
INTERNATIONAL LAW STUDIES

Published Since 1895

Armed Groups and the Protection of Health Care

Ezequiel Heffes

95 INT'L L. STUD. 226 (2019)

Volume 95



2019

Published by the Stockton Center for International Law

ISSN 2375-2831

Armed Groups and the Protection of Health Care

*Ezequiel Heffes**

CONTENTS

I.	Introduction	227
II.	Defining Armed Groups.....	229
III.	Armed Groups, Compliance with International Law, and Health Care	231
IV.	Geneva Call’s New <i>Deed of Commitment</i> : A Promising Development for the Protection of Health Care	236
	A. Geneva Call’s Approach.....	237
	B. The <i>Deed of Commitment</i> Mechanism and the Protection of Health Care	239
V.	The Past and Future of Engagement	241

* Thematic Legal Advisor, Geneva Call. LL.M., Geneva Academy of International Humanitarian Law and Human Rights. Law Degree, University of Buenos Aires School of Law. The author would like to thank Pascal Bongard and Marcos Kotlik for their comments on an earlier draft.

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

That armed groups engage in hostilities on a frequent basis is not news. Indeed, armed groups are active in the majority of contemporary armed conflicts.¹ What seems to have changed in the last few years is the increasing attention that the international community is paying to their behaviors, largely due to the impact that these behaviors have on civilians.² While the international legal obligations of armed groups seem clear, at least within international humanitarian law (IHL),³ finding effective implementing strategies to improve legal compliance remains a difficult endeavor, especially considering that the baseline expectation is generally low.⁴

Armed groups are often responsible for attacks against health care providers, which is one of the greatest humanitarian problems of contemporary armed conflict.⁵ In a number of armed conflicts, medical workers have been

1. ANNYSSA BELLAL, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, *THE WAR REPORT 2018*, at 19 (2019); INTERNATIONAL COMMITTEE OF THE RED CROSS, *THE ROOTS OF RESTRAINT IN WAR 13–14* (2018).

2. Some recent studies have focused on these entities. *See generally* TILMAN RODENHÄUSER, *ORGANIZING REBELLION: NON-STATE ARMED GROUPS UNDER INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS LAW, AND INTERNATIONAL CRIMINAL LAW* (2018); KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW* (2017); DARAGH MURRAY, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS* (2016); HYERAN JO, *COMPLIANT REBELS: REBEL GROUPS AND INTERNATIONAL LAW IN WORLD POLITICS* (2015); *REBEL GOVERNANCE IN CIVIL WAR* (Ana Arjona, Nelson Kasfir & Zachariah Mampilly eds., 2015).

3. Non-state armed groups are bound by Common Article 3 of the Geneva Conventions and customary IHL, as well as by Additional Protocol II to the Geneva Conventions when the conflict falls within its more restricted scope of application. The application of international human rights law to armed groups has also gained momentum. Although the wording of the main treaties of this legal regime addresses only the behavior of States, it has been proposed that there could be an added value in holding groups to account under human rights law, in particular due to their replacement of State control over a given territory and population. *See* FORTIN, *supra* note 2, at 27–68; MURRAY, *supra* note 2, at 120–54; *see also* Annyssa Bellal & Ezequiel Heffes, ‘Yes, I do’: *Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent*, 12 *HUMAN RIGHTS & INTERNATIONAL LAW DISCOURSE* 120 (2018).

4. Hyeran Jo, *Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?*, 19 *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 69 (2018).

5. In 2014, the International Committee of the Red Cross published a report that recorded 1,809 violent incidents relating to the provision of healthcare in twenty-three countries, from the beginning of 2012 to the end of 2013. Armed groups were responsible for

kidnapped, injured, or killed, medical facilities and transports have been bombed, shelled, or looted, wounded fighters and patients have been attacked, and fighting has occurred within or near health care facilities.⁶ Access to medical services is often obstructed and attacks have led to health care personnel leaving conflict areas, thereby further exacerbating the trend. These actions could affect the provision of medical care even after the fighting has stopped.⁷

Armed groups, however, also have attempted to evacuate and treat wounded enemy fighters and civilians. In certain contexts, they have even proactively provided health care services for the civilian population living in the territories under their control. Examples include the Eritrean People's Liberation Front (EPLF) in Eritrea, the Polisario Front in Western Sahara, the FARC-EP in Colombia, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, and Hezbollah in Lebanon.⁸ The Taliban even established a Health Commission,⁹ and it has been reported that members of the Free

more than 700 of these violent incidents. Although many incidents consisted only of threats, armed groups have also killed healthcare personnel and patients, looted healthcare facilities, forced medical staff to provide free treatment, and forced them to treat their own members before others. See INTERNATIONAL COMMITTEE OF THE RED CROSS, HEALTH CARE IN DANGER: VIOLENT INCIDENTS AFFECTING THE DELIVERY OF HEALTH CARE, JANUARY 2012 TO DECEMBER 2013, at 10 (2016), <https://www.icrc.org/en/publication/4196-health-care-danger-violent-incident-affecting-delivery-health-care-january-2012>; see also Fiona Terry, *Violence Against Health Care: Insights from Afghanistan, Somalia and the Democratic Republic of the Congo*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 23 (2013); see generally *Attacks on Health Care*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/attacks-on-health-care/en/> (last visited July 8, 2019).

