case studies where NSAs were employed, resulting in an increase in violence and terrorism directly attributable to regime change efforts.<sup>169</sup>

In modern warfare, NSAs are a harsh reality.<sup>170</sup> Mercenaries, rebels, and insurgents are used and employed as either proxy fighters or minions to serve political interests.<sup>171</sup> Multiple appealing factors compound the problem of NSA employability. For instance, NSAs are employed to avoid attribution and retribution, and mercenaries (a form of NSA) are cheaper to operate and maintain than their conventional counterparts—the armed forces.<sup>172</sup>

### *1. Applying the GCs to NSAs*

Scholars who advocate for the applicability of humanitarian law to NSAs encourage signing treaties and agreements with NSAs to enable the GCs to apply them.<sup>173</sup> In essence, they advocate the urgency of engaging with NSAs to overcome the challenges of compliance in humanitarian law.<sup>174</sup> However, IHL and the GCs are already applicable to NSAs.<sup>175</sup> States should not sign treaties with NSAs for four main reasons. First, the monopoly to use force stays with states, whereas NSAs cannot use lawful force.<sup>176</sup>

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167. See Mosquera & Bachmann, *supra* note 35; see also Ashraf, *supra* note 35, at 7; European Commission, *supra* note 39, at 2.

168. *Principle of Proportionality*, *supra* note 3, at 407.

169. *Id.*

170. See Kelley, *supra* note 9.

171. *IHL to Non-State Actors*, *supra* note 36, at 7.

172. See *Hybrid Warfare*, *supra* note 37, at 178; SEAN MCFATE, *THE NEW RULES OF WAR: VICTORY IN THE AGE OF DURABLE DISORDER* 125 (2019).

173. See Kelley, *supra* note 9, at 31.

174. See *id.* at 31–34.

175. Annyssa Bellal et al., *International Law and Armed Non-state Actors in Afghanistan*, 93 INT'L REV. RED CROSS 47, 55 (2011); see Geneva Conventions Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3]; see also Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609; see also Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Protocol]; see also Tatiana Londoño-Camargo, *The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts*, 130 VNIVERSITAS 207, 225 (2015).

176. CAROLINE VARIN & DAUDA ABUBAKAR, *VIOLENT NON-STATE ACTORS IN AFRICA: TERRORISTS, REBELS AND WARLORDS* 5 (2017) (explaining that by definition violent non-state actors, including terrorists, rebels and warlords, are “considered to be illegitimately exercising violence”).



Second, state obligations under the GCs also apply to NSAs, creating criminal responsibility for NSAs.<sup>177</sup> Third, because the GCs and humanitarian law are generally considered customary international law, they are as applicable to NSAs as they are to state actors.<sup>178</sup> Finally, by signing humanitarian agreements with NSAs, states can legitimize NSAs use of force by only restricting the ways that NSAs can use force against states, in the process nullifying the first point, the monopoly of states to use force.<sup>179</sup>

In internal armed conflicts, territorial states enjoy a monopoly in the use of force and have the jurisdiction to hold criminals, such as NSAs, responsible during armed conflicts.<sup>180</sup> By contrast, in international armed conflicts, the International Criminal Court (ICC) has universal jurisdiction to prosecute NSAs for violating humanitarian law.<sup>181</sup> In internal armed conflicts, national courts and the state are unable to enforce their laws against NSAs, and in international armed conflicts, international institutions, such as the ICC, are unable to enforce humanitarian law in the context of terrorists and NSAs.<sup>182</sup> In both circumstances, the main problem remains that NSAs—including terrorists, rebels, mercenaries, and insurgents—are outlaws who do not conform to or comply with any national or international law.<sup>183</sup> This lack of legal restriction makes the employment and use of NSAs more effective.<sup>184</sup> NSAs are formidable forces that can bring targeted states to their knees by using asymmetric tactics, or by excessively violating humanitarian law and directly targeting civilians and civilian objects.<sup>185</sup> So, is there no way to stop these atrocities and enforce humanitarian law against the use of force by NSAs?

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177. Bellal et al., *supra* note 175, at 55.

178. *Id.*

179. See Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-state Armed Groups*, 45 TEX. INT'L L.J. 297, 309–16 (2009); *IHL to Non-State Actors*, *supra* note 36, at 22.

180. JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 306 (Wm. B. Eerdmans Publishing, 2010).

181. See Héctor Olásolo, *The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor*, 5 INT'L CRIM. REV. 121, 137 (2005); Londoño-Camargo, *supra* note 175, at 223; *IHL to Non-State Actors*, *supra* note 36, at 21.

182. Gentian Zyberi, *Enforcement of International Humanitarian Law*, in *HUMAN RIGHTS INSTITUTIONS, TRIBUNALS AND COURTS: LEGACY AND PROMISE* 377, 381–94 (Gerd Oberleitner ed., 2018).

183. *Id.*

184. See *Hybrid Warfare*, *supra* note 37, at 186.

185. *Id.* at 8–9.

If the issue of applying IHL to NSAs hinges upon compliance with and enforcement of the GCs,<sup>186</sup> then the only plausible and rational solution would be to aid and support the territorial states' law enforcement agencies in fighting and prosecuting NSAs. To that end, all support to rebels, insurgents, terrorists, mercenaries, and NSAs must be outlawed and put to an end in practice. Aid and support to NSAs in cross-border states was technically outlawed by the International Court of Justice (ICJ) in the *Nicaragua* case.<sup>187</sup> Yet, aggressive states that yearn for warfare to advance their political interests support and aid insurgent groups by exploiting the lacunae of the international justice system, which lacks a sound system to enforce humanitarian law against NSAs.<sup>188</sup>

## 2. What Does the Employment of NSAs Generate?

The destabilization in the Middle East, due to ongoing wars, was exacerbated by Western coalition partners choosing to aid and support rebels and insurgents in the region.<sup>189</sup> These groups do not comply with IHL and use illegal force.<sup>190</sup> If NSAs, such as insurgents or rebels, are supported by invading states, it becomes more difficult for territorial states to enforce the law and fight NSAs. Additionally, if the main purpose of the GCs is to make warfare more humane,<sup>191</sup> then foreign states must choose to support territorial states in their fight against insurgencies and rebel groups rather than aiding NSAs for political purposes. Similarly, the ICJ and ICC must also prosecute states sponsoring NSAs in territorial states to stop the incessant violations of the GCs in modern warfare.

