Aim and scope
Established in 1869, the International Review of the Red Cross is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The Review offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the Review informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

International Committee of the Red Cross
The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

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Cover Photo: Ouham province, village of Ouogo. International Humanitarian Law dissemination session to members of the Peoples’ Army for the Restoration of Democracy. Photographer: Marko Kocic. Credit: ICRC.
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The potential human cost of the use of weapons in outer space and the protection afforded by international humanitarian law
Position paper submitted by the International Committee of the Red Cross to the Secretary-General of the United Nations on the issues outlined in General Assembly Resolution 75/36, 8 April 2021
In 2021, the International Committee of the Red Cross (ICRC) estimates that worldwide–around 600 armed groups have the capacity to cause violence of humanitarian concern. These groups’ features are extremely diverse, ranging from armed gangs in a town to sophisticated organizations, exercising full governance and State-like control over large chunks of territory and impressive numbers of people. From those 600, more than 100 can—as a matter of international humanitarian law—be considered parties to a non-international armed conflict, i.e. as non-State armed groups (NSAGs), and are therefore bound by international humanitarian law. These numbers, and the corresponding concentration of power such groups are able to project, underscore the continuing reality of NSAGs, and why continued scholarly analysis remains warranted.

Thus, ten years after the International Review of the Red Cross published its editions on “Understanding armed groups and the applicable law” and on “Engaging armed groups”,¹ the purpose of the present bundle of articles and an interview is to take stock of some recent developments, including the humanitarian impact and challenges of the COVID-19 pandemic. It is not widely known, for example, that many NSAGs not only engage in military operations against the State or other NSAGs they are fighting, but that also many provide a range of services—from basic needs to security and justice—to sometimes millions of people—at times requesting taxation in return to fund those services. Articles in this edition flesh out the implications of such governance, both from the legal angle and (as also illustrated through the interview in this edition) from the operational angle of how to engage such groups. Finally, two fascinating articles analyse the topic of reparations by NSAGs for violations of international law committed by them.

The second part of this edition features nine “selected articles”, i.e. articles which fall within the Review’s “editorial triangle” of international humanitarian law, policy and action, yet which are not necessarily connected to the theme one sees on the cover page of a particular edition. As part of its culture of openness and desire to feature a diversity of voices, indeed, anyone may approach the Review on his/her own initiative via email² to submit an abstract with an idea for publication. Such abstracts and, eventually, articles, get assessed according to the Review’s regular standards of quality, including through “double-blind” peer review. Combined in this edition is a remarkable collection of articles meeting those criteria—each of
which deals with a fascinating topic that, generally, has failed to attract sufficient attention in the literature so far. It is hoped that, by virtue of publishing articles on these sometimes less-known subjects, further interest will be generated in studying them.

Finally, in order to ensure that readers of the *International Review of the Red Cross* remain up to date about noteworthy recent institutional documents from, or initiatives by, the ICRC in the realm of international humanitarian law, policy and action, the final part of this edition (“Reports and documents”) bundles a series of such documents, either in “executive summary” format or in their entirety.
Attaher Zacka Maïga was born on 10 May 1963 in Bia, Bourem Cercle, Gao Region, Mali. He has spent his life in the service of the International Red Cross and Red Crescent Movement, joining the Mali Red Cross as a volunteer in 1987 before working for the International Federation of Red Cross and Red Crescent Societies as a nutritionist in a pilot centre for nutritional recovery and education in Bourem from January 1988 to June 1990. In 1990 and 1991 he acted as consultant to a number of organizations, including World Vision and UNICEF.

In April 1992, Attaher Maïga joined the International Committee of the Red Cross (ICRC) as a “resident” (i.e. local) employee. Since then, he has held many positions. From 1996 to 2000, he was in charge of the Gao office, which employed almost 100 staff, both resident and “mobile” (expatriate). He then took charge of the ICRC’s programmes in northern Mali from 2001 to 2006, ran the organization’s office in the Malian capital Bamako from 2007 to 2008 and was responsible for the Mali communication programme between 2009 and 2011. From November 2011 to November 2014, he was head of the ICRC’s northern Mali sub-delegation, one of the first resident employees to lead an ICRC sub-delegation. Since 2015, Attaher Maïga has been Networking Coordinator for the ICRC’s Mali delegation.

In 1996, Mr Maïga initiated the ICRC’s post-conflict programmes in his country, covering the fields of agriculture, veterinary services and health. In 2009, he launched a pilot migrant project in Kidal, northern Mali. These much-appreciated initiatives...
resulted in his being invited to participate in the 2010 Montreuil meeting, which laid the foundations for the reforms currently underway.

Attaher was the first Mali focal point for the ICRC’s Unit for Global Affairs. This role gave him a deeper understanding of trends in the Islamic world and enabled him to help the ICRC adjust its dialogue with Jihadist armed groups. Our interview with Mr Maïga highlights his extensive experience with one of the oldest humanitarian organizations and is an opportunity for him to share his understanding of the ICRC’s interaction with the armed groups that controlled northern Mali in 2012, when he was representing the ICRC in the region.

Attaher Maïga holds a degree in public administration from the Institut de Gestion et des Langues Appliquées aux Métiers, Bamako.

Keywords: Sahel, non-State armed groups, humanitarian negotiation, Gao, Operation Serval, military intervention.

1. Good morning, Attaher. Thank you for agreeing to share your experience of dialogue with armed groups in the Sahel region. First of all, could you tell us about the setting in which you worked prior to the start of French military operations in Mali in January 2013? What was the role of the ICRC during this period and what dealings did you have with the armed groups in question?

Prior to the arrival of the French military in 2013, operational conditions in Mali had been difficult owing of the sheer number of different armed groups active in the area, including the National Movement for the Liberation of Azawad, al-Qaeda in the Islamic Maghreb, Ansar Dine (Defenders of the Faith) and the Mouvement pour l’Unification et le Jihad en Afrique de l’Ouest (MUJAO; Movement for Unification and Jihad in West Africa). These armed groups had seized control of northern Mali, the armed conflict had escalated and the State had been unable to ensure the provision of basic social services in that part of the country; these circumstances had had a significant impact on the needs and vulnerabilities of the civilian population. Against this background of diverse humanitarian needs, the ICRC had begun work in northern Mali, particularly in the towns of Gao, Timbuktu and Kidal. During the period 2012–2013 we were one of the major humanitarian organizations on the ground, working to meet a large proportion of people’s needs. The humanitarian aid we provided included distributing food, installing water supply systems and building community health centres. This work helped us to win the trust of the civilian population and the armed groups in Mali; our credibility was pivotal to establishing a direct dialogue with these groups.

Our efforts to make contact with the armed groups in Mali dated back to 2007. Our first step had been to approach community leaders to help us to gain direct access. We then sent a letter through an intermediary who we had first contacted in 2010 in Timbuktu indicating our desire to engage in dialogue with the mujahideen, along with a document in Arabic describing the ICRC, our
mandate, our principles and our activities. These initial efforts proved fruitless. In 2011 we sent the same documents to another contact in Kidal. It was only in April 2012 that al-Qaeda in the Islamic Maghreb confirmed receipt of our letter and took steps to contact us.

2. How did you initiate dialogue with these groups? What ICRC decisions had made this contact possible, and what concessions had been necessary?

I was staying in Bamako when I was contacted by one of the people who had previously helped us to engage in dialogue with armed groups. This person informed me that one of his friends wanted to meet with ICRC officials. I jumped at the opportunity and immediately travelled to Gao, where a face-to-face meeting was to take place.

Our reputation and credibility among local communities played a pivotal role in establishing a dialogue with the armed groups. Our humanitarian work in the area enjoyed the broad support of the civilian population. This support had a significant influence on the decision of the armed groups to talk to us. This was made explicitly clear to me by the members of the armed groups themselves, who informed me that civilians had described the ICRC as a trustworthy organization and had told them that anyone who attacked us was attacking the local communities.

3. Could you tell us about the first meeting and how you assessed risk before you showed up?

I was in Bamako when the head of the ICRC delegation, who was based in Niger at the time, called me to tell me that a combatant wanted to meet me. I immediately set out for Niamey. The delegation was worried about me, given the risks involved in attending this meeting. Having reassured the team, we talked at length about the content of any future discussions, as well as our strengths and weaknesses. I needed to be sufficiently prepared for this crucial meeting. Having prepped for the encounter, I travelled to Gao. On arrival, I was taken to see a high-ranking local. After we had talked for a little while, we were joined by a group of mujahideen fighters, including one of the leaders of al-Qaeda in the Islamic Maghreb.

After exchanging the usual pleasantries, I fell into conversation with Mokhtar Belmokhtar. I asked him why he had wanted to meet with ICRC officials. He said that he was aware of the ICRC’s work and had already met with ICRC representatives in Afghanistan in the 1990s. He said that we were a credible, serious organization. Indeed, he thought ICRC to be the most credible of all the international organizations that they had encountered. He then told me that his group lacked the funds to fully meet the needs of the civilian population, and that they wanted to speak to an organization capable of undertaking that task. Essentially, they wanted our support in assessing and responding to the needs of the local people. I told him that while we wanted to help people affected
by conflict, we were unfortunately not always able to gain access to those communities. Moreover, on a number of occasions, the food aid we had tried to distribute had been destroyed by members of armed groups. Finally, I told him that I had taken note of his request but was unable to give him an answer on the spot, as I needed to consult my superiors on how to proceed. That was the first “official” meeting between the ICRC and these armed groups.

4. How did you start to build trust with these groups? How did they view the ICRC?

Trust was built rapidly; soon after we had confirmed our willingness to enter into dialogue with jihadist groups, we were able to expand our activities on the ground, to provide health care to many wounded and sick people. Having undertaken an independent assessment of needs in the region of Gao, Timbuktu and Kidal, we distributed more than 1500 tonnes of goods. The leaders of the jihadist groups were pleasantly surprised by the speed with which we had begun our operations. They were so pleased with our work in the field that they brought the media in to cover our efforts to help people in need.

Our humanitarian work and our professional approach had helped to build trust in the ICRC among the mujahideen. In the course of our work, we tried to take on board some of their demands and recommendations. For example, they did not want women or Christians involved in our work. We took the measures necessary to avoid offending them on that count. However, as their trust in our work grew, we were sometimes granted exemptions. For example, if a serious medical case arose and there was no competent Muslim doctor available, I would appeal to members of the armed groups and obtain their authorization to call in a non-Muslim medic. In time, their trust in our work and our credibility enabled us to send in Christian delegates and workers of different nationalities. Little by little, through a process of negotiation, we were able to free ourselves from the various restrictions that the armed groups had imposed at the start of our formal exchanges.

5. Why do you think that the group agreed to talk to us? Did you manage to expand the scope of the dialogue to cover other ICRC priorities, such as the conduct of hostilities?

As I mentioned previously, the armed groups’ decision to enter into dialogue with us had been, to a large extent, influenced by the civilian population and the trust we had incrementally built through our work.

Our exchanges with the jihadists predominantly revolved around health care, security and access to people in need. While the trust we had built had allowed us to progressively expand the scope of our activities and free ourselves from some of the restrictions initially imposed on our work, it is important to stress that the dialogue with the armed groups never really extended to discussing aspects of international humanitarian law or international human rights law. We were only able to address these issues once, in August 2012, during a meeting I
had arranged with the head of the delegation during one of his trips to Gao. During that meeting, Jean Nicolas – the head of the ICRC delegation – had tried to discuss the issue of hostages and other legal matters relating to protecting people caught up in armed conflict. However, his main counterpart was not open to discussing these issues; for him, human rights emanated from divine law and not from a set of rules established by men. More recently, from mid-2020 onwards, the ICRC delegation has been able to broach issues relating to protection with some of the leaders of the armed groups.

6. How has the relationship evolved over time? Looking back, can you identify any particular phases?

The mujahideen advised us to work exclusively in accordance with the standards and principles of our organization. They also asked us to immediately inform them if someone sought to impede our work.

The decision to allow the ICRC to carry out its mandate to help people in need was taken within the framework of a *shura*, or consultative council. Mokhtar Belmokhtar had told other members of these armed groups that we wished to establish a dialogue with them. A council meeting was held to discuss the matter and after two days of deliberations, a consensus was reached. I was informed by telephone of their decision to allow the ICRC to enter into dialogue with the mujahideen in order to carry out its mandate. It is worth noting that the council had been very methodical in its approach.

During the following nine months, no security incidents took place in the field: the armed groups had made our security a priority. However, they had banned us from using the ICRC emblem. Initially, it had been agreed that we could use an alternative *ad hoc* emblem: the initials of the ICRC on a white background. Nevertheless, three days later, we were informed that some of the jihadists did not agree with us using this form of the emblem, including the branch of the Islamic State group led by Adnan Abou Walid al-Sahrawi, who thought that the alternative emblem was identical to that of the Red Cross. We were therefore obliged to operate without any distinctive emblem whatsoever. In the meantime, however, the mujahideen had implemented an alternative identification system which allowed us to avoid security incidents in the course of our work.

Before the French military forces entered Mali, the mujahideen contacted me to tell me that they did not want to wage war in Gao or Timbuktu, and even less so in Kidal, as these towns had large civilian populations and they did not wish to place civilians in danger. They had therefore decided to withdraw from these towns to save civilian lives. They also assured me that wherever they operated, they would try to make sure that we could continue to do our work.

New armed groups emerged on both sides of the conflict in the wake of the French military operations. Given the evolving situation, our lack of a distinctive emblem made it difficult for the parties to the conflict to identify us as a humanitarian organization. We therefore resumed using the red cross emblem,
especially in view of the increased risk of attacks and air raids. Unfortunately, this move caused anger among certain armed groups and led to a breakdown in our relations with them. They claimed, “we told them not to use the emblem, but as soon as the army arrived, as soon as the white men arrived, they betrayed us and started to use the emblem again”. From a security point of view, it was a very difficult period for us. It was under these circumstances that one of our teams was abducted.

It is important to remember that the inter-community dynamics in the region at that time did not play in our favour, with frequent accusations of ICRC bias towards one or other community. Given this unfortunate turn of events, I sent an envoy to meet with the head of the Mouvement pour l’Unification et le Jihad en Afrique de l’Ouest, with whom I had spoken to at length on the telephone. I explained to him that conditions on the ground had forced us to go against their wishes by using the emblem. I made it clear that we did not seek to defy them and that the ICRC remained a neutral and independent organization. At the same time, we were approached by one of the leaders of al-Qaeda in the Islamic Maghreb who, for his part, reassured us that his group had no problem with the ICRC and that if the contrary had been the case, they would have let us know.

7. Did the fact that the ICRC engaged in dialogue with some of these groups create tensions in your relations with European armed forces, especially the French army?

The fact that we engaged in dialogue with jihadist groups did not cause any problems or tensions between the ICRC and the European armed forces in the region. I had a very good relationship with representatives of the French army, whether they belonged to Operation Serval or Operation Barkhane. We cooperated closely with the European armed forces, who were aware that, as a neutral organization, we engaged in dialogue with all parties to the conflict. For example, after planning the following week’s activities with the sub-delegation on Fridays, I would head over to meet with the French army the following day to share our weekly plans with them. I should, however, mention that certain members of our teams did not always scrupulously respect all the security rules established by the European armed forces and were sometimes reprimanded by them.

8. Was there a lot of debate between the leaders of these groups and Islamic scholars from civil society concerning the application of Islamic law, including criminal law; could you explain to us the role that the ICRC played in these discussions?

We had no direct influence since these issues were, in principle, outside the material scope of our discussions with the armed groups. We did, however, try to influence their actions indirectly by contributing to the internal debates between religious
leaders in Mali and leaders of armed groups. For example, during a seminar on the scope of application of Islamic law (Sharia) organized in Bamako by the Islamic High Council in Mali, we handed out documents to council members on relevant topics, including examples from other settings where the ICRC operated. A further opportunity to raise awareness among the armed groups of some of these issues arose when they approached us to request medical assistance during the amputations they planned to perform. We firmly opposed that suggestion and used the opportunity to raise awareness of the fact that such practices were banned.

9. How did you go about discussing health care in danger? What problems did you face and what arguments did you use to resolve them?

Certain members of the armed groups met with me to inform me that some of the nurses working at the hospital had stolen medicines meant for the use of people in need. They had identified twenty-one suspects who they argued must be punished in line with Islamic law, namely through the amputation of a hand. I was opposed to the idea and immediately informed the head of the ICRC delegation of the situation. The delegation leadership then held talks with the armed groups, making it clear that even if it were established that the allegations were founded, it would be up to the ICRC to decide whether it wanted to pursue the case. It later turned out that the allegations had been made in order to settle scores. Some members of the armed groups thought that there were informants working at the hospital who passed on information to the government in Bamako. We also used this opportunity to raise awareness of the rules protecting health care services during armed conflicts and to remind the armed groups that their members did not always comply with those rules. Later on, we also organized a seminar for the armed groups on the issue of health care in danger. The issue had been taken up by the head of the delegation, who made telephone calls to one of their leaders and also asked me to pass on messages to them on his behalf.

It is also worth pointing out that the armed groups’ concern with maintaining credibility also motivated them to be more open to discussing the issue of protecting the medical services.

10. What impact did inter-community conflicts have on dialogue with different armed groups?

In 2012, inter-community tensions were not as acute as they are today; their impact on the dialogue with different armed groups was minimal. Moreover, we enjoyed the trust of the armed groups who, as I noted earlier, had expressly agreed to engage with us and to allow us to do our work. They were committed to ensuring that our operations continued without impediment. In each region we had a focal point who served as our guide. We could contact them whenever trouble arose. Moreover, I was invited once a month to see the emir to ensure that everything was fine. As far as my own personal safety was concerned, my car was never
searched, I was free to move around and I was treated as an important person. I pleaded for the Islamic police, the *hesba*, to refrain from arresting any ICRC staff members; if any problems arose involving a member of our organization, the ICRC needed to be consulted before any proceedings were brought.

Today things are very different; there is a plethora of armed groups operating in Mali with, at times, unclear agendas and ambitions—although some of these groups do try to facilitate our work as and when we ask them to do so. We are trying, albeit with great difficulty, to win the trust of this new generation of armed groups that, unfortunately for us, are not familiar with our past work. Our credibility and reputation are still an asset in this process, even though carrying out humanitarian work is much more difficult today than it was in 2012.

11. Coming back to more general issues, how important is the fact that you belong to a local community? Do international staff face different challenges when it comes to establishing and maintaining a dialogue with armed groups?

First of all, I have to point out that the armed groups did not want to negotiate with *me* as an individual, but with the ICRC as an institution. I was merely an envoy through whom they were able to communicate with the ICRC. Having said that, I must admit that my background did have a significant impact on the nature of the relationship between the ICRC and the armed groups. Having grown up in the area, I was familiar with the local environment, which lent me a certain legitimacy *vis-a-vis* local communities and armed groups—both Arab and Tuareg. Moreover, I had already worked to help vulnerable people during previous conflicts in Mali. That was why, in 1992, the rebel groups chose me to be the main intermediary in the dialogue between them and the ICRC. However, it is important to remember that I am also a product of the ICRC: working for our organization has also shaped my behaviour and my personality. Although I do hail from a local community in Mali, the training and experience I gained with the ICRC has helped to make me the man I am today.

I am a man of principle who never allows himself to be influenced by emotions when working in the field. I remember that in the 1990s my own community accused me of being pro-Tuareg and pro-Arab because the sub-delegation for which I worked focused on supporting Tuareg and Arab communities, which were among the most deprived. Four of the nine community health centres that we built in 1998 were located in Tarkint, a commune inhabited by Arabs and Tuaregs. In contrast, my own commune—where I was in charge of implementing community projects—had no such infrastructure.

Furthermore, when writing activity reports, I did not hold back from recording violations committed by members of my community against members of Tuareg communities. I was never party to any form of selective justice. Those values and principles were instilled in me by my colleagues at the ICRC, to whom I owe a debt of gratitude. These factors facilitated our efforts to establish and maintain a dialogue between the ICRC and the armed groups in Mali.
The fact that I grew up in Mali and am familiar with local customs has certainly helped to facilitate dialogue with the armed groups. However, I have no doubt that anyone, of any nationality, could also establish and maintain a dialogue with these groups as long as they upheld the values and principles promoted by the ICRC. In order to have the same comparative advantage as me, it would be enough for someone to try to understand the local context in which these groups operate, as well as the socio-cultural norms in that region.

12. Looking back, what did you learn from this experience? What are the mistakes that an international organization should avoid making when seeking to establish a dialogue of this kind?

In my opinion, the one mistake you should never make with these groups is failing to honour commitments towards them. I remember that after my very first meeting with one of the leaders of al-Qaeda in the Islamic Maghreb, he asked me what made a “good” Muslim. By way of reply, I suggested that a good Muslim prayed daily, attended mosque and observed zakat (alms giving). He responded that a good Muslim was someone who kept his word and honoured his commitments. Loyalty is extremely important to these armed groups. That is why I opposed the ICRC’s decision to stop delivering water to Gao; the news had been passed on to me in Niamey by a combatant who was very concerned about what would happen to the communities in need. I asked him where he had got his information and he told me that he had been following the news on Radio France Internationale. I assured him that it was only a rumour and that I would obtain further information when I got to Gao. Once I had verified that his information was, in fact, correct, I handed in my resignation to the head of the ICRC delegation in Gao. I then continued to distribute 20,000 litres of diesel to communities, to the great surprise of the mujahideen, who had heard over the radio that the ICRC was withdrawing. They therefore assumed that the rumours were false—something I was only too happy to confirm. Fortunately, the ICRC leadership later decided to reverse their decision to withdraw.

13. How can an organization like the ICRC “institutionalize” your practical experience?

In my opinion, the best approach would be to record these experiences in writing and to disseminate them. We should not be afraid to write about our experiences or to keep a record of our dealings with armed groups, especially since they do not forbid us to do so. As far as I am concerned, my experiences have been particularly useful for other humanitarian organizations present in Mali, for whom I have worked as an adviser.

Thank you, Attaher, for sharing your broad experience with us.
The legal protection of persons living under the control of non-State armed groups

Tilman Rodenhäuser*
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Abstract
In recent non-international armed conflicts in countries such as the Central African Republic, Iraq, Libya, Nigeria, South Sudan, Syria, Ukraine and Yemen, various non-State armed groups (NSAGs) have exercised control over territory and people living therein. In many cases, and for a variety of reasons, NSAGs perform some form of governance in these territories, which can include the maintenance of order or the provision of justice, health care, or social services. The significance of such measures became particularly apparent when in 2020 not only governments but also armed groups took steps to halt the spread of the COVID-19 pandemic. This article examines key legal issues that arise in these contexts. First, it analyzes the extent to which international humanitarian law protects the life and dignity of persons living under the control of NSAGs, rebutting doubts as to whether this field of international law has a role in regulating what is sometimes called “rebel governance”. Second, it provides a brief overview of aspects of the lives of people in armed group-controlled territory that are addressed by international humanitarian law and aspects that instead fall into the realm of human rights law. Third, the article discusses whether and to what extent human rights law can be said to bind NSAGs as a matter of law and flags issues that need further attention in current and future debates.

* The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC.
Keywords: non-State armed groups, armed groups, international humanitarian law, human rights law, nexus, non-international armed conflict, governance, COVID-19, scope of application.

Introduction

In 2012, two non-State armed groups (NSAGs) took control over the Malian town of Timbuktu. Early on, these groups promulgated edicts regulating the lives of people living in Timbuktu and surrounding areas. These edicts included prohibitions on smoking, drinking alcohol, watching TV, listening to certain types of music, and relationships between unmarried couples.\(^1\) To enforce these rules and to resolve disputes between inhabitants, the two groups established “a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade”.\(^2\) During the approximately ten months that the two groups controlled and “governed” the city, they enforced – for some infractions spontaneously, for others after bringing the case to the Islamic tribunal – the newly promulgated rules, including by corporal punishment.\(^3\) Moreover, they destroyed several mausoleums in Timbuktu, which the new “government” considered to be against its interpretation of Islam.\(^4\)

The situation in Mali was not unique. Looking at recent non-international armed conflicts (NIACs) in countries such as the Central African Republic, Iraq, Libya, Nigeria, South Sudan, Syria, Ukraine and Yemen, it appears fairly common that NSAGs exercise control over territory.\(^5\) In many cases, and for a variety of reasons, NSAGs perform some form of governance in these territories.\(^6\) This became particularly apparent when in 2020 not only governments but also armed groups adopted measures to halt the spread of the COVID-19 pandemic. For

\(^1\) See International Criminal Court (ICC), Prosecutor v. Al Hassan Agabdoul Azizag Mohamed Ag Mahmoud, Case No. ICC-01/12-01/18, Decision on the Confirmation of Charges, 13 November 2019, para. 94.
\(^3\) See ICC, Al Hassan, above note 1, paras 94–128.
\(^4\) ICC, Al Mahdi, above note 2, para. 36. The ICC has charged – or convicted – several persons who were part of the “government” established by the two NSAGs for war crimes and crimes against humanity.
\(^6\) Mampilly has found that NSAGs regularly engage in governance activities, such as “providing security from violence; developing educational and health facilities; establishing a system of food production and distribution; allocating land and other resources to provide opportunities for civilians to engage in livelihood activities (agriculture, small business, etc.); providing shelter to the displaced; regulating market transactions; taxation of civilians and commercial actors; resolving civil disputes; and addressing other social problems that commonly accompany situations of internal war”. Zachariah Mampilly, “Insurgent Governance in the Democratic Republic of the Congo”, in Heike Krieger (ed.), Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region, Cambridge University Press, Cambridge, 2016, p. 44.
example, in northeast Syria the “Crisis Cell of the Jazeera Region” imposed a two-week curfew and ordered the closure of most shops and governance institutions, permitting only essential businesses and organizations to continue their services. In certain regions of Colombia, armed groups communicated a variety of anti-COVID-19 measures to local populations, including “curfews; lockdowns; movement restrictions for people, cars, and boats; limits on opening days and hours for shops; as well as banning access to communities for foreigners and people from other communities”. Some groups, including in Colombia, reportedly also announced that they would “kill people in order to preserve lives” because the population had not respected the orders to prevent Covid-19.

As a matter of fact, the International Committee of the Red Cross (ICRC) has underlined that “for civilian populations, living under the de facto control of a non-State armed group can exacerbate pre-existing needs and vulnerabilities, create new ones, or – in other instances – provide a degree of stability in conflict-ravaged environments”. As a matter of law, States, human rights experts, academics, humanitarian organizations and international criminal tribunals have taken different views on how to address such situations. This has resulted in a lack of clarity on which rules of international law apply, or should apply, when NSAGs exercise control over territory. At least three challenges characterize such situations. First, while in international armed conflicts (conflicts between two or more States) international humanitarian law (IHL) – complemented by human rights law – provides a well-established legal regime for belligerent occupation, no “law of occupation” regulates the administration of territory and populations by an NSAG that has displaced the State authorities in a NIAC. Second, although it is undisputed that IHL applicable in NIAC provides fundamental rules on many acute humanitarian concerns during armed conflicts, questions have been asked regarding the extent to which these rules are sufficient to protect persons living under the control of an NSAG. And third, in recent years human rights experts, scholars and at times States have reached for international human rights law (IHRL) to address NSAGs. However, the question of whether and to what extent NSAGs have human rights obligations as a matter of law remains “not

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9 Ibid. For a detailed account of what measures taken by certain groups in Colombia have meant for affected families and how other NSAGs have reacted to the challenges posed by the pandemic, see International Committee of the Red Cross (ICRC), “As If the War Was Not Enough”: Stories of Hardship and Resilience in Times of COVID-19, Geneva, 2021, pp. 46–51, available at [www.icrc.org/en/document/as-if-war-was-not-enoughColomb](http://www.icrc.org/en/document/as-if-war-was-not-enoughColomb).


11 To recall, NIACs are protracted armed confrontations occurring between governmental armed forces and the forces of one or more NSAGs, or between NSAGs.
settled”,

“highly controversial” and “contested as a matter of international law”. With a view to clarifying how international law protects persons living under the control of NSAGs, this article first analyzes the extent to which IHL protects the life and dignity of persons living under the control of non-State parties to armed conflicts, rebutting doubts on whether this field of international law has a role in regulating how NSAGs exercise control over persons living in territory under their control. Second, it provides a brief overview of aspects of the lives of persons living under the control of NSAGs that are addressed by IHL and aspects that instead fall into the realm of human rights law. Third, the article discusses whether and to what extent human rights law can be said to bind NSAGs as a matter of law and flags issues that need more attention in current and future debates.

Before delving into the legal analysis, a word on terminology is required. An analysis of legal questions requires a generalization of complex realities. There are thousands of armed groups active around the world that pursue different objectives, ideologies or religions, operate in different contexts, and engage in different types of conduct. Among these armed groups, in 2020 more than 100 could be legally classified as parties to a NIAC by the ICRC. In this article, such non-State parties to armed conflicts are referred to as NSAGs. Importantly, while they must share certain features to be considered sufficiently organized to be party to a NIAC, in practice NSAGs are far from a uniform category of groups. This article focuses on those groups that exercise at least some control over territory and, notably, over the persons living therein. This includes a spectrum of groups, ranging from those that exercise somewhat fluent control


17 This article does not address obligations or responsibilities of armed groups that are not parties to armed conflicts and not bound by IHL.

18 For a comprehensive analysis of what the “organization” criterion for an NSAG under IHL means, see T. Rodenhäuser, above note 5, pp. 19–120.

19 While control over territory is one element that is required for the applicability of Additional Protocol II (AP II, see Art. 1(2)), other IHL obligations – most notably those under customary IHL – are the same for all NSAGs, irrespective of whether they exercise “stable” control over territory, whether such control is exclusive, or what governance capacities a group may have. Such considerations have, however, been mentioned in discussions on whether NSAGs might be held accountable under IHRL.
over territory and provide sporadic “services” to the population living therein to groups that have stable control over territory and, de facto, act like a State authority.

The applicability of IHL in territory controlled by NSAGs

When NSAGs took control over the city of Timbuktu in 2012, the International Criminal Court (ICC) concluded that they did so in the context of a NIAC.\footnote{ICC, \textit{Al Mahdi}, above note 2, para. 31.} Indeed, if an NSAG is capable of using military means to oust State armed forces from part of the State’s territory, including major cities, in the ordinary course of events the situation will amount to a NIAC to which IHL applies.\footnote{For in-depth legal analysis on when a situation reaches the threshold of a NIAC, see ICRC, \textit{Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War}, 2nd ed., Geneva, 2020, paras 448–485; Lindsay Moir, “The Concept of Non-International Armed Conflict”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), \textit{The 1949 Geneva Conventions: A Commentary}, Oxford University Press, Oxford, 2015, pp. 404–414.}

It is today uncontroversial that IHL defines a significant number of rules which are legally binding on States and non-State parties to a NIAC, either based on treaty law (common Article 3 and Additional Protocol II (AP II) to the four Geneva Conventions) or customary law.\footnote{ICRC Commentary on GC I, above note 12, para. 232. While the fact that NSAGs are bound by IHL is broadly accepted, academic debate continues on which legal theory may explain the binding effect of IHL on NSAGs. For recent examinations of the issue, see S. Sivakumaran, above note 13, pp. 238–242; Daragh Murray, “How International Humanitarian Law Treaties Bind Non-State Armed Groups”, \textit{Journal of Conflict and Security Law}, Vol. 20, No. 1, 2015.}

It is also well known, however, that IHL applicable in NIAC does not include a comprehensive set of rules on how NSAGs must administer territory they seize and populations in that territory. As Sassòli explains, when States developed IHL rules for NIACs, they dismissed the “horrifying idea” of a non-State party taking control over part of a State’s territory “by simply ignoring it”.\footnote{M. Sassòli, above note 13, p. 269. While AP II mentions the fact that “organized armed groups” might “exercise such control over a part of [a High Contracting Party’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol” (Art. 1(1)), the Protocol does not contain rules on the administration of such territories, other than fundamental guarantees protecting persons who do not take a direct part in or who have ceased to take part in hostilities.}

As a consequence, IHL applicable in NIAC does not contain certain important provisions that are found in the law of occupation, such as “rules addressing issues such as the provision of public order and safety, the possible collection of taxes, or the adoption of laws regulating life in such territory”.\footnote{ICRC, above note 10, p. 53.}

Still, a number of rules of IHL applicable in NIAC contain prohibitions and obligations that are relevant to and provide protection for persons living under the control of NSAGs. These include

- the protections afforded to the wounded and sick;
- the protection of civilian hospitals;
- the principle of humane treatment;
- the prohibition of collective
penalties, pillage, and reprisals; the taking of hostages; the prohibitions of deportation and forcible transfer; and the right to due process and judicial guarantees – [which] are already applicable to non-international armed conflicts, whether through comparable treaty provisions or through customary international law.25

Thus, while the law of occupation as such does not apply in NIAC, it is clear that certain “essential standards for the protection of civilians and persons hors de combat are essentially the same in internal armed conflict”.26 As Sivakumaran explains, “the law of belligerent occupation is, in reality, a composite category that contains a number of different rules”, some of which are also found in IHL applicable in NIAC. The same conclusion is reached by Spoerri, who argues that even though the law of occupation does not apply in NIAC, this does not mean that no IHL rules apply for the insurgent side since they must – when exercising control over parts of the national territory – always abide by the provisions of Common Article 3 of the Geneva Conventions of 1949 and by Additional Protocol II when applicable.27

Other experts, however, have questioned whether IHL would apply to “governance” acts conducted by an NSAG in territory under its control.28 Arguments that question the applicability of IHL to such acts are, at times, accompanied by suggestions that with regard to “everyday life”, human rights law is the more appropriate and protective legal framework that should apply.29

In order to determine whether and to what extent IHL rules protect persons living under the control of NSAGs, this article examines the issue step by step.