6. One example is the recent attacks by armed groups against Ebola Treatment Centers in the Democratic Republic of the Congo. See *Ebola Virus Disease – Democratic Republic of the Congo*, WORLD HEALTH ORGANIZATION (Mar. 14, 2019), <https://www.who.int/csr/don/14-march-2019-ebola-drc/en/>; see also Susannah Cullinane, *Ebola Treatment Center Attacked Again as Congo Battles a Deadly Epidemic*, CNN (Mar. 10, 2019), <https://edition.cnn.com/2019/03/10/health/ebola-drc-congo-who-death/index.html>.

7. Aryn Baker, *Syria's Health Crisis Spirals as Doctors Flee*, TIME (Feb. 4, 2014), <http://time.com/3968/syrias-health-crisis-spirals-as-doctors-flee/>.

8. MURRAY, *supra* note 2, at 258.

9. *Annex: The Islamic Emirate of Afghanistan. The Layha [Code of Conduct] For Mujabids*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 81, 103, 117 (2011); see also Muhammad Munir, *The Layha for the Mujabideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 81 (2011).

Syrian Army have set up a secret hospital to care for individuals.¹⁰ Furthermore, several armed groups have committed to respect and protect health care in armed conflict through different means, such as unilateral declarations, codes of conduct, and agreements with humanitarian organizations.¹¹

This article describes some of the key challenges related to the variation of armed groups' behaviors and the protection of health care. Part II defines armed groups for the purposes of this article, while Part III addresses armed groups and compliance with international law concerning health care protection, inquiring into why some armed groups attacked medical facilities, staff, and transports, while others have taken positive measures to ensure the protection of medical professionals and the provision of medical care. Part IV introduces the approach undertaken by Geneva Call when engaging these non-State actors and discusses its new *Deed of Commitment on the Protection of Health Care in Armed Conflict*. Part V concludes by assessing the protection of health care and the future of humanitarian engagement with armed groups.

II. DEFINING ARMED GROUPS

Although the nature, organization, and structure of armed groups are issues of increasing concern, relatively little is known about these groups from an international law perspective.¹² There are two explanations. First, assuming the existence of a non-international armed conflict, the law applicable to armed groups is part of public international law, which was and remains

10. CNN, *Syria Rebels Set up a Secret Hospital to Care for Refugees*, YOUTUBE (Sept. 6, 2013), <https://www.youtube.com/watch?v=WhDtLokvi4I>.

11. For instance, the Patani United Liberation Organization (PULO) has included within its list of core principles to “[r]espect and protect medical personnel and objects, including those bearing the Red Cross/Red Crescent/Red Crystal, and other symbols of humanitarian organizations.” See PULO, List of Core Principles of PULO’s Engagement Rules r. 6 (2012), http://theirwords.org/media/transfer/doc/th_pulo_01-ea2ba13b6dc3c5a3b5d202f280ee6e1b.pdf.

Similarly, the 1992 agreement on the application of IHL between the parties to the conflict in Bosnia Herzegovina contained a commitment to respect and protect the wounded, sick, and shipwrecked. It also stated, “Hospitals and other medical units, including medical transportation may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attacks.” Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992 art. 2.2(1), *Bosn & Herz.*, May 22, 1992, reprinted in 3 MARCO SASSOLI, ANTOINE A. BOUVIER & ANNE QUINTIN, HOW DOES LAW PROTECT IN WAR? 1717, 1719 (3d ed. 2011).

12. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 3 (2012).

State-centric.¹³ Second, from a methodological perspective, “armed group” encompasses a variety of entities with different features, goals, and even international obligations.¹⁴ While some groups may have strong individual leaders, such as Joseph Kony of the Lord’s Resistance Army (LRA) in Uganda, Foday Sankoh of the Revolutionary United Front (RUF) in Sierra Leone, or John Garang of the Sudan People’s Liberation Movement/Army (SPLM/A) in Sudan, others may be more dispersed and decentralized.¹⁵ Furthermore, armed groups may fight against foreign military occupation, to remove or replace existing governments, to become an independent State, to promote a religious agenda, or act from purely economic incentives.¹⁶ As such, identifying and categorizing common constitutive elements from these groups has proven a rather difficult task, particularly for international lawyers.

The lack of unified criteria has led to the use of many different terms to refer to the same type of entity: “armed groups,” “non-State armed groups,” “armed non-State actors,” “armed opposition groups,” “rebels,” and so on. While at times the term used depends on the international rules under analysis, as may be the case of specific treaties referring to a given term,¹⁷ others

13. *Id.*

14. Even IHL, which undisputedly applies to non-State armed groups, foresees that highly organized entities will be bound by more international obligations than other groups. In order to be applicable, the 1977 Additional Protocol II requires that organized armed groups that are under responsible command “exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol.” Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 1(1), June 8, 1977, 1125 U.N.T.S. 609. *See also* Olivier Bangerter, *The ICRC and Non-State Armed Groups*, in *EXPLORING CRITERIA AND CONDITIONS FOR ENGAGING ARMED NON-STATE ACTORS TO RESPECT HUMANITARIAN LAW AND HUMAN RIGHTS LAW* 74, 76 (2008).