The root cause of increases in violence, terrorism, and destabilization of regions is the use of asymmetric war tactics where the employment of NSAs to use force lies in the center.<sup>192</sup> The use of mercenaries and support for insurgent groups, inadvertently, also increases terrorism and violations

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186. See Kelley, *supra* note 9, at 33; see also Krieger, *supra* note 9, at 8; see also Zyberi, *supra* note 182.

187. See Nicaragua, *supra* note 75, at 64 (effective control test).

188. See LUIZ ALBERTO MONIZ BANDEIRA, *THE SECOND COLD WAR: GEOPOLITICS AND THE STRATEGIC DIMENSIONS OF THE USA* 246, 291–95 (Américo Lucena Lage trans., Springer Int'l Pub. 2017); THEODOR MERON, *THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH: SELECTED SPEECHES* 68 (2011); Londoño-Camargo, *supra* note 175, at 223; *IHL to Non-State Actors*, *supra* note 36, at 21.

189. See, e.g., BANDEIRA, *supra* note 188, at 293.

190. VARIN & ABUBAKAR, *supra* note 176, at 5.

191. EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 177 (2016) (explaining the purpose of IHL); see also PRETORIA UNIVERSITY LAW PRESS, *HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA: A READER* 163 (Christof Heyns & Karen Stefiszyn eds., 2006).

192. *Hybrid Warfare*, *supra* note 37, at 174.

of humanitarian law because the NSAs' use of asymmetric tactics does not conform to any law.<sup>193</sup> Hypothetically, if all aid to NSAs by agencies and invading states was stopped and territorial states were supported by foreign governments to fight and prosecute NSAs, then the enforcement and lawfulness of the GCs would surely improve. When this analysis is applied to Syrian warfare, Western countries must ideally cease support to Syrian rebel and insurgent groups because support to Syrian rebels destabilizes the whole region, worsens humanitarian conditions, and makes it difficult for the Syrian law enforcement agencies to control violence, prosecute perpetrators, and fight terrorism.<sup>194</sup> The ICJ and the ICC must prosecute sovereign states that are responsible for sponsoring NSAs for political purposes of regime change. The Western coalition partners and the international community should instead encourage the Syrian government to enforce humanitarian law by prosecuting NSAs for war crimes and illegal use of force.<sup>195</sup>

### 3. *The Use of Mercenaries*

In the strategic need to subvert the conventional military means of warfare such as firepower, airpower, ethics, and morality, asymmetric methods are employed to deliberately target civilians, cause excessive destruction, and evade enforcement of war crimes or humanitarian law under the GCs.<sup>196</sup> To meet this end, both weak and powerful states employ mercenaries/insurgent groups to serve their political interests. Most notably, Western powers in the Middle East used rebel groups to change the Assad regime in Syria and the Qaddafi regime in Libya.<sup>197</sup> Mercenaries are mainly used to avoid attribution and retribution as a form of hybrid warfare.<sup>198</sup> This is because, to use force in self-defense, a victim state must prove that the aggressive state was in full control of the NSAs or mercenaries that conducted the offensive armed attack.<sup>199</sup> So, the employment of mercenaries dressed as civilians helps states circumvent the legal requirements of the full-control test in international law by attacking victim states without any

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193. See *IHL to Non-State Actors*, *supra* note 36, at 9, 17–18.

194. See *Principle of Proportionality*, *supra* note 3.

195. *IHL to Non-State Actors*, *supra* note 36.

196. See *Hybrid Warfare*, *supra* note 37, at 178.

197. See *Principle of Proportionality*, *supra* note 3.

198. See Mosquera & Bachmann, *supra* note 35, at 11, 25; see also Ashraf, *supra* note 35, at 7; see also European Commission, *supra* note 39.

199. See Nicaragua, *supra* note 75, ¶¶ 105–15 (effective control test).

possibility of being attributed to the attack.<sup>200</sup> This issue regarding diffused responsibility is known as “the problem of many” or “slippery hands” because when there are many hands involved in the hierarchy of mercenaries, the responsibility is conveniently diffused to avoid attribution.<sup>201</sup> Mercenaries are also employed because they are cheaper to maintain than conventional armed forces; the chief reason for mercenaries to commit to assignments is money or economic benefits.<sup>202</sup> For this reason, Michael Walzer deems the use of mercenaries as dirty and believes that one of the biggest moral problems concerning the employability of mercenaries is the lack of accountability.<sup>203</sup>

Another reason to deploy mercenaries is to avoid a conventional military standoff.<sup>204</sup> Powerful countries use mercenaries in situations where armed intervention is deemed unlawful in accordance with the international law of using force, whereas weak states use mercenaries to balance the inequality in armed power when fighting a powerful enemy.<sup>205</sup> Some proponents of the use of mercenaries for weaker states, such as David Rodin, believe that humanitarian law under the GCs must be relaxed for weak states using mercenaries to level the battlefield between weak victim states and strong aggressive states in an effort to achieve a chess-like equal-opportunities situation that allows each state the same chance to succeed.<sup>206</sup> For this reason, Rodin advocates for the relaxation of the GCs’ humanitarian rules for weaker parties to a conflict.<sup>207</sup> The problem with this is that each state’s military strength, technology, and training vary drastically, rendering equal opportunities impossible. Rodin also argues that guerilla tactics should be allowed because they are more efficient in fighting a war.<sup>208</sup> However, the argument of efficiency is not enough on its own to justify a relaxation from humanitarian law without moral justification. If humanitarian law under the GCs is relaxed for any party, the lives of innocent people will be affected. Humanitarian law is enshrined in the GCs to protect the lives and property of innocent civilians who do not take part in an armed

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200. See Mosquera & Bachmann, *supra* note 35, at 25; see also Ashraf, *supra* note 35, at 7; see also European Commission, *supra* note 39.

201. KATERI CARMOLA, PRIVATE SECURITY CONTRACTORS AND NEW WARS: RISK, LAW, AND ETHICS 138 (2010).

202. See UNIVERSITY OF BARCELONA, LAW SCHOOL, BARCELONA, SPAIN, PUBLIC INTERNATIONAL LAW AND HUMAN RIGHTS VIOLATIONS BY PRIVATE MILITARY AND SECURITY COMPANIES 72–73 (Helena Torroja ed., 2017) [hereinafter Torroja].

203. See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 160–62 (1973); see also CARMOLA, *supra* note 201, at 136–37.