25 S. Sivakumaran, above note 13, p. 530.
27 Philip Spoerri, “The Law of Occupation”, in Andrew Clapham and Paola Gaeta (eds), The Oxford Handbook of International Law of Armed Conflict, Oxford University Press, Oxford, 2014, p. 185. Similarly, Sassòli finds that IHL applicable in NIAC has a “certain utility for people who find themselves in territory administered by an armed group by protecting them against torture, summary executions, starvation as a method of war, looting, enforced disappearance or the destruction of their cultural heritage”. M. Sassòli, above note 13, p. 269.
Starting from the assumption that an NSAG takes control over territory and persons living therein in the course of a NIAC (since IHL only applies if there is an armed conflict), the following section analyzes where and for how long IHL applies during armed conflict. The article then asks whether IHL applies to how NSAGs treat persons living in territory under their control.

Determining where and for how long IHL of NIAC applies

In 2020, the ICRC estimated that between 60 and 80 million people were living in territories exclusively controlled by an armed group.\(^30\) In most of these situations, the armed group is party to a NIAC and therefore bound by IHL.

Often, people living under the control of an NSAG that is party to a NIAC will not live close to the “front line” but rather in towns or villages which have fallen into the hands of an NSAG, and which may be at a significant distance from places in which hostilities are conducted. As many of today’s NIACs are protracted, meaning that they last for many years, the reality is that populations might live in NSAG-controlled territory for several years.\(^31\) For example, in the 1980s the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka became “increasingly capable of attacking [Sri Lankan Army] positions and holding territory, thereby establishing a stronghold in the north and controlling territory in the east of the island”.\(^32\) Reportedly, they progressively acquired “the trappings of pseudo-state institutions, including a police, courts and detention centres” until the conflict ended in 2009.\(^33\) More recently, in 2014 “groups of armed people began to seize the buildings of government institutions across Donetsk and Luhansk regions” in Ukraine, and shortly after “proclaimed independence from Ukraine and the creation of the ‘Donetsk people’s republic’ and ‘Luhansk people’s republic’”.\(^34\)

As this reality has not changed as of 2021, this means that people in the Donetsk and Luhansk regions have been living under the effective control of these groups for over six years. For our purposes, this raises at least two important questions. First, does IHL apply anywhere in NSAG-controlled territory? And second, for how long does IHL apply?

\textit{The geographic scope of application of international humanitarian law}

Regarding the geographic scope of application of IHL, the Geneva Conventions stipulate that common Article 3 applies “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting

\(^30\) See the article by Jerome Drevon and Irénée Herbert in this issue of the Review.


\(^33\) \textit{Ibid.}

Parties” and must be respected “at any time and in any place whatsoever”. Interpreting what this broad stipulation means, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held:

[T]he rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. … [I]nternational humanitarian law continues to apply[,] … in the case of internal conflicts, [in] the whole territory under the control of a party, whether or not actual combat takes place there.\(^{35}\)

Similar to common Article 3, the scope of application of AP II is not limited narrowly to areas in which hostilities take place. The Protocol applies “without any adverse distinction … to all persons affected by an armed conflict” as defined in the Protocol.\(^{36}\)

As a result, IHL treaty law and the jurisprudence of international tribunals make it clear that common Article 3, AP II if applicable, and customary IHL apply in the whole territory controlled by a State or non-State party to a NIAC, even in areas where no hostilities take place.\(^{37}\) This includes the entire part of a State’s territory that has fallen into the control of an NSAG.

**The temporal scope of application of international humanitarian law**

Today, it is widely accepted that a NIAC exists and IHL starts applying “whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.\(^{38}\)

Once applicable, IHL applies for as long as the conflict lasts. Common Article 3 and AP II only state that the respective treaties apply “in the case of” or “to” a NIAC; the question of when a NIAC ends is subsumed in these formulations.


\(^{36}\) AP II, Art. 2(1). Armed conflicts to which AP II applies are defined in Article 1(1) of AP II.

\(^{37}\) See also ICRC Commentary on GC I, above note 12, paras 455–464; L. Moir, above note 21, p. 404; Eric David, “Internal (Non-International) Armed Conflict”, in A. Clapham and P. Gaeta (eds), above note 27, pp. 261–262; Jann K. Kleffner, “Scope of Application of Humanitarian Law”, in D. Fleck (ed.), above note 26, p. 59. IHL of NIAC may also apply in certain areas outside the territory of the State on whose territory the conflict takes place, for instance in the context of spill-overs.

When defining the notion of NIAC for international criminal law purposes, the ICTY stated in the Tadić case that NIACs end when “a peaceful settlement is achieved”. More recent jurisprudence of the ICC indicates that the analysis of whether such a “peaceful settlement” has been achieved “does not reflect only the mere existence of an agreement to withdraw or a declaration of an intention to cease fire”. Indeed, a narrow interpretation that a “peaceful settlement” requires a peace agreement or a similarly formal act has been criticized as “too strict a standard”, potentially introducing “a measure of formalism in a determination that should, first and foremost, be driven by facts on the ground”.

If an NSAG exercises control over territory, fighting will likely continue with varying intensity at the demarcation line of such territory. In that case, IHL undoubtedly continues to apply not only in the area in which hostilities take place but throughout “the whole territory under the control of a party, whether or not actual combat takes place there”. In addition, there may also be situations in which an NSAG controls territory and the fighting reaches a sort of stalemate, the fighting “freezes”, or a ceasefire is agreed between the parties. In that case, according to the ICRC, the NIAC would only end if there is “a lasting cessation of armed confrontations without real risk of resumption”.

This cautious approach appears pertinent for legal and practical reasons, including when an NSAG exercises control over territory and population. First, if an NSAG exercises control over parts of a State’s territory and no viable political solution is found between the two parties, there will likely be an ongoing risk that hostilities resume, because the State will seek to regain control. Second, a hasty conclusion that a NIAC has ended and IHL has ceased to apply, followed by a resumption of hostilities and a reclassification, potentially followed by another conclusion that IHL has ceased to apply if the intensity of violence drops again, might lead to misunderstandings about the applicable legal framework and gaps in the legal regime protecting persons affected by conflict.

39 ICTY, *Tadić*, above note 35, para. 70. This standard has been taken up by other tribunals, including the ICC. See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute: Public (Trial Chamber I), 14 March 2012, paras 541, 548; ICC, *Bemba*, above note 35, para. 141.


44 ICRC Commentary on GC I, above note 12, para. 491. Going in a similar direction, Sivakumaran concludes that a NIAC would end only “when the fighting declines up until the point that it dissipates entirely”. S. Sivakumaran, above note 13, p. 253. The ICRC suggests the following indicators to assess whether or not this threshold has been met: “the effective implementation of a peace agreement or ceasefire; declarations by the Parties, not contradicted by the facts on the ground, that they definitely renounce all violence; the dismantling of government special units created for the conflict; the implementation of disarmament, demobilization and/or reintegration programmes; the increasing duration of the period without hostilities; and the lifting of a state of emergency or other restrictive measures”. ICRC Commentary on GC I, above note 12, para. 495.
and violence. Third, while the end of IHL applicability arguably protects civilians against “arbitrary exercise of State power” because only human rights law would apply, that same calculus may not apply with regard to NSAGs which are “bound by IHL but probably not by human rights law”. Indeed, unless it is accepted that IHRL binds NSAGs, once IHL ceases to apply, the conduct of NSAGs would—under international law—only be regulated by certain rules of international criminal law, i.e., individual criminal responsibility for crimes against humanity or genocide.

Who is protected by IHL in NIAC, and from what acts? The “nexus” question

Based on the above analysis, it must be concluded that IHL applies in the whole territory under the control of a party to the conflict and for as long as the conflict lasts. But does IHL offer protection for everybody living in territory controlled by an NSAG, and if so, what acts does IHL protect against? Looking at the COVID-19-related examples presented in the Introduction to this article, can IHL be said to prohibit NSAGs from using physical force against people who do not comply with the group’s public health measures? And more broadly, would IHL prohibit NSAGs from committing mutilations, cruel treatment or torture during “law and order” operations even if such acts are sanctioned by the rules or “laws” promulgated by the NSAG?

According to common Article 3, each party to the conflict shall in all circumstances treat “persons taking no active part in the hostilities” humanely and shall abstain from a number of acts with respect to these persons, including “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”. The ICRC’s 2016 Commentary on Geneva Convention I recalls that persons who take no active part in the hostilities and who are therefore protected by common Article 3 “are first and foremost the civilian population”. Under IHL applicable in NIAC, there is no requirement that civilians be affiliated with the adversary in order to be protected against certain forms of violence. Instead, it is understood that common Article 3 protects all civilians who find themselves in the power of a party to the conflict, which includes those in the physical custody of such parties as well as “civilians living in

45 As the ICTY cautioned, if the end of IHL applicability is declared too easily, “the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion”. ICTY, Prosecutor v. Gotovina, Case No. IT06-90-T, Judgment (Trial Chamber), 15 April 2011, para. 1694.
47 Note, however, that certain rules of IHL continue to apply even after the end of a NIAC. See, for example, AP II, Art. 2(2). On the applicability of international criminal law to NSAGs, see T. Rodenhäuser, above note 5, Part 3.
48 ICRC Commentary on GC I, above note 12, para. 521. The Commentary makes reference to the ICC Elements of Crimes, which define as persons protected by common Article 3 of the Geneva Conventions: “such person or persons [who] were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities” (emphasis added).
areas under the control of a Party to the conflict”. Developing and supplementing common Article 3, AP II also defines the scope of persons protected by IHL broadly: it states that IHL applies without any adverse distinction to “all persons affected by an armed conflict”, which includes “all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted”. When negotiating AP II, Canada stated that the intention of defining this wide scope of application of IHL was “to persuade Governments and insurgents alike of the humanitarian benefits of acting with reasonable restraint in their treatment of civilians and captured combatants”. The IHL treaties and their drafting history leave little doubt: this body of law protects civilians living under the control of State or non-State parties to armed conflicts who are affected by the conflict.

The nexus requirement under international humanitarian law

The broad personal scope of application of IHL is, however, restricted by the understanding that IHL applies only to conduct that is related to, or has a nexus with, the armed conflict. Yet surprisingly, no international treaty rule defines this nexus requirement. In AP II, this need for a link between the conduct of a party to the conflict and the armed conflict is expressed in the specification that the Protocol applies to persons “affected by” the conflict. Hardly any discussion on this point is found in the drafting history of AP II. The limited discussion among the drafters on similar language found in Article 75 of Additional Protocol I only shows that in international armed conflicts, States considered the issue of how a State treats its own nationals in relation to issues that have no link

49 ICRC Commentary on GC I, above note 12, para. 541. See also Sarah Knuckey, “Murder in Common Article 3”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 21, para. 10. This understanding can be traced back all the way to Article 44 of the Lieber Code, which prescribed severe punishment for the killing of inhabitants in an invaded country.

50 AP II, Art. 2(1). The question of when a person is affected by an armed conflict is further discussed below.

51 Ibid., Art. 4.


54 As Cassese observed: “As no international rule clearly and explicitly defines the nexus under discussion, the contours and content of such nexus must be inferred from the whole spirit of IHL and international criminal law (ICL) as well as the object and purpose of the relevant international rules.” Antonio Cassese, “The Nexus Requirement for War Crimes”, Journal of International Criminal Justice, Vol. 10, No. 5, 2012, p. 1397.

55 As the ICRC reported from the conferences of government experts preceding the actual negotiations of the Additional Protocols, some experts considered it “exaggerated to lay down the automatic application of all the Protocol provisions to the entire territory of a High Contracting Party, even though only a very small part of the country might be affected by the armed conflict”. ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary, Geneva, October 1973, p. 134; see also ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Report on the Work of the Conference (Second Session, Geneva, 3 May–3 June 1972), Geneva, August 1971, p. 68.
to the conflict as outside the scope of IHL. In contrast, there is no doubt that IHL of international armed conflicts protects civilians who find themselves in the hands of a party to the conflict of which they are not nationals, including an Occupying Power. Melzer explains this difference as follows:

[W]hile the detention of a common thief in the domestic territory of a party to the conflict would hardly justify the application of Art. 75 API, this situation would change already if that same thief were arrested by an occupying power who is exercising its authority for reasons related to the conflict.

If this understanding of the notion of persons “affected by” an armed conflict as found in international armed conflict is applied to NIAC, it may be concluded that in State-held territory the interaction between the State and its citizens is not regulated by IHL unless the acts committed by the State have a specific nexus to the armed conflict. The rationale for restricting the scope of application of IHL in this manner is clear: States are expected to have a governance system in place which must conform with their obligations under human rights law. IHL is not meant to regulate how a State governs territory or people who are not affected by armed conflict.

The situation is significantly more complex in territory over which an NSAG takes control in the context of an armed conflict; such a scenario is normally not comparable to the relationship between States and their citizens. For example, before a conflict breaks out, the NSAG will often not exist or be in control of territory or people and will not be bound by international law. In many cases the taking of control over territory and population by an NSAG will be factually more akin to a belligerent occupation, even if it cannot be legally qualified as such. It is thus difficult to imagine that persons living in such territory should not be considered as being affected by the conflict, and that IHL

57 See Geneva Convention IV, Art. 4.
58 Nils Melzer, Targeted Killing in International Law, Oxford University Press, Oxford, 2008, p. 143. Similarly, in an analysis of the jurisprudence of the International Military Tribunal of Nuremberg and the question of which crimes were considered to have a nexus to the Second World War, Cassese held: “There was no need to show that these civilians were up in arms against Germany or its allies, no need to show formal status of prisoners of war, and no requirement that the medical experiments were directly linked to the war efforts. The existence of the armed conflict, coupled with the fact that the medical experiments in question were carried out in unison with a persecutory plan that could not concretely have been carried out in the absence of the hostilities were sufficient to consider the conduct in question to be war crimes.” A. Cassese, above note 54, p. 1401 (emphasis in original).
59 The question of whether this understanding of the “nexus” contradicts the “equality of belligerents” principle is discussed under the heading “Caveats to a Wide Nexus Requirement” below.
rules should therefore not be applicable. For example, if a non-State party takes control over parts of a State’s territory in the course of a NIAC, people living in that territory will often be affected by hostilities between the parties. At least during the period in which fighting over control of a village or town is ongoing, and territorial control is disputed between State and non-State forces, inhabitants will undoubtedly be affected. More generally, once the NSAG establishes itself as the new military (and political) authority, persons living in territory under the NSAG’s control will find themselves subjected to a new governing authority and will thereby be affected by the acts of one party to the conflict.60 This is particularly the case if the NSAG decides to change the previously existing legal order and imposes new rules. As the ICRC argued during the negotiations of AP II, these are precisely the situations in which IHL must apply and protect the civilian population “against the arbitrary authority of the Parties to the conflict when constitutional guarantees ha[ve] been generally suspended or … no longer appl[y] effectively”.61

This broad conclusion has been challenged by reference to an arguably narrower scope of application found in some IHL rules.62 Concretely, the judicial guarantees defined in Article 6 of AP II apply only to “the prosecution and punishment of criminal offences related to the armed conflict”. This can be read as suggesting that the article does not apply to the prosecution of crimes which do not have a link to the conflict, such as common theft. Unfortunately, the travaux préparatoires of AP II do not provide an answer on why Article 6 has a narrower scope of application than the one defined for the Protocol as a whole (i.e., “all persons affected by an armed conflict”63). This uncertainty gives room for different interpretations, with potential implications for other rules of IHL. If the nexus requirement under Article 6 is interpreted strictly in accordance with its wording, one may conclude that it excludes the prosecution of common crime by NSAGs, just as it excludes the prosecution of common crime that does not have a nexus to the conflict in State-controlled territory. As AP II “develops and supplements [common] Article 3”,64 this can also be taken to mean that the judicial guarantees as found in common Article 3 and in customary IHL only


63 AP II, Art. 2(1).

64 Ibid., Art. 1(1).
apply with regard to “criminal offences related to the armed conflict”. However, there are also arguments to challenge such a conclusion. For one, it could be advanced that interpreted in its context, the scope of application of AP II Article 6 should be read in light of the general scope of application of the Protocol, which is wider.65 This conclusion may also be supported by a teleological interpretation: if a person is, for example, prosecuted for an offence that does not have a nexus to the conflict but was criminalized only by the NSAG, it may be argued that the person is, in fact, affected by the conflict. And two, even if a narrow interpretation of the nexus requirement under Article 6 is taken, one may argue that the judicial guarantees as found in common Article 3 and customary IHL maintain a broader scope of application, “an autonomous existence”.66

To sum up, there are strong reasons to conclude that IHL applies to how an NSAG treats persons living under its control, even if the conduct in question might be described as part of “governance” and is not directly linked to combat operations. This conclusion finds further support in international criminal law jurisprudence.

The nexus requirement under international criminal law

The conclusion that IHL applies to how an NSAG treats persons living under its control is further supported by the interpretations of the nexus requirement in war crimes jurisprudence by international criminal tribunals. As war crimes are—by definition—IHL violations, the interpretation of the nexus by these tribunals is directly relevant to the interpretation of IHL.67

In the ICC’s Elements of Crimes, States defined the nexus as requiring that an act “took place in the context of and was associated with an armed conflict”.68 In several cases, tribunals and courts have held that an act may amount to a war crime—i.e., a serious violation of IHL— if there is an “evident nexus between the alleged crimes and the armed conflict as a whole”.69 In their views,

65 See ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): Commentary of 1987, Geneva, 1987, para. 4568, which states: “The term ‘deprived of their liberty for reasons related to the armed conflict’ is taken from Article 2 (Personal field of application), paragraph 2, of the Protocol. At this point it is appropriate to recall its far-reaching scope. … However, there must be a link between the situation of conflict and the deprivation of liberty; consequently prisoners held under normal rules of criminal law are not covered by this provision.” It is not clear what is meant by “normal rules of criminal law”.
66 Ibid., para. 4457.
67 As Bothe explains, “[r]ules concerning the punishment of war crimes are secondary rules in relation to the primary rules concerning behaviour which is prohibited in case of an armed conflict”. Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, Oxford, 2002, p. 381. Indeed, if an act is committed as part of the “official duties” of a member of the NSAG and is found to have a nexus to a conflict, the same act will also be sufficiently linked to the conflict to bring into play IHL obligations of the NSAG.
68 For war crimes committed in the context of an armed conflict not of an international character, see ICC, Elements of Crimes, 2011, Arts 8(2)(c), 8(2)(e).
69 ICTY, Prosecutor v. Tihomir Blaškić, Case No. IT-95-14, Judgment (Trial Chamber), 3 March 2000, para. 69; ICTR, Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-A, Judgment (Appeals Chamber), 26 May 2003, paras 569–570. For a more comprehensive analysis of case law, see G. Gaggioli, above note 53, pp. 513–517.
the existence of an armed conflict must, at a minimum, have played a substantial/major part in the perpetrator’s ability to commit [the act], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.\textsuperscript{70}

In practice, the courts have applied a set of indicative factors to determine whether an act is sufficiently linked to an armed conflict. These include

- the fact that the perpetrator is a combatant;
- the fact that the victim is a non-combatant;
- the fact that the victim is a member of the opposing party;
- the fact that the act may be said to serve the ultimate goal of a military campaign; and
- the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.\textsuperscript{71}

Importantly, the elements and indicative factors are listed as alternatives, meaning that they do not all need to be established to prove the existence of a nexus between an act and the conflict; in other words, they are not a checklist. Based on this jurisprudence, and as will be seen below, there are compelling reasons to conclude that IHL applies to a wide spectrum of interactions between NSAGs and persons living under their control.\textsuperscript{72}

Consider a group that takes control over a territory in the course of a NIAC and imposes a new political or religious order for the inhabitants, such as the two groups in Mali described above. The group’s presence and governance in that territory can hardly be separated from the ongoing armed conflict. The existence of the armed conflict plays “a substantial part” in:

- The group’s ability to affect the lives of those under its control: the group would, in most cases, not control territory and population without having ousted—and without continuing to fend off—State forces or other groups by armed force.
- Likewise, the manner in which an NSAG affects persons under its control is shaped by the NSAG’s position as the new authority.
- Moreover, exercising control over a territory and population—and imposing a political or religious order that reflects the NSAG’s interests—is likely one reason for which the NSAG is engaged in the conflict. While the reason for which an NSAG is engaging in armed violence is not relevant in determining


\textsuperscript{71} ICTY, \textit{Kunarac}, above note 70, para. 59; ICTR, \textit{Rutaganda}, above note 69, paras 569–570. See also ICC, \textit{Bemba}, above note 70, para. 143. In the \textit{Bemba} case, the ICC omitted the factor that “the victim is a member of the opposing party”.

\textsuperscript{72} As stated above, this finding is, logically, limited to issues on which IHL provides rules. As seen in the section below entitled “Do NSAGs Have Human Rights Obligations?”, there are a number of issues for which IHL does not provide any rules and for which human rights law might be relevant.
whether an armed conflict exists, it is a relevant consideration for determining a link between an act and the conflict. For example, if an NSAG is involved in an armed conflict to establish an ethnically homogeneous population in areas under its control and commits acts of violence against persons of different ethnicity which it finds in that territory, the aim of the group is a relevant consideration for determining whether the acts of violence are linked to the conflict. In such cases, the group’s decision to impose its will on civilians, including by force, and the purpose for which it does so are difficult to separate from the conflict.

The same result is also reached by applying the indicative factors:

- the person interacting with the civilian population will be a member of the NSAG;
- the affected person does not take part, or is no longer taking part, in hostilities;
- the act will be committed as part of the NSAG member’s official duties;
- an act committed in an official capacity will likely serve to establish, or reinforce, the NSAG’s authority as a new territorial ruler, which in many—but not all—cases is linked to the “ultimate goal of the military campaign”.

Two common scenarios may help to explain the last point. First, if a group aims to control territory in order to establish a political or religious order that reflects its interests, acts that serve to impose “law and order” appear closely linked to the ultimate goal of the group’s engagement in the armed conflict. Second, there are groups that pursue criminal objectives (such as controlling a territory to enable the production and smuggling of drugs or the extraction of minerals) either as a primary objective for which the NSAG engages in the NIAC, or as an objective alongside other political or religious objectives. If such an NSAG imposes (formal or informal) rules on civilians living in areas under its control to ensure some form of stability and to thereby protect the group’s business, it is difficult to see why ill-treatment of a civilian who “violates” the newly imposed rules would not be linked to the conflict. After all, for the protection of civilians

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73 See ICRC Commentary on GC I, above note 12, paras 447–451; ICTY, Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66, Judgment (Trial Chamber), 30 November 2005, para. 170.

74 Based on relevant case law, Cassese has argued that for a nexus to exist, “the offence must be committed to pursue the aims of the conflict or, alternatively, be carried out with a view to somehow contributing to attain the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign”. A. Cassese, above note 54, p. 1397.


76 A nexus to the conflict might also be said to exist if the group takes control over territory and enforces pre-existing rules, such as the territorial State’s criminal law. The act would still be committed by an NSAG member in the exercise of “official duties” against a person protected by IHL, and it is likely that in many cases the consolidation of territorial control—and control over the civilians living in the territory—will align with the group’s military objectives. For a different view, see W. Schabas, above note 28, p. 97, arguing that “the observation that a group may be in a position to do things after it has taken power that it was not previously able to do hardly seems an adequate nexus for war crimes law to apply”.

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it should not matter whether the group purports to act for political, economic, religious or any other reasons.

**Caveats to a wide nexus requirement**

The conclusions set out above, however, must not be misunderstood as suggesting that everything that happens in armed group-controlled territory is regulated by IHL.

First, it stands to reason that IHL applies only if an armed group is party to a NIAC. IHL does not apply and cannot bind that group even if the group exercises control over territory and population but is not, or is no longer, a party to an armed conflict,

Second, IHL defines a limited set of rules to regulate hostilities and protect those who do not participate or are no longer participating in hostilities against violence, and to alleviate their suffering. There are many “governance issues”, such as those related to the political, economic, social and cultural rights of persons, that are not addressed by IHL (see the section below entitled “IHL Provides Important—but Limited—Rules”). Even if IHL of NIAC applies generally, it has nothing to say on such issues.

This being said, it is submitted that IHL does impose limits on how an NSAG enforces “governance” measures. Concretely, while IHL applicable in NIAC is silent on whether an NSAG may conduct “law enforcement”, IHL provides rules on how an NSAG may exercise its power vis-à-vis the civilian population: it prohibits torture, other forms of ill-treatment, arbitrary deprivation of liberty and murder, and these rules apply even if acts of violence form part of what the group calls “law enforcement”, “investigations” or “criminal prosecution”. Along the same lines, although IHL does not prescribe specific measures that a party to a NIAC may take to curb a pandemic such as COVID-19, IHL would prohibit an NSAG from ill-treating or murdering a civilian who does not comply with the group’s COVID-19 policies.

Third, interactions between civilians in NSAG-controlled territory are not necessarily addressed by IHL. This means that there will be crimes committed in such territories that are not related to the NIAC. For example, a civilian stealing a loaf of bread in the local bakery, or a civilian taking “advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years”, may occur in NSAG-controlled territory but will not show a sufficient nexus to the armed conflict. These acts are not regulated by IHL, and the murder of the neighbour would not amount to a war crime. As stated above, however, IHL does impose limits on how an NSAG may react to alleged crimes.

77 While this conclusion is based on the analysis of the understanding of the nexus and indicative factors presented by criminal tribunals, it must be noted that Articles 5 and 6 of AP II do not apply to conditions of detention of persons detained for reasons unrelated to the armed conflict or to penal prosecutions of criminal offences that are not related to the conflict.

78 See ICTR, Rutaganda, above note 69, para. 570.
The interpretation of the nexus requirement as presented in this article has been criticized as “a one-sided approach to civil war that does not sit well with the fundamental principles of international humanitarian law by which all parties to a conflict are approached as equals”.79 Indeed, according to the IHL principle of equality of belligerents, “parties to an armed conflict have the same rights and obligations under IHL”.80 While it is true that the above analysis concludes that the same act—for example, ill-treating a civilian in the context of a law enforcement operation—may be considered differently in government-held territory and NSAG-held territory, this conclusion is due not to the different obligations of the two parties but to the different ways in which the victim is affected by the armed conflict. The distinguishing issue is not a different obligation but the point that one situation does not have a nexus to the conflict while the other does. Undoubtedly, the same IHL rules bind the State and the non-State party to the conflict. However, an ordinary person who is ill-treated by State police forces in a context that has no nexus to the conflict cannot be said to be affected by the conflict. In contrast, an ordinary person is affected by the conflict if he or she is ill-treated by a member of an NSAG that has imposed itself as a new military and political authority in the context of a NIAC. In other words, the same rules apply differently in situations that may look alike but are different.

The nexus requirement in protracted armed conflicts

It could further be asked whether the analysis set out above does, or should, reach its limits in protracted NIACs in which an NSAG exercises stable control over territory and the people living therein, and establishes State-like governance structures. While it has been observed that “rebels inevitably begin with a system of unitary rule in which governance decisions are vested with the military command”81 there are also examples of NSAGs developing various forms of (civilian) governance structures.82 In some cases, an NSAG might even establish, or condone the establishment of, a civilian government with some degree of independence from the NSAG. In more than a few places, such regimes have effectively governed territory for several years. The more that State-like governance structures exist with a separation of powers between the administration’s civilian and military components, the more it may be questioned whether IHL is still the appropriate and applicable body of international law with regard to “governance acts” by what looks like a new quasi-State authority.83 In such cases, the assessment under the nexus requirement as interpreted in international criminal law might also change. When assessing these situations, several points should be considered.

79 W. Schabas, above note 28, p. 98.
80 ICRC, above note 42, p. 17.
82 For several examples, See T. Rodenhäuser, above note 5, pp. 159–180.
83 See, for instance, K. Fortin, above note 28.
First, as noted above, once a situation has stabilized to the extent that it can no longer be classified as a NIAC, IHL will cease to apply and will no longer be pertinent. If the NIAC continues, however, IHL continues to apply.

Second, if IHL applies, it applies throughout a territory under the control of a party and to acts that have a nexus to the conflict. As analyzed above, the nexus requirement is almost necessarily met if governance functions are performed by members of the NSAG.

Third, if an NSAG succeeds in establishing an administration in territory under its control (run by what may be considered the political wing of the NSAG), this new administration will likely perform acts which are not addressed by IHL, for instance to address political, economic or cultural issues. Such acts fall into the purview of human rights law, not IHL. Still, IHL treaties and the interpretation of the “nexus” by international criminal courts and tribunals suggest that IHL – for as long as it applies – protects civilians with regard to those acts of an NSAG that IHL regulates. This conclusion is without prejudice to whether human rights law may, in practice, also be referred to.

Fourth, there may be cases in which a civilian administration emerges in an NSAG-held territory which is not established or otherwise controlled by the NSAG, or which has at least obtained a significant degree of independence from the NSAG. To determine whether IHL applies to that administration’s conduct, the examination of whether a nexus exists between the conduct of this independent entity and the armed conflict might conclude that certain acts are not sufficiently linked to the conflict.

IHL provides important – but limited – rules binding NSAGs when exercising control over territory and persons living therein

The next question is the scope of obligations that IHL imposes on NSAGs that control territory during a NIAC. Let us return to the example of COVID-19 measures taken by groups in various parts of the world. In Myanmar, for instance, one NSAG reportedly disseminated “public health information”, imposed “travel restrictions on people coming from cities and towns outside KIO [Kachin Independence Organization] areas”, required “social distancing and temperature-screening measures”, provided “handwashing stations”, established “quarantine areas created in bamboo huts”, restricted “movement in and out of camps” and “issued pandemic guidelines on matters such as large gatherings and

84 IHL rules and the related war crimes regime would continue to apply to those acts for which IHL defines rules and regardless of whether other bodies of international law, such as human rights law, may be said to also be relevant. This would be an approach analogous to how the law of occupation as applicable in international armed conflict would address the issue.

85 See the section entitled “Do NSAGs Have Human Rights Obligations?” below.

86 Note, however, that even in such situations a conflict nexus will exist if members of that administration capture and ill-treat a person who is suspected of spying for another party to the conflict – irrespective of who is conducting the ill-treatment.
business hours”. As mentioned at the beginning of this article, groups in Colombia have also taken various measures to address the COVID-19 pandemic. It can be assumed that some of these public health measures will have had a positive impact. Still, from the perspective of persons living under the control of these groups, some measures taken might also raise questions regarding their right to freedom of movement, of assembly or of work, the restriction of which could lead to significant humanitarian needs. Moreover, if people decide not to comply with these measures, they face the risk of violence to life and person, such as murder (or “arbitrary deprivation of life”, to use human rights-based terminology); torture or cruel, inhuman or degrading treatment; or corporal punishment.

Looking at such cases, it appears that some threats to the life and well-being of persons living under NSAGs are addressed by IHL rules applicable in NIAC. Without going into detail, IHL applicable in NIAC sets out a number of rules that all parties to NIACs must comply with in their interaction with civilian populations, and IHL addresses several conflict-related humanitarian concerns that are likely to occur in territory held by armed groups.