15. JO, *supra* note 2, at 39.

16. GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, POLICY BRIEFING NO. 1, REACTIONS TO NORMS: ARMED GROUPS AND THE PROTECTION OF CIVILIANS 11 (2014), https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Policy%20Briefing/Geneva%20Academy%20Policy%20Briefing%201_Amed%20Groups%20and%20the%20Protection%20of%20Civilians_April%202014.pdf.

17. *See*, for example, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 4(1), May 25, 2000, 54 U.N.T.S. 263, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 1(1), *supra* note 14 (noting the Optional Protocol discusses “[a]rmed groups that are distinct from the armed forces of a State,” while Article 1(1) of Additional Protocol II discusses “dissident armed forces or other organized armed groups”).

are related to the specific features of armed groups that want to be stressed. In this article, four elements are used to identify an armed group: (i) the armed group should be illegal under domestic law, or should at least challenge the State's monopoly of the use of force; (ii) the group is not part of, or controlled by, a State; (iii) the group is created mainly to use armed violence; and (iv) unlike governments, the armed group as such will most likely cease to exist after the end of an armed conflict, either because it triumphs in its struggle, eliminating the need to fight, or is defeated and disbanded.¹⁸ The last two elements stress the intrinsic relation between the notions of armed conflict and the notion of armed group, since the latter cannot exist without the former.¹⁹

III. ARMED GROUPS, COMPLIANCE WITH INTERNATIONAL LAW, AND HEALTH CARE

Compliance has been defined as “behavioural conformity with existing norms and regulations.”²⁰ For armed groups, this implies the observed match between their behavior and their international obligations.²¹

As any party to an armed conflict, armed groups should not be seen as entities that either violate or respect international law without exception. Instead, they may follow certain rules while disregarding others.²² For instance, an armed group may respect the prohibition on using and recruiting children in hostilities, but at the same time summarily execute detainees or take hostages. Similarly, an armed group may deliberately attack health care facilities

18. Armed groups are indeed provisional in character. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL LAW 130 (2005). In order to identify an armed group as a party to an armed conflict a list of non-exhaustive factors utilized by the International Criminal Tribunal for the Former Yugoslavia is often referred to: (i) the existence of a command structure; (ii) the military (operational) capacity of the armed group; (iii) its logistical capacity; (iv) the existence of an internal disciplinary system and the ability to implement IHL; and (v) its ability to speak with one voice. *See* Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-T, Judgment, ¶¶ 197–203 (Int'l Crim. Trib. for the former Yugoslavia July 10, 2008).

19. *See* Marco Sassòli, *Two Fascinating Questions: Are All Subjects of a Legal Order Bound by the Same Customary Law and Can Armed Groups Exist in the Absence of Armed Conflict?*, EJIL TALK! (Nov. 4, 2016), <http://www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/> (noting that Sassòli argues against the existence of armed groups in the absence of armed conflicts).

20. JO, *supra* note 4, at 65.

21. *Id.*

22. MICHAEL L. GROSS, THE ETHICS OF INSURGENCY: A CRITICAL GUIDE TO JUST GUERRILLA WARFARE 74 (2015).

and transports in breach of IHL while prohibiting the forcible displacement of civilians. Moreover, these non-State entities often modify their behaviors throughout the hostilities, reflecting an increase or decrease in their level of compliance with humanitarian provisions. For example, Wood has identified that civilian victimization is “anticipated during moments in which the viability of the groups is threatened or when it faces significant military setbacks.”²³ For Weinstein, this variation is a result of the membership and organizational structure of the group. He argues, “[s]tructures matter because they affect the capacity of rebel leaders to employ violence selectively without making errors; mistakes make a difference because they affect the calculations of potential civilian supports about how to respond to rebel groups when they enter a region.”²⁴ Variation is also evident in peace processes. When an armed group looks for political recognition, they might adopt a different attitude than a group whose main purpose is to show its strength or to terrorize the civilian population living in the territory it controls.²⁵

Accordingly, compliance should be understood as a spectrum, rather than an on/off switch.²⁶ As such, armed groups’ behavior is better conceptualized as “a matter of degree varying with the circumstances of the case.”²⁷ This conclusion acknowledges that while some groups have deliberately attacked medical personnel, facilities, and transports, others have attempted to

23. Reed M. Wood, *Understanding Strategic Motives for Violence against Civilians during Civil Conflict*, in *INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM THE AFRICAN GREAT LAKES REGION* 13, 15 (Heike Krieger ed., 2015) [hereinafter *INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW*].