204. See MCFATE, *supra* note 172, at 125.

205. *Id.* at 128–29; see also Rodin, *supra* note 38.

206. Rodin, *supra* note 38, at 158–59.

207. See *id.* at 159.

208. See *id.* at 156, 158.

conflict.<sup>209</sup> If this protection is lifted for the sake of efficiency, it will translate into more casualties and destruction. If the arguments of a chess-like situation and efficiency of guerilla tactics are based on moral reasons of fairness for weaker parties to a conflict,<sup>210</sup> then what about justice and fairness for the innocent people who will be affected by lifting the protection of humanitarian law?

#### 4. Relaxation of the GCs

While Rodin advocates for the legalization of guerilla tactics for weaker states due to its efficiency, Fritz Allhoff supports “lethal covert action” for armed forces so that they can fight terrorists and NSAs.<sup>211</sup> Allhoff argues that the use of efficient guerilla tactics by terrorists and NSAs puts armed forces playing by the humanitarian guidelines at a disadvantage.<sup>212</sup> Therefore, a state’s armed forces should also be allowed to violate humanitarian law by using irregular tactics as a way to equalize their battlefield footing against terrorists as a matter of necessity and exceptionalism.<sup>213</sup> Allhoff employs the language of necessity to advocate the use of torture, assassination, and violation of the due process of law, while explicitly noting that these practices are proscribed by international law.<sup>214</sup> The problem, however, is that if people are not identified properly during targeted assassinations or by violations of due processes of law, innocent people may be killed or imprisoned.<sup>215</sup>

The world has witnessed the outcome of assassination of targets through drone attacks—a disproportionate killing of innocent civilians.<sup>216</sup> Crawford’s research noted that 10 innocent people die for every assassination attempt by drones.<sup>217</sup> This means if humanitarian law is relaxed for armed forces to fight terrorists and NSAs, then the protection offered to civilians and innocent people will be lost and, subsequently, the current situation of civilian

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209. Geneva Conventions Protocol I, *supra* note 51.

210. See Rodin, *supra* note 38, at 158.

211. See *id.* at 156; ROUTLEDGE, *supra* note 9, at 204–05.

212. See ROUTLEDGE, *supra* note 9, at 228.

213. See generally Allhoff, *supra* note 9 (discussing exceptionalism, which grants permission for soldiers in active combat to use lethal force).

214. See ROUTLEDGE, *supra* note 9, at 204–06, 215.

215. See *Drone Attacks*, *supra* note 116, at 102.

216. *Id.* at 104.

217. CRAWFORD, *supra* note 116; see *Drone Attacks*, *supra* note 116, at 104.

catastrophe where millions of innocent people are affected by wars will continue to worsen.<sup>218</sup>

The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries 1989 explicitly criminalized the use, financing, and training of mercenaries.<sup>219</sup> Yet, mercenaries are still heavily employed by both powerful and weak parties in modern warfare.<sup>220</sup> To tackle the prevailing humanitarian crises caused by the use of mercenaries in contemporary warfare tactics, the international community must come together to adopt a new universal convention to regulate actions against the states' divergent methods of hybrid warfare without accountability.<sup>221</sup> Section II.E of this Article will elaborate on the challenges faced by the GCs by another form of hybrid warfare—cyberwarfare.

### *E. Cyberwarfare*

As the nature of conflict has evolved, states and NSAs have started to employ cyberspace as a new battlefield by weaponizing advances in technology. Cyberattacks do not respect international borders, and civilians are caught in the digital crossfire of misinformation campaigns and cyberattacks on critically important infrastructure.<sup>222</sup> Untraceable cyberattacks can take place in a matter of seconds by targeting data centers, clouds, server farms, and intelligent infrastructure, including power grids, without the world knowing about it for a year.<sup>223</sup> Cyberattacks, such as the WannaCry attack of 2017, highlight the importance of reflecting on international laws to protect the security of the civilian population and infrastructure.<sup>224</sup>

#### *1. Calls for a Digital Geneva Convention*

Given the fact that the GCs were promulgated to protect civilians and civilian objects during armed attacks, there have been calls for a Geneva Convention 5.0—“A Digital Geneva Convention”—particularly to protect

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218. See *Principle of Proportionality*, *supra* note 3, at 407.

219. The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art. 2, Dec. 4, 1989, 2163 U.N.T.S. 1-37789.

220. See, e.g., MCFATE, *supra* note 172, at 124–34; see also Rodin, *supra* note 38.

221. See Torroja, *supra* note 202, at 78; see also Mosquera & Bachmann, *supra* note 35, at 6–8, 25–26; see also Ashraf, *supra* note 35, at 2–6; see also European Commission, *supra* note 39.

222. Guay & Rudnick, *supra* note 9.

223. James Carlini, *Geneva Convention in Cyberwarfare? Don't Count on It*, INT'L POL'Y DIGEST (Aug. 6, 2017), <https://intpolicydigest.org/geneva-convention-cyberwarfare-don-t-count/> [<https://perma.cc/Z9DS-ZFAP>].

224. Guay & Rudnick, *supra* note 9.

civilians and civilian objects from cyberattacks.<sup>225</sup> In February 2017, at an RSA security conference in San Francisco, Microsoft President Brad Smith introduced the idea of developing protocols by giving the private sector a stronger role in humanitarian work to protect the civilian population and critical infrastructure because tech giants are already aware of cyber threats and possess the technical know-how to defend against them.<sup>226</sup> Guay and Rudnick propose that, to cater to cyber threats and protect civilians who are already vulnerable, a new humanitarian framework should be formed by routing humanitarian assistance to private tech giants.<sup>227</sup> Leigher also believes that a new convention, rules of engagement, and guidelines on cyberwarfare should be formed to protect the general public and states from cyberattacks.<sup>228</sup>

In 2018, the U.N. Secretary-General António Guterres emphasized that the international community must address the lack of rules in international law for confronting cyberwars.<sup>229</sup> He claimed that “we have not been able to discuss whether . . . the Geneva Conventions appl[ies] to cyber war or whether . . . international humanitarian law applies to cyberwar.”<sup>230</sup> On another occasion, in Lisbon, he asserted that “episodes of cyber warfare already exist [and] there is no regulatory scheme for that type of warfare [because] it is not clear how the Geneva Convention[s] or humanitarian laws apply.”<sup>231</sup> For these reasons, Guterres proposed that the First Committee of the U.N. General Assembly should be used to seriously address the applicability of the GCs and humanitarian law on the issues of cyberwar.<sup>232</sup>

Guterres’s assertions raised a few eyebrows since rules to address cyberwarfare already exist.<sup>233</sup> He undermined his own call for the international law to not apply to cyberwarfare when he claimed that cyberwar was

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225. *Id.*

226. *Id.*

227. *Id.*

228. Bill Leigher, *It’s Time for a Cyber Geneva Convention*, ATLANTIC COUNCIL (Mar. 6, 2019), <https://www.atlanticcouncil.org/blogs/new-atlanticist/it-s-time-for-a-cyber-geneva-convention> [https://perma.cc/R2W5-RY4Z].