IHL rules do not address other issues which can be described as being part of “governance”. Some of these issues are, however, addressed in IHRL.

Needs of the civilian population that are not, or are not comprehensively, addressed by IHL but are regulated by IHRL

A broad-brush comparison between rules of human rights treaties and IHL shows that there is some overlap between IHL and human rights law, in particular with regard to rules on the treatment of persons. Yet human rights instruments also address a number of important civilian concerns that are not, or are not comprehensively, regulated by IHL. In the following, the focus is on the latter kind of issues, meaning those on which IHL and IHRL differ.

First, there are issues that both IHL and IHRL address, yet each with a different focus. For instance, with regard to cultural life, IHL focuses on the protection of cultural property against damage and destruction linked to the conflict. IHRL, in contrast, sets out a broader right to participate in cultural life.

Other areas in which IHL provides particular conflict-specific obligations for

90 For an excellent analysis of this point, see K. Fortin, above note 28, p. 169.
parties to NIACs without addressing broader or more long-term concerns that may arise for the civilian population during protracted conflicts include the protection of detainees, internally displaced persons, humanitarian assistance, health, education, work and family life.  

Second, there are a number of issues that IHL applicable in NIAC simply does not address. These include, primarily, rights relating to the civil capacity of the individual (recognition of a person before the law, right to nationality), participation in civil and political life in society (such as freedom of thought, conscience, expression, peaceful assembly or participation in public affairs), certain family-related matters (right to marry and to found a family), social and economic rights (right to form a trade union, right to social security), and the protection of minorities and those who are persecuted (right to seek asylum). These issues have traditionally fallen into the realm of human rights law. Moreover, IHRL provides individuals with a right to remedy for alleged violations, which does not, as such, exist in IHL.

There are also differences in the nature or scope of obligations under IHL and obligations under human rights law. IHL sets out obligations that parties to armed conflicts must respect in their military operations and their interactions with those that do not participate, or no longer participate, in hostilities. Many IHL rules consist of prohibitions—only some rules require positive steps, meaning acts for which it is required to invest additional resources. In contrast, IHRL treaties require States Parties not only to respect human rights but also to “ensure” these rights, meaning to protect and fulfil them.

As seen in this brief overview, while rules found in IHL and IHRL overlap to some extent, there are also important differences regarding the type of issues that these two fields of international law address. In this respect, human rights law could complement IHL in the protection of persons living under the control of NSAGs.

**Do NSAGs have human rights obligations?**

While it is well settled that NSAGs are legally bound by IHL, the possible human rights obligations of NSAGs raise several questions. Recently, the ICRC recalled that “essential questions remain unanswered, such as the source, scope, and limitation of
non-State armed groups’ potential human rights obligations, and the relationship between these potential obligations and those of the territorial State”.99 This is despite the fact that over the past two decades there have been multiple occasions on which States in the United Nations (UN) Security Council, the UN General Assembly and the UN Human Rights Council have condemned human rights “violations” or “abuses” by NSAGs in various contexts and have called upon NSAGs to respect human rights.100 With regard to the first two organs, analysts have taken this practice as a recognition that the conduct of at least some NSAGs “can amount to violations or abuses of human rights”, even though it cannot be said that this State practice is itself sufficient to endow NSAGs with “human-rights obligations in general under international law”.101 It has further been concluded that the practice of States in the Human Rights Council indicates that “the international community increasingly holds [armed non-State actors] accountable for human rights violations, despite legal uncertainties” such as “how and to what extent” NSAGs are bound by human rights law.102

Notwithstanding this lack of legal clarity, various UN special procedures or commissions of inquiry have applied human rights law to the conduct of NSAGs.103 It remains unclear, however, what legal sources these experts rely on for their findings.104 In their reports, the experts normally start by recalling that armed groups “cannot become parties to international human rights instruments”,105 therefore, the only possible way to argue that IHRL treaties apply to NSAGs is to

99 ICRC, above note 10, p. 54.
101 J. Burniske, N. K. Modirzadeh and D. A. Lewis, above note 100, p. 27.
102 A. Bellal, above note 100, p. 32.
104 For an analysis of possible sources and legal constructs that could be invoked to argue that NSAGs have human rights obligations, see A. Clapham, above note 103; D. Murray, above note 5, pp. 167–171; K. Fortin, above note 29, pp. 273–274. See also T. Rodenhausen, above note 5, pp. 169–177.
rply on the idea that human rights obligations devolve with territory and bind NSAGs even if they only control part of a State’s territory.\textsuperscript{106} In addition to human rights treaties, the other legal source that could be invoked for possible human rights obligations of NSAGs is customary IHRL. Yet, as noted above, analyses of State practice in UN organs have concluded that such practice does not currently seem sufficient to find that customary human rights obligations exist for armed groups.\textsuperscript{107} Outside UN organs, the present author is not aware of sufficient practice or \textit{opinio juris} that supports the notion that customary human rights law obligations extend to NSAGs, nor of much jurisprudence that has found such obligations, and academic experts are divided on the matter.\textsuperscript{108}

In the absence of a widely agreed legal source of human rights obligations of NSAGs, States and practitioners have seemingly turned to various legal-policy approaches that demand armed groups to respect human rights. For one, there is an occasional and often broadly formulated political demand in resolutions adopted by States in different UN fora for various types of armed groups to respect human rights, often alongside IHL obligations.\textsuperscript{109} In addition, there seems

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\textsuperscript{108} For a sceptical view on possible human rights obligations of NSAGs, see M. Sassòli, above note 13, pp. 270–273. Similarly, Ronen points out that “it is also difficult to locate articulations of states’ positions regarding [non-State actors] human rights obligations”. Yaël Ronen, “Human Rights Obligations of Territorial Non-State Actors”, \textit{Cornell International Law Journal}, Vol. 46, No. 1, 2013, p. 38. For views that NSAGs have human rights obligations as a matter of law, see J.-M. Henckaerts and C. Wiesener, above note 103, fn. 86, citing K. Fortin, above note 28, pp. 172–176; D. Murray, above note 5, pp. 120–154; A. Bellal, above note 100, pp. 26–30. In previous publications, the present author found that “practice remains somewhat unclear on the nature and scope of possible human rights obligations”, but noted that “State and human rights expert practice of addressing human rights obligations to armed groups indicates in which direction international human rights law develops”. T. Rodenhäuser, above note 5, p. 211.

\textsuperscript{109} See above notes 100–102. While these resolutions at times make reference to territorial control exercised by armed groups, this does not seem to be a condition. A rather broad approach to possible human rights obligations of armed groups is found in progressive statements by human rights experts, such as that “human rights obligations constituting peremptory international law (\textit{ius cogens}) bind States, individuals and non-State collective entities, including armed groups”. Human Rights Council, \textit{Report of the Independent International Commission of Inquiry on the Syrian Arab Republic}, UN Doc. A/ HRC/19/69, 22 February 2012, para. 106.
to be some form of agreement among a number of UN human rights experts that human rights law may be used as a reference standard or a “legitimate expectation of the international community” if an NSAG exercises “de facto control” over an area or “de facto control over territory akin to that of a Governmental authority”. These practices suggest that while there is uncertainty on the precise legal source and nature of human rights when used with regard to NSAGs, human rights “standards” or “expectations” seem to be—at least—a practical point of reference for addressing certain messages on the protection of civilians who live in NSAG-controlled territory.

A related approach is found in the practice of certain humanitarian organizations. For instance, the ICRC has explained that when it operates in a context in which an NSAG “exercises stable control over territory and is able to act like a State authority” and the organization cannot rely on IHL alone to address the protection needs of the civilian population, the ICRC takes a “pragmatic approach” and refers to the “human rights responsibilities” of such groups.

Such approaches seem to resonate with at least some NSAGs, which have included reference to human rights law in their own documents. For instance, in 2016 the Free Syrian Army declared that it shall treat persons “in areas under [its] control in accordance with international human rights treaties”. Likewise, the Sudanese Justice and Equality Movement (JEM) announced in 2008 that it will do its “utmost to guarantee the protection of civilian populations in accordance with the principles of human rights”. In 2010, it established a JEM Committee for Human Rights with the mandate to conduct “immediate and periodic reviews of JEM directives relating to observation of Human Rights and Rights of Children and their harmonization with relevant international Conventions and ethos”. Going in the same direction, the Sudan People’s Liberation Movement/Army – North (SPLM/A–N) has even announced the establishment of an “independent Human Rights Court … to address complaints of human rights violations in SPLM/A-N’s liberated areas”.

112 Human Rights Council, above note 14, para. 62. See also UN Human Rights, above note 34, para. 31.
113 ICRC, above note 10, p. 54. In such cases, the ICRC explains that it “operates on the premise that ‘human rights responsibilities may be recognized de facto’ if a non-State armed group exercises stable control over territory and is able to act like a State authority”.
Legal and policy considerations on the scope of possible obligations

The different approaches and practices for demanding that NSAGs respect the existing rules of human rights law appear to be the result of political decisions by States when adopting resolutions in UN organs, human rights experts’ and humanitarians’ pragmatic aim of preventing or responding to human suffering, and progressive ideas of academics. As this author has argued previously, “today’s reality, in which a variety of states and armed groups commit acts in complete disregard of their victims’ human rights, seemingly forces states and practitioners to move beyond the traditional state-centred focus of IHRL”. Indeed, asking NSAGs to respect human rights seems to pursue the objective of protecting the inalienable rights of every human being irrespective of what kind of authority exercises control over a population. Moreover, for experts or institutions with a human rights-based mandate, reference to human rights law can be necessary to address the conduct of NSAGs. In some instances, human rights mechanisms have taken concrete measures vis-à-vis NSAGs, comparable to how these experts have traditionally addressed States. Yet these approaches and practices are still nascent or evolving, and as such, lack some of the detail and precision that lawyers will normally strive for. Unresolved legal and practical questions remain, and some approaches may also pose risks. Even if the foundational question of a legal source is put aside, further thinking is needed on which human rights are most relevant when engaging NSAGs. Moreover, which types of NSAGs should be addressed with human rights-based demands, and how would the three dimensions of States’ human rights obligations – respect, protect and fulfil – translate into the NSAG context? These questions are touched upon next.

Which human rights are commonly referred to when addressing NSAGs, and which should be?

With regard to the question of which human rights are most relevant for the protection of persons living under NSAG control, it appears that the practice of

119 For instance, in 2020 the UN Working Group on Enforced or Involuntary Disappearances reported that it had started “documenting violations tantamount to enforced disappearance perpetrated by non-State actors” and that “during the reporting period, the Working Group transmitted 21 cases tantamount to enforced disappearance, namely to the Libyan National Army – Libya (4 cases); to the self-proclaimed “Donetsk People’s Republic” – Ukraine (8 cases); to the de facto authorities in Sana’a – Yemen (5 cases); and to Hamas – State of Palestine (4 cases”). Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/45/13, 7 August 2020, paras 23, 24. Note, however, that most human rights enforcement mechanisms, such as treaty bodies and tribunals, are currently addressing State violations of human rights, not the conduct of NSAGs.
120 On the challenge of finding a relevant reference list of human rights for different NSAGs, see T. Rodenhäuser, above note 5, pp. 177–180, 189–192, 206–208.
States offers little clarity. When UN organs condemn human rights violations or abuses by NSAGs or demand respect for human rights, such statements are often framed in general terms without specifying which acts they refer to or which rights must be respected. In contrast, in the practice of human rights special procedures or commissions of inquiry, reference can be found to specific human rights. Often, the violations or abuses that these experts examine and the demands they make on NSAGs are rather basic and reflect what is already a legal obligation of NSAGs under IHL. This is the case, for instance, if the human rights reference framework is defined as “peremptory” or “most basic human rights obligations” during armed conflict, such as

the prohibitions of extrajudicial killing, maiming, torture, cruel[,] inhuman or degrading treatment or punishment, enforced disappearance, rape, other conflict related sexual violence, sexual and other forms of slavery, the recruitment and use of children in armed hostilities, arbitrary detention.

This overlap seems to reflect the reality of situations that special procedures or commissions of inquiry are asked to examine, which are often NIACs. Given that these situations are already governed by IHL, which binds all parties to armed conflicts, it is unclear whether reference to possible human rights responsibilities that reflect IHL obligations adds much in practice.

In other contexts, however, special procedures have also focused their human rights-based demands on issues that are not covered by IHL. For instance, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions recommended that the LTTE in Sri Lanka “should refrain from violating human rights, [including] respect for the rights to freedom of expression, peaceful assembly, freedom of association with others, family life, and democratic participation, including the right to vote”. In 2012, the UN Office of the High Commissioner for Human Rights (UN Human Rights) took the view that when different NSAGs took control over the north of Mali (the situation discussed at the start of this article), serious human rights violations occurred, including “violations of freedom of expression and of the right to information and violations of the right to education and health”. These issues are not – or are only rudimentarily – addressed in IHL. Thus, demanding NSAGs to respect these kinds of human rights could broaden the reference framework under which the international community holds these groups accountable – or arguably

121 See A. Bellal, above note 100, Annex; J. Burniske, N. K. Modirzadeh and D. A. Lewis, above note 100, Annex II. Occasionally, resolutions condemn specific violations explicitly, such as violence against children and women, including child recruitment, discrimination or sexual violence, or demand protection and access for humanitarian personnel.

122 UN Mission in the Republic of South Sudan, Conflict in South Sudan: A Human Rights Report, 8 May 2014, para. 18.

123 Note, however, that with regard to some issues, such as the minimum age for recruitment, IHL and IHRL address the same issue but include different standards. Compare Article 4(3)(c) of APII with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

124 P. Alston, above note 110, para. 85.

the group’s legal obligations – and thereby strengthen the protection of persons living under their control.

These examples show that reference to human rights can have an added protection value, notably outside armed conflicts or when invoking rights that are not addressed by IHL. However, in cases in which IHL provides a well-established legal obligation, IHL will present a lawyer with the strongest argument.

**Careful consideration is needed on the scope of possible human rights responsibilities**

A further question to consider when addressing human rights-based demands to NSAGs is whether the expected conduct consists of respecting human rights (negative obligations, meaning demanding that the NSAG abstain from certain conduct) or also of protecting and fulfilling human rights (positive obligations, meaning asking the NSAG to take certain measures). In most cases in which either UN resolutions or experts consider human rights when addressing NSAGs, they condemn human rights violations or abuses or ask the group to “respect” human rights. Thus, they demand that the NSAG abstain from certain conduct. While this practice was, at some point, novel under international law, continues to be seen as politically sensitive, and remains subject to discussion, substantially it does not appear to alter the rules that are already binding on NSAGs or their members under national law. In fact, the demand to abstain from interfering with the human rights of other individuals reflects an obligation that all individuals should normally have by virtue of national law: to implement their human rights obligations, States are required to create and enforce a legal framework that ensures that individuals, or groups of individuals, do not interfere with the human rights of others. Thus, the national law of the territorial State should already prohibit an NSAG and its members from abusing human rights. In this respect, condemnations of human rights violations or abuses, and demands to respect human rights, could even be considered as reinforcing the law (that should be) in force in each State. While invoking a different body of law and relying on international rules and their enforcement mechanisms (to the extent that they apply to NSAGs) instead of on national law, at least the substance of obligations of NSAGs or their members would not necessarily change.

126 As the Human Rights Committee has held, “the positive obligations on States Parties to ensure [ICCPR] rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”. Human Rights Committee, General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8. See also Inter-American Court of Human Rights, Velásquez Rodríguez v. Honduras, Judgment, 29 July 1988, para. 175; African Commission on Human and Peoples’ Rights, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication No. 245/02, Judgment, 15 May 2006, paras 143–147.

127 However, some have cautioned that addressing human rights obligations directly to NSAGs could legitimate such groups. See UN Commission on Human Rights, Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/RES/1992/72, 5 March 1992, paras 614, 627. For discussion on this issue,
A similar conclusion cannot, however, be drawn when NSAGs are called upon to protect or fulfil human rights. Such responsibilities would not reflect rules that bind individuals or groups under national law. Demanding that an NSAG either protect the human rights of persons living under its control, or take steps to progressively realize their human rights, would be significantly more far-reaching. Still, in some situations human rights experts have considered the positive human rights obligations of NSAGs. For example, the Commission of Inquiry for Libya found, with regard to attacks on migrant workers and sexual violence committed by civilians in areas under the control of the National Transitional Council, that such acts raise “issues of failures to protect from non-State violence” by the non-State authorities.128 These reports seem to build on the position of UN Human Rights, which has argued: “It is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights.”129

The reference to “certain circumstances” in this statement indicates that demands to protect and fulfil human rights should be highly context-dependent. As has been pointed out by scholars, while “negative obligations to refrain from doing harm may be applicable regardless of the level of control of territory, … positive duties may be largely dependent on the degree of control exercised”.130 Indeed, in the Libya case the Commission considered that the non-State authorities exercised “de facto control over territory akin to that of a Governmental authority”.131 NSAGs with such capacities exist, but they remain—by far—the exception; most NSAGs in contemporary NIACs do not have the capacity to act in a State-like manner in a defined territory.132

Demanding that NSAGs protect and fulfil human rights is potentially significant and requires careful consideration in each context. As such, positive obligations for NSAGs that go beyond rules of abstention are not necessarily unusual. For instance, IHL requires all parties to a NIAC to search and care for the wounded and sick, and if trials are conducted, IHL requires significant effort to ensure that essential judicial guarantees are provided. Demanding that NSAGs also protect and fulfil IHRL, however, would arguably go a step further. For example, if an NSAG is requested to protect the human rights of persons under its control, and if this demand is interpreted in analogy to States’ human rights

132 See the article by Jerome Drevon and Irénée Herbert in this issue of the Review.
obligations, it would mean that the group would have to “exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”. Would the NSAG have to put into place “effective criminal law provisions … backed up by law enforcement machinery” to enforce them? In other words, demanding that an NSAG protect and fulfil human rights could signify that the group would have to adopt law, establish law enforcement and judicial institutions, and – as a last resort – be required to use force or firearms against persons living under its control “in proportion to the seriousness of the offence [committed by an individual] and the legitimate objective to be achieved”. The extent of such requests is far-reaching and can, depending on the situation, undermine the protection of civilians instead of strengthening it. Still, good reasons have been advanced to justify such requests in the interests of protecting the rights of persons living under the effective control of NSAGs that exercise stable control over territory in a State-like manner: while the territorial State continues to have certain (limited) positive obligations to secure human rights, the extent to which these positive obligations are effective in practice is questionable. And if State obligations are indeed ineffective, and if the NSAG has the necessary institutional capacities, addressing the human rights responsibilities of a non-State authority might be a necessity to ensure the continued protection of human rights.

Conclusion

Today, tens of millions of people live in territory exclusively controlled by NSAGs. In addition to defending such territory militarily, and as seen in the example of northern Mali described at the outset of this article, many groups also establish some form of governance, including by adopting new “laws” or regulations and establishing institutions to enforce these rules.

This article has shown that IHL provides an essential protection framework for the civilian population against a range of acts committed by NSAGs, most notably most forms of physical violence. As long as a NIAC is ongoing, IHL applies throughout the territory controlled by either party to the conflict with regard to all acts that have a nexus to the conflict. An analysis of relevant IHL rules, expert interpretations and international criminal law jurisprudence suggests that violence to life and person – such as murder, all forms of ill-treatment, sexual violence, mutilations, or the passing of sentences without a fair trial – committed by NSAGs against persons living under their control violate IHL, even if

133 Human Rights Committee, above note 126, para. 8.
purportedly part of “rebel governance”. While some have argued that such acts are too remote from the conduct of hostilities to fall into the scope of application of IHL, the better view is that the fundamental guarantees contained in IHL protect all persons that find themselves in the hands of a non-State party to a conflict. Just as there is no question that IHL safeguards protect civilians in occupied territory in an international armed conflict, it is difficult to see how acts of violence by NSAGs against civilians living under their control would not be regarded as linked to the armed conflict. In an international legal framework where IHL is the only set of rules that undoubtedly binds NSAGs, it would be legally and politically dangerous to dismiss this body of rules too quickly.

This being said, it is also clear that IHL has been developed to protect victims of armed conflict against violence and to address urgent humanitarian needs related to the conflict. IHL applicable in NIAC was not designed as a legal regime comprehensively regulating the interaction between authorities and persons subject to their power, which is the purview of human rights law. Still, IHL applicable in NIAC contains rules that aim to safeguard a certain standard of living for the general population, including health, education, work and family life. However, it does not address questions relating to the civil capacity of individuals, participation in civil and political life in society, many family-related matters, or social and economic rights. Concretely, when looking at the various measures taken by NSAGs during the COVID-19 pandemic, only human rights law addresses the freedom of movement or the right to work. As a result, there are valid arguments to suggest that the legal protection of persons living under NSAG control could be strengthened if these groups were required, as a matter of international law, to respect human rights.

Yet, it is difficult to conclude—based on current State practice—that NSAGs have human rights obligations. Nonetheless, over the past two decades States in relevant UN fora, as well as human rights experts, have frequently condemned human rights violations or abuses by NSAGs and called on such groups to respect human rights. This has been particularly the case where NSAGs exercise control over territory and act in a manner that is comparable to State authorities. In this evolving and much discussed practice, however, numerous questions remain unanswered, the most important one being the legal source of possible obligations. It is also not always clear what the added value of reference to human rights law is if the provisions referred to completely overlap with NSAGs’ existing legal obligations under IHL. Moreover, a careful analysis is necessary to determine what type of human rights-based requests should be addressed to what type of groups. For example, human rights or humanitarian actors need to consider—in each individual context—what the potential consequences are of requesting that an NSAG protect human rights, which can mean asking the NSAG to adopt necessary legislation and enforce it, or discussing with the group whether its de facto restriction of a human right is lawful. With many NSAGs, the most important conversation might rather be how the humanitarian consequences of the group’s conduct can be avoided or mitigated—for instance, by abstaining from using force against civilians or “punishing” them—in accordance with the NSAG’s IHL obligations.
Engaging armed groups at the International Committee of the Red Cross: Challenges, opportunities and COVID-19

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Abstract

This article examines the presence of 605 armed groups in today’s conflict environment by bringing new evidence based on internal research. It looks in particular at the way these non-State entities provide varying degrees of services to the population in the spaces that they control, and how this might impact the way a humanitarian organization like the ICRC engages with them in a dialogue over time. This model of analysis is then used to situate and better explain armed groups’ positions on the COVID crisis.
Introduction

The ICRC interacts with State and non-State actors that play a role in contemporary armed conflicts and other situations of violence. Engaging armed groups more specifically represents a substantial part of the work of the institution considering their pervasiveness in the non-international armed conflicts and in other situations of violence in which the ICRC operates. Although the ICRC needs to preserve the confidentiality of its engagement with armed groups, this article aims to present general information for the public interest about contemporary dynamics of armed conflicts and their consequences on the work of the institution.

As an independent and neutral humanitarian institution, the main purposes of the ICRC’s interactions with armed groups are to protect and to assist civilian populations affected by armed conflicts and to promote international humanitarian law (IHL). This mission is legally grounded in the Geneva Conventions of 1949, their Additional Protocols, the ICRC’s own Statutes and those of the International Red Cross and Red Crescent Movement. In practice, the ICRC interacts with more armed groups than any other humanitarian organization considering the range of countries and activities in which it is involved. Interacting with armed groups is necessary to gain safe access to vulnerable populations that live under their direct control or influence. It also helps the ICRC to act as a neutral intermediary and promote its modus operandi based on independence and neutrality. Last, engaging armed groups seeks to ensure better respect for the laws of armed conflict.

In 2021, the ICRC identified 605 armed groups whose capacity to cause violence is of humanitarian concern in the contexts where the ICRC is operating. Not necessarily all of these armed groups are a party to a non-international armed conflict for the purposes of IHL.

1 The ICRC used an internal working definition of armed groups as “broad range of groups with varying goals, structures, doctrines, funding sources, military capacity and degree of territorial control. It denotes a group that is not recognized as a State, but has the capacity to cause violence that is of humanitarian concern. Included in this broad operational category are ‘non-State armed groups’ (NSAGs) that qualify as a party to a non-international armed conflict and are therefore bound by international humanitarian law.”


3 The ICRC considers that it becomes a “neutral intermediary” when it acts as a third party between two or several parties in dispute and with their agreement in order to facilitate the resolution of the dispute or the implementation of a settlement agreement.

4 Not necessarily all of these armed groups are a party to a non-international armed conflict for the purposes of IHL.

5 All the data reported in this article are drawn from our internal reports.
range from State-like territorial bureaucracies that rule populations larger than Switzerland (population: about 8.7 million) to networks partly embedded in communities that exist only in political and security vacuums when the State is no longer able to govern locally. The ICRC has developed an array of tools to analyse and synthesize its patterns of interaction and humanitarian dialogue with these groups.6 These analyses help us better understand the functioning of armed groups worldwide, including the nature of their activities, objectives, relations to the population and other States, and patterns of violence. Since early 2020, these analyses also have guided our response to COVID-19 by situating armed groups’ reactions to the crisis in a consistent analytical framework.

The outbreak of COVID-19 presented several challenges in humanitarian contexts. The challenges were particularly severe for civilian populations, since the pandemic has exacerbated the humanitarian situation in countries that were already experiencing armed conflicts before the pandemic. The presence of an array of armed groups that sometimes replace existing governmental institutions was a notable predicament. Any local response to the pandemic was affected by the proliferation of a growing number of non-State parties.7 The in-depth analysis of armed groups’ characteristics across cases and of our patterns of interactions with them were therefore important to the ICRC to situate those groups’ positions on the crisis and better calibrate our response. This understanding helped us define the feasibility, the practicalities of our engagement and potential response to the pandemic.

This article builds upon internal yearly surveys undertaken since 2018 and our work engaging armed groups. The specific details of the surveys, especially country-specific information, cannot be published to protect the ICRC’s operational dialogue. Our work relies on the maintenance of confidentiality and the protection of the ICRC’s interactions with State and non-State interlocutors alike. Nonetheless, we have decided to release general background information that illustrates important aspects of our work while ensuring full respect of the Fundamental Principles of the International Red Cross and Red Crescent Movement. In terms of methodology, the data are extracted from a comprehensive survey sent out yearly to every ICRC delegation to collect exhaustive data about the number, type and characteristics of the ICRC’s interlocutors on the ground. The statistics provide a general overview of some of these groups’ most important features.

Our estimate (see below) of the population affected by the control of armed groups includes civilians that live under the exclusive political and security control of armed groups, although the central government might still maintain some public services (e.g. in the fields of education or health), and people living in areas where this control is disputed. These estimates are notoriously difficult to assess since frontlines can change quickly, and the number of residents in some of these

places is at best an approximate assessment. These numbers nonetheless provide an important snapshot on this phenomenon. We do not claim that governance by armed groups is a new phenomenon, but we believe that it is critical to evaluate its contemporary magnitude and humanitarian consequences.

The paper is structured in three parts. First, the article presents the most important trends concerning armed groups’ presence worldwide. Two notable characteristics of contemporary armed conflicts are the widespread external State support for armed groups and the extent of armed groups’ areas of control. Almost half of the armed groups receive external support. In contexts where control is full, armed groups often try to replicate traditional State structures to rule the population after the elimination of the political and security presence of internationally recognized governments. The second part of this article examines the impact of these two characteristics on our engagement with armed groups. It contends that, regardless of their ideological leanings, the type of non-military activities performed by armed groups informs the type of humanitarian objectives that the ICRC can achieve as well as the quality of dialogue with these groups. This finding confirms that facts on the ground are more determinative than the narratives built around them. Finally, the third section builds upon these findings to illustrate our analysis of the impact of COVID-19 and the range of response that can possibly be provided. It exposes armed groups’ enduring and contextual characteristics and their impact on the ICRC’s ability to engage these actors.

Two dominating trends: External support and governance

Armed groups’ activities are primarily local (55%), sub-national (19%) or national (10%) in nature. They range from low-intensity armed actions perpetrated by local groups structured around their communities to significant nationwide campaigns put together by groups with national ambitions effectively in charge of large proportions of territories. Most groups remain primarily engaged for national or sub-national purposes, as direct challengers to central State authorities or seekers of some sort of alternative social order.

However, even national conflicts rarely remain only driven by national dynamics. The first notable trend of contemporary armed conflicts is the importance of external support for armed groups, which is a major vector through which conflicts can spill over across the border. Nearly half of armed groups worldwide are supported by one or more foreign States. Support relationships are a major feature of contemporary warfare; more information can be found at: IRC, Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War, Geneva, 2021, available at: https://www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce.

territorial State or to take the form of a direct intervention with the projection of their own military forces.

The diversity of armed groups, their localism, and the existence of multiple contending alliances involving States, questions the common understanding of external support as a mechanical relationship whereby armed groups would be a mere tool for foreign States. External support is too often understood as a rather unilateral patron–client relationship where power and agency primarily lie in foreign States. However, the local embeddedness of many groups also acts as a real constraint on supporting States, which must concede the limits of their actions. Local groups are occasionally reluctant to be responsive to the demands of their external supporters when local communities oppose foreign States’ specific demands. Moreover, being able to switch alliance in a crowded marketplace reinforces the bargaining power of local groups who can play contending coalitions against each other. According to our research, State support is particularly important in favour of armed groups that only conduct armed activities or engage in full-scale governance, while it is substantially weaker for the groups that only provide some type of social services or security.

The geopolitical capacity to form coalitions is not limited to States. Armed groups also establish cross-group alliances where their level of cooperation ranges from transactional exchanges of material support, to tactical military coordination, strategic partnerships and, finally, full mergers. Cross-group alliances can be short-lived. They also compete with one another in most conflicts in a dizzying number of combinations that forms the kaleidoscope of today’s armed conflicts. Cross-group alliances are important to examine carefully since they complexify the legal determination of IHL’s applicability.

The second notable feature of contemporary armed conflicts is the widespread phenomenon of armed groups’ governance. For the sake of our internal study, governance refers to the organization of civilian life such as policing the population, administration of some mechanisms of dispute resolution (i.e. justice), and sometimes the provision of public goods related to health or education, or the imposition of taxes. Governance can be exercised more or less directly in informal or bureaucratic patterns. Armed groups whose local governance is legally recognized domestically, for instance as part of a peace agreement regulating power sharing, are not included. Moreover, this definition includes contested areas where State and non-State authorities compete to impose themselves on local communities. These areas are potentially the most problematic from a humanitarian point of view considering the challenges posed by the presence of contending local authorities. In these areas, the State and local armed groups fight over control and strive to dissuade civilians from collaborating with the other side, including with violence. Last, our definition is agnostic on the type of group controlling the population.

With this definition of “full territorial control”, our internal study estimates that, at the time of writing\(^1\) between 50 to 60 million individuals live under the full control of armed groups worldwide while an approximate 100 million live in areas where this control is contested.\(^2\)

Armed groups’ governance varies substantially across cases. Some armed groups compete with territorial States by intentionally replicating State authorities. They set up formal governing bodies in charge of the population that increasingly cooperate with international institutions on cooperation and humanitarian assistance. In some cases, armed groups rely on technocratic figures to create cooperation channels with international organizations and maintain some level of plausible deniability regarding their connection to the alternative authority that they support locally. In other cases, they directly rule the population through their own organizational structures. Many direct and indirect forms of governance are comparable to established governments, although they typically lack international recognition. Armed groups’ governance arrangements can, at times, be effectively as sophisticated as the governance of the internationally recognized governments that they oppose. In other cases, loosely structured armed groups can only establish rudimentary forms of governance tending to be more tightly embedded in their local communities. These cases expose the inherent organizational strength of these groups as much as the weakness of domestic governments and highlight that armed groups governance is a critical feature of contemporary armed conflicts.

Differences in organizational structures and capacities of armed groups are important for the debate on the applicable legal framework in which humanitarian engagement with armed groups takes place. For instance, to be party to an armed conflict and bound by IHL, the latter legal framework (an exhaustive presentation of which is outside the scope of this paper) requires an armed group to show a certain degree of internal organization and be involved in a sufficiently intense level of violence. This is particularly challenging to establish for de-centrally structured groups with an opaque chain of command. On the other extreme, if NSAGs exercise stable control over territory and are, de facto, able to act like a State authority, their interaction with and impact on the life and wellbeing of persons living under their control is significant. In these situations, it may become relevant for humanitarian organizations to also refer to human rights norms to ensure the protection of affected populations, in addition to these armed groups’ IHL obligations as applicable to non-international armed conflicts.\(^3\) The question of the applicable international legal framework has immediate consequences, for instance on individuals detained by armed groups worldwide. Beyond detention, we notice that armed groups’ involvement in

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1\^ The changes induced by the arrival of the Islamic Emirate of Afghanistan in Kabul are not taken into consideration by this article whose data and writing predate 15 August 2021. However, the order of magnitude conveyed by the overall figures would not be significantly changed.