24. JEREMY M. WEINSTEIN, *INSIDE REBELLION: THE POLITICS OF INSURGENT VIOLENCE* 198 (2007).

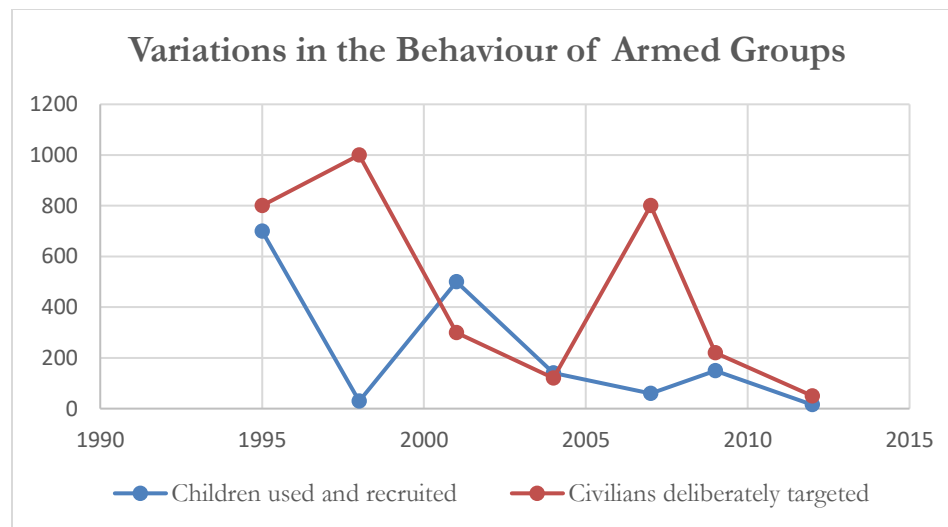
25. Jo has argued that compliant ANSAs emerge when they seek legitimacy. “Compliant rebels are those that want to enhance the ‘legitimacy’ of their own organization and movement in the eyes of key political ‘audiences’ that care about values consistent with international law at domestic and international ‘levels.’” JO, *supra* note 2, at 13. It should be noted that this is not true in every context. For instance, in Sri Lanka, human rights researchers documented that the LTTE used civilians as human shields, shot civilians as they tried to flee the group’s control, deployed artillery near civilians, and forcibly recruited children as soldiers during the final months of the conflict. See Meenakshi Ganguly, *Sri Lanka Takes the Wrong Road to Peace*, HUMAN RIGHTS WATCH (May 17, 2011), <https://www.hrw.org/news/2011/05/17/sri-lanka-takes-wrong-road-peace>.

26. Richard A. Falk, *On Identifying and Solving the Problem of Compliance with International Law*, 58 *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AND ITS ANNUAL MEETING* 1, 5 (1964); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 17 (1995).

27. Falk, *supra* note 26, at 5.

evacuate and treat wounded enemy fighters and civilians. Armed groups should therefore be seen as dynamic and evolving actors. Like States, these non-State entities may weigh the costs against the benefits of complying with international law, and the results will vary depending on the goals of the group and the moment in which its behavior takes place.²⁸

The figure below shows how an armed group complied with two different rules, the prohibition on the use and recruitment of children and the prohibition on deliberately targeting civilians, throughout an armed conflict.²⁹ The figure demonstrates that armed groups may increase or decrease their compliance at different moments of the conflict. Understanding that these non-State entities do not have the same approach to every rule throughout the conflict is essential. Indeed, such nuance is crucial for humanitarian organizations, such as Geneva Call, when defining its strategies of IHL engagement with these groups.³⁰



28. TANISHA FAZAL, *WARS OF LAW: UNINTENDED CONSEQUENCES IN THE REGULATION OF ARMED CONFLICT* 59 (2018).

29. The data included in the figure does not represent any specific armed group. Its inclusion is only to clarify the proposed explanation.

30. The Geneva Academy of International Humanitarian Law and Human Rights has identified, in this sense, that “[t]hose seeking to promote compliance with international norms should monitor the conflict for ‘windows of opportunity’ that may offer a greater chance for success of engagement on specific humanitarian concerns.” ANYSSA BELLAL & STUART CASEY-MASLEN, *RULES OF ENGAGEMENT: PROTECTING CIVILIANS THROUGH DIALOGUE WITH ARMED NON-STATE ACTORS* 20 (2011), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf>.

While important, identifying this behavioral variation remains a somewhat superficial analysis. For example, in non-international armed conflicts, compliance by armed groups can be linked to several factors, such as the group's lack of knowledge of international standards and the absence of an incentive to abide by the applicable rules.³¹ In this sense, as Bangerter correctly notes, "only a relatively small circle of persons are aware of legal concepts in any given society, and it is unlikely that leaders of armed groups will be recruited in this particular circle."³² Armed groups may not know, for instance, what medical ethics and triage imply or how to deal with humanitarian access, key principles for the delivery of health care by humanitarian organizations.³³ Their lack of incentive to respect humanitarian norms might result from a complex mixture of diverse motivations. As Krieger concludes, power relations, as well as historical, political, and social conditions, serve to determine these motivations, making compliance a context-dependent issue.³⁴ Furthermore, some humanitarian norms can be perceived as prohibiting actions that "often serve the strategic interests of rebel groups – the sort of actions that may, at times, give them a competitive advantage over government forces."³⁵

Armed groups' fragmented structures and lack of capacity to implement their obligations can also present important challenges for compliance.³⁶ The

31. INTERNATIONAL COMMITTEE OF THE RED CROSS, IMPROVING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: ICRC EXPERT SEMINARS 20–21 (2003), http://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf; see also Olivier Bangerter, *Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 353, 357 (2011).