229. David P. Fidler, *The UN Secretary-General’s Call for Regulating Cyberwar Raises More Questions Than Answers*, COUNCIL ON FOREIGN RELS. (Mar. 15, 2018, 1:51 PM), <https://www.cfr.org/blog/un-secretary-generals-call-regulating-cyberwar-raises-more-questions-answers> [https://perma.cc/VU8D-VMDB].

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.*

violating humanitarian and human rights law without accountability.<sup>234</sup> The laws he claimed were violated are the applicable to cyberwarfare. There has been extensive discussion on the application of humanitarian law, including the GCs, and the law of using force against cyberwarfare.<sup>235</sup> For instance, the U.N. Group of Governmental Experts (GGE) agreed that the international law of using force applies in cyberspace, which led to the integration of cyber operation analysis into states' law manuals.<sup>236</sup> Similarly, the Tallinn Manual and the International Committee of the Red Cross discussed the scenarios of cyberattacks on critically important state infrastructure to address questions and the applicability of international humanitarian law and international law of using force to combat it.<sup>237</sup> While instances of cyber interference in state elections do not attract the applicability of humanitarian laws, they do apply human rights law and other critical principles of sovereignty and nonintervention.<sup>238</sup>

Guterres is not the first person to demand the stronger role for international law on the issue of cyberwarfare, nor will he be the last.<sup>239</sup> The key, however, is to not blur the lines of peace and war or ignore discussions in the international community regarding the implications and applicability of international law to cyberwar.<sup>240</sup> Oftentimes, the chief concern for those like Guterres is cybersecurity rather than cyberwar.<sup>241</sup> Tarah Wheeler also erroneously believes that no rules apply to cyberwar and confuses cybersecurity with cyberwar.<sup>242</sup> Wheeler claims that outsourcing cybersecurity to the private sector has exposed states to foreign cyberattacks, resulting in a situation where international law is not clear about what constitutes an armed attack in cyberspace.<sup>243</sup> Similarly, Wheeler believes that assuming conventional international law applies to cyberwarfare is flawed.<sup>244</sup> She adds that no international law requires other states to take precautions to

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234. *Id.*

235. Waseem Ahmad Qureshi, *Cyberwarfare: A Tortuous Problem for the Law of Armed Conflicts*, 28 TULANE J. INT'L & COMPAR. L. 1 (2019) [hereinafter *Cyberwarfare*].

236. Fidler, *supra* note 229.

237. *Id.*; INT'L GRP. OF EXPERTS, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL] (a non-binding academic study on the application of international laws on cyberwarfare).

238. Fidler, *supra* note 229.

239. *Id.*

240. *Id.*

241. *Id.*

242. Tarah Wheeler, *In Cyberwar, There Are No Rules*, FOREIGN POL'Y (Sept. 12, 2018, 8:00 AM), <https://foreignpolicy.com/2018/09/12/in-cyberwar-there-are-no-rules-cyber-security-war-defense/> [https://perma.cc/34AJ-EF39].

243. *Id.*

244. *Id.*



assess civilian casualties and collateral damage during a cyberoperation.<sup>245</sup> Waugh also believes that international law is not directly applicable to cyberwarfare, and that the world only applies existing redundant laws and regulations.<sup>246</sup> These laws are essentially state-centered and do not even define what constitutes an armed attack or who is considered a belligerent.<sup>247</sup> Therefore, “A Digital Geneva Convention” is long overdue to define new cyber problems and propose solutions.<sup>248</sup>

## 2. Application of Existing Laws

It is naive to believe that the international law of using force and humanitarian law under the GCs do not apply to cyberwarfare since the international community has put forth a considerable amount of effort into interpreting and applying the existing law on cyberwar.<sup>249</sup> For instance, the Tallinn Manual provides a detailed overview of applicable guidelines on the ramifications of cyberattacks and humanitarian protection offered to civilians and civilian objects.<sup>250</sup> Similarly, the U.S. Department of Defense Field Manual and the U.K. Joint Service Manual on Armed Conflicts explicitly acknowledge that these international agreements apply to cyberwars.<sup>251</sup> Several scholars also highlight the *jus in bello* and *jus ad bellum* principles to cyberwarfare.<sup>252</sup>

Furthermore, the Tallinn Manual provides a comprehensive list and explanation of what constitutes a legitimate target in cyberwarfare in the context of the principle of distinction under the GCs.<sup>253</sup> This includes “computers, computer networks, and cyber infrastructure” that contribute

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245. *Id.*

246. Steve Waugh, *Geneva Conventions for Cyber Warriors Long Overdue*, NAT'L DEF. MAG. (Mar. 18, 2020), <https://www.nationaldefensemagazine.org/articles/2020/3/18/geneva-conventions-for-cyber-warriors-long-overdue> [https://perma.cc/SBG2-E24X].

247. *Id.*

248. *See id.*

249. Iain Sutherland et al., *The Geneva Conventions and Cyber-Warfare*, 160 RUSI J. 30, 30 (2015).

250. TALLINN MANUAL, *supra* note 237.

251. Sutherland et al., *supra* note 249.

252. *See id.* at 31; *Jus ad Bellum and Jus in Bello*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/jus-ad-bellum-jus-in-bello> [https://perma.cc/AC3T-7N48] (explaining that *jus in bello* is international humanitarian law that governs the conduct of warfare, while *jus ad bellum* determines whether war is permissible).

253. TALLINN MANUAL, *supra* note 237.

to military actions.<sup>254</sup> This list, however, does not mean that the distinction of what constitutes a legitimate target is straightforward or that international humanitarian law under the GCs warrants no further consideration to form more detailed guidelines.<sup>255</sup> For instance, some infrastructure—such as medical databases that keep records of soldiers or the storage of both military and civil information on the cloud for interdependencies and interconnection reasons—can serve the dual purpose of aiding military and civilian objectives, thus reverting their purposes back and forth, causing problems of graduality.<sup>256</sup> Ideally, military and civilian systems should be separate so that a cyberattack targeting the military does not cause damage to civilians.