2\^ This preliminary estimate is aggregated from the ICRC’s delegations worldwide.

3\^ For a full legal discussion on this issue, see Tilman Rodenhäuser, “The Legal Protection of Persons Living Under the Control of Non-State Armed Groups” in this edition of the International Review of the Red Cross.
governance largely determines their decisions regarding the humanitarian situation of the communities under control. Imperatives linked to local governance, including the need to be responsive to the local needs and expectations of the population, play a vital role in armed groups’ leaderships’ decisions to adopt certain policies and engage external actors.

External State support and local governance are two key challenges for armed groups and international organizations’ interactions with them. They shape these groups’ interests and perceptions. Moreover, they situate the broader contexts in which they can be engaged regardless of their ideological leanings and organizational affiliations.

Engaging armed groups

Armed groups vary according to different factors including their ideological leanings, areas of influence, type of non-military activities they are engaged in, and external ties. These dimensions inform the type of engagement that humanitarian organizations have with them since armed groups that share important characteristics often behave in a congruent manner. The second factor concerns armed groups’ own organizational structures, especially when they control territory. These two features are strongly predictive of the type of engagement and dialogue with armed groups that can be pursued beyond anecdotal evidence and assumptions, such as that more radical groups would systematically refuse to acknowledge or follow IHL while in practice it is not necessarily the case.

For the sake of our survey we defined engagement with armed groups along five categories. The first category refers to direct protection dialogue with armed groups to which IHL applies in view of these groups qualifying as a party to a non-international armed conflict in the sense and for the purpose of IHL. That type of dialogue raises concrete protection concerns and points NSAGs to their legal obligations. In the second category, the ICRC does not refer to IHL directly, notably where an armed group is not party to an armed conflict or if the group is not willing to recognize this body of international law. In such cases, the ICRC relies rather on other legal norms or general principles of humanity, such as respect for human dignity and the protection of human life, which are common to all legal traditions and stem from religious or cultural sources. The third category of engagement is more geared towards practically enabling humanitarian assistance: dialogue can include direct discussions on operational concerns, including access to territories where armed groups are active, to negotiate acceptance and security, but without going into the issue of how hostilities should be conducted. The fourth category is when the ICRC entertains dialogue with NSAGs that references IHL and other legal frameworks in a non-contextual manner. This comprises, for example, the provision of IHL training. The last category is simply an absence of dialogue. Differentiating these types of dialogue across the spectrum of armed groups helps to better understand the nature of our engagement with them, and the level of mutual understanding and trust that
consolidates over time.\textsuperscript{14} There is a relatively strong level of engagement across the spectrum of armed groups. Most of them, regardless of their ideological leanings and positions, can be engaged at least on operational matters. Engaging armed groups on IHL is generally more difficult as it requires a stronger degree of awareness and understanding of the importance of engagement with external actors, which only materializes over time. Engagement is weaker for the groups situated on the more criminal side of the spectrum, as they are not usually willing to engage external organizations. Engagement is associated with a stronger measurement of armed groups’ perception of the ICRC. Engagement improves mutual understanding of one another. It also lowers misperceptions.

Although some armed groups have specific ideological leanings that might be antagonistic to international engagement with external organizations, the type of activities conducted by armed groups locally has a critical impact on their willingness to collaborate with humanitarian and other actors. There is a systematic relationship between the level of armed groups’ engagement with our organization and perception of our work and the type of activities conducted by armed groups. Regardless of their ideological commitments, armed groups providing a range of social services, or fully governing parts of their territories have a much stronger engagement with the ICRC, including on IHL, where applicable. This finding suggests that they are responsive to different types of incentives, including the necessity to access their local communities and establish new external relations in the current international environment, when their range of activities widens. It also exposes their more advanced organizational features that facilitate that type of engagement. Understanding these features is critical to foster dialogue instead of merely assuming that certain types of groups are simply not responsive to external engagement, for ideological reasons for instance. It also helps better understand how to tackle new crises, such as pandemics, and the evolution of armed groups’ long-term trajectories more generally.

The systematic analysis of armed groups’ comparative features and engagement over the years has well positioned our organization to emerging challenges. These included, in the past decade, adapting to new networks of armed groups and global franchises. A major challenge, since 2020, has been the COVID-19 pandemic against the backdrop of substantial territorial control by armed groups worldwide. Understanding the combination of several key structural and contextual factors underpinning armed groups’ responsiveness was important to understand their positioning and suggest possible avenues for dialogue.

**The COVID-19 pandemic**

The COVID-19 pandemic illustrates important issues when engaging armed groups. As previously indicated,\textsuperscript{15} the authors of this article estimate that, as of July 2021,

\textsuperscript{14} The ICRC previously published research on this theme, above note 6.
\textsuperscript{15} Above note 11.
150 to 160 million individuals currently live under the direct control of armed groups, or in areas where this control is fluid. Groups active in these grey areas can be vying to take over central governments, achieve territorial autonomy, or be simply behaving with short-term economic rationale. These differences are important to define the type of engagement that is possible after the outbreak of pandemics like COVID-19.

Armed groups worldwide have adopted three main positions on COVID-19 (vertical axis in Figure 1). (1) On the lower end of the spectrum, armed groups or influential figures close to them have simply denied its existence, often blaming their global enemies. Others have turned responsibility to deliver public health responses back to the State, while refusing to engage in dialogue of substance on the subject matter. (2) In the intermediary category, armed groups may have engaged in public campaigns for precautionary measures showcasing their State-like capabilities but without strong commitment on addressing the crisis. (3) The last category includes the groups that have taken proactive measures and/or been willing to actively engage with international partners to join international efforts against the pandemic. Figure 1 represents the different trajectories, as well as two turning points (A and B) in which armed groups’ decisions can potentially change over time (horizontal axis).

Regarding the reasons explaining changes of trajectories on COVID-19, we differentiate two types of factors. The first are relatively structural. They are situated on the top-row boxes of Figure 2, which schematize from left to right a group’s potential trajectory from denial to engagement, with A and B symbolizing the turning points between different attitudes. These structural factors include armed groups’ lasting characteristics that external actors cannot directly influence. For example, armed groups that are less embroiled in cross-group competition within the same social movement are aligned with the State, and are strongly embedded in their communities are more likely to recognize the severity of COVID-19 and try to play a relatively active role. They are also more inclined to collaborate with international organizations when they seek to nurture international ties, or when health conditions deteriorate quickly. The second type of factors, in the lower-row boxes, are more conjunctural. They can be used by international and local organizations to encourage immediate action on pandemics. Engaging in direct dialogue with armed groups or specific figures of influence can help reduce the amount of denial and lead to more proactive engagement.

This understanding has informed the range of engagement with armed groups regardless of their official ideological positioning. For example, many Islamist armed actors expressed relatively strong denials in the beginning of the crisis by invoking religious scriptures and anti-Western feelings. However, only referring to these positions was not a satisfactory way to account for their leadership decisions, although religious explanations are important for the

16 Armed groups usually evolve in larger social movements that can be based on religious, nationalist or other ideological foundations. Intensive competition within the same social movement can exacerbate armed groups’ contending positions on COVID-19.
community to make sense of these decisions. Our comparison of different types of groups suggests that what mattered was not merely their reading of religious texts but the structure of their broader social movement and these groups’ relations with State authorities. Armed groups that are aligned to domestic State authorities have attempted to position themselves as credible providers to their constituencies. Public responses, including communiqués and street spreading of disinfectants, were therefore particularly common in some countries. This situation contrasted substantially with armed groups whose social movement was very divided over religious authority. Internal divisions over religious legitimacy and credibility were reflected in their divergences on COVID-19. Divergences on COVID-19 were often, in these cases, the outcome of internal competition between different religious authorities. Internal competition incentivizes individual actors to develop a stronger theological reading to appear more religiously rigorous, and therefore legitimate. Differences of positioning between Islamist armed groups therefore do not stem from essentialist readings of their theological methodologies but from broader political variables that we include in our analyses.

The same arguments apply to the global and trans-border franchises. Groups’ affiliates have been largely driven by their own position in armed conflicts rather than the position of their patron. Franchises in charge of populations have been more willing to take some measures. This was not the case for the franchise groups that barely control territories in their areas of influence, since they were not pressured to develop a position in the absence of territorial control. This position could have been substantially different had the group been in charge of populations.

Armed groups’ positioning must be understood more systematically, beyond the individual positions of their leaders and ideological readings. Situating these groups in their contexts and relations to one another and to the civilian population reveals underlying factors that might not seem to be evident in the first place, especially in the case of arguably “ideological” groups that appear to
be more strongly committed to certain principles antagonistic to IHL and its implementation (such as access to health care in the case of COVID).

**Conclusion**

Humanitarian crises present important specificities that shape the possibility of engagement with armed groups and respond to crises like the COVID-19 pandemic. Many features of contemporary non-international armed conflicts mentioned in this article are not necessarily new, especially foreign support for armed groups, but their relevance has increased over the past decade. More ideologically committed groups should not be essentialized. These groups are also responsive to their environments, which shape their behaviour and political positions beyond stated ideological commitments. This approach maintains a healthy distance from the labels attached to these groups by their opponents or the narratives actively promoted by themselves, which act as framing devices obfuscating any attempt at engagement, be it for humanitarian purposes, or for larger conflict transformation ambitions. The attempt to build a more systematic understanding of armed groups in armed conflicts that the ICRC has developed notably suggests that, regardless of ideological commitments and leanings, establishing structures of governance is a major factor influencing these groups’ trajectories and informing avenues for engagement. First, these features play a particularly prominent role when new crises occur, and armed groups must respond quickly to new needs that they are not always equipped to cater for. Second, by focusing on behaviour rather than supposed intentions, it puts people’s need firmly at the centre of a neutral humanitarian planning process before any other policy consideration. Although limited exceptions exist, especially in the case of specific global franchises, these exceptions should not conceal a much more frequent case in favour of calibrated dialogue and collaboration in which respect for humanitarian considerations constitute the minimum common ground.
Beyond the state of play: Establishing a duty of non-State armed groups to provide reparations

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Abstract
This article examines whether and how non-State armed groups, as distinct entities, might be required to provide reparations for their violations of international humanitarian law. It shows that the possibility of holding armed groups to reparations is marked by uncertainty in international law. This complex question calls for clarification. In building on these observations, the article explores how the duty to provide reparations by armed groups could be operationalized as a matter of lex ferenda. This exercise involves examining how such a duty could be conceptualized and put into practice. From this discussion, a multi-faceted proposal emerges, which draws upon existing approaches in international law and responds to the particular challenges presented by armed groups. The article ends by considering the implications of the proposal.

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Introduction

It is no secret that non-international armed conflicts involving armed groups have become the dominant form of armed conflict, while inter-State conflict has become a rather exceptional occurrence.1 In this context, the International Committee of the Red Cross (ICRC) identified, in its 2019 Challenges report, the “proliferation of non-State armed groups” as a central feature of “the changing geopolitical landscape of the last decade”.2 The realities of these present-day armed conflicts, such as the protracted conflicts in the Central African Republic, Syria and Colombia, demonstrate the detrimental impacts that they can have in terms of human suffering, damage to property and displacement.3 It is clear that in such contexts harms have resulted from the wrongful acts committed by both States and non-State armed groups, which are parties to non-international armed conflicts.4

There has been gradual growth in awareness and recognition of the plight of victims of armed conflict and of the need to provide reparations for the harmful consequences that they have endured following violations of international law.5 Reparation for wrongs developed historically as a means of settling disputes between offenders and victims; it is generally understood as involving the obligation of a responsible person, or entity, to redress the injury caused as a

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result of an unlawful act.\(^6\) Besides constituting a fundamental legal principle in domestic legal systems, reparation has also gained a firm basis in international law: first, as an inter-State mechanism and, later, as a broader responsibility mechanism also addressed to certain non-State actors, particularly individuals and international organizations.\(^7\) Under international law, the duty to repair is one of the legal consequences which arises from the commission of an internationally wrongful act by a responsible actor.\(^8\) Reparations generally seek to restore the situation that existed before the wrong occurred, so-called full reparation or *restitutio in integrum*, by way of a different range of forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.\(^9\)

The duty of wrongdoers to provide reparation has been recognized as an important justice and accountability measure for victims of armed conflict or, in the words of Judge Cançado Trindade, as “an imperative of justice”.\(^10\) This notion is also reflected in the United Nations (UN) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles), which hold that “reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law”, and more broadly in the field of transitional justice.\(^11\) Within this context, the International Criminal Court held that one of the purposes of reparations, besides redressing the harm, is that they enable the Court to ensure that those responsible for

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\(^8\) International Criminal Court (ICC), *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3129-AnxA, Order for Reparations (Appeals Chamber), 3 March 2015, para. 2; ARS, above note 7, Arts 28 and 31; ARIO, above note 7, Arts 28 and 31.


\(^11\) UNGA Res. 60/147, above note 9, para. 15; Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence – Note by the Secretary-General, UN Doc. A/69/518, 14 October 2014, para. 11.
serious crimes account for their acts. Importantly, reparations are one of the only measures which are specifically designed to benefit the victims of armed conflict directly, while acknowledging their suffering and needs, and attempting to address the harms that they have endured. In other words, “reparations constitute an effort that is explicitly and primarily carried out on behalf of victims” and, in doing so, they go beyond the narrow focus of criminal prosecution.

The recognition that non-State armed groups have become one of the main protagonists in present-day armed conflicts, and that they can cause significant harm in the societies in which they operate as a result of their violations of international humanitarian law, calls for holding these groups responsible vis-à-vis their victims. This call is reinforced by the significance of this measure in countering impunity. More specifically, it raises the question as to whether, like the States that are party to these conflicts, armed groups should also hold a duty under international law to make reparation for the harms they have inflicted on their victims. However, as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions recently concluded, and as will be discussed in further detail, “the current legal framework to hold them accountable has unacceptably large deficits with regard to access to justice, remedies, and reparations”.

In tackling this question, the article begins by examining, in the next section, the state of play of non-State armed groups’ possible duty of reparation under current international humanitarian law. The remainder of this article explores how such a duty could be operationalized as part of a future responsibility regime, which involves determining how this duty could be conceptualized and put into practice. In doing so, it makes a significant contribution to the scholarly debate by clarifying some of the rules and principles that could govern the content of armed groups’ international responsibility.

The discussion will first argue that the possible duty of non-State armed groups to provide reparations is marked by uncertainty in international law and needs clarification. The second part of the article will present a multi-faceted proposal on how such a duty for armed groups could be operationalized as a matter of lex ferenda, by arguing for the introduction of a cascading regime of responsibility for reparation and an actor-specific approach. The analysis draws

12 ICC, Lubanga, above note 8, para. 2.
from existing approaches to reparations in the law of international responsibility and from examples in practice. Simultaneously, the particularities that are presented by these armed actors are taken into account, including some of the responses that have developed thereto under international humanitarian law. To conclude, the implications of the proposal will be considered.

**Non-State armed groups and reparations under international humanitarian law**

It would appear logical that non-State armed groups, as such, should incur international responsibility, and a resulting duty of reparation, where they violate their well-established primary obligations under international humanitarian law. Yet, this question is far from being settled. Indeed, there is, at present, no treaty or legal instrument, nor any accompanying forum, that provides a normative and institutional framework to hold armed groups internationally responsible for their wrongful acts.

The ICRC Commentary of 2020 to Article 3 common to the four Geneva Conventions confirms that “[i]nternational law is unclear as to the responsibility of a non-State armed group, as an entity in itself, for acts committed by members of the group”.17 Moreover, the ICRC Customary Law Study of 2005 recognizes that such international responsibility could at least be argued but, at the same time, indicates that it is particularly unclear to what extent armed groups are under a duty to make full reparation.18 This study makes further reference to the Articles on State Responsibility, drafted by the International Law Commission, whose Commentary leaves the possibility open that an armed group may itself be held responsible for breaches of humanitarian law by its forces.19 All in all, the international responsibility of armed groups is neither firmly affirmed nor is it rejected in the work of the ICRC and the International Law Commission, respectively.

The question of responsibility also remains controversial in legal scholarship. Some scholars argue that the international responsibility of non-State armed groups in international humanitarian law has been recognized, and that the contemporary debate should centre on issues such as attribution or content of responsibility.20 However, this position is far from universal, and the majority of scholars have been more careful in their assertions. Aside from arguing for the

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19 ARS, above note 7, ILC Commentary to Art. 10, p. 52, para. 16.
responsibility of armed groups and identifying increased support for such a development, this latter group of scholars generally concludes that existing practice is too scarce to draw any definite conclusion on the matter.\(^\text{21}\)

At best, the wrongful conduct of non-State armed groups has been dealt with through monitoring and sanctioning efforts by, for instance, the UN Security Council, commissions of inquiry and other fact-finding missions, while justice efforts have predominantly focused on holding individuals criminally responsible for the crimes committed on the occasion of their membership to such groups.\(^\text{22}\) From a reparative justice perspective, these initiatives remain unsatisfactory, since they do not provide an avenue for victims to claim reparations directly from responsible armed groups for the entire spectrum of violations and harms caused.\(^\text{23}\) Moreover, the existing regime of State responsibility does not remedy this situation in a satisfactory manner, since a State is in principle not responsible for the wrongs committed by non-State armed groups, unless the group is successful in establishing a new government or State.\(^\text{24}\) Yet, this leaves the responsibility of unsuccessful groups unaddressed.

This state of play sits in stark contrast with a fundamental principle of international law, in the words of the Permanent Court of International Justice: “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”.\(^\text{25}\)

Moreover, in contrast to armed groups, States, which are party to non-international armed conflicts, hold a secondary obligation to make full reparation

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\(^\text{24}\) ARS, above note 7, Art. 10.

\(^\text{25}\) PCIJ, Factory at Chorzów (Germany v. Poland), Series A, No. 9, Judgment (Jurisdiction), 26 July 1927, p. 21; PCIJ, Factory at Chorzów Case (Merits), above note 7, p. 29.
for the injury caused by their internationally wrongful acts.\textsuperscript{26} As concluded by Evans, “this illustrates a major lacuna in international humanitarian law”.\textsuperscript{27} More specifically, it gives rise to a problematic responsibility gap, which manifests itself, at the theoretical level, in terms of the asymmetry that exists between the primary and secondary rules applicable to non-State armed groups, and, in practice, because of the \textit{de facto} impunity for certain violations of international law.\textsuperscript{28}

However, important support for armed groups’ possible duty of reparation can be found in the UN Basic Principles, which, as a key international soft law instrument for reparations, has been referred to as “an international bill of rights of victims”.\textsuperscript{29} Besides recognizing a State’s international obligation of reparation, principle 15 holds:

\textit{[i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.}

Hence, the principle explicitly acknowledges that entities of a non-State nature could be obliged to provide reparations for serious violations of international humanitarian law: this could arguably include non-State armed groups.\textsuperscript{30}

This preliminary conclusion finds support in Special Rapporteur van Boven’s reflections on the process of discussions and negotiations of the Basic Principles, in which he identified the question of non-State actors as one of the main issues that came up.\textsuperscript{31} He reveals that there was general support for obligating armed groups, which exercise effective control over a certain territory and people, to make reparation on the basis of “legal liability”.\textsuperscript{32} However, the Basic Principles’ scope was only extended in a “modest and cautious way”, which indicates the drafters’ hesitation to make any conclusive decision on the matter.\textsuperscript{33} The latter consideration is also reflected in the adopted term “should”, in principle 15, which was used where an international norm was deemed to be

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\item\textsuperscript{26} ARS, above note 7, Art. 31; J. Henckaerts and L. Doswald-Beck, above note 18, Rules 149 and 150.
\item\textsuperscript{27} C. Evans, above note 5, p. 31.
\item\textsuperscript{28} V. Bílková, above note 21, p. 275.
\item\textsuperscript{29} M. C. Bassiouni, above note 6, p. 203.
\item\textsuperscript{32} \textit{Ibid.}, p. 3.
\item\textsuperscript{33} \textit{Ibid.}.
\end{itemize}
“less mandatory”.34 Despite the drafters’ attention to non-State armed groups, the final text does not make this focus explicit. This can be explained by the instrument’s emphasis on the situation of the victims, regardless of the State or non-State identity of the perpetrator.35

Accordingly, principle 15 reflects an “emerging concept of the responsibility” of armed groups under international humanitarian law.36 The principle recognizes that these groups could potentially be liable to provide reparations. The significance of this conclusion is reinforced by the status of the Basic Principles, which were adopted by the UN General Assembly without a vote. As pointed out by the International Law Commission, such resolutions carry significant weight and “offer important evidence of the collective opinion of its Members” for the identification of a rule of customary international law.37

Nevertheless, there exists little practice on the issue.38 Even so, compelling, and recent, practice can be found in Colombia, where the 2016 peace agreement between the government and the Revolutionary Armed Forces of Colombia–People’s Army (Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo; FARC-EP) ascribes a role to the non-State armed group in the reparations process on the basis of the group’s responsibility for at least breaches of international humanitarian law.39 More concretely, the agreement states that “the FARC-EP as insurgent organization that acted in the framework of rebellion, undertakes to contribute to the material reparation of the victims and in general to their comprehensive reparation”.40 Indeed, the FARC-EP has acknowledged collective responsibility and has offered public apologies on behalf of the group, among other measures.41 It builds on a

36 As observed by the Chairperson-Rapporteur: “[t]he Principles and Guidelines have been built on international law and practice as they have evolved in the course of the development of the Principles; thus, the emerging concept of the responsibility of non-State actors is reflected in the Principles and Guidelines.” The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law – Note by the High Commissioner for Human Rights, UN Doc. E/CN.4/ 2004/57, 10 November 2003, para. 13.
37 The General Assembly is a plenary organ of the UN with virtually universal participation. ILC, Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10, 2018, Commentary to Draft Conclusion 12, para. 2.
38 As concluded, in different instances, non-State armed groups’ international responsibility very much constitutes “a textbook case”, or reparations were “rarely asked from armed groups and even more rarely awarded to their victims”. M. Sassòli, above note 20, p. 47; International Law Association Committee on Non-State Actors, Washington Conference: Non State Actors, 2014, p. 11.
40 Ibid., p. 186 (author’s translation).
previously established transitional justice process that is regulated by the Justice and Peace Law of 2005, which is said to represent “the ability of armed groups to be held responsible for reparations”. Further support can be found in several peace and other types of agreements concluded between States and armed groups in other countries, such as the Philippines and Sudan. This latter agreement between the Government of Sudan and the Justice and Equality Movement-Sudan provides that “[t]he Parties shall expeditiously take measures to commence the payment of compensation to returning IDPs [internally displaced persons], refugees as well as all other victims of the conflict”. Moreover, other armed groups have included measures akin to reparations in their own codes of conduct. Together, these instances of practice contribute to laying the initial foundations for a duty of armed groups to make reparation in cases of humanitarian law violations.

Besides these contemporary examples, important historical precedent can be found in the laws of insurgency and belligerency. Indeed, aspects of State practice, from separated periods, demonstrate that these legal frameworks did not exclude the possibility for States to claim reparations directly from armed groups, especially those exercising control over territory beyond the influence of the State concerned. Concrete examples of such practice can be found in the Spanish Civil War, which was not recognized as a situation of belligerency, and the American Civil War, among other instances. Fortin’s analysis of this practice demonstrates that “the responsibilities that an armed group accrued by virtue of its control of territory were not dependent on a declaration of belligerency per se. … during the Spanish Civil War, Franco insurgents were regularly held bound by third States to provide compensation for damages that they suffered to persons or

42 Justice and Peace Law of Colombia (Law 975 of 2005); L. Moffett, above note 30, p. 343. Judgment C-370/06 of the Constitutional Court introduced the notion of “solidarity civil responsibility” of armed groups into the Justice and Peace Law process. See Constitutional Court of Colombia, Case No. C-370/06, Judgment, 18 May 2006, para. 6.2.4.4 (author’s translation).
44 Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan on the Basis of the Doha Document for Peace in Darfur, 6 April 2013, Art. 17, para. 43.
45 The “Basic Rules” of the New People’s Army (NPA) active in the Philippines include as one of their “Eight Points of Attention”: “compensate all damages”. Similarly, the “Eight Codes of Conduct”, which governed the interactions of Revolutionary United Front (RUF) fighters with civilians in Sierra Leone provided that members “pay for everything that you demand or damage”. Finally, the National Liberation Army (ELN) Code of War states that “[e]fforts shall be made … to make reparations where possible”. For the primary sources, see Olivier Bangerter, “A Collection of Codes of Conduct Issued by Armed Groups”, International Review of the Red Cross, Vol. 93, No. 882, 2011, pp. 489–490 and 497; Geneva Call, Their Words: Directory of Armed Non-State Actor Humanitarian Commitments, available at: http://theirwords.org/.
assets”. Yet, for armed groups lacking territorial control, no similar support in State practice has been identified.

More recent evidence can be found in international practice. Although not a consistent element in its reports, the Independent International Commission of Inquiry on the Syrian Arab Republic recommended, in 2013, that armed groups should provide “effective redress for victims based on international standards”. A similar call can be found in the 2005 report of the International Commission of Inquiry on Darfur. Moreover, certain UN special rapporteurs recently recognized that armed groups should provide reparations for their internationally wrongful acts. Also some truth commissions recommended that non-State armed groups might contribute in certain ways to reparations. The Commission on the Truth for El Salvador most clearly recognized a duty to provide reparations, material and moral, by the armed group concerned “where it is found to have been responsible”.

Overall, the discussion has indicated that the existence of a possible duty of non-State armed groups to provide reparation for violations of international humanitarian law remains characterized by uncertainty: it presents itself as being, predominantly, a matter of lex ferenda. At the same time, the issue is considered as being at an incipient stage in current international law. This conclusion acknowledges that there is at least some legal precedent and recognition that armed groups, particularly with control over territory, should provide reparations when violating their primary obligations in situations of armed conflict. However, it is simultaneously cognisant of the present lack of an established secondary norm of international law to that end and the need for further clarification. In moving beyond this present state of play, and responding to this need, the remainder of the article will explore how a future duty of reparations by non-State armed groups could be operationalized. This process involves examining how such a duty could be conceptualized and put into practice.

Operationalizing a duty of non-State armed groups to provide reparations: A multi-faceted proposal

The law of State responsibility as a point of departure

As a first step, the methodology which is to frame the analysis needs to be determined. It sets the approach for examining how the reparation rules and principles, which could comprise a future regime of international responsibility of non-State armed groups, could be operationalized. An evident point of departure is the law of State responsibility, which has been referred to as “the paradigm form of responsibility on the international plane”.55 Indeed, several scholars have relied on this regime as a useful opening to explore the international responsibility of armed groups: by way of analogical legal reasoning.56 Although this kind of technique can be useful for filling legal gaps, it should not be understood as a process of mechanically copying and pasting legal rules and principles. The use of analogies instead constitutes a method of legal reasoning based on an assessment of relevant similarities and differences.57

Certain similarities between non-State armed groups and States can be noted, which suggest that the rules on State responsibility can constitute an advantageous baseline. Both are collectivities with at least a minimum level of organization, which allows them to engage as distinct entities in organized armed violence of a degree of intensity that reaches the threshold of a non-international armed conflict.58 Some armed groups control territory, in which they may even exercise government functions akin to those of States.59 Moreover, armed groups are bound by the same primary obligations as States under international humanitarian law applicable in non-international armed conflict.60

However, while some non-State armed groups may display State-like features and could potentially be bound by similar secondary rules as States, others are characterized by their loose organizational structures, absence of any

57 As explained by Ahlborn, the use of analogical reasoning generally involves the application of a legal rule covering a specific case to a different case that is unregulated by law but has similar characteristics. Christiane Ahlborn, “The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations an Appraisal of the ‘Copy-Paste Approach’”, International Organizations Law Review, Vol. 9, No. 1, 2012, pp. 55–57; L. Íñigo Álvarez, above note 21, pp. 81–83.
territorial control, and limited or lack of resources. With regard to reparations, these observations present themselves as a challenge in terms of the varying degrees of armed groups’ capacity to provide reparations: a key issue to be further examined in the next section. For now, it suffices to preliminarily conclude that there is a need to take account of these disparities that exist between armed groups and States, as well as amongst armed groups themselves, when elaborating a future system of responsibility.

Thus, an exercise of analogical reasoning should respond to the particularities presented by armed groups. This process will need to consider that “subjects of law … are not necessarily identical in their nature or in the extent of their rights”, and will potentially require the development of sui generis rules. Consequently, it may very well be that different rules govern the international responsibility of distinct subjects. Even so, the proposed methodology keeps the balance between facilitating a more consistent approach to responsibility in the international legal system and, at the same time, giving consideration to armed groups’ specific capacities.

Correspondingly, the rules and principles on reparations included within the law of State responsibility will be used as an initial starting point to frame a possible duty to repair of armed groups. In addition, it is deemed beneficial to consider the existing approaches to reparations in respect of other non-State actors, particularly international organizations and individuals, as a supplementary source of analysis.

The feasibility of holding non-State armed groups to reparations

Before examining the analogical application of the existing reparation standards under international law to non-State armed groups, it is necessary to better understand the particularities that characterize these groups and, particularly, those that are of specific importance to the question of reparation.

64 V. Bílková, above note 21, pp. 279 and 284.
65 A similar approach guided the ILC in its work on the responsibility of international organizations. While the Articles on State Responsibility were taken as the general model of international responsibility, it did not imply a general presumption that the same principles apply. Instead, each principle was considered from the specific perspective of the responsibility of international organizations, by taking account of their internal diversity and their differences in comparison with States, amongst other issues. ILC Commentary to the ARIO, above note 7, pp. 46–47, paras 3–7.
Although some, but certainly not all, armed groups have State-like features, such groups usually do not have the equivalent organizational capacity as States, nor do they typically possess the same amount of resources. As argued by Moffett, the “state is in the most appropriate position to carry out reparations as it has the capacity, through its institutions, and the resources to provide effective remedies to victims”. Correspondingly, scholars have indicated that armed groups may lack the capacity to provide reparations to those victimized by their internationally wrongful acts. Atrocities committed by these groups can result in a vast and complex universe of victims, which could easily overwhelm their practical capabilities to make reparation and, consequently, leave claims without any prospect of success. Groups may, for instance, be indigent or lack the monetary resources to even contribute in a significant manner to redress. Such concerns are not surprising and are certainly not new; they have also been voiced in the academic debates on the duty of reparation by other non-State actors, particularly individuals and international organizations.

The capacity of armed groups to provide reparations may also differ significantly across groups. These capabilities necessarily tie in with a specific group’s level of organization and resources. Armed groups may “range from hierarchically complex, well-financed armed groups that exercise control over large swathes of territory at one extreme, to minimally organized, poor, and mobile groups at the other”. Moreover, a group’s level of organization may fluctuate over the course of time. As indicated by Íñigo Álvarez, an armed group can have a more rudimentary organization at the beginning of an armed conflict and become more sophisticated in later years, or vice versa. Still, an armed group must retain a minimum organized structure to be considered a party to a non-international armed conflict for the purposes of international law. Additionally, a group’s organizational structure may fragmentize, be absorbed into another group or even dissolve. The unstable and temporary nature of armed groups may render it difficult to bring reparation claims against the very group that is responsible. Hence, the overall capacity of an armed group to fulfil a duty of

68 L. Moffett, above note 30, p. 325.
72 L. Íñigo Álvarez, above note 21, pp. 87–88.
73 International Law Association Committee on Non-State Actors, above note 38, p. 10; L. Moffett, above note 30, p. 334.
reparation may vary significantly in comparison with other groups, may shift over
time and may even be rendered infeasible in practice.