32. Olivier Bangerter, *Comment: Persuading Armed Groups to Better Respect International Humanitarian Law*, in INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW, *supra* note 23, at 112, 113.

33. As Geneva Call found, several groups felt that they did not have a complete understanding of the rules governing humanitarian access and consequently "are not able to elaborate on what they entail." ASHLEY JACKSON, GENEVA CALL, IN THEIR WORDS: PERCEPTIONS OF ARMED NON-STATE ACTORS ON HUMANITARIAN ACTION 14 (2016), https://www.genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WHS_Report_2016_web.pdf.

34. Heike Krieger, *Introduction* to INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW, *supra* note 23, at 1, 4–5.

35. JO, *supra* note 2, at 6.

36. Several researchers have demonstrated that the way armed groups are organized can make hostilities more violent, longer lasting, and more difficult to resolve. See, e.g., Kris-

ICRC has recognized this challenge in its recent Commentary on Common Article 3 to the 1949 Geneva Conventions.³⁷ Regarding the obligation to care for the wounded and sick, the ICRC has explained that some groups have the capacity to provide sophisticated medical care, while others have more rudimentary capacities.³⁸ Nonetheless, non-State armed groups must endeavor to provide treatment to the best of their abilities. The obligation to care for the wounded and sick is an obligation of means, even if the exact requirement depends on the specific circumstances of each case.³⁹

Exchanges between Geneva Call and various armed groups have confirmed that a lack of capacity is a key factor in whether international law is respected. Many groups, particularly those with a lower level of organization, a weak coercive capacity for enforcing organizational decisions, or a decentralized authority, have less potential to guarantee their members will respect most of these rules. Further, the very structure and rationale of armed groups challenge the likelihood of meeting some of these obligations, as they are created to perform combat functions, not to provide health care, and they devote a large amount of their resources to their military components.

Certain organizations and initiatives have attempted to address some of these difficulties by recognizing that it is essential to engage with these groups in order to enhance the protection of health care in armed conflicts. One important example is UN Security Council Resolution 2286, the first resolution to focus specifically on attacks on health services in armed conflict.⁴⁰ Moreover, the UN Secretary-General published a list of recommendations pursuant to this Resolution,⁴¹ including measures to enhance the protection of and prevent acts of violence against the wounded and sick, medical

tin Blakke, Kathleen Gallagher Cunningham & Lee J. M. Seymour, *The Problem with Fragmented Insurgencies*, WASHINGTON POST (May 13, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/05/13/the-problem-with-fragmented-insurgencies/>.

37. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 753 (2016) (noting with respect to the obligation to collect the wounded and sick that “if significant resources in terms of personnel and equipment are available, their deployment is required according to what is reasonable. Conversely, if resources are scarce, the Convention does not require Parties to do the impossible, but they must do what is feasible under the given circumstances, taking into account all relevant resources”).

38. *Id.* ¶ 761.

39. *Id.* ¶¶ 761–62.

40. S.C. Res. 2286 (May 3, 2016).

41. *Id.* ¶ 13

and humanitarian personnel exclusively engaged in medical duties, and their means of transport and equipment, as well as hospitals and other medical facilities.⁴² It also included measures aimed to ensure greater accountability for violations of these protections.⁴³

Two recommendations are especially relevant when dealing with armed groups. First, recommendation seven, “Promoting awareness and compliance,” affirms that member States and parties to a conflict, with the support from the UN and relevant organizations, “should undertake training programmes for military personnel and *members of non-State armed groups* on the protection of medical care in armed conflict.”⁴⁴ Second, recommendation nine encourages parties to make and enforce internal measures, such as command orders, dissemination activities, and sanctions, aimed at enhancing the protection of medical care in armed conflict.⁴⁵

Different institutions and organizations have taken various measures following these recommendations. For example, Geneva Call started working to increase the respect of rules related to the protection of health care in armed conflict.⁴⁶ Part IV presents Geneva Call’s approach when engaging with non-State actors, and discusses its new *Deed of Commitment* on the protection of health care.

IV. GENEVA CALL’S NEW *DEED OF COMMITMENT*: A PROMISING DEVELOPMENT FOR THE PROTECTION OF HEALTH CARE

The need to engage armed groups to enhance their respect for humanitarian norms is not a new concern. The most important organization in this regard is the ICRC, which engages with non-State entities as parties to armed conflict to fulfill its mandate. Indeed, as far back as 1871, the ICRC’s founder,

Further requests the Secretary General to promptly provide the Security Council with recommendations on measures to prevent incidents of the kind described [in the Resolution] and to better ensure accountability and enhance the protection of the wounded and sick and medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities.

42. U.N. Secretary-General, Letter dated Aug. 18, 2016 from the Secretary-General addressed to the President of the Security Council, 1, U.N. Doc. S/2016/722 (Aug. 18, 2016).