Additionally, the Tallinn Manual protects infrastructure, such as dams, dikes, and nuclear sites, from cyberattacks so civilians are not caught in the collateral damage.<sup>257</sup> This is particularly notable because cyberattacks have historically targeted sites that contain dangerous forces, such as the attack on the Iranian civilian nuclear facility using the Stuxnet virus.<sup>258</sup>

The international law on cyberwar should be simple. If the results of a cyberattack are the same as those of a kinetic attack, then there is no need to reach a different conclusion. For example, in the attack on the supervisory control and data acquisition system (SCADA), which releases the water of a dam, it should not matter whether the destruction by water release was caused by a drone attack or a cyberattack.<sup>259</sup> The same reasoning can be used to apply humanitarian principles enshrined in the GCs to analyze the repercussions of cyberattacks. For instance, civilian objects and lives are protected by the principle of distinction under the GCs, so an attack destroying civilian objects or lives would violate the principle of distinction regardless of whether kinetic or cyber means were employed.<sup>260</sup> Likewise, the same result-oriented reasoning can be used to apply the principles of precaution and proportionality.<sup>261</sup>

The main problem, however, remains that NSAs, such as terrorists, do not respect international and humanitarian laws, so it is likely that they

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254. *Id.* at 125, 134; Sutherland et al., *supra* note 249, at 31–32.

255. Sutherland et al., *supra* note 249, at 31.

256. *Id.* at 31–32.

257. *Id.* at 33; TALLINN MANUAL, *supra* note 237, at 143.

258. Sutherland et al., *supra* note 249, at 33.

259. *Id.* at 32.

260. Geneva Conventions Protocol I, *supra* note 51, art. 48; Geneva Conventions Protocol II, *supra* note 105, art. 13; TALLINN MANUAL, *supra* note 237, at 125, 134.

261. *See* Geneva Conventions Protocol I, *supra* note 51, art. 51(4), 57(2); *see also* *Cyberwarfare*, *supra* note 235, at 29–33 (for different approaches of applying international law on cyberwarfare).

will never sign or abide by any agreement that wishes to regulate cyberwars.<sup>262</sup> Therefore, the only reasonable step to protect a target from cyberattacks is to increase cybersecurity because tanks and F-35s will not be able to defend against a cyberattack by a single hacker terrorist.<sup>263</sup> For these reasons, Leigher proposes that cybersecurity can be improved by increasing Department of Defense (DoD) security, establishing the internal structure of security agencies, and enhancing the cyber capabilities of joint armed forces.<sup>264</sup> Furthermore, to strengthen cybersecurity, infrastructure, and the protection of civilian objects, Sutherland, Xynos, Jones, and Blyth recommend using symbols, emblems, and warning banners—in physical and digital forms, as they are used to protect and denote medical facilities and armed forces—to mark neutral objects.<sup>265</sup> In the meantime, there must be other ways to efficiently induce compliance and enforce humanitarian law enshrined in the GCs. Accordingly, Section II.F will elaborate on recommendations to induce compliance and enforce GCs among warring states.

#### *F. Enforcement and Compliance*

Violations of the GCs, such as war crimes, prompt individual and state criminal responsibilities.<sup>266</sup> Zyberi noted that non-international armed conflicts, and therein the use of national and international force by NSA groups controlling large parts of territories, are the main cause of the proliferation of violence and indiscriminate violations of humanitarian law.<sup>267</sup> While humanitarian law chiefly applies to international armed conflicts, the nature of customary international law makes part of the GCs equally applicable to non-international armed conflicts.<sup>268</sup> The enforcement mechanisms for humanitarian law are domestic, regional, and international, with both judicial and nonjudicial natures.<sup>269</sup> But the states retain the duty to enforce humanitarian law under Article 1 of the 1949 Geneva Conventions.<sup>270</sup> To enforce IHL, states take monitoring, preventive, punitive, and supervisory

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262. Sutherland et al., *supra* note 249, at 31; Carlini, *supra* note 223.

263. Carlini, *supra* note 223.

264. Leigher, *supra* note 228.

265. Sutherland et al., *supra* note 249, at 30–31.

266. Zyberi, *supra* note 182, at 393.

267. *Id.*

268. *Id.*

269. *Id.*

270. Geneva Convention I, *supra* note 156.

steps through domestic courts.<sup>271</sup> Likewise, regional human rights organizations have managed to help states enforce IHL by developing standards of conduct with the assistance of courts and commissions, despite lacking jurisdiction.<sup>272</sup>

International criminal courts and tribunals that focus on individual criminal liability for war crimes have performed important functions with regard to responsibility, accountability, and reconciliation against violations of the GCs.<sup>273</sup> For instance, tribunals for the former Yugoslavia and Rwanda serve as deterrents for breaches of the GCs.<sup>274</sup> Therefore, according to Green, it is likely that similar ad hoc tribunals and international criminal courts will be called upon for post facto process and punishment.<sup>275</sup> Yet, it is vital that the domestic criminal courts must strengthen the functioning of international tribunals and criminal courts.<sup>276</sup> The most important role for the enforcement of humanitarian law is left to United Nations organs at the international level, but this is limited by the permeating selectivity of power politics calculations,<sup>277</sup> which has left the contemporary world with unpunished and untethered violations of humanitarian law.<sup>278</sup>

### *1. Inducing Compliance*

The problem of nonenforcement of humanitarian law can be handled by inducing compliance among NSAs, which are increasingly trending towards violence in international and non-international armed conflicts.<sup>279</sup> Actors other than concerned states can induce compliance with humanitarian law in war-torn areas to invigorate a sense of neutrality.<sup>280</sup> In this regard, international organizations play an important role in enforcing humanitarian

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271. Zyberi, *supra* note 182, at 393.

272. *Id.*

273. *Id.*

274. *Id.*

275. L. C. Green, *Enforcement of International Humanitarian Law and Threats to National Sovereignty*, 8 J. CONFLICT & SEC. L. 101, 130 (2003).

276. Zyberi, *supra* note 182, at 393.

277. *Id.*

278. *Id.* at 17–18.