While the discussion could lead some to conclude that reparations are
simply not relevant for armed groups, Dudai convincingly shows, on the basis of
eamples from practice, that “at least in some cases, and in relation to at least
some forms of reparations, it would indeed be feasible to discuss the question of
reparations from armed groups”.75 Hence, instead of disregarding the issue, there
is a need to develop an approach which accommodates these differences in
organizational capacity amongst armed groups, and in comparison with States, to
ensure the effectiveness of a future regime of international responsibility. The
challenge is to come to abstract rules on reparations, which can be applied
generally and, at the same time, provide sufficient flexibility to respond to these
disparities.76 Ultimately, the approach should ensure that the normative
framework can be applied effectively on the ground, and avoid the creation of
legal fictions.77

In addition, victims may not only face difficulties in obtaining reparations
from armed groups due to their limited or lack of capacity, but they may also be
faced with their lack of willingness.78 Both issues call for the incorporation of a
mechanism in the proposed legal framework that guarantees, to the greatest
extent possible, the provision of redress to the victims, where a group lacks
capacity or willingness.79

Bridging the gap: The need for a cascading regime of responsibility
for reparation

A central element of the concept of reparation is the intrinsic relation that exists
between responsibility for internationally wrongful acts and the duty of the
responsible actor to provide reparations.80 Besides being encapsulated in judicial
decisions, this fundamental principle of international law is also found in other
international legal sources.81 The regime of State responsibility follows this

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75 R. Dudai, above note 14, p. 786. Similarly, see L. Moffett, above note 30, p. 345.
76 J. K. Kleffner, above note 21, pp. 258 and 261. Compare with ARIO, above note 7, ILC Commentary to
Art. 2, p. 51, para. 15.
Zappalà, “Can Legality Trump Effectiveness in Today’s International Law?”, in Antonio Cassese (ed.),
Hiroshi, “Effectiveness”, in Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public
potential system of responsibility will need to take into account these structural differences [between
armed groups] in order for such a framework to be realistic.” L. Íñigo Álvarez, above note 21, p. 67.
78 R. Dudai, above note 14, p. 786.
79 L. Moffett, above note 30, p. 346.
81 PCIJ, Factory at Chorzów Case (Merits), above note 7, p. 29; Inter-American Court of Human Rights, El
International Court of Justice, Armed Activities on the Territory of the Congo, above note 9, para. 259;
African Court on Human and Peoples’ Rights, Comparative Study on the Law and Practice of
understanding, by conceptualizing the obligation of reparation as “the immediate corollary of a State’s responsibility” or, in other words, “as an obligation of the responsible State resulting from the breach”.82 The Articles on the Responsibility of International Organizations reproduce this approach.83 The same intrinsic relationship is also reflected in the reparations orders of the International Criminal Court, which are “intrinsically linked to the individual whose criminal liability is established in a conviction”.84

From this discussion, it logically follows that the violator of an international norm, i.e. the responsible actor, should bear the primary duty to provide reparation. Correspondingly, a strong argument can be made that a non-State armed group should bear this primary duty for its own wrongful conduct in international law. Such a proposition should not be deemed controversial, since it follows established principles in international law, as has been previously demonstrated.

That being said, armed groups may lack the organizational capacity to provide reparations, may only be capable of fully or partly contributing to certain forms of reparation, or might simply cease to exist. Others may be unwilling to take up responsibility for remedying the past. Therefore, a future regime of responsibility should not make the provision of reparations to those who suffered injury solely dependent upon such actors.

Similar considerations are reflected within the legal frameworks which govern the duty of reparation by other non-State actors. The Articles on the Responsibility of International Organizations include, for instance, an obligation for the members of a responsible organization to enable it to fulfil its reparation obligation.85 Similarly, the reparations scheme of the International Criminal Court assigns a role to the Trust Fund for Victims where the convicted person’s resources are insufficient, which has been the case regarding all reparations orders issued thus far.86 This reality illustrates that reparations cannot be fully dependent upon non-State perpetrators alone.87

In line with the underlying rationale of these approaches, the Basic Principles assign a subsidiary role to the State with a view to mitigating the difficulties that the provision of reparation by a non-State actor may experience.

82 ARS, above note 7, ILC Commentary to Art. 31, p. 91, para. 4.
83 See ARIO, above note 7, Art. 31.
84 ICC, Lubanga, above note 8, para. 20 (emphasis in original).
87 A. Pellet, above note 66, pp. 49–50; African Court on Human and Peoples’ Rights, above note 81, p. 13.
Principle 16 holds that “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.” This scheme ensures that victims have access to redress either way. A similar position has been echoed in other legal instruments, such as the Chicago Principles on Post-Conflict Justice. Furthermore, this approach to non-State armed groups enjoys support in international practice and legal scholarship.

Building on this scheme, the territorial State could bear a subsidiary responsibility to provide reparations for the wrongful acts of a non-State armed group: as a matter of law or, at least, out of a sense of morality, where the responsible group is unable or unwilling. Yet, it is clear that the character of this form of responsibility would eventually determine the extent to which a State could be legally compelled, where it lacks the political will, to step in. Regardless of this concern, States have in some cases taken on, exclusively or along with the concerned armed group, the provision of reparations to all victims of the respective armed conflict. The State could carry out this role by, for instance, creating a special trust fund, an administrative reparations programme, or introducing a dedicated line in the annual budget. This approach reflects the reality within the majority of conflict and post-conflict situations, namely that reparations cannot be provided by perpetrators alone, and thereby, necessitating the application of a comprehensive approach to reparations in order to address the full range of needs. Additionally, the international community could

88 (Emphasis added).
89 Basic Principles, paras 3(c)–(d), 8 and 11(b); L. Moffett, above note 30, p. 331.
93 L. Magarrell, above note 13, pp. 10–11.
96 Examples can be found in the approaches to reparations for victims of the Colombian armed conflict within the context of Law No. 1448 of 2011, see Luke Moffett, Cheryl Lawther, Kieran McEvoy, Clara Sandoval and Peter Dixon, Alternative Sanctions Before The Special Jurisdiction For Peace: Reflections
provide further assistance in particularly weak and resource-scarce States through, for instance, an international trust fund for victims.\textsuperscript{97} The redress offered by third actors must be accompanied by an acknowledgment of victimhood in order to ensure its reparative nature and to distinguish it from humanitarian assistance, development or similar initiatives.\textsuperscript{98}

From these considerations emerges a proposal for a cascading regime of responsibility for reparation: the responsible armed group bears the principal duty to provide reparation; the territorial State incurs a subsidiary responsibility, to the extent that the group is unable or unwilling; and the international community takes a potential additional role. In practice, the State may end up taking a complementary role in the provision of reparations, where the responsibility of the armed group is only partially exercised. As will be further elaborated on in the next section, this might be the case when a group has the capacity to contribute to the provision of reparations, but cannot do so fully. The main objective of this cascading regime is to guarantee, to the greatest extent possible, the required redress for victims.

Reparations from non-State armed groups: A way forward

The adequate forms of reparation required in a given case are usually determined on the basis of the nature of the violation and the resulting harm that was caused, which consequently frame the duty to provide reparation.\textsuperscript{99} This framing exercise does not take the type of responsible entity into consideration.\textsuperscript{100} Although the rules on State responsibility do allow some flexibility in how full reparation is to be achieved, by introducing elements of equity and reasonableness, this does not go as far as granting the possibility of restricting the quantum or quality of reparation owed when it merely proves to be difficult for the wrongdoer to comply.\textsuperscript{101}
These practices are taken as the starting point in respect of reparations from non-State armed groups. However, a proposal is made to still take account of a responsible group’s organizational capacity to deliver the required forms of redress when concretely applying the duty of reparation to that group, whilst safeguarding the reparation that is owed through a subsidiary mechanism.  

Although this proposal is not mirrored in the law of State responsibility, it finds support in the current regulation of armed groups under the primary rules of international humanitarian law. Indeed, the process of determining the scope of primary obligations applicable to a particular armed group is not done in an abstract manner. Instead, it includes an evaluation of that group’s level of organization to ensure its normative capacity. More concretely, a greater body of obligations will bind an armed group under Additional Protocol II, which requires a higher degree of organization of that group, compared with an armed group with a minimum level of organization, sufficient for the sole application of common Article 3. As explained in the Boškoski case:

[t]his difference in the required degree of organisation is logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol II conflicts … By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application.102

Thus, as observed by Sivakumaran, there is “a close nexus between the organization of the armed group and the content of the applicable law”.103 This reasoning finds support in the text of article 1(1) of Additional Protocol II, which holds that armed groups should be under responsible command and in control over territory “as to enable them … to implement this Protocol”. The ICRC Commentary recognizes that the higher threshold for application has a “degree of realism”104. The Commentary submits that in such circumstances it can be reasonably expected that the parties apply “the rules developed in the Protocol” given they have “the minimum infrastructure required therefor”.105

The discussion shows that an armed group’s level of organization is used as an indicator of its normative capacity to apply the imposed obligations under international humanitarian law. This results in a differentiated approach to the legal regulation of armed groups in terms of their primary obligations.106 Fundamentally, the international legal framework shows sensitivity towards ensuring the reasonable feasibility of a group to fulfil its obligations. In doing so,


105 Ibid.

it legally responds to the challenges posed by the heterogeneous nature of armed groups, while rendering the regulatory regime more realistic.\footnote{K. Fortin, above note 48, pp. 137 and 154–155.}

A similar differentiated approach could inform the operationalization of the possible obligations that arise for armed groups under the secondary rules of international law, particularly vis-à-vis reparations. This has the potential to be a viable solution to the capacity concerns which have been previously addressed. There is no apparent reason why these considerations could not be extended to the sphere of international responsibility.

\textit{Moving towards an actor-specific approach}

Building on these findings, a proposal is made for an actor-specific approach to the application of a duty of reparation to an armed group in a given case. This entails that a case-specific evaluation is made of the level of organization and resources of a responsible group, as indicators of its organizational capacity to comply with the imposed duty. The objective of this evaluation is to determine the concrete scope of the group’s duty of reparation, by considering two interrelated aspects.

The first aspect concerns the range of reparation forms which have been requested from the responsible armed group in an effort to accomplish \textit{restitutio in integrum}. Under the proposed approach, an evaluation would help determine which of these forms of reparation the group could actually provide for. For instance, an armed group, which holds a limited degree of organization and hardly any resources, may have been requested to provide satisfaction and monetary compensation. However, an evaluation made under the actor-specific approach might reveal that, due to its lack of capacity, the group is unable to provide for both. As such, the actor might be primarily obliged to provide the ordered measures of satisfaction, as their provision is within the group’s capabilities. Yet, as will be demonstrated, this approach is contingent on the State stepping in to ensure full reparation.

The second aspect concerns the conduct which is required to deliver a particular form of reparation or, indeed, full reparation. In this regard, when an armed group is not capable of fully satisfying the reparation ordered against it, the group could be required to contribute to, or at least facilitate, the provision of reparation by States or other actors. Mégret makes a similar argument with regard to symbolic reparations and guarantees of non-repetition afforded by responsible individuals. While certain forms of symbolic reparation may be beyond their capacity, individuals could still help in bringing such reparation to fruition. For example, although individuals might not be ordered to search for the whereabouts of the disappeared altogether, they could still assist in that process by sharing information on the matter.\footnote{Frédéric Mégret, “The International Criminal Court Statute and the Failure to Mention Symbolic Reparation”, \textit{International Review of Victimology}, Vol. 16, No. 2, 2009, pp. 137–138.}
Such reasoning is deemed equally relevant for non-State armed groups. Similarly, a responsible armed group may not be capable of providing rehabilitative services to victims residing under its control, but the group could at least facilitate the delivery of such services by other actors through the granting of access to these areas of the territory. A group could also contribute to providing satisfaction to victims by at least disclosing information on certain violations, which could be instrumental in a truth-seeking process. Finally, if resources are limited, they can still be used to contribute, even symbolically, to compensation, or the financing of other forms of reparation through, for instance, a State-led fund or reparations programme.

The majority of armed groups could probably provide certain reparation forms in international law with more ease than others. It is likely that, for instance, restitution by way of the return of wrongly seized property or satisfaction through public apology commonly require a lesser degree of organizational capacity than rehabilitation services and monetary compensation. Nonetheless, the discussion demonstrates that poorly organized armed groups could still be able to contribute to, or at least facilitate, the provision of these latter measures of reparation.

At the same time, the approach leaves room for the development of adjusted or new reparation forms, which could accommodate the specific capabilities of armed groups, by capitalizing on their collective efforts, skills and knowledge in certain areas. Indeed, such examples can be found in Colombia, where the FARC-EP has engaged in concrete actions, such as infrastructure-rebuilding work in conflict-affected areas or humanitarian demining, with a view of contributing to reparation. However, any attempt to think outside the box needs to carefully guard the concept of reparation. This legal concept should not


110 Basic Principles, para. 22(b); Lars Waldorf, “Ex-Combatants and Truth Commissions”, in Ana Cutter Patel, Pablo de Greiff and Lars Waldorf (eds), Disarming the Past: Transitional Justice and Ex-combatants, Social Science Research Council, New York, 2009, pp. 120–121; Luke Moffett, Cheryl Lawther, Kieran McEvoy, Clara Sandoval and Peter Dixon, above note 96, paras 130 and 132. Recent examples can be found in the Colombian context, see Carolina Ávila, “La comisión de Farc que busca a los desaparecidos”, El Espectador, 12 March 2019, available at: https://www.lespectador.com/colombia-20/jep-y-desaparecidos/la-comision-de-farc-que-busca-a-los-desaparecidos-article/.

111 See for concrete examples Law No. 1448 of 2011 (Colombia), Art. 177(a); Sierra Leone Truth and Reconciliation Commission, above note 53, p. 183; Note by the Secretary-General, above note 11, para. 57(b).

112 Correspondingly, the Basic Principles contain a non-exhaustive list of reparation forms, which allows for other forms that might be more appropriate in a concrete case. M. Zwanenburg, above note 35, p. 666.

be stretched to any action that contributes to some form of development. Otherwise, it risks being robbed of its specificity and significance.

All in all, the proposed approach takes account of armed groups’ varying capabilities and thus results in a differentiated and case-sensitive application of the duty to repair to such groups. Yet, as briefly raised, the viability of this actor-specific approach proposal is dependent on a crucial condition: the various forms of reparation ordered, so as to secure full reparation, are to be guaranteed by the subsidiary responsibility of the territorial State. In this conception, the State would be prompted to contribute to the extent that the responsible armed group lacks capacity. The well-established principle of full reparation would thus be upheld, insofar possible regarding gross violations, by way of a division of responsibility between the armed group and the State. Here, the actor-specific approach ties in with the cascading regime of responsibility for reparation, as presented in the previous section. At the same time, the provision of certain forms of reparation, such as public apologies, cannot be substituted by the State. As such, the role of the responsible group could prove to be indispensable.

The justification for the proposed approach lies in the need to develop a realistic normative framework, that reasonably ensures the effectiveness of the reparation obligations imposed upon a non-State armed group. As previously argued, this requires accommodating concerns over divergent capabilities of an armed group, in comparison with States and other groups. Similar to the primary rules of international humanitarian law, the proposed approach, based on organizational capacity, allows for a matching of the international legal framework with realities on the ground. It thereby responds to such concerns.

The notion that an armed group’s organizational capacity determines the extent to which it is concretely bound to provide reparation raises the question as to which indicia could be used to evaluate such capacity in a given case. The International Criminal Tribunal for the former Yugoslavia has adopted a number of indicative factors to assess the organization of an armed group, as part of the two-fold test to determine the existence of a non-international armed conflict. Some of these could form a useful starting point to develop evaluative indicia. The group of factors which indicates that an armed group is able to speak with one voice could, for example, display a group’s capacity to authoritatively provide public apologies or acknowledge collective responsibility. Similarly, factors which signal the presence of a command structure could be indicators of the ability of a group to implement guarantees of non-repetition among its members, e.g., by issuing and disseminating internal regulations.

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114 N. Roht-Arriaza, above note 7, p. 158. Similarly, regarding the responsibility of international organizations: “the principle of full reparation is not put in question”. See ARIO, above note 7, ILC Commentary to Art. 31, p. 77, para. 3.
115 L. Íñigo Álvarez, above note 21, p. 197.
116 International Criminal Tribunal for the Former Yugoslavia, Boškoski, above note 102, para. 203.
117 Ibid., para. 199. A concrete manifestation can be found in the practice of the UN Security Council, which has called upon parties to armed conflict to make and implement commitments to combat sexual violence, which should include, among other things, the issuance of clear orders through chains of command prohibiting sexual violence. UNSC Res. 1960, 16 December 2010, para. 5.
needed on the specific forms of reparation and the different organizational capacities that are required for an armed group to provide them. Dudai has, for instance, identified several organizational features, such as internal cohesion, discipline and strong leadership, which he views as being vital factors for the feasibility of an armed group’s engagement in measures of truth-recovery and symbolic reparation.118 Kleffner and Zegveld have argued, in their turn, that credible rather than illusory reparative measures should be ordered; with regard to monetary compensation, this could entail that the economic position of the armed group is taken into account.119

**Concluding observations**

In going beyond the uncertainty that surrounds the existence of a duty to provide reparations by non-State armed groups, the article has presented a multi-faceted proposal on how this duty could be operationalized as part of a future regime of international responsibility. This novel proposal responds to the particularities presented by armed groups and aims to bring forward a realistic normative framework which is grounded in existing approaches in international law and practice. Moreover, a future domestic or international forum could apply this framework to judicial or administrative reparations claims directed to armed groups. It can also inform extra-judicial initiatives that address the question of reparations, such as the work of truth commissions and peace negotiations with armed groups.

The article has demonstrated that a possible duty of armed groups to provide reparations for their internationally wrongful acts could be conceptualized in a similar manner to that of States under international law. The main difference lies in how this framework of abstract rules and principles is to be put into practice, or rather, concretely applied to an armed group, by way of the actor-specific approach and the cascading regime of responsibility for reparation.

The proposal to adopt an actor-specific approach to the application of a particular group’s duty to make reparation injects flexibility into the regulatory framework, which assists in accommodating the specificities of a given case. This actor-specific approach does not stray away from the existing methods to frame a responsible entity’s duty of reparation, nor does it go as far as to argue that the required redress should be restricted when it proves to be difficult for that entity. Instead, the proposed approach involves making a case-specific assessment of the responsible armed group’s level of organization and resources, as indicators of its organizational capacity to comply with the obligations arising from its duty of repair. The aim of this assessment is to determine the concrete scope of the

group’s duty: in terms of the reparation forms it is required to grant and the extent of its engagement in the provision of reparatory measures.

The subsidiary responsibility of the territorial State could be subsequently triggered, as part of the proposed cascading regime of responsibility for reparation, to the extent that an armed group lacks the capacity to comply with its duty of reparation. Thus, the approach could result in a division of responsibility between the group and the State. This scheme ultimately seeks to safeguard the full provision of the required redress. The same subsidiary mechanism is activated when a group would be unwilling to provide reparations. Moreover, the international community could serve an important role in providing supplementary assistance. Fundamentally, the proposal is premised on the argument that reparations for victims of armed conflict cannot be solely dependent on non-State armed groups.

This multi-faceted proposal implies that the well-established principle of full reparation, as well as the five main forms of reparations included in the Basic Principles, could be transposed to armed groups by analogy, without too many modifications, but possibly requiring the substitution by the State in practice. At the same time, adjusted or new forms could be envisaged for armed groups. This conception differs from other authors, who have emphasized certain forms of reparation that supposedly come closer to the objective capabilities of non-State armed groups.

In addition, the proposed approach accommodates all types of armed groups, from highly organized groups which exercise control over a territory, to groups which maintain a minimum level of organization, and thus, not solely groups which resemble States. This inclusive approach differs from the tendency, within international law, to emphasize the international responsibility of groups with territorial control or State-like characteristics. In doing so, the potential opening of a responsibility gap when a group no longer reaches this standard is prevented. Indeed, as was demonstrated, a group’s level of organization is not necessarily stable and may fluctuate over the course of an armed conflict. This reality could bar victims from directly addressing a responsible group where it no longer falls within the law of international responsibility. Instead, following the proposed approach, victims of different types of armed groups are treated equally under international law. Or, differently, all armed groups can be held internationally responsible for their wrongful conduct.

120 Similarly J. K. Kleffner, above note 21, p. 264.
Although the multi-faceted proposal could certainly be applied to a non-State armed group during an ongoing armed conflict, insofar that the responsible group is still an identifiable entity, the matter is that reparations have been usually claimed and provided for after a conflict has ended. Yet, post-conflict reparations by an armed group constitute a complicated issue, since the group will no longer legally exist in international law. Nonetheless, the proposal presented in this article implies that victims could still call upon the subsidiary responsibility of the State. It recognizes that reparations by armed groups will not be feasible in all cases. Thus, the cascading regime of responsibility for reparation seeks to provide victims to the extent possible with a final safety net.


124 As explained by Zegveld, “The legal personality of armed opposition groups is based on their position as parties to an internal armed conflict.” L. Zegveld, above note 20, p. 152.
Violence and repair: The practice and challenges of non-State armed groups engaging in reparations

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Abstract

Atrocities by non-State armed groups (NSAGs) often capture international attention, but efforts to repair the harm they have caused are often overlooked. This article traces out some of the practices and tensions in NSAGs making reparations during wartime and in post-conflict transitions. It argues that engaging in reparations for acts committed by NSAGs can not only encourage greater compliance with international...
humanitarian law but also build support amongst civilian populations during armed conflict and facilitate ex-fighter reintegration at the end of hostilities. Drawing from interviews with a number of armed groups, the article also suggests that engaging with the armed group’s organization rather than just individuals themselves can be an effective way to collectively mobilize a group’s motivation and capacity to deliver on reparations, including recovery of disappeared persons, restitution of property and apologies. As such, this article seeks to contribute to a deeper understanding of reparation practices by NSAGs in order to see how reparations can be mediated and a hierarchy of reparation obligations developed.

**Keywords:** non-State armed groups, reparations, rebel governance, transitional justice.

Under international law, it is well recognized that non-State armed groups (NSAGs) have international humanitarian law (IHL) obligations when they are parties to armed conflict. The question of whether they also have human rights obligations has received increasing attention. Despite this, recognition of their obligations of cessation and remedy have received less consideration and remain debateable. There have been claims that reparations by NSAGs are a non-starter, in that there are “virtually no instances” of them, victims are unable to claim them, or it is unnecessary to seek redress from the perpetrators.

Despite this, NSAGs do make reparations during wartime and in post-conflict societies. Overlooking this practice disregards the purpose of reparations as a form of justice and a political project, which acknowledges and alleviates as far as possible victims’ harm by a responsible actor and can allow the re-establishment of social and moral relations between individuals and institutions. Neglecting reparations by NSAGs could prevent their victims from accessing an effective remedy, such as the location of the remains of the disappeared.


2 Reparations refer to measures made by armed groups to make good on a wrong committed by them or some form of suffering for which they are responsible.


Accordingly, reparations not only benefit victims, but this article argues that they can also be beneficial to NSAGs in managing their relations with civilians during conflict, their political constituencies and their reintegration at the end of hostilities.\(^8\) Reparations can help NSAGs to improve their image and recalibrate their wrongdoings as not simply sources of shame and humiliation, but as an opportunity to make amends.

Importantly, NSAGs making reparations for their violations and acknowledging their wrongdoing could be a pragmatic way for them to enhance their respect for and internalization of humanitarian norms.\(^9\) Approaching the issue from a practice perspective, seeing through the eyes of armed groups and drawing from their ideology, world view or customs may be conducive to improving their ownership of and buy-in to humanitarian law.\(^10\) Ignoring NSAG compliance with humanitarian law through focusing only on States risks the legitimacy of humanitarian law mechanisms by making them appear to be State-biased.\(^11\) This article positions the discussion of reparations within the increasing literature on civilians’ agency and their relationship with armed groups during conflict, rebel governance and transitional justice.

Despite the growing attention to NSAGs, there has been little analysis aimed at developing a theoretical or pragmatic approach to link their legal responsibility under IHL, or arguably under human rights law, with secondary rules of reparations.\(^12\) Indeed, there has been “no concentrated effort to develop either a normative doctrine or practical modalities to enable armed groups to provide measures of reparations to their victims”.\(^13\) This article provides some content to fill these gaps, not just in abstract terms, but by examining their practice in making reparations during and post-conflict. It will draw from interviews with sixteen NSAGs from nine countries,\(^14\) the broader academic literature, and primary materials including codes of conduct, internal policies and communiqués.

The article begins by briefly outlining the possible legal basis of obligations of NSAGs to make reparations under IHL and human rights law. It finds that there are limitations in speaking of secondary obligations for NSAGs to make reparations despite being responsible for violations. As a result, it suggests that there could be a

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\(^8\) NSAGs may make amends to enemy fighters, especially at the end of hostilities, but this may be difficult, as it requires them to acknowledge their responsibility and the victimhood of their enemy. See “Colombian Ex-Farc Rebels ‘Ashamed’ of Kidnappings”, BBC News, 15 September 2020, available at: www.bbc.co.uk/news/world-latin-america-54160284 (all internet references were accessed in July 2021).

\(^9\) B. Saul, above note 1, p. 64.


\(^14\) Interviewees came from Nepal, Ethiopia, Peru, Colombia, Lebanon, Guatemala, Uganda, Northern Ireland and South Sudan, and included foot soldiers and senior commanders involved in peace negotiations, men and women, and indigenous and former child soldiers.
Reparations, non-State armed groups and international law

Legal analysis on NSAGs and reparations has concentrated on such actors’ responsibility and obligations under international law. A detailed examination of the law and NSAGs is beyond the scope of this article. Instead, the article intends to take a different perspective by drawing on interviews with NSAGs in order to make a unique contribution to their role on reparations. This bottom-up perspective contrasts with the international law position, which remains reluctant to bestow legitimacy on such groups due to the risks of justifying their violence or undermining the authority of the State; this approach prevents their inclusion into the international legal order. Yet non-international armed conflicts have been the main form of armed conflict since the Second World War. Neglecting the responsibility of NSAGs is potentially “dangerous”. NSAGs can project power, control territory, provide services and conduct their own courts, which can make them appear like a State within their own jurisdiction. This means that some NSAGs have governed millions of individuals, whereas others have been embedded in communities for years or even decades.

16 See the article by Olivia Herman in this issue of the Review.
The language of NSAGs’ legal obligations assumes that these entities are coherent actors for conceptual and practical purposes. However, their heterogeneity, ambiguity and even transience of capacity and existence besets this frame of analysis. NSAGs, rebels and insurgents remain undefined in international law.\(^{20}\) NSAGs can include armed liberation fighters holding vast swathes of territory, paramilitary or community-based defence organizations, small gangs or mafias controlling a few blocks in a city, and even mercenary groups.\(^{21}\) Rodenhäuser suggests that NSAGs are now “less structured, fragmented, or operating in loose coalitions and with diverse agendas”.\(^{22}\) Indeed, the heterogeneous nature and multitude of armed groups makes a one-size-fits-all approach under international law problematic.\(^{23}\) In human rights law, NSAGs cannot become parties to human rights conventions.\(^{24}\) Their human rights obligations remain contested; practice suggests that certain ones exist in the exceptional circumstances where such groups control territory and fulfil State-like or government-like functions.\(^{25}\)

For States, obligations to make reparations for the conduct of NSAGs only arise where such conduct is attributable to the State. Moreover, if an NSAG becomes the new government of the State, its past violations now become the responsibility of the State. While this rule was crafted with accountability in mind,\(^{26}\) it is unlikely to include situations where the armed group engages in a power-sharing arrangement or takes power through democratic elections.\(^{27}\) Before the International Criminal Court, individual members of NSAGs can be held criminally responsible for

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22 T. Rodenhäuser, above note 1, p. 1.

23 Under Article 3 common to the Geneva Conventions, armed groups would have to satisfy the condition of being under an organized command and the conflict reaching a sufficient intensity without the requirement for territorial control. See International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70, and Case No. IT-94-1, Judgment, 7 July 1997, para. 562; International Criminal Court, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-2842, Judgment, 14 March 2012, para. 538. Article 1 of Additional Protocol II also sets out its material scope of application as being those circumstances where an armed group exercises control over territory and is able “to carry out sustained and concerted military operations and to implement this Protocol”.


25 Alexander Breitegger, “The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and Other Emergencies”, *International Review of the Red Cross*, Vol. 95, No. 889, 2014, pp. 100–104. See also the article by Olivia Herman in this issue of the *Review*.


27 See Luke Moffett, “Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda”, in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann...
international crimes and held liable for reparations. However, they are often too indigent to provide reparations. Accordingly, international law continues to inadequately articulate the appropriate parameters for the responsibility of NSAGs for reparations.

NSAGs’ obligations to make reparations under international law remain tenuous. IHL provides for a limited scope of reparations of only compensation for violations during international armed conflicts under Article 91 of Additional Protocol I, which does not apply to NSAGs and non-international armed conflicts. Moreover, IHL is silent on an individual’s right to reparation, enforcement mechanisms against States, and the applicability of compensation rules for non-international armed conflicts. This may be slowly changing. Human rights law more clearly articulates States’ obligation to provide reparations to all victims of gross violations of human rights, in light of the principle of subsidiarity of the State to ensure an effective remedy, with only soft-law declarations for NSAGs to have similar obligations. For instance, the 2005 UN Basic Principles speak of the liability of a “person, legal entity or other entity” to provide reparations to victims or to indemnify the State where it has already done so. Indeed, the issue seems a circular one that situates the analysis from a State-centric perspective, rather than being about ensuring an effective remedy for victims. Commissions of inquiry increasingly call upon NSAGs to make reparations for such violations through State programmes. Indeed, one commander of the Revolutionary Armed Forces of Colombia – People’s Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) argued this point because, during war, violence “got out of the hands of many

(eds), Responsibilities of the Non-State Actor in Armed Conflict and the Market Place, Brill, Leiden and Boston, MA, 2015.
34 A. Clapham, above note 19, p. 24.
people and … things happened that never should have happened. … [I]f someone killed another person then that money has to be from that person; that doesn’t make sense. The State will always be primarily responsible for such reparation.”

Simply holding NSAGs responsible for reparations for all violations in the same way as a State overlooks the “idiosyncratic” nature of each group. A hierarchy of reparation obligations for NSAGs may better fit their capacity, while avoiding minimal compliance through voluntary contributions would also complement more adequately funded and supported State-run reparation programmes.

Instead of proliferating the legal regimes as they currently are and trying to making NSAGs fit them, it may be more productive to consider the practice of armed groups in order to help discern a hierarchy of reparation obligations that can slot into a State domestic reparation programme. Sassòli suggests a sliding scale of obligations, reflecting the organization of the armed group and the stability of its control over territory, corresponding with an increasing applicability of IHL. Mastorodimos suggests different layers of human rights obligations based on an NSAG’s capacity. In light of both of these arguments, a hierarchy of secondary obligations for reparations could be explored for NSAGs based on their organization, control of territory and capacity, ranging from medical rehabilitation to compensation or memorials. These would not displace the State’s obligation to establish a reparation programme. Fortin proposes that obligations could be shared between two duty holders, such as a State and an NSAG, based on their “capabilities and immediate relevance”, which could reflect the limited capacity of NSAGs to provide reparations. We should be cautious in crafting reparation obligations for NSAGs in terms of creating institutional isomorphism by comparing them to State obligations and requiring NSAGs to provide “full” reparations. Alternative accountability mechanisms may be more effective in getting an armed group to internalize norms through more “tailor-made” solutions that focus on “social interaction”, such as the Geneva Call Deeds

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40 Konstantinos Mastorodimos, Armed Non-State Actors in International Humanitarian and Human Rights Law, Ashgate, Farnham, 2016, p. 185.
42 Paloma Blázquez Rodríguez, “Does an Armed Group Have an Obligation to Provide Reparations to Its Victims?”, in James Summers and Alex Gough (eds), Non-State Actors and International Obligations, Brill, Leiden, 2018, p. 424.
of Commitment. This is not to suggest that such measures taken by NSAGs have a lesser value than those provided to State victims, but we have to recognize that they will be more limited. Nevertheless, NSAG reparations can have a particular benefit or “added value”, such as the return of a family home, guarantees of safe passage for a displaced family or public acknowledgement that a person killed was not an informer.

The value in calling such remedial measures “reparations” is that it provides a moral baseline and normative content of what they should include, such as victim participation, non-discrimination and appropriate forms. Victim participation ensures that those most affected can have input to effectively shape the appropriate forms of reparations. Non-discrimination aims to mitigate further secondary harms or exclusion of certain groups or people from reparations. Appropriate forms of reparation refer to measures that can contribute “as far as possible” to remedying victims’ suffering. This offers an interpretative tool to guide the progressive development of NSAGs’ responsibility in international law and to ensure that reparations are adequate and effective in remedying victims’ harm. Moreover, such measures are a way to end impunity for violations by asking NSAGs to engage in self-reflection on the harm they have caused and the human cost of their actions. To an extent this may seem utopian, but armed groups instrumentally use restraint and violence. It also reflects the increasing practice of armed actors to provide reparations in conflict situations in order to alleviate victims’ suffering. A number of armed groups we spoke to recognized and practiced reparation in order to “get closer to the civilian population”, with others having a “culture of compensation” as something “for our own benefit as people need to support the war effort”.