43. *Id.*

44. *Id.* at 6 (emphasis added).

45. *Id.* at 6–8.

46. GENEVA CALL, ANNUAL REPORT 2017, at 16–17 (2017), https://genevacall.org/wp-content/uploads/dlm_uploads/2018/07/GVA_CALL_RA2017_WEB.25.06.18-1.pdf.

Henry Dunant, engaged with leaders of the Paris Commune to negotiate the release of hostages taken by rebel groups.⁴⁷ Over the last three decades, other institutions and non-governmental organizations have joined the ICRC in engaging armed groups.⁴⁸ In 2000, members of the International Campaign to Ban Landmines created Geneva Call, which acknowledges that armed groups are key entities for improving the implementation of IHL in armed conflict.⁴⁹ As of 2019, Geneva Call has engaged with approximately 100 armed groups on different humanitarian issues.⁵⁰

A. Geneva Call's Approach

When engaging armed groups on humanitarian norms, the State-centric nature of international law presents specific challenges. Three challenges are especially prevalent: (i) existing international treaties regulate almost exclusively the conduct of States; (ii) even though armed groups are bound by IHL, they cannot negotiate treaties or become parties to relevant agreements, and they cannot contribute to the formation of customary international law;⁵¹ and (iii) armed groups' views on humanitarian norms are generally dismissed, thus they may have limited incentives to respect them. In sum, armed groups may not feel bound by rules that they have not been involved in making and are not allowed to sign.⁵²

47. Bangerter, *supra* note 14, at 75.

48. The United Nations, through its framework to address the situation of children affected by armed conflict, is an important example in this regard. This framework allows armed groups to engage with UN agencies and sign "action plans," which could lead to delisting groups from the UN Secretary-General's list of actors that commit one or more of the six grave violations of children's rights, including attacks against schools and hospitals. For more information, see OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, UNITED NATIONS, <https://childrenandarmedconflict.un.org/> (last visited July 8, 2019).

49. SIVAKUMARAN, *supra* note 12, at 538.

50. GENEVA CALL, MISSION, <https://genevacall.org/who-we-are/> (last visited July 8, 2019).

51. As affirmed in a previous study, this has an impact on armed groups' respect for IHL from a practical perspective, since it seems unlikely that they will accept any set of rules "merely by the fact that it has been previously agreed upon by States, be it customary or treaty law." Ezequiel Heffes & Marcos Kotlik, *Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 1195, 1202 (2014).

52. Elisabeth Decrey Warner et al., *Armed Non-State Actors and Humanitarian Norms: Lessons from the Geneva Call Experience*, in MODERN WARFARE: ARMED GROUPS, PRIVATE MILITARIES, HUMANITARIAN ORGANIZATIONS, AND THE LAW 73, 74 (Benjamin Perrin ed.,

Addressing these challenges has been an essential part of Geneva Call and the organization's work. Because the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction⁵³ (the Ottawa Convention) did not formally bind armed groups, Geneva Call developed an innovative tool, the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*,⁵⁴ that would allow these armed non-State entities to commit to this treaty's core obligations. This *Deed of Commitment* attempted to solve the treaty's limited scope of application by offering "a parallel process for non-State armed actors . . . to actively enter a formal commitment to ban anti-personnel landmines."⁵⁵ By acknowledging the importance of armed groups' consent to their international obligations, the *Deed* aims to develop their sense of ownership of the humanitarian rules they undertake to respect and their understanding that they will be held accountable for their pledge. Such an inclusive approach is instrumental in increasing how these groups show respect for international norms.

While initially focusing on the prohibition of anti-personnel mines, Geneva Call has since expanded its thematic work to other humanitarian issues, including the protection of children, the prohibition of sexual violence and gender discrimination, the protection of cultural heritage, the prohibition of forcibly displaced individuals, and the protection of health care.⁵⁶ However, not all of these issues have a thematic *Deed of Commitment*. Finally, in addition to its thematic engagement process, Geneva Call provides training to armed groups on humanitarian norms, as group members are often unaware of their obligations and providing information and training on these rules is essential to increasing their level of respect for these norms.

2012); see also JO, *supra* note 2, at 256 (concluding that "[f]rom a rebel perspective, an opportunity to participate in this drafting process may also serve as a powerful incentive and rationale to change behavior").

53. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 17, 1997, 2056 U.N.T.S. 211.

54. Geneva Call, *Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action* (2000), https://genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Banning-anti-personnel-mines.pdf.

55. Ulrich Schneckener & Claudia Hofmann, *The Power of Persuasion, in* INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW, *supra* note 23, at 79, 100.

56. See GENEVA CALL, *supra* note 46, at 16–17.

B. The Deed of Commitment Mechanism and the Protection of Health Care

In addition to the *Deed of Commitment* banning anti-personnel mines, Geneva Call has developed three additional deeds: the *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* (2010),⁵⁷ the *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination* (2012),⁵⁸ and the *Deed of Commitment for the Protection of Health Care in Armed Conflict* (2018).⁵⁹ These four *Deeds of Commitment* mirror international rules applicable to States and include both negative and positive obligations. Crucially, they allow armed groups to pledge to respect these humanitarian norms.