279. Krieger, *supra* note 9, at 34 (discussing inducement of compliance); Phil Williams, *Violent Non-State Actors and National and International Security*, INT'L RELS. & SEC. NETWORK (2008), <https://www.files.ethz.ch/isn/93880/vnsas.pdf> [<https://perma.cc/MEV2-XYUK>] (discussing the increasing role of non-state actors—such as terrorists, warlords, and insurgents—in national and international violence); Christopher P. Dallas-Feeney, *Violent Non-State Actors in the Middle East: Origins and Goals*, E-INTERNATIONAL RELS. (May 28, 2019), <https://www.e-ir.info/2019/05/28/violent-non-state-actors-in-the-middle-east-origins-and-goals/> [<https://perma.cc/JC3S-37RV>] (discussing major violent non-state actors that mount campaigns of violence in the Middle East).

280. Dallas-Feeney, *supra* note 279.

law.<sup>281</sup> But the political willingness of their member states determines the efficacy of measures for inducing compliance.<sup>282</sup> Thus, NSAs are widely deployed to expedite the resolution of armed conflicts at the expense of excessive violations of the GCs where international organizations are unwilling to act. NSAs perceive international organizations to be neutral actors that can contribute to inducing compliance by adopting compliance mechanisms based on traditional motives and logic of consequences.<sup>283</sup>

The mechanisms of inducing compliance independently reinforce each other.<sup>284</sup> Since hardcore and regular violators are not convinced by persuasion alone, the threat of coercion must be used along with collaborative dialogue and adverse legislation to induce compliance.<sup>285</sup> Compliance-inducing mechanisms and persuasion work more smoothly if they are complemented by instruments of coercive legal enforcement.<sup>286</sup> If ad hoc efforts are directed at isolated contexts, the efficiency of inducing compliance will be much lower.<sup>287</sup> By contrast, legal enforcement will benefit from persuasion, if both are applied concurrently.<sup>288</sup> The instruments chosen to induce compliance and persuasion in addition to coercive legal enforcement legislation depend on the choice of an inducer.<sup>289</sup> This choice will mainly be contingent upon considerations of the addressee's behavior, legal competences, social deliberation, political alliances and dynamics, geopolitical shifts, and the distinct context of the conflict zone where it is being applied.<sup>290</sup>

However, it is pertinent to note that, unlike NSAs held captive by a domestic legal regime, armed NSA groups can only be dealt with by enforcement of international law during an armed conflict because domestic law cannot be enforced against armed bands of NSAs fighting the same

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281. Zyberi, *supra* note 182, at 383.

282. Krieger, *supra* note 9, at 34; see Dep't for Int'l Dev., *Understanding Political Will*, Gov.UK (Jan. 1, 2004), <https://assets.publishing.service.gov.uk/media/57a08cbfed915d622c001551/R8236Appendix3.pdf> [<https://perma.cc/4A7J-9UJV>] ("When a political actor is willing to commit precious time, energy, funds and political capital to achieve change—when [the political actor] is prepared to take risks and to incur opportunity costs to that end—we can safely conclude that [the political actor] is exhibiting 'political will.' The Individual and the Collective.").

283. Krieger, *supra* note 9, at 34.

284. *Id.* at 34–35.

285. See Kelley, *supra* note 9, at 26–32; Krieger, *supra* note 9, at 34–35.

286. Krieger, *supra* note 9, at 34–35.

287. *Id.* at 35.

288. *Id.* at 34–35.

289. *Id.* at 35.

290. *Id.*

national legal system.<sup>291</sup> It is essential to engage with armed groups to improve the situation of civilians caught in armed conflict, which in turn enforces humanitarian law.<sup>292</sup> Of course, in such engagement, state interests should be accommodated.<sup>293</sup> The empirical data has found that the efforts of the international community to protect civilian lives may have serious consequences for civilians living under armed conflict if these efforts work against political development and the conflict dynamics of the concerned area.<sup>294</sup> Therefore, these findings must also be considered and applied during the engagement and application of compliance tactics.<sup>295</sup>

If the goal is to increase the effectiveness and compliance of the GCs, productive dialogue must be pursued to engage armed NSAs.<sup>296</sup> The unwillingness of political interests to engage NSAs in dialogue will not reduce the intensity of violence in contemporary warfare.<sup>297</sup> In fact, the political will to avoid engaging in peaceful dialogue with NSAs will only worsen the suffering of civilians during armed conflicts.<sup>298</sup> In a 2010 report, the former U.N. Secretary-General insisted that member states must “consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for humanitarian purposes.”<sup>299</sup> Accordingly, as ICRC President Jakob Kellenberger rightly noted, “[T]he lack of compliance of non-state armed groups is a very serious problem that we need to address, reinforcement of international law rules and mechanisms lies in the hands of States.”<sup>300</sup> For these reasons, Kelley advocates relaxing the humanitarian law enshrined in the GCs to engage NSAs and weakening the humanitarian consequences of armed conflicts on civilian lives.<sup>301</sup> However, if humanitarian law is relaxed, the protection offered for civilian lives under the GCs will be lost or at least diminished. So, if the goal is to protect civilians, it seems oxymoronic and hypocritical to relax the protection offered to civilian lives.

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291. Sassóli, *supra* note 9, at 63.

292. Krieger, *supra* note 9, at 35.

293. *Id.*

294. *Id.*

295. *Id.*

296. Kelley, *supra* note 9, at 32.

297. *Id.* at 32–33.

298. *Id.* at 33.

299. U.N. Secretary-General, *Report Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 57, U.N. Doc. S/2010/579 (Nov. 11, 2010).

300. Jacob Kellenberger, President, Int’l Comm. Red Cross, Address at the Ministerial Working Session for the 60th Anniversary of the Geneva Conventions: Ensuring Respect for International Humanitarian Law in a Changing Environment and the Role of the United Nations (Sept. 26, 2009).