Relying only on international law to delimit the scope of violations for reparations when dealing with NSAGs is also problematic as it neglects the smaller, but impactful, harms that civilians suffer. For instance, one FARC-EP commander recalled how his company of 120 fighters moved through a farmer’s field and picked some of the berries along the way. While each fighter only took a handful, for the farmer it amounted to a few kilos of produce. To avoid

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44 Permanent Court of International Justice, Germany v Poland, “The Factory at Chorzow”, File E.c.XIII, Docket XIV-I, Judgment No. 13 (Claim for Indemnity, Merits), 13 September 1928, para. 125. The 2005 UN Basic Principles, Principles 19–23, outline the five forms of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. This is developed from practice of States and jurisprudence of human rights courts, reflecting their obligations to ensure and respect human rights.


46 Ibid., p. 161.


48 Meeting with Ogaden National Liberation Front (ONLF) commanders, Belfast, November 2018.
recrimination, the FARC-EP commander paid the farmer for his loss.49 A hierarchy of reparation obligations could reflect that damage or loss to a person’s property would be considered lower down in terms of priority than personal injury or death of civilians, and that it is still morally important to make amends for the damage caused to civilians even if it was permissible under IHL.

This article does not intend to present some rosy-eyed perspective of NSAGs as moral paragons, nor to convey that their positions are static. Not all armed groups may be willing or able to engage with civilians on reparations, and some may use intimidation and violence to discourage them from pursuing the issue. As one FARC-EP commander said, NSAGs are not “guardian angels” of civilians.50 This contrasts with Guevara’s sentiment that a guerrilla army should be a “guardian angel” to the civilian population.51 There remain a number of challenges in claiming reparations, such as the identity of the responsible organization being unknown,52 the fluidity and insecurity caused by the conflict leading to a breakdown in the social and legal order in areas under the armed group’s control,53 the fact that NSAGs often do not have the assets or capacity to provide reparations to all victims,54 or the political or military climate inhibiting victims or NSAGs from engaging on these issues.55

Perhaps the language of “claiming” is quite strong here, in that reparations in the circumstances described below are more a mediated solution rather than a formal legal entitlement. This does not strip them of being considered “reparations”, as they still acknowledge victimhood and responsibility along with providing symbolic and material measures to alleviate victims’ suffering. From analyzing the practice of different NSAGs, a general point can be made regarding their engagement on reparations to remedy a range of violations committed against civilians or their own members, on behalf of their communities, or to other groups. Five modalities can be identified that cut across the themes discussed below: (1) measures to civilians who are injured or killed by the group; (2) claims-making on behalf of the victimized communities they represent;56 (3) support for family members of comrades injured or killed in combat; (4) actions to respond to violations committed within the group; and (5) reparations for transgressions committed against other armed

50 Interview with female FARC-EP commander, above note 36.
52 C. Rose, above note 4, pp. 309–310.
54 L. Zegveld, above note 15, p. 149.
55 R. Dudai, above note 7, pp. 785–786.
groups.57 As such, NSAGs can use reparations as part of efforts to resolve a complex web of relations and violations, for multiple motivations.58 These practices can be best seen in how such measures are used during and post-conflict.

**During conflict**

NSAGs’ behaviour towards civilians can be informed by ideology, contextual circumstances, access to resources and/or historical grievances.59 In protracted conflicts that can last decades, waiting for reparations until the end of hostilities may mean that victims have to live with the increasing burden of the conflict over time, such as not knowing the fate or location of the remains of a loved one. Reparations during wartime can help to mitigate further suffering and vulnerability of victims. Moreover, engagement with NSAGs on reparations for violations is pursued not only for material or symbolic gains, but also to change the behaviour of the group so that such acts do not reoccur. In Nepal, the Maoists modified or withdrew policies, carried out investigations and offered public apologies following complaints by civilians.60 A number of other groups expelled members who had committed violations, such as Dhe Qar, the Irish Republican Army (IRA) and the Taliban.61 The act of making amends by NSAGs is a means of recognizing their causal responsibility for the harm suffered by victims, not necessarily their legal or moral responsibility.62 It is notable that these public pronouncements on moral responsibility are often made with a particular intent or political goal. For the Túpac Amaru Revolutionary Movement (Movimiento Revolucionario Túpac Amaru, MRTA) in Peru, the intention was to “explain mistakes” to affected communities so as to minimize hostility.63

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57 For example, after the Dinka/Nuer split in the Sudanese People’s Liberation Army in the 1990s, the 1999 Wunlit Reconciliation Process provided land restitution, return of abductees and guarantees of non-repetition. Similarly, the FARC-EP and ELN signed a pact in 2010 that acknowledged the harm done to each other and to communities, offered apologies and allegedly provided compensation to some civilians. See “Un singular pacto de paz Eln-Farc”, Verdad Abierta, 28 September 2011, available at: [https://verdadabierta.com/un-singular-pacto-de-paz-eln-farc/](https://verdadabierta.com/un-singular-pacto-de-paz-eln-farc/).


63 Interview with MRTA commander, above note 47. This reflects Guevara’s guidance that guerrillas should explain decisions to the civilian population in order to maintain their legitimacy.
The next part of this section outlines the benefits of “buy-in” for NSAGs engaging in reparative practices, including for ideological, governance and social ties, as well as image restoration justifications. The subsequent part discusses some of the challenges, risks and costs of making reparations during armed conflict for NSAGs and civilians.

**Buy-in**

The practice of reparation by NSAGs during conflict builds on recent studies on the internalization of norms evidenced by fighters’ restraint in the use of violence. This reflects the asymmetrical nature of internal armed conflicts, whereby NSAGs are out-gunned and often out-resourced by the State, leaving them dependent on local communities for support and survival; this restrains their violence, but these communities also expect some moral consistency in behaviour towards them, including making reparations when violations occur.64 This conduct manifests in the ideology, governance and expressivism or imagery of armed groups. These three areas reflect the different facets in the ways that armed groups conceive and present themselves to each other, themselves and the world in terms of reparations.

**Ideological**

A number of codes of conduct by armed groups include provisions for remedies, reflecting these groups’ ideological approach to the conduct of hostilities. Maoist-influenced groups in particular make reference to restitution or repair. This is unsurprising given Mao’s metaphor of the relationship between guerrillas and the people being like fish in the water. Mao stipulated that a group should “return everything borrowed” and “compensate all damages”.65 The Viet Cong Code of Discipline makes reference to “restitution for things damaged”.66 Even the Sierra Leonean Revolutionary United Front instructs members in its code of conduct “to pay for everything that you demand or damage”, despite being notorious for its violations against civilians.67 Other groups include specific provisions for reparations, with the Colombian National Liberation Army (Ejército de Liberación Nacional, ELN) requiring members “to make reparations where possible” when damage is caused to civilians.68

Internal codes of conduct can be a rules-based approach to improving respect for civilians by armed groups and maintaining their confidence and trust,
such as with the Taliban and its Layeha. In some IRA apologies, the group referred to its own code of conduct as a normative and self-legitimizing function in offering symbolic reparations to victims, but at the same time narrowly framed its wrongdoing, such as expressing remorse for the secret burial of informers rather than for their killings. The issuing of new written codes of conduct after violations could also be considered a guarantee of non-repetition, provided that they are complied with. For instance, the Taliban code of conduct stipulates that those who have violated their rules can have their weapons removed, be punished or be barred from the group.

The practice of reparations by NSAGs during conflict is often conducted more discreetly, in private with victims, their families or their communities, but it can be influenced by local culture or emotions. It can also be apparent in the courts of armed groups, which can offer reparative measures such as compensation. One example is the Karen National Union, where there is a preference for mediation and settlement, with failure to achieve this being seen as shameful. The relationship between civilians and an NSAG is not only simply one of anarchy, nor is it based simply on ideology, though it can shape the “particular form of social order”. Reparations can be necessary as a governance issue in maintaining relations with civilians, which may organically develop or be a bargain struck between the civilians and the NSAG.

Governance and social ties

Some armed groups can be predatory or criminal in nature and have no concern for maintaining civilian relations or carrying out governance services. Nevertheless, civilian collaboration can be highly valued by armed groups for their sustainability and survivability, in particular to avoid informers and civilian support of competitors. Although governance by NSAGs often focuses on the provision of public services, this subsection of the article takes a broader approach by also looking at the social connections between civilians and NSAGs

70 R. Dudai, above note 7, p806-807.
76 J. M. Weinstein, above note 59, p. 18.
in managing territory under the latter’s control. Political mobilization of membership for NSAGs can often draw upon pre-existing social-cultural ties and values in order to find solidarity with civilians.\textsuperscript{78} This may involve cooperating with or co-opting local or cultural governance or mediation institutions, which can depend on the quality of organization of pre-existing institutions and willingness to engage with the armed group – i.e., mutual trust.\textsuperscript{79} Ultimately it is about coexistence, with one not overtly interfering in the life of the other.\textsuperscript{80} As Arjona, Kasfir and Mampilly put it,

rebels cannot fight wars effectively while holding a gun to the head of every civilian, nor have the financial rewards alone proven sufficient for ensuring civilian compliance. … By creating systems of governance, rebels seek to win over local populations – or at least dissuade them from actively collaborating with incumbents.\textsuperscript{81}

Social ties between armed groups and civilians reflect broader trends and dynamics of violence in armed conflicts, whereby violence against civilians and restraint are strategic choices of armed groups that speak to their domestic and international audiences.\textsuperscript{82} Restraint consists of “deliberate actions to limit the use of violence”.\textsuperscript{83} There are audience costs to using violence against civilians, including reduced financial, recruitment, and moral and logistical support from sympathetic local communities and external donors.\textsuperscript{84} Some armed groups have access to resource-rich environments or committed external supporters that enable them to use indiscriminate violence,\textsuperscript{85} but many armed groups do not have a consistent supply of resources, making them more reliant on social capital and the moral restraint of supporters. This reflects the “symbiotic” character of the relationship between NSAGs and civilian populations, which can create strategic opportunities but also humanitarian risk and insufficient resources to sustain guerrilla groups.\textsuperscript{86}

\textsuperscript{78} Abdulkader H. Sinno, “Armed Groups’ Organizational Structure and Their Strategic Options”, \textit{International Review of the Red Cross}, Vol. 93, No. 882, 2011, p. 313.

\textsuperscript{79} A. Arjona, above note 75, pp. 73, 212; Shane Joshua Barter, “The Rebel State in Society: Governance and Accommodation in Aceh, Indonesia”, in A. Arjona, N. Kasfir and Z. Mampilly (eds), above note 64, p. 234; Till Förster, “Dialogue Direct: Rebel Governance and Civil Order in Northern Côte d’Ivoire”, in A. Arjona, N. Kasfir and Z. Mampilly (eds), above note 64, p. 206.

\textsuperscript{80} A. Arjona, above note 75, p. 2.

\textsuperscript{81} Ana Arjona, Nelson Kasfir and Zacariah Mampilly, “Introduction”, in A. Arjona, N. Kasfir and Z. Mampilly (eds), above note 64, p. 3.


\textsuperscript{83} ICRC, above note 59, p. 18.


\textsuperscript{85} J. M. Weinstein, above note 59, p. 7; ICRC, above note 59, p. 22.

Ensuring effective restraint requires a certain level of organizational structure to control the use of opportunistic violence; increasing and consolidating power over the rank and file is key to restraining violence against civilians, but cannot always prevent it. The International Committee of the Red Cross (ICRC) *Roots of Restraint in War* study distinguishes between centralized, decentralized and community-based organizations, with important implications for behaviour. Centralized NSAGs can improve discipline and restrain violence through their command structure, codes of conduct, education, sanctions, and vetting out those likely to use unrestrained violence. Decentralized and community-based organizations, which are unlikely to have a written code of conduct or formalized sanctions regime, are more likely to rely on shared values, traditions and local leaders to manage the use of violence. That said, violence by community-based organizations can be seen as acceptable “swift justice” by communities – for example, vigilante punishment attacks for individuals involved in anti-social behaviour, such as burglary and drug dealing, or revenge against other communities or actors that have victimized the community. Moreover, socialization and integration of norms can differ within an organization, which may have competing sources of authority to shape such norms.

The organizational structure of a group can reinforce the hierarchy of reparation obligations that NSAGs have the capacity to coherently provide. Centralized organizations that control territory are more able to set down strong community bonds with local civilians and provide reciprocal services, reflecting their capacity to provide more substantive redress such as health care. Community-based organizations may be able to draw upon their embedded position in a local populace, but they will likely have limited resources and mobile membership, and be restricted to local practices that may vary between different units. Accordingly, such groups may only be able to offer token compensation, “bonds of hope” or symbolic measures such as a public acknowledgement of responsibility or an apology in the media or in private to the victim or their family.

The variance of the organization and relationship of NSAGs with civilians can mean they have a range of social interactions and governance arrangements. This can vary from decentralized armed groups intimidating civil society organizations to more centralized or community-based groups shaping and

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87 J. Stanton, above note 82, p. 15.
88 ICRC, above note 59, p. 21. See also A. H. Sinno, above note 78, who examines patronage-based groups that are common in Yemen and Afghanistan, as well as US use of contractors.
89 M. Abrahms, above note 84, p. 9.
92 ICRC, above note 59, p. 65.
93 A. H. Sinno, above note 78, p. 319.
94 E. C. Guevara, above note 51, pp. 50, 104. Guevara used the phrase “bonds of hope” to refer to a common interest in socially reforming society that would benefit the masses, but also, in particular, to a promissory note to recompense peasants or merchants from whom the guerrillas had taken goods or services, which was to be paid as a soon as possible.
leading the articulation of civil society political demands for formal or informal governance processes.\textsuperscript{95} Often such armed group governance arises from the absence of the State, meaning that communities’ access to justice and reparations is limited; this may be due to physical access, such as crossing a front line, or the risk of being identified as an informer through engaging with State institutions.

While it may be speedier and cheaper than that provided by State institutions, the provision of justice by NSAGs often does not incorporate procedural protections for participants.\textsuperscript{96} This may create challenges in victims being able to effectively articulate their needs in terms of reparations and seeking effective redress. Creating or supporting judicial institutions can help an armed group to consolidate power by offering a way to extend the group’s social control and in turn gain legitimacy with civilians, by effectively engaging in State governance mimicry.\textsuperscript{97} This approach allows the group to “penetrate a community, obtain information about its members and their networks, gain legitimacy, and control civilian behaviour”.\textsuperscript{98} The FARC-EP’s provision of courts and ordering measures such as compensation or repairing schools and roads by offenders were considered a way to meet governance expectations and to maintain the group’s legitimacy in the community.\textsuperscript{99}

Civilians are not just vulnerable, passive individuals during conflict, but have agency to shape and pressure NSAG activities.\textsuperscript{100} Increasing social interaction and “value reciprocity” between NSAGs and civilians can provide non-fighters with a basis for claims-making to the armed group.\textsuperscript{101} Civilian engagement with armed groups can include protests, threats, and dialogue aimed at shaping outcomes to civilians’ ends, such as seeking the return of stolen property. Such engagement can provide civilians with a way to cope and manage or mediate conflict with arms carriers.

These structural and social factors can have implications for the delivery of reparations by NSAGs, both in terms of the capacity and values of the group. NSAGs’ governance and their provision of reparations can be a means for them to extend their legitimacy as “symbolic expressions of power”.\textsuperscript{102} NSAGs may make apologies or carry out other forms of symbolic reparations, such as creation of memorials or acknowledgments of responsibility, as a way to restore their image to local and international audiences.\textsuperscript{103} However, such efforts may be framed to limit the NSAG’s own responsibility, in particular their intent, putting

\textsuperscript{95} Enrique Desmond Arias, Criminal Enterprises and Governance in Latin America and the Caribbean, Cambridge University Press, Cambridge and New York, 2017, p. 139.  
\textsuperscript{96} Ibid., p. 61. Respondent members of NSAGs spoke about carrying out punishment shootings, beatings, killings, public restraints (tying to a lamppost or a tree) and exile of perpetrators.  
\textsuperscript{97} A. Arjona, above note 75, p. 72.  
\textsuperscript{98} Ibid., p. 73.  
\textsuperscript{101} S. Podder, above note 82, p. 691.  
\textsuperscript{102} Zachariah Mampilly, “Performing the Nation-State: Rebel Governance and Symbolic Processes”, in A. Arjona, N. Kasfir and Z. Mampilly (eds), above note 64, p. 74.  
\textsuperscript{103} M. Abrahms, above note 84, p. 182.
out the message that loss of life was collateral damage or beyond the group’s control. Governance can impose a substantial burden on armed groups that can discourage many from carrying out such activities or engaging in more shared governance arrangements. NSAG governance has to be flexible and at times highly mobile, meaning that it can be temporary if it is defeated or displaced permanently from a territory. That said, in the absence or distrust of the State, NSAGs may provide an avenue for victims to seek redress.

Providing reparations can also benefit the armed group in other ways. Ensuring reparations are made for wrongs committed against civilians can be a way of improving morale and discipline. In addition, it is an internally and externally facing accountability process that enables the group’s code of conduct and humanitarian norms to be reiterated and complied with. Making reparations to civilians may allow the group to take the moral high ground and vindicate its members’ own self-image as honourable fighters in contrast to the State’s violations or other NSAGs. However, there remain risks and limitations, with reparations potentially appearing as inadequate, insincere or propaganda. This can be seen in how armed groups engage in measures such as reparations to restore their own image.

**Image restoration**

There is some research which suggests that violence by armed groups is expressive, in that their actions, whether violent or not, are a way to promote moral and political messages that they seek to cultivate in contrast to those of the State or other actors. This is apparent in armed groups claiming responsibility for an attack as a way to publicize their abilities, convey a political message (including how those affected deserved such violence), and/or demonstrate the weakness, corruption or inability of the State to prevent such violence. Yet using violence as a communicative tool is a “flawed” strategy; while it can grab media headlines, States, civil society and victims can misinterpret the motives and agenda of the group. NSAGs may not always be forthcoming where their operation or attack resulted in civilian loss that received local, national and/or international condemnation. Claiming responsibility or apologizing for an act is a way to mitigate public condemnation, in particular where there are high civilian casualties for little military gain. Abrahms points out that groups often turn to denying their

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105 J. M. Weinstein, above note 59, p. 171.


107 O. Bangerter, above note 91, pp. 361–362.


109 M. Abrahms, above note 84, pp. 55–56.

involvement as a way to distance themselves from some wayward members of the group and to minimize the cost in terms of audience support for the group. Nevertheless, the claiming of responsibility and partial or full censure of the actions of the group’s members evinces a form of accountability in that the armed group is intending to communicate norms and values.

NSAGs presenting themselves as complying with IHL can potentially widen mobilization. Engaging in the human rights discourse or incorporating humanitarian norms to remedy harm to victims, or at least provide them with assistance, can give the group a competitive advantage over other groups, as a unique selling point to domestic and international audiences. Other groups may carry out reparative practices not as part of organized governance but as a way to maintain their respect for cultural norms. For instance, the Ethiopia-based Ogaden National Liberation Front (ONLF) compensates the families of civilians accidentally killed by the group as something “for our own benefit as people need to support the war effort”. There are also reports of the ONLF killing enemy collaborators and leaving the “necessary blood compensation in cash with the corpse in order to prevent revenge from the victim’s kin”.

Armed groups can also be representations of their political community; this is not to say that all armed groups are social activists, but they often have close political, social and practical links with civilians that precipitate and perpetuate their ability to fight. Violence is seen as a way of “speaking for” or “defending a community”, and of taking action rather than expecting handouts. These perceptions and representations of the group can be embedded in notions of sacrifice, honour and loyalty, which can serve to motivate and justify the continuing use of violence. When violations do occur, reparations by armed groups can signal their “goodwill” and cast them in a more positive light. However, civilians or victims may reject such expressions and gestures of reparations as self-serving or insincere, such as the apology of the New IRA for the killing of the journalist Lyra McKee in Derry in 2019. Civilians can also resist or reject reparations by NSAGs in order to deny any social connection to them or to avoid recrimination; one example of this is the woman whose family...

111 M. Abrahms, above note 84, p. 174.
112 K. Fortin, above note 10, p. 171.
113 S. Podder, above note 82, p. 691.
114 A. Clapham, above note 19, p. 33.
115 Meeting with ONLF commanders, above note 49.
119 M. Abrahms, above note 84, pp. 182–183.
120 The apology read: “In the course of attacking the enemy Lyra McKee was tragically killed while standing beside enemy forces. The IRA offer our full and sincere apologies to the partner, family and friends of Lyra McKee for her death. … We have instructed our volunteers to take the utmost care in future when engaging the enemy, and put in place measures to help ensure this.” See Connla Young, “New IRA Admits Murder of Journalist Lyra McKee and Offers ‘Sincere Apologies’”, Irish News, 23 April 2019.
bicycle was taken by the FARC-EP, which later returned with a new one, but the woman refused it for fear of the army finding out.\footnote{121} NSAGs selling or repackaging the violence of the armed struggle as legitimate, justified or remediable when excesses occur, and using reparations to support this view, raises other challenges.

### Challenges, risks and costs

The instrumental use of reparations by NSAGs raises three challenges in terms of legitimization of violence, security risk and financial cost. First, encouraging NSAGs to engage in reparations may be a means to further embed their legitimacy and perpetuate the conflict. This may, in turn, inhibit the NSAG from engaging in reparations to victims on the other side. Hezbollah provided compensation to those affected by Israeli strikes, but not to Israeli victims injured or killed in its attacks.\footnote{122} This may be something that requires distance and space from the day-to-day activities of the armed conflict, to see the other side not as the enemy, but as human beings.\footnote{123} One former Colombian M-19 commander disclosed that after the end of hostilities and her work in peacebuilding, she came into contact with a police officer who said, “I was a policewoman and you can tell me that I was a victimizer, but then I was also a victim of the FARC.” This led the M-19 commander to recognize that the binary of victim–victimizer is “polarizing” and a “vicious circle”.\footnote{124}

In some conflicts shifting alliances can mean that victimhood is used to manipulate ethnic, political or national identities in the pursuit of legitimacy and State power, meaning that “all civilians are fair game”.\footnote{125} Indeed, collective victimhood can be used by all sides to build a communal identity and portray themselves as innocent and deserving of sympathy.\footnote{126} In light of this collective victimhood and acting on behalf of aggrieved communities, civilians can also join armed groups as a way to “redress grievances”.\footnote{127} Armed groups can be motivated to communicate their grievances to those responsible, but often “their grievances exceed their capability to redress them”.\footnote{128} This was expressed by ex-fighters we interviewed whose friends and family members had been killed. This

121 O. Kaplan, above note 100, p. 251.
123 Danny Morrison, a former IRA prisoner, wrote in his prison diary that he wished to see a police officer kidnapped by the IRA in South Armagh released, as “[t]here can never be enough demonstrations of mercy in war”. Danny Morrison, Then the Walls Came Down: A Prison Journal, Mercier Press, Cork, 2018, pp. 96–97. Thanks to Kevin Hearty for this reference.
124 Interview with female former M-19 commander, Bogotá, March 2019.
128 M. Abrahms, above note 84, p. 1.
is not to justify the violence of such groups, but reflects that the lack of effective State enforcement and remedial mechanisms to allow the law to settle disputes allowed grievances to fester.

An armed group may have limited resources to allocate to reparations, offering compensation that is only a token amount or is insufficient to remedy a victim’s suffering. The Taliban’s 2016 policy of making amends was small-scale and more symbolic than real due to the financial cost, making its use mainly strategic in terms of maintaining political appearances or public relations. Violence can also be a means of social control, but greed and grievance can still play a part in the activities of NSAGs that may inhibit their motivation to engage in reparations. The passage of time and the impact of the conflict on the economy and local resources can mean increasing poverty, stressing the group’s governance structures or causing its members’ ideological adherence to become weaker. Armed groups may no longer have access to the same financial resources to provide compensation or other measures to victims, making such reparations a costly war strategy. This reflects the hierarchy of reparations challenges when dealing with NSAGs with differing capacities, whereby the most some victims will receive may be an apology rather than compensation.

There are risks for those involved, including being targeted for further violence, unequal power dynamics and bargaining power, which may signal weakness to other groups, and fragmentation. Members of NSAGs may be unable or lack the capacity to adjudicate on violations, and such adjudications would be unlikely to meet basic principles of fair process such as independence, promptness and evidential integrity. Of course, armed groups have volunteers and supporters who come from a range of backgrounds, and can provide independence by engaging local community leaders to act as arbitrators. A further difficulty is that if NSAGs make reparations during conflict, such measures may not be recognized as legitimate by the State or other actors, such as the restitution of land, death certificates for missing persons, or registration of births of those abducted. Alternatively, reparations by NSAGs may be used by prosecutors to evidence recognition of wrongdoing by the group or individual members of a NSAG in war crimes trials, which may discourage their efforts to repair. If victims are not satisfied with the remedy offered by the armed group, they are unlikely to be able to appeal to a State court or have the initial decision.

130 S. N. Kalyvas, above note 64, p. 115.
131 This does not displace their right to reparations from State reparation programmes.
134 In Aceh, see S. J. Barter, above note 79, p. 234.
135 The International Criminal Court allows mitigation in sentencing for those who compensate their victims (Rules of Procedure and Evidence, Rule 145(2)(a)(ii)) or who help to locate assets for the benefit of victims (Rome Statute, Art. 110(4)).
recognized as legal. In post-conflict societies, reparation programmes may be better placed to accept evidence from victims or NSAG courts as supporting evidence for claims, provided they could be corroborated. At the same time, NSAGs actively mediating with civilian constituencies during conflict and providing reparations can contribute to a more peaceful future as they can be considered as more acceptable for social reintegration; an example of this is the greater willingness by the Peruvian MRTA to engage in auto-criticism to communities and before the Peruvian truth commission in comparison to the more violent and unrepentant Shining Path.136

Post-conflict

Peace agreement negotiations or transitional justice processes may provide an opportunity for the violations of all sides to be remedied. NSAGs can play an important part in reparation processes, whether as victims, responsible actors, facilitators or advocates. For instance, the Ugandan Lord’s Resistance Army wanted “compensation for losses” for itself as part of the Juba peace negotiations.137 Armed groups can also advocate for more comprehensive reparations for victims, such as the Zapatistas demanding more than compensation for the damage caused to indigenous lands.138 In peace agreements, armed groups have committed to giving compensation to victims,139 assisting in the recovery of disappeared persons,140 establishing trust funds for victims’ rehabilitation,141 restitution of land and property,142 repatriation of displaced persons,143 measures of satisfaction to publicly acknowledge harms caused, and guarantees of non-repetition of violations.144 Some groups take a comprehensive approach to reparations, such as the National Democratic Front

136 The Shining Path was a more secretive organization during the conflict, whereas the MRTA was more media-savvy in managing its image as a social justice armed group. See Rebekka Friedman, Competing Memories: Truth and Reconciliation in Sierra Leone and Peru, Cambridge University Press, Cambridge, 2017, p. 148; and Nelson Manrique, “The War for the Central Sierra”, in Steve J. Stern (ed.), Shining and Other Paths: War and Society in Peru 1980–1995, Duke University Press, Durham, NC, 1998, p. 213, citing the example of the MRTA apologizing after killing an indigenous leader for collaborating with the State, resulting in the community rebelling against the group.


140 Townsville Peace Agreement, 2000, Part 3(1)(a).

141 Accord politique pour la paix et la réconciliation en république centrafricaine, February 2019, Art. 12.

142 In Nepal, the Seven Point Agreement, 1 November 2011, para. 6(a).

143 Bogotá Accord, 1984, Art. 3(6); Liberian Comprehensive Peace Agreement, 2003, Arts XIV(4), XXX.

of the Philippines, which committed to “adequate compensation or indemnification, restitution and rehabilitation, and effective sanctions and guarantees against repetition and impunity”. This seems to be a recent phenomenon, heightened by the FARC-EP peace agreement, as former fighters in Colombia that we spoke to, such as those of the M-19, and former non-State fighters in Guatemala, Nepal and Northern Ireland had no specific agenda for reparations. One former Guatemalan guerrilla commander spoke about his group’s eagerness to engage in reparations, but the government was unwilling to give the group a “chance to participate”.

There is also the challenge of transforming the financial structures of a group, which can be fixated on by some victims as a source of reparations. The responsibility of armed groups to fund reparations has implications for the resources available and expectations of the NSAG’s wealth, and can have an effect on trust when such sources do not appear. This is apparent in Colombia, where despite research suggesting that the FARC-EP was making over $1 billion annually, the group had only turned over $12.9 million of nearly $300 million promised for reparations by the end of 2020. NSAGs’ financial contributions to reparation programmes that could benefit their own victimized members need to have robust financial regulation and auditing to avoid them being a vehicle for money laundering. At the same time, there need to be means to secure such resources for reparations, otherwise they can result in lengthy and complex legal proceedings. For instance, in Northern Ireland, litigation by some victims of the 1998 Omagh bombing that killed twenty-nine civilians against members of the Real IRA was successful in holding the latter liable for £1.6 million. While the victims have never received any money, their objective was to hold those responsible to account.

This practice can reflect the dual dimensions of reparation as justice and delivering political goals of reconciliation and trust. The experience in many transitional societies shows that coercive policies to seek reparations from NSAGs have proved fruitless; however, there are some encouraging praxes where members and former armed groups are incentivized to engage on reparations. In Northern Ireland, for instance, loyalist and republican armed groups have carried out informal truth recovery for victims along with apologies and acknowledgments of responsibility. Yet such informal processes are at risk of abuse and of material being used in criminal proceedings, such as when Gerry Adams, leader of Sinn Fein, was arrested for information that was provided by former IRA members to an oral

146 Interview with former guerrilla commander, Guatemala City, May 2018.
147 A. Wennmann, above note 86, p. 350.
149 See L. Moffett, above note 27.
150 Interview with former UVF member, Belfast, 6 April 2018.
Such experiences have left little trust or political willingness on the part of such groups to engage with victims or redress the past.

There are legal, political and social dynamics for NSAGs moving from war to peace. At the end of hostilities, the organized military structure of the armed group is dissolved through demobilization and so it can be difficult to speak about the collective responsibility of a group that the State and the group’s own (former) members agree no longer exists. Nonetheless, the political wing of the former armed group may remain the representative voice and organizer for such engagement on reparations, in particular symbolic measures such as apologies and acknowledgments of responsibility. For such measures to be effective, the person providing the apology must have the necessary position, authority and legitimacy within the group to be able to speak for it. Here there may be tension between political leaders speaking for actions carried out by military commanders, and this tension may fracture the coherence of the group as a political community. Victims may want the direct perpetrator or a military leader to apologize rather than a spokesperson or political representative, as the latter may make the apology seem more like a political statement rather than a remedial effort by those responsible to account for and repair the harm they have caused.

For armed groups to lay down their arms, it requires them to some extent to no longer recognize the continuation or justification of the armed struggle (or at least to recognize that the conditions or their grievances have been alleviated) and to accept the authority and legitimacy of the State. However, this can often be strained by bad faith on the part of the government; internal dissidence within the group or ex-fighters turning to crime, leading to continued low-level violence; or even the group’s own mythologized, self-justified political narrative of the past. In Northern Ireland, Colombia, South Sudan, Nepal and Uganda, former fighters all expressed a concern that the political and legal context faced changing priorities from the respective peace agreements due to a lack of a comprehensive approach for dealing with the past and a lack of good

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152 This may only be partial or may involve integration with State forces such as in the Democratic Republic of the Congo. Joanna Spear, “Disarmament and Demobilisation”, in Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens (eds), Ending Civil Wars: The Implementation of Peace Agreements, Lynne Rienner, Boulder, CO, 2002.


157 Such as with ETA’s apology to “those citizens without responsibility”: L. I. Álvarez, above note 12, p. 188.
faith on the part of the new government. This can also have mental health implications for former fighters, which are often not addressed in the long term. These issues may impact upon former fighters contributing to reparations. Engagement in transitional justice mechanisms such as truth recovery or reparations that can individually identify and implicate them in past violations can only heighten the visibility of former fighters who want to start a new life. The reintegration of ex-fighters into civilian life can bring social challenges, as they can be rejected by their families or communities, or suffer discrimination or stigma.159 That said, there can be benefits and related costs to engaging in reparations that may nuance some of these issues, and engaging in reparations at least shows good faith of former members of armed groups to make amends for their past violations.