Importantly, armed groups may sign these deeds only after meeting certain conditions. First, they should have an impact on the thematic area covered by the *Deed* in question. For example, if a group does not use anti-personnel mines, and this is not a humanitarian concern in their specific context, encouraging the signing of the *Deed* dealing with these weapons will not have a direct impact. Second, the armed group should have a clear leadership structure that represents their members and can sign the document on behalf of the entire group. It should also be capable of internalizing the obligations it has undertaken through training and internal orders. Finally, Geneva Call and its partner organizations are granted the right to monitor the group's compliance with the *Deeds* in the territories where the signing group operates.

Geneva Call cannot offer *Deeds of Commitment* to an armed group unless the group fulfills these requirements.⁶⁰ If the armed group meets these criteria, its leadership signs the *Deed*, which Geneva Call and the Government of the Republic and Canton of Geneva, which serves as a custodian of the

57. Geneva Call, *Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict* (2010), https://genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf.

58. Geneva Call, *Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination* (2012), https://genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf.

59. Geneva Call, *Deed of Commitment for the Protection of Health Care in Armed Conflict* (2018), https://genevacall.org/wp-content/uploads/dlm_uploads/2018/11/Deed-of-Commitment-for-the-protection-of-health-care-in-armed-conflict-final-version.pdf.

60. It should be noted that Geneva Call has engaged on different humanitarian norms with several groups that have not signed any *Deed of Commitment*. See *Armed Non-State Actors that Were Engaged by Geneva Call*, GENEVA CALL, <https://genevacall.org/armed-non-state-actors-engaged-geneva-call/> (last visited July 8, 2019).

document, then countersigns.⁶¹ As of June 2019, sixty-four armed groups have signed one or more *Deeds of Commitments*.⁶²

When dealing with the protection of health care, Geneva Call has carried out activities related to dissemination and training of humanitarian norms, including protection of the wounded and sick, health care staff, facilities and transport, and the Red Cross and Red Crescent emblems.⁶³ Furthermore, and as noted earlier, Geneva Call developed a specific *Deed of Commitment* on the protection of health care in 2018.⁶⁴ For this purpose, it conducted two consultations with experts from key organizations and academic institutions in Geneva and shared the draft with selected armed groups to include their views and inputs as a sort of “reality check.”⁶⁵ These non-State actors were chosen carefully to ensure that various types of groups were included, and that there was a balanced geographical representation.

The new *Deed* includes obligations for the groups to respect and protect “the wounded and sick, whether civilian or military, friend or enemy, in all circumstances;” to take all “possible measures to search for, collect and evacuate the wounded and sick without delay or adverse distinction, including by allowing civilians and impartial humanitarian organizations to assist in these tasks;” and to respect and protect “health care personnel engaged in the provision of health care” and health care facilities.⁶⁶ The signatory group also undertakes to protect and respect medical transport, to respect the distinctive emblems of the Red Cross, Red Crescent, and Red Crystal, and not to use them for purposes unrelated to the provision of health care.⁶⁷ Finally,

61. *Deed of Commitment*, GENEVA CALL, <https://genevacall.org/how-we-work/deed-of-commitment/> (last visited July 8, 2019). The *Deed* signing ceremony usually takes place in the Alabama Room of Geneva City Hall, where the first Geneva Convention was adopted in 1864. *Id.*

62. This information is on file with the author.

63. Geneva Call has also addressed the issue of health care through other *Deeds*. For example, the deed protecting children commits armed groups to “take concrete measures towards ensuring that children have access to adequate . . . health care (including psychosocial support) . . .” *Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict*, *supra* note 57, art. 7(i).

64. *Deed of Commitment for the Protection of Health Care in Armed Conflict*, *supra* note 59.

65. These organizations included the ICRC, the World Health Organization, Doctors Without Borders-Switzerland, and the Safeguarding Health in Conflict Coalition.

66. *Deed of Commitment for the Protection of Health Care in Armed Conflict*, *supra* note 59, arts. 1–3.

67. *Id.* art. 6. Furthermore, the *Deed* requires armed groups to give due warning in situations where health care personnel, facilities, or medical transports are “used outside their

armed groups commit to “[e]nsure, maintain and provide access for affected populations to essential health care facilities, goods and services, without adverse distinction” in areas where they exercise authority.⁶⁸ Although the most recent *Deed* on the protection of health care has not yet been signed by an armed group, Geneva Call’s prior success in dealing with other thematic areas, such as the prohibition of anti-personnel mines and the protection of children, gives hope that the protection and respect for health care by armed groups will be embraced.