301. Kelley, *supra* note 9, at 33.

Kelley deems IHL ill-fitting, slow, and ineffective in modern warfare involving NSAs and asymmetric tactics because willingness to comply depends on the perceived relevance and its stipulations.<sup>302</sup> Thus, Kelley suggests that new laws must be formed to protect NSAs from domestic laws, so that they are induced to comply with IHL.<sup>303</sup> Kelley also proposes that, since international conventions cannot be signed by NSAs for legal reasons, unilateral deeds of commitment, memoranda of understanding, and action plans by NSAs should be formed to reflect their understandings and military commitments.<sup>304</sup> Sassóli also offers a similar solution, that a simple and short code of conduct, tailored to the context of each NSA, should be designed to “ensure military discipline while respecting local culture and the civilian population, while remaining in compliance with international norms.”<sup>305</sup> Likewise, to promote compliance among NSAs, national broadcast and social media should be used to endorse an understanding of what humanitarian law expects in armed conflicts, to ensure that NSAs recognize and have a basic knowledge of civilian protection.<sup>306</sup> Often, NSAs are oblivious about their obligations under IHL.<sup>307</sup>

### III. CONCLUSION

Although GCs have immensely improved conditions for prisoners of war and medical operations during armed conflicts, in considering the effectiveness of the regime, the scale of humanitarian law violations during armed conflicts under the aegis of the GCs dwarfs the size of their success.<sup>308</sup> Tannenwald shows that, owing to the magnitude and sophistication of means of using force, the effects of wars on civilian populations have become harsher in modern warfare than they were before the GCs.<sup>309</sup> Similarly, Randolph Martin believes that “civilian population displacement and

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302. *Id.* at 26–28.

303. *Id.* at 27.

304. *Id.* at 29.

305. Sassóli, *supra* note 9, at 64; ANNYSSA BELLAL & STUART CASEY-MASLEN, GENEVA ACADEMY OF INT'L & HUM. RIGHTS, RULES OF ENGAGEMENT: PROTECTING CIVILIANS THROUGH DIALOGUE WITH ARMED NON-STATE ACTORS 35 (Oct. 2011), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf> [<https://perma.cc/6HSN-DPET>].

306. Kelley, *supra* note 9, at 30.

307. *Id.* at 29–30.

308. TANNENWALD, *supra* note 1, at 5.

309. *Id.*

casualties have increasingly become the purpose rather than a by-product of war.”<sup>310</sup> Since the 1990s, civilians makeup 80% to 90% of war victims compared to only 5% during World War I.<sup>311</sup> Some analysts claims that the number of civilian and military deaths during World War II were equal, and the international community agrees that, since then, the number of civilian victims has exceeded the military casualties.<sup>312</sup> This trend of increasing numbers of civilian victims coincides with the advent of the GCs, which implies that the GCs produce a counterproductive effect.<sup>313</sup>

For instance, the Afghan War proved to be disproportionate to its military objectives.<sup>314</sup> It counterproductively increased terrorism, destabilized Afghanistan, and inadvertently decreased U.S. security at the cost of billions of dollars, hundreds of thousands of lives, the destruction of essential services in Afghanistan, and more than a million war crimes.<sup>315</sup> Similarly, the Iraq War was not only unlawful under the U.N. Charter, but also grossly violated humanitarian law under the GCs.<sup>316</sup> The Iraq War cost 190 million dollars per day, caused the deaths of half a million people, displaced more than three million people, destroyed Iraqi infrastructure and governance, and increased violence.<sup>317</sup> The Syrian War also increased violence and terrorism in Syria, destabilizing the whole region.<sup>318</sup> Its consequences have left two million people injured, and has caused the killing, kidnapping, and torturing of millions more.<sup>319</sup> More than five million Syrians have become registered refugees, and 7.6 million (almost half of the Syrian population) is displaced internally and internationally.<sup>320</sup>

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310. *Id.*

311. *Id.*

312. *Id.* at 6.

313. *Id.*

314. *Principle of Proportionality*, *supra* note 3, at 411.

315. *See generally* REICH & DOMBROWSKI, *supra* note 46, at 36; Al Jazeera English, *supra* note 42; Crawford, *supra* note 54 (discussing the costs of war for Afghanistan); *see generally* General Security Situation in Afghanistan, *supra* note 66 (state of Afghanistan after decades of war); *Why Afghanistan Is More Dangerous Than Ever*, *supra* note 48; Gannon, *supra* note 49.

316. *Lessons of Iraq War*, *supra* note 61; *see generally* *Principle of Proportionality*, *supra* note 3, at 412–16.

317. REICH & DOMBROWSKI, *supra* note 46, at 36; Neta C. Crawford, *Iraqi Civilians*, WATSON INST. INT’L & PUB. AFF.: COSTS OF WAR (Nov. 2018), <https://watson.brown.edu/costsofwar/costs/human/civilians/iraqi> [<https://perma.cc/2JHE-9UXZ>]; Amnesty Int’l, *supra* note 66; GARRIAUD-MAYLAM, *supra* note 66; UNHCR Returns to Iraq, *supra* note 66; McMahan, *supra* note 66; *see generally* Al Jazeera English, *supra* note 42.

318. *See* GARRIAUD-MAYLAM, *supra* note 66.

319. *Id.*; UNHCR International Protection, *supra* note 81, at 7.

320. GARRIAUD-MAYLAM, *supra* note 66; UNHCR International Protection, *supra* note 81, at 24; *The Syrian Situation – International Humanitarian Law Violations and the Call for Justice: A Summary*, AL-MARSAD, <http://golan-marsad.org/wp-content/uploads/>



Humanitarian law under the GCs is also violated by NSAs that are backed by coalition forces, terrorists, and the government of Syria.<sup>321</sup>

While investigating the humanitarian crisis and the inefficiency of the GCs, the 2019 ICRC report noted that certain types of ammunitions are highly inaccurate and, therefore, can cause serious problems when used in populated urban areas.<sup>322</sup> These weapons include mortars, rocket launchers, artillery and unguided missiles, rockets, and munitions.<sup>323</sup> For example, for every drone attack targeting one person, on average ten innocent people are killed.<sup>324</sup> To decrease humanitarian crises, despite there being no prohibition on the use of explosives in populated areas, the ICRC suggests that the use of big explosive weapons should be banned in urbanized regions during armed conflicts for three main reasons.<sup>325</sup> First, there is a pattern of high civilian harm due to the use of explosive weapons in urbanized regions.<sup>326</sup> Second, it is unfeasible to respect the principles of proportionality and distinction while using explosive weapons in populated areas.<sup>327</sup> Third, there is no regularity over the application and employment of explosive weapons in populated areas.<sup>328</sup> To prohibit the use of explosive weapons in populated areas, states should eagerly participate in ICRC armed forces training on weapons adaptability in accordance with the urbanized settings of armed conflicts to vigorously consider the vulnerabilities of civilians and civilian objects.<sup>329</sup>

Modern warfare is being orchestrated with the idea of consciously avoiding attribution for war crimes.<sup>330</sup> For this purpose, states routinely employ NSAs and mercenaries so that the retaliatory actions and the attribution of war crimes are avoided,<sup>331</sup> which explains the increase in the number of civilian victims in recent wars. The reason for this is that terrorists and the asymmetric tactics of NSAs deliberately target civilians

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The-Syrian-Situation-International-Law-Violations-and-the-Call-for-Justice-A-Summary.pdf  
[<https://perma.cc/F7KP-3YJ5>].