Benefits and costs of non-State armed groups’ engagement in reparations

In the transition from war to peace, NSAGs, whether as political bodies or as associations of ex-fighters, may benefit from engaging in reparations and other transitional justice processes. Reparations by former fighters and the political wings of armed groups can be a means for them to recast their image and facilitate their social reintegration. This may be something that occurs not from external pressure but from within the membership of the group, and that does not necessarily have to be “reciprocated” by other responsible actors.160 Reparation can be a way to continue the social transformation that some groups hoped to obtain through arms; as one FARC-EP commander stated, it is another “tool to continue the struggle”.161 This “ideological sense of self” can provide an important buy-in for fighters to see their own contribution as being a social good or part of their ongoing contribution to improve conditions in their country.162 One former loyalist in Belfast argued for “community reparation” to repair the “residual effects”, such as poverty, for those most affected by violence, as otherwise “identity becomes a lot more important to people or foremost in their mind when they don’t have anything else … but [when] you start to chip at their identity … it becomes a point of conflict”.163 Reparations can also be a means for NSAGs to maintain their role as political and moral actors and to be socially active on their, and others’, grievances, as the “fundamental point of reparation is to heal the causes that generated the conflict”.164 This view was shared by a female Guatemalan ex-fighter who said: “We used to be guerrillas; now we are helping victims with the consequences of the war. … We are still

160 Interview with former UVF member, above note 150.
161 Interview with female FARC-EP commander, above note 36.
162 See K. McEvoy, A. Bryson and K. Hearty, above note 156.
163 Interview with former loyalist group member, Belfast, April 2018.
164 Interview with female FARC-EP commander, above note 36.
fighting and struggling here.” Armed groups can legitimize their struggle as positive social transformation, but this may overlook transformations that were already under way before the conflict started and were disrupted by the violence, such as in Mozambique and Peru.166

In Nepal, some Maoist cadres and supporters saw the loss of comrades and disappearance of family members as part of the cost of and continued efforts for social transformation.167 This “war by other means” by ex-fighters may be one-sided. While initially the Maoists in Nepal pushed for the payment of compensation for those killed and disappeared as martyrs of State violence, they at times tried to buy off those they had victimized from pursuing accountability for atrocities. For instance, the 2005 Madi bus bombing by the Maoists killed thirty-eight civilians and injured seventy-two others; after the war one of the Maoist leaders made a deal with the victims to provide them with health care, employment and an allowance to forgo truth and justice for the incident.168 A discourse also crept in between civilian martyrs and “real martyrs” in Nepal,169 in terms of who should be prioritized, and Maoist local leaders redirected funds to ex-fighters who were disqualified from the relief scheme.170 Victims resisted this by creating a memorial, giving evidence to the truth commission, and pursuing accountability.171 In response, the Maoists threatened to kill the survivors if their demands were unreasonable.172 This reflects the continuing contest over the past and the political statements and patronage by former armed groups, which may amount more to rhetoric aimed at instrumentalizing victims in the run-up to elections than advocacy for justice for those they victimized.173

Similar narratives and advocacy by former ex-fighters and armed groups’ political wings may not be so generous to civilian victims. For instance, in South Africa some former fighters argued that as they had struggled against apartheid, they should be recognized as more deserving of support than civilian victims, who they saw as using the struggle for freedom for their own financial reward.174 While reparations programmes should be done concurrently with reintegration programmes, so that the different needs of civilians and ex-fighters are met, civilians are often neglected. This can mean that more money can be poured into

165 Interview with female former Guatemalan National Revolutionary Unity fighter, Guatemala, May 2018.
166 J. M. Weinstein, above note 59, p. 3.
168 “TRC Takes Exception to Dahal’s Deal with Madi Blast Victims”, Kathmandu Post, 6 December 2017.
173 One Maoist leader acknowledged that the bombing was a grave mistake, but did not apologize. “Guilty of Madi Bus Ambush Should Face Legal Action: Dahal”, Kathmandu Post, 5 November 2017.
former fighters’ reintegration at an earlier stage, to prevent them from taking up arms, or they may have better access to services than civilians. Alternatively, if ex-fighters’ needs are not being met they may “re-badge” themselves as victims and seek support through this pathway, which is permitted in Northern Ireland.\footnote{Cheryl Lawther, “The Construction and Politicisation of Victimhood”, in Orla Lynch and Javier Argomaniz (eds), Victims of Terrorism: A Comparative and Interdisciplinary Study, Routledge, London, 2014.}

Reparations claimed by victims may be counter to the armed group or its political wing’s narrative of the conflict. For instance, the mobilization of families of those disappeared by republicans in Northern Ireland in the 1990s placed a very public pressure on Sinn Fein, which was trying to transition to peace, to provide information on the recovery of their remains.\footnote{Sandra Peake and Orla Lynch, “Victims of Irish Republican Paramilitary Violence: The Case of ‘The Disappeared’”, Terrorism and Political Violence, Vol. 28, No. 3, 2016, p. 469.} Memorialization and commemoration of those who were killed during the conflict also poses a serious source of contention where “dead body politics” is played out to contest and reinforce selective interpretations of the past.\footnote{See Kevin Hearty, “Problematising Symbolic Reparation: ‘Complex Political Victims’, ‘Dead Body Politics’ and the Right to Remember”, Social and Legal Studies, Vol. 29, No. 3, 2020.} Such contestation and confrontation over the past may have a negative effect on a group in delegitimizing its violence or may cement its position as drawing a line under the past of the armed struggle and present its leaders distancing themselves from past violence as now being politically generous. Such shifts are dependent not only on former fighters but also on the State and civil society in allowing divergent narratives of the past and power structures to be legitimized in the aftermath of conflict. Yet this often sees a lack of good faith by former belligerents over time, wherein the violence of the past becomes a new source of meta-conflict to be politically contested in order to tarnish the other side and diminish common values.\footnote{See Cheryl Lawther, “’Let Me Tell You’: Transitional Justice, Victimhood and Dealing with a Contested Past”, Social and Legal Studies, 2020.} It also keeps alive notions of collective victimhood and unaddressed grievances, which may be used by subsequent generations to justify further violence.\footnote{D. Bar-Tal \textit{et al.}, above note 126.}

There can also be a capacity challenge for NSAGs and ex-fighters in how to handle and disclose information, engage with victims, and provide symbolic or material reparations. As one ex-fighter who engages with victims said, “we know how to destroy this building, it’s very easy for us, but to build a small house was so hard”.\footnote{Interview with former Lebanese rebel commander, April 2018.} There are limits to engagement. In Ireland, while the republicans and their organizations took efforts to locate those who had disappeared, they did not identify those responsible for prosecution and not all those involved participated.\footnote{R. Dudai, above note 7, p. 801.} Thus it is important to appreciate the diversity of groups, but also to provide space and capacity-building to be able to contribute to such processes. This may require a legal framework where ex-fighters can come forward to

\begin{verbatim}
179 D. Bar-Tal \textit{et al.}, above note 126.
180 Interview with former Lebanese rebel commander, April 2018.
181 R. Dudai, above note 7, p. 801.
\end{verbatim}
acknowledge their responsibility and make amends with mitigated legal repercussions. The Colombian Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) to some extent provides this framework, where members of the FARC-EP and the Colombian armed forces have made acknowledgements of responsibility as well as having to collectively contribute to reparations in exchange for reduced sentences. Of course, the JEP concentrates more on collective responsibility of the group and is complemented by a truth commission and reparations programme, which may not exist in other contexts. A bespoke approach should allow ex-fighters, victims and affected communities to find their own balance in exchanging full punishment for redress, rather than copying what operates in one context and applying it to another. Such a framework would need to nuance those most responsible for international crimes, to manage those who refuse to engage, and to have conditional elements for those who are incentivized to come forward, such as facing imposition of their sentence if they support or engage in further violence. There is a risk that without some conditionality around reparations made by NSAGs, reparations may be seen as a means to “buy off” or silence victims.182

For NSAGs, reparations may be a “dirty word”, may be unfamiliar or may reflect the language of the State or colonizer. For some armed groups we engaged with, reparations were at times seen as “retributive”, especially for one Irish republican group that had been in contact with members of Basque Fatherland and Liberty (Euskadi Ta Askatasuna, ETA), which had its assets seized for reparations.183 This is also clearly seen in the Somali region of Ethiopia, where the Ethiopian government introduced a law for families and clans of ONLF members to pay compensation to individuals who had been killed by the ONLF.184 This framing of reparations by States, where they have been used in bad faith to impose collective punishment rather than to ensure a remedy for victims, may have implications for NSAGs’ future engagement with the concept.

Retributive discourses around the past can be a means to use reparations to impose a secondary punishment on members of NSAGs. For instance, one former commander of the MRTA had a $15,000 reparation award imposed at the same time as his sentencing twenty-five years ago. During prison and since his release two years ago he has been paying it off in $30 monthly instalments, but now with interest the amount is $300,000, an impossible sum for him to pay off. His family has also had property seized, and anything he earns is subject to a judicial order of confiscation. This money does not go to the victims of his group, but to the State, which has already indemnified the victims under the national reparation

183 Interview with former republican group member, Belfast, June 2018.
programme. Such an approach morally flattens the multifaceted identities in conflict between bad perpetrators and innocent victims, reinforcing exclusion and further victimization of complex victims—i.e., victimized perpetrators. Importantly, this misses the purpose of reparations as not being punitive but as finding a balance in interests to make amends for the past within a framework of common values that can help to prevent future repetitions of violence. Such practices may militate against engagement by former fighters taking ownership of their past wrongdoings.

The role of ex-fighters and the organization of armed groups in reparations

Former commanders of armed groups can provide continuity and political leadership around difficult issues relating to the past. Leaders of NSAGs can have a significant moral and political authority to speak “on behalf of” their communities, given their role in fighting for them, and can be well placed to advocate for peace and transitional justice issues. However, they should not be the only voices from their communities. The role of such commanders in providing apologies, acknowledgement of responsibility and engagement in truth recovery can give weight and value to the seriousness of the process and outcome. Such leadership may not be possible, however, as the armed group may cease to exist or such commanders may die or defect, causing some of the momentum and engagement on transitional justice to be lost. The group may be fragmented or face threats from dissidents for engaging in reparations. One commander of the Shining Path spoke about those former members who are paying reparations on a monthly basis as “traitors to the cause,” reflecting that not all members of armed groups are willing to support the transition or accept the peace.

Reintegration can play an important part in socially relocating ex-fighters back into civilian life, and reparations can contribute to mitigating some of the social distrust and resentment against them. Ex-fighters can play an important part in community political mobilization and rebuilding local social capacity in the aftermath of conflict, and this highlights the importance of their social reintegration. Disarmament, demobilization and reintegration (DDR) processes have been criticized for often providing pay-outs or economic opportunities for ex-fighters, but with little long-term or sustainable attention to their social reintegration. Moreover, the use of “reintegration” of ex-fighters can stand in stark contrast to how they see themselves as politically motivated actors fighting

185 See L. Moffett, above note 58.
187 R. Dudai, above note 7, p. 786; interview with former republican group member, above note 183.
188 Interview with Shining Path commander, Lima, May 2019.
189 B. Rolston, above note 117, p. 266.
190 Ibid., pp. 263–265.
for social transformation, particularly in relation to past victimization and marginalization, as well as their position as people who speak for a community and convey its values. Seeing ex-fighters as political and community actors can also help to engender their ownership on redress for violations by resonating with the NSAG’s values and broader norms. Yet the issue of reciprocity may arise, in that members of an NSAG cannot engage in reparations without serious engagement by the State and other actors, such as with the issue of land reform advocated by the FARC-EP.

The experience of social reintegration of Colombian ex-fighters can also impact on their support of transitional justice. Where ex-fighters were recognized and accepted by their community they were more willing to engage in such mechanisms, but if they were relocated far from the areas of combat and remained anonymous, they were less likely to support transitional justice processes. Combat exposure can have a negative and enduring effect on ex-fighters’ perceptions of and engagement in conflict resolution. Moreover, DDR processes do little to socialize ex-fighters into norms of civilian justice. Encouraging the collective organization of an armed group to make reparations may be more productive than making it the responsibility of individual convicted members. Using the social connections and human capacity of an NSAG can mobilize more resources for reparation engagement. In times of conflict when the armed group still militarily exists, it makes sense to speak of legal obligations as a collective, but at the end of hostilities it may make more sense to use less obligatory terms, or to incentivize former members of NSAGs to contribute in some way in exchange for reduced sentences or immunity, such as was used to encourage the disclosure of information from republican NSAGs regarding the recovery of the disappeared in Ireland. This reflects the hierarchy of reparation obligations when it comes to armed groups, and the complementary role of State reparation programmes.

Conclusion

Reparations are a process that aims to help victims and responsible actors to find a balance of competing interests in order to remedy the harm caused. Human rights law suggests that this should be “full reparation” as a maximal account. However, most reparation mechanisms try to find a more feasible point that not only

195 S. Zukerman Daly, above note 192, p. 670.
remedies victims’ harm, but also allows for the reintegration of those responsible. NSAGs as responsible actors can make an important contribution to acknowledging and alleviating victims’ suffering. While the scope of the obligation to make reparations in international law for NSAGs remains debateable, such measures are practiced by NSAGs, but can vary in motivation and extent. A hierarchy of reparation obligations can reflect the different capacity of NSAGs to contribute to redressing the harm they have caused during conflict, alongside States’ obligations to ensure reparation programmes for all victims. In such situations, remedying violations through reparations can take on the ideological flavour of the NSAG in terms of practicing its political agenda and governance, as well as offering some practical benefits of community support and image restoration to the armed group. Challenges remain in getting such groups to remedy the harm caused to the “other side”, but in post-conflict societies there is clearly scope for this, as demonstrated by the work of the JEP in Colombia. During conflict, NSAGs’ codes of conduct or other regulations could include norms on reparation or even remedies for breaches of the Deeds of Commitment used by Geneva Call.197

Reparations provide a way for victims, communities and humanitarian actors to engage NSAGs in reflecting on their actions and encourage non-repetition of violations. In terms of facilitating accountability, reparations go beyond the finding of responsibility to the procedural aspect of answerability,198 in hearing NSAGs give an explanation for their actions to those affected by them. The vernacular of reparations can enable armed groups to morally and politically articulate values, demonstrate leadership within the political communities for whom they claim to speak, normalize their social reintegration and reinforce norms of accountability. Ultimately reparations provide a medium for armed actors to struggle for societal transformation beyond the barrel of a gun, by making efforts to remedy their own wrongdoing.

ICRC Engagement with Non-State Armed Groups

Why, how, for what purpose, and other salient issues


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I. Introduction

Humanitarian engagement with armed groups, including non-State armed groups (NSAGs) has long been a defining feature of the ICRC’s work. In today’s challenging environment, the organization must more than ever continue to seek and engage in direct contacts and dialogue with armed groups in order to alleviate the suffering of persons affected by non-international armed conflicts (NIACs) and situations falling below that threshold, i.e. other situations of violence.
Through its neutral and confidential work, the ICRC has been able to achieve tangible results. Examples include, but are not limited to, providing lifesaving assistance to persons living in areas controlled by armed groups; supporting health-care facilities that treat the sick and wounded in such areas; ensuring that the basic needs of detainees are met; and strengthening groups’ knowledge of and respect for the applicable legal framework.

The ICRC’s operational approach is necessarily broad given that its mandate encompasses both NIACs and situations falling below that threshold. The term “armed group” denotes a group that is not recognized as a State but has the capacity to cause violence that is of humanitarian concern. It includes a wide range of groups with varying goals, structures, doctrines, funding sources, military capacity, and degree of territorial control. Included in this broad operational category are NSAGs, which qualify as a party to a NIAC and are therefore bound by IHL.

In 2020, for its internal purposes and relying on the purely operational definition, the ICRC identified 614 armed groups of humanitarian concern to the organization globally. Out of this totality, 296 armed groups were located in Africa (about half the number), and 132 in the Middle East. The ICRC had contact with 465 armed groups or 75 percent of the total number. It engages with more armed groups than any other humanitarian organization in the world, both in terms of the number of groups and the extent of interaction with them. In the ICRC’s estimate, between 60 to 80 million people live under the direct State-like governance of armed groups. Such governance can relate to a range of issues, from providing health care, to taxing the population, or dispensing criminal justice, to name a few. Access to the populations involved and responding to their needs presents enormous operational and other challenges.

It should be stressed that the only reason an armed group may become of concern to the ICRC and the primary reason for the organization possibly seeking engagement with it are the potential adverse effects of a group’s actions on populations and persons. Simply put, the ICRC’s engagement with armed groups is a matter of humanitarian necessity. Engagement is indispensable if the organization is to carry out its humanitarian activities aimed at alleviating the suffering of people in need:

- Engagement is, first, a precondition for the ICRC’s safe access to populations and persons affected by a NIAC or other situation of violence who may be in need of protection and assistance while located in a territory in which an armed group operates or which it controls.
- Second, engagement is essential to ensuring that an armed group understands and accepts the ICRC as an independent, neutral and impartial humanitarian organization and enables it to perform its humanitarian tasks in safety.
- Third, engagement is a prerequisite for promoting IHL and other relevant legal frameworks as a means of ensuring respect for the law and thus preventing/alleviating the suffering of the victims of NIACs and other situations of violence.
Fourth, it should be recalled that the ICRC is the only impartial humanitarian organization explicitly mentioned in the 1949 Geneva Conventions as an example of an organization that may offer its services to the parties to a NIAC, including NSAGs.

After brief legal and other remarks on the contemporary NSAG environment, this paper further elaborates the main reasons, outlined above, for the ICRC’s engagement with NSAGs. It concludes by recalling some of the challenges to such engagement.

II. Some legal and other remarks by way of background

Armed conflicts involving non-State armed groups are not new. Examples, among others, include the American and Spanish civil wars in the 19th and 20th centuries, the protracted conflicts in Colombia and Sri Lanka spanning several decades of the latter, and the present-day violence in the Middle East and the Sahel. What is new, relatively speaking, is that this type of armed conflict - NIAC - has become by far the most prevalent today. It is characterized by significant civilian suffering and thus an increased need for rapid and multifaceted humanitarian responses.

Non-international armed conflicts are those waged between a State’s armed forces and one or more non-State armed groups. This is in distinction to international armed conflicts, or IACs, which involve only States. A NIAC may also be waged among non-State armed groups only. This type of armed conflict is not necessarily defined by the territory in which it takes place, but rather by the nature of the parties, one of which must be a non-State armed group. In the last two decades there have been a range of conflicts in which one or more “supporting” States have fought alongside the armed forces of a “host” State against one or more non-State armed groups in its territory (e.g., Afghanistan, Iraq, Mali). These conflicts have likewise been deemed NIACs having a “extraterritorial” element.

It is generally accepted that for a situation of violence to be classified as a NIAC two conditions must be met: clashes between the parties must be of an intensity that amounts to hostilities, and the non-State armed group must be sufficiently organized to constitute a “party” to the armed conflict. Both the law and practice indicate that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are not considered armed conflicts. Determining if and when a particular situation of violence has reached the threshold of a NIAC is not an easy task. It depends primarily on a solid grasp of the facts on the ground and their analysis against the requisite legal conditions for a NIAC classification.

There is no body at the international level mandated to pronounce on the existence, or not, of a NIAC (or international armed conflict, IAC) in a given case.

2 Idem.
3 Additional Protocol II of 1977 to the Four Geneva Conventions of 1949, Article 1(2).
Like other actors, the ICRC engages in its own analysis. The organization’s aim in undertaking a classification is to establish the relevant legal framework as a guide for its operational, protection and other humanitarian responses.

III. Some relevant features of the NSAG environment

The number of non-international armed conflicts has more than doubled since the early 2000s - from fewer than 30 to over 70.\(^4\) A parallel feature of this changing geopolitical landscape has been the proliferation of non-State armed groups. In some of the most complex recent conflicts analysts have observed a multitude of NSAGs engaging in armed violence. Their size, structure and capabilities vary widely. While large groups with centralized and well-defined command and control structures continue to arise and exist, other groups are decentralized in structure and operate in fluid alliances. The motivation for violence of these myriad armed actors is an overlay of political, religious, economic, and other interests. The fragmentation of longstanding NSAGs into smaller “splinters” due to internal divisions among members may also be said to contribute to the general trend of NSAG proliferation.

The current armed conflict map is further marked by a considerable number of States intervening, or assisting, in armed conflicts abroad, in particular in the Middle East and on the African continent. This has led to an increasingly dense and global web of interactions between allied States’ militaries but also, of relevance to the purpose of this paper, to alliances between the armed forces of States and NSAGs. These - sometimes two-way - support relationships take various forms and involve a variety of points of common interest, constituting a relatively new phenomenon, especially in terms of scope. NSAGs also engage in varying degrees of coordination among themselves, forming loose coalitions. The practical, legal, policy and other consequences arising from such interactions are evidently complex and are beginning to be explored in more detail, including by the ICRC.

In this context it should be noted that a significant portion of today’s conflicts involve self-described jihadi groups: half of all States experiencing a NIAC on their territory are affected by conflicts involving jihadi groups. Moreover, the great majority of foreign interventions are directed against such groups.

IV. Access to civilians in territory in which NSAGs operate or exercise control

As may be observed daily, the devastation and suffering caused by armed conflicts and exacerbated by behavior contrary to IHL and other bodies of law is primarily

borne by civilians. Civilians are directly attacked and killed, their houses and livelihoods are destroyed, they suffer from starvation and lack of health care, and children are often left without education and also recruited into fighting forces. Detainees are harshly treated, and families are displaced or otherwise torn apart, unable to connect with each other and loved ones. Sexual violence is frequent.

Urban warfare causes additional, long-term effects due to the destruction of infrastructures and services without which life in cities and towns becomes a fight for survival. This painful description could go on, and the acts mentioned are not only caused by NSAGs.

The ICRC seeks access to civilian populations and persons located in territories in which a NSAG operates or exercises control so as to be able to provide them with protection and assistance in accordance with its exclusively humanitarian mission. Protection activities are extremely varied and context-based. They may include, but are not limited to, dialogue for better respect of IHL, the re-establishment of family links, the tracing of missing children, the identification and burial of bodies, the registration of detainees and visits to places of detention, and others. Assistance, in the broad meaning of the term, also encompasses a range of interventions, from emergency response to resilience building, from distributing food to restoring livelihoods, rehabilitating wells, water and sewage plants, supporting or running hospitals, setting up orthopedic services, conducting war surgery, and others.

Thus, by way of just a few examples, between 2014 and 2017 the ICRC held a series of dissemination and IHL trainings sessions for certain NSAGs in Syria. Similar sessions were conducted in 2019 and 2020 with NSAGs in Africa, Asia and other countries in the Middle East.

The ICRC also regularly acts as a neutral intermediary in the release of both civilians and security and armed forces members’ who are held by NSAGs. For instance, in the past few decades the ICRC facilitated the release of more than 1,800 people held by NSAGs in Colombia; this includes the release in 2020 of 22 people held by different NSAGs in the country.

In 2020, the ICRC likewise acted as a neutral intermediary in the exchange of more than 1,000 detainees between the Yemeni authorities and the Ansarullah Movement in that country, in the largest simultaneous exchange of prisoners between the warring sides.

In 2009 the ICRC visited detainees (members of the Afghan National Security Forces), held by the Taliban in the west of Afghanistan, efforts which continue to this day. The organization was simultaneously conducting systematic visits to persons detained by Afghan, international and US forces in different places of detention in the country.

In the early days of the Libyan conflict, the ICRC was able to deliver Red Cross messages and facilitate family contacts by means of telephone calls between government soldiers captured in the hostilities and held by armed fighters in the east of the country.

Recently, the ICRC and the Norwegian Red Cross started support to medical infrastructure in a province of Afghanistan for people living under
NSAG control. This includes the full rehabilitation of a health center (water, electricity, waste management) and its surgical wards, as well as a training program for medical personnel.

In Gaza in 2014, working with the parties, including Hamas, the ICRC helped local farmers whose lands were destroyed by the fighting to get back on their feet by facilitating the clearance of unexploded remnants of war and the releveling of damaged agricultural land.

During the time of the conflict in Nepal (with the Communist Party for Nepal-Maoist), and in the Philippines (with the Moro Islamic Liberation Front), the ICRC was able through a sustained dialogue to contribute to a better understanding and implementation of IHL rules on the conduct of hostilities by these NSAGs.

As may be seen from the above, access to territories in which NSAGs operate or which they control enables the ICRC to maintain proximity to people affected by conflict, understand the context, people’s needs and local capabilities, ensure effective two-way communication channels and enable participation, as well as inclusive and accessible programs. Access is also crucial to establishing the needs and priorities of affected populations and to devising and putting in place a meaningful and accountable humanitarian response.

The impact of the destruction and damage caused to people in NIACs is direct, meaning that humanitarian action to alleviate the consequences of armed conflict must happen on the ground, close to the populations and persons affected. Where people are located in territories in which NSAGs are operating or exercise control, a dialogue and other forms of engagement with such groups are indispensable to ensuring ICRC access for humanitarian purposes.

V. Acceptance of the ICRC

In order for the ICRC to be granted access to populations and persons living in NSAG-controlled territories, or those in which they operate, an NSAG must understand what the ICRC is, what it does, and trust that its action in favor of people affected by the armed conflict is based exclusively on humanitarian concerns. The establishment of a dialogue with NSAGs serves this crucial purpose as well and is by no means an easy task.

ICRC access and security are based on acceptance, by all sides of a conflict, of its presence and action. An NSAG’s understanding and acceptance of the ICRC and its mission - or lack thereof - has direct consequences on the safety and security of ICRC staff in the field. Attacks on humanitarian personnel have been on the rise over the past decades and the number of incidents in which ICRC staff, and that of other humanitarian organizations, have been killed, wounded, or taken hostage, to

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5 As is well known, the CPN-Maoist have since become part of the Government of Nepal and the MILF has taken up an official role in the local government as a result of the decades-long peace negotiations with the Government of the Philippines.
name just a few, continues to be extremely concerning. Particularly in conflicts and insecure contexts, the ICRC generally strives to achieve, if not acceptance, at least a certain level of tolerance of its work, which translates into avoidance of being rejected and potentially targeted by antagonists. Obtaining the necessary security guarantees for the safe access of ICRC staff on the ground is thus imperative and also requires a constant dialogue and interactions with NSAGs.

A NSAG may, to give but a few examples, not know of the ICRC. It may have an incorrect view of its role, be wary of the reasons for the ICRC’s request for access to populations and persons, or be opposed, on a variety of ideological or other bases, to the organization’s work. Even when initially gained, an NSAG’s understanding and acceptance of the ICRC and its work may on occasion waver due to, for example, internal differences of opinion within a group, or external pressures of different kinds or scope, thus requiring sustained contact and engagement between the ICRC and an NSAG over time.

There is no specific template or formula for initiating or maintaining a dialogue or other forms of interaction with NSAGs, whether for the purposes of ICRC acceptance by a group, or for subsequent access to civilians and other persons in need, as outlined in the previous section. The way in which engagement is sought and sustained will depend on a variety of factors - that may also change over time - and can involve different hierarchical levels within a group. Interactions can, for example, take place both directly and/or through intermediaries, orally and/or in writing, in bilateral and/or multilateral meetings, in IHL dissemination or training sessions, in meetings to discuss security guarantees, during visits to places of detention, and in a broader sense can occur indirectly through social media postings.

What must be emphasized is that the organization’s interactions with NSAGs are strictly based on the ICRC’s Fundamental Principles and are facilitated by confidentiality as its working method.

ICRC acceptance by the parties to an armed conflict, including NSAGs, is largely dependent on the parties’ trust that the ICRC operates as an independent, neutral and impartial humanitarian organization. These Fundamental Principles, of long standing, are also the bedrock of the International Red Cross and Red Crescent Movement of which the ICRC is a component. The ICRC’s independence from States or non-State actors, including organizations, persons, groups or entities means it has the autonomy it needs to accomplish its exclusively humanitarian task. In accordance with the Fundamental Principle of neutrality, the organization does not take sides in hostilities or engage in controversies of a political, racial, religious or other nature. Impartiality requires that the ICRC not engage in discrimination of any kind and that its work be aimed at relieving the suffering of individuals, guided solely by their needs.

NSAGs, like States parties to a NIAC, are sensitive to the ICRC’s adherence to the Fundamental Principles and quick to react when they suspect or perceive - however mistakenly - any deviation therefrom. A dialogue with NSAGs is thus necessary not only to explain, initially, the Fundamental Principles guiding the ICRC’s work as a prerequisite to the organizations’
acceptance, but to also overcome possible questions in specific cases if and when they later arise.

Confidentiality as a working method is likewise a hallmark of the ICRC. This method was developed over many decades as a means of facilitating a constructive dialogue with any party to an armed conflict, especially when violations of IHL are involved. ICRC confidentiality is not an aim in itself. It is a way of ensuring that IHL violations are addressed by those responsible as they are happening, rather than after the fact, and serves to create the trust necessary for open exchanges to take place and for ICRC recommendations to be made and acted on. Confidentiality as a working method is complementary to the range of other ways in which domestic and international actors engage with the parties to NIACs.

VI. Influencing behavior, protection dialogue, and respect for IHL

Alleviating the immediate suffering of persons affected by armed conflict is the driving force of ICRC operations in the field. Another, also aimed at alleviating suffering, is to ensure that the parties to a NIAC, including NSAGs, know, accept, and implement IHL in order to conduct their operations in respect of its rules. ICRC efforts to improve NSAGs’ observance of the law can only take place through an adapted and continuous protection dialogue with such groups and those wielding influence upon them. The ICRC’s *Roots of Restraint in War* report, published in 2018,6 identified various sources of influence on NSAG behavior, and suggests that adherence to IHL norms could be promoted through reference to local beliefs, legal traditions, customs and practices that encapsulate similar norms of restraint, or help to convey the sense of such restraint through analogy to them.

It should be emphasized that IHL is the only body of international law that undoubtedly binds NSAGs and thus constitutes a precious normative framework for engagement with non-State parties to a NIAC.

There is, under IHL, equality of rights and obligations of the parties to a NIAC. Both must respect the law as a means of sparing civilians and civilian objects - regardless of whose side of the conflict divide they may be located - from the devastating effects of armed conflict.7 Both parties must, for example, distinguish between civilians and combatants/fighters in the conduct of hostilities and both must ensure the humane treatment of persons in their power. The main sources of IHL in NIAC: Common article 3 to the 1949 Geneva Conventions and Additional Protocol II thereto of 1977 where applicable, as well as customary IHL, further elaborate what specific behavior is required of NSAGs, as well as States, to give effect to these foundational principles.

6 See note 4 above.
7 There is no equality of rights and obligations of the parties to a NIAC under domestic law, as explained further below.
The ICRC’s protection dialogue and engagement on IHL with NSAGs can take many forms depending, among other things, on the operational context, structure and openness of a group to integrate the law in its operations. Dialogue on the behavior of members of an NSAG and its consequences on the civilian population is the basic form of engaging with a group on IHL. Dissemination sessions and the distribution of relevant materials is another. These may be general in nature or focus on specific issues, such as the protection of the civilian population, the treatment of detainees, or respect for hospitals and schools. Courses, workshops and training in IHL may likewise be organized, general or tailored, and will be calibrated as much as possible to the capacity and level of knowledge of the participants.

Adapted engagement on IHL, depending on the specific audience, is necessary. The substance and scope of a dialogue will, similarly, differ depending on the ability of an interlocutor to influence in practice the behavior of a group. Thus, confidential ICRC interventions on protection concerns and possible IHL violations will be submitted to and discussed with the appropriate NSAG hierarchy or leader as the ones having the power to effect change - if there is a will to do so - in accordance with ICRC recommendations.

A dialogue on IHL can also serve to encourage NSAGs to improve respect for IHL rules by integrating them in their doctrines, codes of conduct, disciplinary regulations and other internal normative instruments. NSAGs can likewise be assisted in preparing public commitments to observe IHL in the form of unilateral declarations or deeds of commitment, as well as by means of the special agreements among the parties to a NIAC envisaged in Common Article 3 to the Geneva Conventions.