Common provisions to all *Deeds* affirm that armed groups agree to take necessary measures to enforce their commitments (through internal orders, training, and sanctions) as well as to cooperate with Geneva Call to verify their compliance.⁶⁹ Although there are no formal deadlines or benchmarks included in the *Deeds* by which these activities should take place, this is generally discussed and addressed through implementation plans between Geneva Call and the relevant group. Finally, armed groups acknowledge that adhering to any of the *Deeds* shall not affect their legal status, as stated in Common Article 3 to the 1949 Geneva Conventions.⁷⁰ They also accept that, in cases of confirmed violations, Geneva Call may publicize them as a means of sanctioning their non-compliance.⁷¹

V. THE PRESENT AND FUTURE OF ENGAGEMENT

Interestingly, the compliance record of armed groups engaged by Geneva Call generally has been good.⁷² For instance, signatories of the *Deeds* have

humanitarian functions to commit harmful acts, allowing them necessary time to remedy the situation or to safely evacuate.” *Id.*

68. *Id.* art. 8.

69. *See, e.g.*, Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict, *supra* note 57, arts 7, 8.

70. *See, e.g., id.* art. 11.

71. *See, e.g., id.* art. 12.

72. There have been cases of non-compliance nonetheless. For example, following a field visit to Rojava, Syria in 2017 to monitor engagement on child protection issues by the People’s Protection Units/Women’s Protection Units/Democratic Self-Administration (YPG/YPJ/DSA), a signatory to the *Deed for the Protection of Children* since 2014, Geneva Call confirmed the existence of cases that constituted a violation of their commitments. In an official response, the YPG/YPJ/DSA admitted its responsibility and highlighted some practical challenges in this respect. *See Syria: New Measures Taken by the Kurdish People’s Protection Units to Stop Recruiting Children under 18*, GENEVA CALL (June 22, 2018), <https://genevacall.org/syria-new-measures-taken-by-the-kurdish-peoples-protection-units-to-stop-using-children-under-18/>.

abided by their commitment on the prohibition of using anti-personnel mines, cooperation in mine action, and destroying their stockpiles.⁷³ They have also demobilized children from their ranks.⁷⁴ Other groups have pledged to prohibit or limit the use of this weapon, unilaterally or through agreements with governments.⁷⁵

The signing of Geneva Call's *Deeds* has also been relevant when the State fighting against the non-State group has not ratified the international convention dealing with that specific humanitarian topic. Decisions by armed groups to sign one or more of these *Deeds* were, in this sense, instrumental to the accession of States to international treaties due to internal social pressure within the State in question.⁷⁶ For example, Sudan ratified the Ottawa Convention in 2003, only after the Sudan People's Liberation Movement/Army (SPLM/A) signed the corresponding *Deed of Commitment* in 2001. High-level officials involved in mine action activities in that country indicated that the government would not have ratified this international treaty if not for the SPLM/A's signing of the *Deed*.⁷⁷ Interestingly, when South Sudan became a new State in 2011 and the SPLM/A became its government, the first humanitarian treaty to which it acceded was the Ottawa Convention.⁷⁸

As we look forward, reaching agreements with armed groups on these thematic areas provides an important step in furthering respect for, and compliance with, IHL. Some may insist that publicly dealing with armed groups could legitimize their goals and aims, but as Cismas has correctly suggested,

73. See, for example, *Final Destruction of 2,485 Stockpiled Anti-Personnel Mines in Western Sahara*, GENEVA CALL (January 22, 2019), <https://genevacall.org/final-destruction-of-2485-stockpiled-anti-personnel-mines-in-western-sahara/>.

74. *Syria: Kurdish Armed Forces Demobilize 149 Child Soldiers*, GENEVA CALL (July 7, 2014), <https://genevacall.org/de/syria-kurdish-armed-forces-demobilize-149-child-soldiers/>; see also *DR Congo: Child Soldiers Leave Armed Groups Following Geneva Call's Awareness-Raising Efforts*, GENEVA CALL (February 1, 2017), <https://genevacall.org/dr-congo-child-soldiers-leave-armed-actors-following-geneva-calls-awareness-raising-efforts/>.

75. Schneckener & Hofmann, *supra* note 55, at 100.

76. *Id.* at 102.

77. According to Martin Barber, Director of the UN Mine Action Service, "Sudan would not have felt able to ratify the Treaty of the SPLM/A had not already made a formal commitment to observe its provisions in the territory under its control." GENEVA CALL, *ENGAGING ARMED NON-STATE ACTORS IN A LANDMINE BAN: THE GENEVA CALL PROGRESS REPORT 2000–2007*, at 8–9 n.18 (2007).

78. Sandesh Sivakumaran, *Implementing Humanitarian Norms Through Non-State Armed Groups*, in *INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW*, *supra* note 23, at 125, 131–32; see also Schneckener & Hofmann, *supra* note 55, at 102.

“legitimation may indeed take place; however, one needs to understand and emphasize that the resulting legitimation is that of the actor as rights-holder and duty bearer, not of its goals and conduct.”⁷⁹ The goal of inducing armed groups to respect international law is not to give them an international legal status. Instead, acknowledging that they should be aware that there are international rules applicable to them, including those relating to health care, and giving them the opportunity to internalize these rules, can only help to eventually hold them accountable for their lack of respect. These measures are necessary to increase the protection of individuals in armed conflict.

79. IOANA CISMAS, *RELIGIOUS ACTORS AND INTERNATIONAL LAW* 75 (2014).