321. UNHCR International Protection, *supra* note 81, at 17.

322. ICRC, *supra* note 9, at 20.

323. *Id.*

324. CRAWFORD, *supra* note 116; *Drone Attacks*, *supra* note 116, at 96.

325. ICRC, *supra* note 9, at 21–22.

326. *Id.*

327. *Id.* at 22.

328. *Id.*

329. *Id.* at 15.

330. See Mosquera & Bachmann, *supra* note 35, at 13–14; see also Ashraf, *supra* note 35, at 13–14; see also European Commission, *supra* note 39, at 7.

331. See *IHL to Non-State Actors*, *supra* note 36, at 21–22.

to compensate for the imbalance of power in numerical strength and resources.<sup>332</sup> Analogously, mercenaries (a form of NSA) are employed because they are cheaper to operate and maintain than their conventional counterparts, the armed forces.<sup>333</sup> While, in internal armed conflicts, national courts and states are unable to enforce their laws against NSAs, international institutions, such as the ICC, are unable to enforce humanitarian law in the context of terrorists and NSAs in international armed conflicts.<sup>334</sup> In both instances, the main problem remains that NSAs are outlaws who lack the incentives to conform to or comply with national or international law, and that is what makes the employment and use of NSAs more effective.<sup>335</sup> For this reason, Michael Walzer deems the use of mercenaries to be dirty and believes that one of the biggest moral problems concerning the employability of mercenaries is the lack of accountability.<sup>336</sup> Hence, if the whole NSA problem of applying IHL hinges upon the compliance and enforcement of the GCs,<sup>337</sup> then the only plausible and sane solution would be to aid and support the territorial states' law enforcement agencies to fight and prosecute NSAs. To that end, countries should outlaw all support to rebels, insurgents, terrorists, mercenaries, and NSAs.

Though, the international law of using force is simple, it still has downsides in enforcement and compliance. The law on cyberwarfare requires that if the results of a cyberattack are the same as that of a kinetic attack, then there is no need to reach different conclusions.<sup>338</sup> This result-oriented approach for applying international humanitarian law on cyberattacks can also be used to apply principles of distinction, precaution, and proportionality on cyberwarfare.<sup>339</sup> Nevertheless, the main problem remains that NSAs do not respect any international or humanitarian law, which foretells that they will also remain noncompliant towards regulations on cyberwarfare in the future.<sup>340</sup> Therefore, in situations where international law cannot protect vulnerable targets from cyberattacks by NSAs, the cybersecurity of vulnerable facilities must be increased.<sup>341</sup> Leigher recommends increasing

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332. See Rodin, *supra* note 38.

333. MCFATE, *supra* note 172, at 125.

334. Zyberi, *supra* note 182, at 392.

335. *Id.* at 379; see *Hybrid Warfare*, *supra* note 37, at 186.

336. Walzer, *supra* note 203, at 178–79; see also CARMOLA, *supra* note 201, at 136–37.

337. Kelley, *supra* note 9, at 33; Krieger, *supra* note 9, at 31; Zyberi, *supra* note 182, at 392–93.

338. Sutherland et al., *supra* note 249, at 31.

339. Geneva Conventions Protocol I, *supra* note 51, art. 48, 51; see Geneva Conventions Protocol II, *supra* note 105, art. 13; see also TALLINN MANUAL, *supra* note 237, at 125–37. See generally *Cyberwarfare*, *supra* note 235, at 1–39 (explaining different approaches of applying international law to cyberwarfare).

340. Sutherland et al., *supra* note 249, at 31; Carlini, *supra* note 223.

341. Carlini, *supra* note 223.

DoD security, establishing internal structure of security agencies, and enhancing cyber capabilities of joint armed forces to drastically improve cybersecurity.<sup>342</sup> Likewise, Sutherland, Xynos, Jones, and Blyth suggest that symbols, emblems, and warning banners should be used to mark neutral objects and facilities in order to increase cybersecurity and protect civilian objects and infrastructure of critical importance.<sup>343</sup>

The problem of nonenforcement of international humanitarian law can be handled by inducing compliance among NSAs, which are increasingly leaning towards violence in armed conflicts.<sup>344</sup> Competence for inducing compliance with international humanitarian law in war-torn areas can be allocated to non-state actors in order to invigorate a sense of neutrality.<sup>345</sup> The mechanisms of inducing compliance independently reinforce each other.<sup>346</sup> Since violators are rarely convinced by persuasion alone, a mixture of instruments must be used to induce compliance, such as the threat of coercion, collaborative dialogue, and adverse legislation.<sup>347</sup> The selection of instruments will depend on behavior, legal competences, social deliberation, political alliances and dynamics, geopolitical shifts, and the distinct context of the conflict zone where the instruments will be applied.<sup>348</sup> By contrast, the political will to not engage in peaceful dialogues with NSAs will only worsen the suffering of civilians during armed conflicts.<sup>349</sup> Since international conventions cannot be signed by NSAs for legal reasons, unilateral deeds of commitment, memoranda of understanding, and action plans by NSAs should be implemented to reflect their mutual understandings and military commitments.<sup>350</sup> Likewise, simple and short codes of conduct, tailored according to the context of each NSA, should be designed to resolve the problems of the GCs' compliance and enforcement.<sup>351</sup>

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342. Leigher, *supra* note 228.

343. Sutherland et al., *supra* note 249, at 30–31.

344. Krieger, *supra* note 9, at 34.

345. *See id.* at 34–35; *see, e.g.*, GENEVA CALL, [www.genevacall.org](http://www.genevacall.org) [<https://perma.cc/W9N4-WY3C>].

346. Krieger, *supra* note 9, at 34.

347. *Id.* at 34–35.

348. *Id.*

349. Kelley, *supra* note 9, at 27.

350. *Id.* at 29.

351. Sassóli, *supra* note 9, at 64.