IHL will be the ICRC’s first “port of call” in a legal dialogue aimed at persuading an NSAG to conduct its operations in keeping with the foundational principles and rules of armed conflict. This is not to say that it is the only framework for a dialogue on protection issues given that IHL rules in NIAC are sometimes broad in nature and that certain groups may contest their applicability to themselves. Based on an appreciation of these and other factors the organization may also seek - when necessary for greater impact in terms of protection outcomes - to complement its engagement by reference to local customs, beliefs and traditions, where they overlap with IHL. If and when an IHL-based dialogue is not feasible, the organization’s protection outreach may also rely on principles of humanity when deemed appropriate.

VII. Legal basis for ICRC engagement

While the proliferation of NIACs and NSAGs is a relatively recent phenomenon, IHL started making provisions for this type of armed conflict as far back as 1949. Common Article 3 in each of the four Geneva Conventions is devoted to “armed conflict not of an international character”\(^8\), lays down the principle of humane
treatment, and contains a list of provisions that “each party to the conflict shall be bound to apply, as a minimum”\textsuperscript{9}

Common Article 3 also provides the ICRC with an explicit mandate to engage with both sides to a NIAC, and thus NSAGs, by specifying that: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict”.\textsuperscript{10}

The services are not listed, but it is understood that the offer - which the parties are not legally bound to accept but which the ICRC has a legal right to submit - may pertain to any humanitarian activity aimed at alleviating suffering based on needs on the ground. Some such activities have been already mentioned above. It is also generally accepted that an ICRC offer of services should not be interpreted as an unfriendly act or as unlawful interference in a NIAC, and that it should not be arbitrarily rejected.\textsuperscript{11} Such an offer is not and should not be seen as a threat to or a breach of State sovereignty.

Additional Protocol II to the Geneva Conventions of 1977, which is entirely devoted to NIACs, “develops and supplements”\textsuperscript{12} Common Article 3, “without modifying its existing conditions of application”.\textsuperscript{13} An ICRC offer of services may thus be made to NSAGs, and States, involved in the type of NIAC governed by AP II as well.

The application of IHL - and by implication the ICRC’s right to offer its services - do “not affect the legal status of the parties to the conflict”.\textsuperscript{14} This explicit statement in Common Article 3 is intended to allay the possible fears of States that IHL application confers any recognition, status or legitimacy on an NSAG, whether legal or political. Consistent practice has demonstrated that it does not. Moreover, IHL does not limit a State’s right to fight NSAGs using all lawful means and does not affect its right to prosecute, try and sentence its adversaries under domestic law for any crimes they may have committed.

It should be noted that an acceptance of an ICRC offer of services by an NSAG can only come about as a result of dialogue with the group. ICRC action pursuant to the mandate provided for in Common Article 3 thus also requires engagement with NSAGs. As mentioned, a dialogue does not confer legitimacy of any kind on NSAGs. On the contrary, it serves to influence and persuade them to “do the right thing”, i.e. to better respect the law as a means of protecting civilians and helping to alleviate their suffering.

\textsuperscript{9} By way of reminder, these provisions prohibit, among other things, violence to life, in particular murder, cruel treatment and torture, hostage-taking, outrages upon personal dignity, and the passing of sentences without the application of judicial guarantees. Idem, para 1 (a-d).

\textsuperscript{10} Idem, para 2. This is also known as the ICRC’s treaty-based right of humanitarian initiative pursuant to Common Article 3. The organization also has a right of humanitarian initiative under the Statutes of the International Red Cross and Red Crescent Movement (Article 5(3)), which it may rely on to offer humanitarian services in situations of violence below the threshold of a NIAC.


\textsuperscript{12} Additional Protocol II of 1977 to the Four Geneva Conventions of 1949, Article 1(1).

\textsuperscript{13} Idem.

\textsuperscript{14} Geneva Conventions I, II, III and IV of 1949, Common Article 3, para 2.
VIII. Current challenges to engagement with NSAGs

In the last 20 years or so the world first saw the launching of the so-called “global war on terrorism” - a concept to which the ICRC did not subscribe - and, more recently, an ever-expanding web of legal and other measures taken by States to deal with NSAGs designated as “terrorist” and/or included on sanctions lists at the international, regional and domestic level. While States undoubtedly have a right and duty to protect the safety and well-being of their populations, it is by now recognized that the fight against NSAGs involved in terrorism and/or deemed to constitute a threat to international peace and security has in some instances had the effect of shrinking the space for humanitarian action, to the detriment of civilians and other persons in need who are suffering the effects of NIACs.

It must be recalled that an NSAG is deemed a party to a NIAC based solely on whether it factually fulfills the organizational criterion mentioned earlier. No other considerations, such as a group’s motives for waging war or what it is called by States or others play a part. IHL speaks only of the “parties” to a NIAC, non-State and State, because the goal of this body of law is not to determine the justness or reasons for the use of force by any side; it is solely to prevent or limit suffering by obliging the parties to provide, or allow the provision of protection and assistance to persons regardless of where they may find themselves.

The designation of many NSAGs as “terrorists” or as “listed entities” under an array of international and regional instruments, as well as under the domestic law of States, poses a risk to those who engage with such groups - even for humanitarian reasons - with potentially grave legal and other consequences. Thus, the regular activities of the ICRC, such as engaging with NSAGs or “listed entities” for the purpose of distributing food assistance to civilians living in territory under their control, visiting detainees designated as “terrorists”, or conducting training sessions so that groups may better respect IHL, could fall afoul of certain States’ criminal laws due to the vague wording of existing or new criminal offenses prohibiting “services” or “support to” terrorism or to sanctions lists.

Aside from a risk of criminal sanctions against staff, the ICRC (and other humanitarian organizations) are also potentially exposed to the ambit of international or domestic sanctions regimes established to prevent contact with “listed” groups. Restrictive “anti-terrorist” and “sanctions” funding clauses in donor agreements may also have the effect of limiting humanitarian action both directly in terms of its scope, and also by creating legal insecurity due to which humanitarian organizations may be reluctant to act when needed.

Some of the anti-terrorism measures or sanctions regulations mentioned above would have the effect of circumscribing humanitarian activities in a way that would be incompatible with the letter and spirit of IHL and the Fundamental Principles binding the ICRC and the other components of the International Red
Cross and Red Crescent Movement. Pursuant to the Principle of impartiality, to give but one example, the ICRC may not discriminate among persons and is bound to “relieve the suffering of individuals (...) guided solely by their needs, and to give priority to the most urgent cases of distress”. The ICRC’s medical assistance to the victims of a NIAC on all sides of a NIAC could be rendered difficult based on a strict reading of some of the anti-terrorism instruments. It could imply, for instance, that medical services to persons rendered hors de combat by wounds or sickness, as well as to other persons under the control of an NSAG designated as “terrorist” could be prohibited as they may be considered as support or services to “terrorism”. This is a result that erases the concept of humanity and contradicts the very idea behind the creation of the ICRC over 150 years ago.

There is, fortunately, an increased acknowledgment in the international community and among certain States that ways should be found to exempt impartial humanitarian action from the scope of anti-terrorism measures and sanctions regimes. It is to be hoped that discussions around this issue will lead to a better appreciation of the challenges posed to protection and assistance activities in favor of the victims of NIACs and that an adequate solution may be agreed going forward.
State responsibility for community defence groups gone rogue

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Abstract

In situations of national crisis, it is not uncommon to see community members join together to provide security services to their communities, gap-filling or supplementing the security services of the State. These “community defence groups” perform many roles, from operating checkpoints and conducting surveillance missions to patrolling roads and even participating in combined combat operations with the State. Unfortunately, while many community defence groups perform an important service for their community, some have been accused of serious human rights abuses or even war crimes. This article examines the circumstances in which a State might be responsible in relation to wrongful acts of community defence groups operating within their territory.

Each community defence group differs in its structure, its activities and its relationship with the State. As such, any assessment of the potential responsibility of the State will depend upon the particulars of each group and its operations. The contribution of this article is to provide a framework for assessing State responsibility in relation to community defence groups. It does so by examining the potential attribution of acts of the community defence group to the State, applying secondary rules of State responsibility. In addition, it also considers the potential responsibilities of the State under primary rules of international law, namely

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international humanitarian law and international human rights law, in circumstances where the primary wrongful act is not attributable to the State.

Keywords: State responsibility, community defence groups, State organs, exercise of government authority, State control, common Article 1, aiding and abetting, due diligence.

Introduction

During situations of national crisis, the security services of a State may be pushed to their limit and be unable to protect communities from encroaching violence and conflict. It is not uncommon in these circumstances to see community members join together to attempt to fill this gap and provide security services to their immediate community. Around the world, so-called “community defence groups” perform many roles, from operating checkpoints and conducting surveillance missions to patrolling roads and even participating in combined combat operations with the State. Unfortunately, while many groups perform an important service for their community, many have also been accused of serious human rights abuses or even war crimes. This article examines the circumstances in which a State might be held responsible in relation to wrongful acts of community defence groups operating within the State’s territory. It focuses on the relationship between the territorial State and the community defence groups, as the interest in protecting a community from violence is in principle shared by the State and those groups, and in practice this often results in complex relationships of support between the two.¹

Noting that the nature of community defence groups varies from context to context, the aim of this article is to provide a framework for assessing the particular relationship between the community defence group, the State and the wrongful act, and the potential responsibilities that may arise from this. After providing a background to the phenomenon of community defence groups in the first section, the second section of the article discusses the potential attribution of acts of the community defence group to the State, applying secondary rules of State responsibility.² The third section discusses potential responsibilities of the State under the primary rules of international law, namely international humanitarian law (IHL) and international human rights law (IHRL), in circumstances where the primary wrongful act is not attributable to the State. The examples discussed

¹ This article does not address potential responsibilities that might exist in relation to extraterritorial States providing support to community defence groups. The principles of attribution discussed in the second section of the article could similarly extend to extraterritorial States, but extraterritoriality adds additional complexities of jurisdictional scope in relation to IHL and IHRL that are not addressed here.

in this article are predominantly from Africa, but the phenomenon is not limited to that part of the world.³

The phenomenon of community defence groups

In Maiduguri, Nigeria, a young man attracted local notoriety in 2013 for pursuing a militant from the group commonly referred to in the media as Boko Haram⁴ “with a stick, capturing him and delivering him to the authorities”.⁵ Others followed his example, joining together to patrol the streets and establish checkpoints.⁶ The group grew and called itself the Civilian Joint Task Force (CJTF), a name that intentionally referenced and indicated the group’s complementarity to the State’s Joint Task Force that was tasked with responding to the crisis in the northeast. As of 2020, the CJTF is said to have 30,000 members.⁷

In this article, the term “community defence group” is used to describe actors like the CJTF. This label neatly encapsulates three defining features. The first is that the group arises from or belongs to a community.⁸ In defining the broader category of “community-based armed groups”, Schuberth notes their
eponymous embeddedness within the community in which they emerge. The boundaries of the community can be defined (1) by territory—such as an urban neighbourhood or a village; (2) by blood ties—as in a family or clan; or (3) by a shared identity—like in the case of ethnic groups.⁹

By way of example, in relation to the phenomenon of community defence groups in South Sudan, Jok notes that

⁴ “Boko Haram” is not a label used by the group itself but is commonly used in media reporting to refer to the armed group People Committed to the Propagation of the Prophet’s Teachings and Jihad, or, less often, to the Islamic State West Africa Province. For more information, see International Crisis Group, Facing the Challenge of the Islamic State in West Africa Province, Africa Report No. 273, 16 May 2019, available at: www.crisisgroup.org/africa/west-africa/nigeria/273-facing-challenge-islamic-state-west-africa-province (all internet references were accessed in July 2021).
⁶ Ibid., p. 4.
⁹ Moritz Schuberth, “The Challenge of Community-Based Armed Groups: Towards a Conceptualization of Militias, Gangs, and Vigilantes”, Contemporary Security Policy, Vol. 36, No. 2, 2015, p.299. See also D. Pratten, above note 8, p. 6, on the link between vigilantism and the “politics of belonging”.

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[c]ommon to all of the groups is their roots in ethnic groups or region. … 

[T]hey are responses to the localised nature of violence and a suspicion that the state has become monopolised by some ethnic groups while others are excluded, forcing them to rely on their own means of defence.10

The community link will often underpin the structure and function of the group and distinguish these actors from business-oriented groups, such as private military and security companies.11

The second defining feature is that the group is a “defence group” – it purports to serve a defensive purpose. This mirrors the so-called “conservativism” that is discussed in relation to “vigilantism”: the orientation of the group is towards the (re-)establishment of a form of existing social order.12

Johnston, for example, suggests in relation to “vigilantes” that such groups act when “an established order is under threat from the transgression, the potential transgression, or the imputed transgression of institutionalized norms”.13 For instance, the group known as the Arrow Boys in South Sudan was formed by Azande men responding to the threats posed to their community by the Lord’s Resistance Army in 2005.14 This security orientation enables community defence groups to be distinguished from groups whose dominant orientation is political or economic.15

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13 L. Johnston, above note 12, p. 229.


15 M. Schuberth, above note 9, p. 303. In practice, it can be difficult to separate the motivation of groups. See, for example, Johnston’s discussion of vigilantism as a reaction to crime and social deviance, and the complex overlaps that can exist with social control vigilantism, or even vigilantism seeking political power: L. Johnston, above note 12, pp. 228–230. David Pratten notes the disbanding of the O’odua People’s Congress and Bakassi Boys due to their promotion of political agendas, but also notes the
The security orientation also reflects that community defence groups are most active in circumstances where a State’s own security institutions are not responding well to the threats posed to a community. The groups may have existed prior to a crisis, but then evolve to match an increasing threat. For example, in the northeast of Nigeria, traditional hunter groups were mobilized to respond to increasing attacks against civilian targets such as mosques, schools and marketplaces.16 In Eastern Equatoria, South Sudan, community defence groups are said to be organized according to traditional “age sets” whereby young to middle-aged men “assume responsibility for the governance and security of the community for specific time periods”.17 These were mobilized during South Sudan’s civil war to, inter alia, secure roads and protect the community from looting and violence.18 The groups’ foundations in the community often mean that they are less likely to be perceived as a threat to existing political or social structures, and they may receive support from the State for their complementary service to the community. This is a key theme that will be returned to later in this paper.

Finally, the term “community defence group” also highlights that these groups involve a collective enterprise. Johnston expresses this element in relation to vigilantism as the involvement of planning and premeditation by those engaging in it.19 Rather than a spontaneous reaction to an imminent threat (perhaps akin to a levée en masse), a community defence group has at least a vague structure that allows for collective actions against a more generalized and not necessarily immediate threat. A community defence group may be, but is not necessarily, an “organised armed group” under IHL.20 This article will highlight the implications of whether a group is considered an organized armed group in relation to State responsibility.

In the absence of functioning State security services, there is an obvious appeal to members of the community mobilizing to protect their community. Community defence groups may be in a better position to respond than the centralized government entities, whose personnel may not necessarily speak the local languages or understand well the dynamics of the area under threat. For example, the Titweng or Gelweng (cattle guards) in Bahr el Ghazal, South Sudan, were reported to wield a “greater legitimacy among local communities because of their respect for local norms, relationship with chiefs and elders, and their reality of vigilante groups as a means for “poor, unemployed youth” to “insert themselves within political and economic niches of the state apparatus”: D. Pratten, above note 8, pp. 5, 7.

16 C. A. M. Kwaja, above note 12.
19 L. Johnston, above note 12, p. 220.
20 We are thus considering a broader category of actors than “community-embedded armed groups” per the ICRC’s Roots of Restraint in War study, which is limited to groups that “lack an organizational structure and responsible command necessary to be considered an armed group under IHL”. ICRC, The Roots of Restraint in War, Geneva, 2018, p. 54, available at: www.icrc.org/en/publication/4352-roots-restraint-war.
emphasis on protecting cattle”. Community defence groups may benefit from existing social structures, informal taxation and other forms of community resourcing, mystic beliefs about their role and abilities, and an innate understanding of the terrain on which they operate.

Yet, the operation of community defence groups is not without risk. The gaps in the State security services from which such groups operate can mean that in practice, accountability to the State may be weak. Certain community defence groups have been accused of demanding pay-offs in exchange for turning a blind eye to the behaviour they claim to be addressing, conducting raids against other communities, committing summary executions or vengeance killings of those suspected to be members of opposition armed groups, ill-treating or torturing suspects before handing them over to the police, and/or sexual violence against members of the vulnerable communities which they purport to serve.

The second and third sections of this article discuss the potential responsibility that a State might have in relation to wrongful acts of a community defence group. This assessment depends upon a clear identification of the relationship existing between the State and the community defence group, which may vary significantly between contexts. States may have been involved in the

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22 See, for example, C. A. M. Kwaja, above note 12, p. 21; J. M. Jok et al., above note 10, p. 9.


24 The existence of non-State accountability mechanisms of community defence groups varies from context to context. For example, the ICRC’s Roots of Restraint in War study notes as sources of influence and authority over the cattle-keeping groups of South Sudan (e.g. the Titweng and Gelweng discussed above) the role of chiefs and divine authority, in addition to politico-military elites: ICRC, above note 20, pp. 57–58. Community defence groups that are organized armed groups (as discussed below) by definition will have an internal means for regulating the conduct of their members: see International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 195.

formation of these groups, and have promoted their recruitment;\textsuperscript{26} they may acquiesce to the existence and activities of such groups, but otherwise have no direct involvement; they might actively cooperate with such groups and/or make regular payments to members of such groups; they may provide training, uniforms and/or equipment;\textsuperscript{27} they may engage in the planning and coordination of activities for the group; they may carry out mandatory recruitment into community defence groups;\textsuperscript{28} they may favourably comment on the activities of such groups;\textsuperscript{29} and they may engage the group for the provision of a specific security service, or even formally incorporate the group within the State’s own security apparatus.\textsuperscript{30} Understanding these relationships is essential to identifying any existing responsibility, but it is not always easy. The relationships that can exist between States and community defence groups may be complex, non-transparent and evolving.

\section*{Attribution pursuant to secondary rules of State responsibility}

This section examines the circumstances in which acts of a community defence group may be attributable to the State, pursuant to the principles of State responsibility articulated in the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility, ASR).\textsuperscript{31} It will consider situations where a community defence group and/or certain of its members is an organ of the State (Article 4), where the community defence group is exercising governmental authority (Articles 5 and 9), and where the community defence group is acting under the

\begin{footnotesize}\begin{enumerate}
\item For example, military officers are said to have visited communities in order to encourage recruitment of people into the CJTF in 2013: see International Crisis Group, above note 5, p. 6. In recognition of the apparent effectiveness of the Arrow Boys’ response to the Lord’s Resistance Army, US and Ugandan soldiers were said to have regularly consulted the group and “periodically furnished them with equipment in exchange for information”: J. M. Jok \textit{et al.}, above note 10, p. 9.
\item For example, the Borno Youth Empowerment Scheme provided some military training and uniforms to a select group of young men in the CJTF: see International Crisis Group, above note 5, pp. 5, 9.
\item For example, service in the Sungusungu of Nyahenya, Tanzania was said to be compulsory: M. L. Fleisher, above note 25, p. 216; Suzette Heald, “State, Law and Vigilantism in Northern Tanzania”, \textit{African Affairs}, Vol. 105, No. 419, 2005, p. 273.
\item See, for example, J. M. Jok \textit{et al.}, above note 10, p. 9.
instruction, direction or control of the State in carrying out that conduct (Article 8).  

Responsibility for community defence groups or members of community defence groups as organs of the State

Article 4 of the ASR states that “[t]he conduct of any State organ shall be considered an act of that State under international law”. This extends to “all the individual or collective entities which make up the organization of the State and act on its behalf”.  

In principle, a State could legally incorporate a community defence group into the State security apparatus. This is rare, presumably because there is little advantage for the State to assume unequivocal responsibility for groups outside of its already existing security institutions. Further, for the community groups themselves, direct incorporation into the State’s institutions would result in the loss of their independence and potentially also their community-based identity.  

The International Court of Justice (ICJ) has in addition considered that in exceptional circumstances, “persons, groups of persons or entities” may be considered an organ of the State even in the absence of domestic incorporation, if there is “proof of a particularly high degree of State control over them”, so much so that the persons or entities operate in “complete dependence” on the State. The author is not aware of any community defence groups that would fall under this category. The characteristics of community defence groups tend to run counter to absolute State control, including their creation and foundations in the community (suggesting some degree of autonomy) and that they are most active in situations where the State security apparatus is not meeting the security needs of the community (suggesting a possible incapacity for the State to exercise absolute control). Situations where the State exercises control at a level that results in less than complete dependence are discussed below in relation to Article 8 of the ASR.

32 This article does not consider responsibility on the basis of conduct acknowledged and adopted by the State as its own. It would seem far-fetched that a State would ever accept and adopt as its own the type of conduct of community defence groups described in this article that would form the basis of the wrongful act.


34 Articles on State Responsibility, above note 31, p. 40.

35 The Volunteers for the Defence of the Homeland, in Burkina Faso, warrants further study in this respect. A decree was passed in 2020 on the group’s status that provides, *inter alia*, that the command of the group is assured by the command of the armed forces, and that the group benefits from the protection of the State in the execution of its missions. *La loi portant institution des Volontaires de la défense de la Patrie*, Decree No. 2020-0115, 12 March 2020, available at: https://tinyurl.com/kd76jwby.


37 In relation to the relevance of the State’s role in the creation of the group as a factor indicating control, see ICJ, *Nicaragua*, above note 36, paras 93–94; C. Kress, above note 2, pp. 106–107.
An apparently simpler solution for the State than expressly incorporating the whole group would be to incorporate or recruit certain members into the State’s existing security institutions. In November 2020, for example, 400 members of the CJTF were reported to have been formally recruited into the Nigerian Armed Forces. Yet, even this is not common. Employing members of the community defence group requires a greater financial contribution by the State, including regular salaries and possibly health insurance, pensions and other benefits. Incorporation of community defence group members may also be difficult as these individuals may not fulfil the educational requirements for recruitment. In Nigeria, constitutional requirements of geographical representation intended to address overrepresentation of certain regions in recruitment were also reported to be a challenge for recruitment. Further, a practice of employing community defence group members might be perceived as creating an incentive for their operation.

The domestic employment law of a State will be relevant, as will any regulations that apply to recruitment in the specific institutions in question, to determine as a matter of fact whether members of a community defence group have become employees of the State.

For community defence group members who are also employees of the State, the State will be responsible for their acts “[w]here such a person acts in an apparently official capacity, or under colour of authority”, even if that person is exceeding their authority or contravening their instructions. This would cover situations where an employee commits misdeeds while in uniform, even if outside of working hours, because of the air of authority that comes with wearing that uniform. It could also cover instances where an employee is using a security

38 In relation to “incorporation”, Cameron and Chetail give the example whereby by act of contract, the State of Papua New Guinea purported to bestow upon members of a private security firm the status of “special constables”, a classification within the national police force. See Lindsey Cameron and Vincent Chetail, Privatizing War: Private Military and Security Companies under Public International Law, Cambridge University Press, Cambridge, 2013, pp. 140–141.


40 M. L. Fleisher, above note 25, p. 210. Payments made to community defence group members (if any) who are not employed by the State vary between contexts. For example, the chairman of the Anambra Vigilante Services suggested that his members were paid only “a token amount”: see Human Rights Watch, The Bakassi Boys: The Legitimization of Murder and Torture, May 2002, available at: www.hrw.org/reports/2002/nigeria2/index.htm#TopOfPage. See also International Crisis Group, above note 5, p. 12.

41 International Crisis Group, above note 5, p. 21.

42 Ibid.

43 J. M. Jok et al., above note 10, pp. 4, 6, 23.

44 See the discussion on the relevance of domestic law in L. Cameron and V. Chetail, above note 38, p. 137. In practice, determining whether an employment relationship exists can be difficult, as a person may receive a regular paycheck pursuant to a contract, and insurance, and be subject to a clear chain of command, yet the State may characterize the relationship as “volunteerism”. See, for example, Decree No. 2020-0115, above note 35.

45 Articles on State Responsibility, above note 31, pp. 42, 47, and Art. 7.

46 Ibid., p. 46.
vehicle outside of work operations where the use of that vehicle would also give the appearance of authority. The “colour of authority” may also extend to off-duty security-related work of the employee with the community defence group, where such work benefits from wide-ranging support or endorsement from the State. Essentially, the critical question would be whether the activities of the employee, engaged with the community defence group while “off-duty”, can be clearly distinguished from his or her official function.

Finally, the responsibility of States is arguably broader in relation to the acts of community defence group members who are also members of the armed forces during international armed conflicts. Article 91 of Additional Protocol I to the Geneva Conventions provides: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed force.” This is understood by some commentators as a lex specialis rule of State responsibility under IHL whereby the distinction between private and public acts is either not maintained at all or is at least not maintained “in wartime and with regard to acts governed by international humanitarian law”. That being said, none of the examples of community defence groups discussed in this article were mobilized as a result of international armed conflicts.

Exercising governmental authority

Article 5 of the ASR provides that the conduct of persons or groups that are not organs of the State but which are “empowered by the law of the State to exercise elements of the governmental authority shall be considered as an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

49 Articles on State Responsibility, above note 31, p. 46.
50 See also Hague Convention IV, Art. 3.
52 See, for example, the discussion above in relation to the mobilization of the CJTF in northeastern Nigeria and the Arrow Boys in South Sudan. This is consistent with global trends whereby the “vast majority” of conflicts are non-international: see Annyssa Bellal, The War Report: Armed Conflicts in 2018, Geneva Academy of International Humanitarian Law and Human Rights, 3 June 2019, available at: www.rulac.org/news/the-war-report-armed-conflicts-in-2018.
For a community defence group’s activities to be attributed to the State under Article 5, the group must be an entity capable of being empowered by law to exercise governmental authority. The Commentaries to the ASR make it clear that the definition of “entity” is to be broad: “The generic term ‘entity’ reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority.” In order to be “empowered”, the group needs to be capable of definition and most likely would require legal personality under the domestic legal framework of the State. This is not unheard of; for example, the Vigilante Group of Nigeria was registered in 1999 as a not-for-profit organization.

Second, the community defence group must exercise elements of governmental authority. The ASR Commentaries suggest that “what is considered ‘public power’ depends on the society in question, its history and traditions”. Cameron and Chetail conclude on review of the drafting history, as well as domestic and international law approaches to defining governmental authority, that “it appears that the notion of elements of governmental authority is entirely linked to the exercise of the special powers of the state and not to the general public interest or the goal of a given activity”. This would likely encompass many activities of community defence group of a policing character, such as manning checkpoints on public roads, arresting persons suspected to be involved in organized armed groups, and engaging in interrogations. The Commentaries provide the example of private security firms contracted as prison guards and consider that in this capacity they may “exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations”. It would not, on the other hand, extend to other peripheral activities of community defence groups that do not require “elements of government authority”, such as translating services or community liaison work.

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53 Articles on State Responsibility, above note 31, p. 43.
54 This is consistent with the examples provided in the ASR Commentaries, namely public corporations, semi-public entities, public agencies of various kinds, and private companies: ibid., p. 43.
56 Articles on State Responsibility, above note 31, p. 43.
57 L. Cameron and V. Chetail, above note 38, p. 198. See also J. Maddocks, above note 3, pp. 62–77, and in particular her discussion of “quintessentially” government functions. For a discussion on the meaning given in the United States to tasks that are “inherently governmental” and may only be performed by members of the US Armed Forces or civilian employees of the Department of Defence, see Emanuela-Chiara Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law”, International Review of the Red Cross, Vol. 88, No. 863, 2006, pp. 550–551.
58 Katja Nieminen, “Rules of Attribution and the Private Military Contractors at Abu Ghraib: Private Acts or Public Wrongs?”, Finnish Year Book of International Law, Vol. 289, No. 15, 2004, p. 299. Note, however, that many countries provide for a “citizen’s arrest” that does not involve the exercise of public authority, usually limited to stopping a person in the commission of a serious offence: see, for example, France, Criminal Procedure Code, Art. 73; Indonesia, Criminal Procedure Code, Art. 18(2). See also Articles on State Responsibility, above note 31, p. 43.
59 Articles on State Responsibility, above note 31, p. 43.
60 K. Nieminen, above note 58, p. 300.
Third, the community defence group must be “empowered by the law of the State” to exercise the governmental authority.\footnote{Note that the Iran–US Tribunal considered that express authorization of the exercise of governmental authority was not required for the establishment of State responsibility, but instead considered that the exercise of governmental authority by the “Komitehs” or “Guards” created a reserve presumption whereby “the Respondent has the burden of coming forward with evidence showing that members of the ‘Komitehs’ or ‘guards’ were in fact not acting on its behalf, or were not exercising elements of government authority, or that it could not control them”. Iran–United States Claims Tribunal, \textit{Kenneth P. Yeager v. The Islamic Republic of Iran}, Judgment, 1987, paras 43–45. This case is discussed further below in relation to Article 9 of the ASR.} There is some uncertainty about what is required by this. As Cameron and Chetail identify, the expression “by the law of the State” is ambiguous in English because it could refer to a specific law or more generally to a legal order. The French version’s usage of the expression \textit{le droit interne} (as opposed to \textit{lois internes}) is consistent with the broader interpretation, whereby delegation of authority would be possible provided it was undertaken within the legal order of the State.\footnote{L. Cameron and V. Chetail, above note 38, p. 168.}

The ASR Commentaries do not definitively address “whether such authority must be granted through a concession of legislative power, or, for example, through an executive act, as it could be a contract between a government and a private entity to perform public functions”.\footnote{Vanessa Ballesteros Moya, “The Privatization of the Use of Force Meets the Law of State Responsibility”, \textit{American University International Law Review}, Vol. 30, No. 4, 2015, pp. 800–801.} The Commentaries refer to entities that are “empowered by internal law to exercise government authority”, which might be understood to refer to a legislative or regulatory act, but, as mentioned above, they give as an example private security firms contracted to act as prison guards.\footnote{Articles on State Responsibility, above note 31, p. 43. The ICRC’s Customary Law Study also refers to responsibility for persons or entities “which [States] have empowered, under their internal law”: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), \textit{Customary International Humanitarian Law}, Vol. 1: \textit{Rules}, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 149, available at: \url{https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1}. See also L. Cameron and V. Chetail, above note 38, pp. 168–169.}

The Montreux Document on private military and security companies, a document finalized on 17 September 2008 and to date supported by fifty-six States,\footnote{Swiss Federal Department of Foreign Affairs, “Participating States of the Montreux Document”, available at: \url{www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html}.} states that under customary international law, attribution would only occur in this respect where private military and security companies are “empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State)”.\footnote{Montreux Document, above note 11, Part 1, para. 7.} In its discussion of circumstances where State responsibility might be attracted, it also specifies that “entering into contractual relations does not in itself engage the responsibility of Contracting States”.\footnote{Ibid., Part 1, para. 7. See also E.-C. Gillard, above note 57, pp. 554–555. However, see also Cameron and Chetail’s discussion of decisions by both the Iran–US Tribunal and the ICJ in which neither body required}
the ASR generally, the circumstances attracting responsibility under Article 5 will be rare, as it would require a State to provide in its laws or regulations for the delegation of authority to community defence groups.68

Finally, the wrongful act must have been committed by the community defence group or its member while acting in an “empowered” capacity.69 The extension of responsibility to ultra vires acts under Article 7 of the ASR (and the discussion of this provision in relation to responsibility under Article 4, above) is equally applicable here.

Attribution of responsibility for the acts of community defence groups under the instruction, direction or control of the State

Article 8 of the ASR provides for State responsibility for wrongful acts committed if a State instructs a member of a community defence group, or the group itself, to commit that wrongful act, or when groups or their members are acting under the direction or control of the State in carrying out that act.70

In relation to attribution on the basis of control, preliminary questions in relation to the degree of control required must be addressed. As is well known and often repeated, the ICJ in the Nicaragua decision considered that the United States’ support for the Contras (a non-State armed group operating in Venezuela) could give rise to legal responsibility on the part of the United States if it was “proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.71

The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber reached a different conclusion in the Tadić case when examining the internationalization of conflicts, considering that conduct of military or paramilitary groups was attributable where “the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”72 The approach in Tadić has been adopted by the International Criminal Court (ICC) in relation to the internationalizing of armed conflicts.73 The ICJ continues to

68 See the discussion of the Anambra State Vigilante Services per Law No. 9, Anambra State Vigilante Services Law, 2000, in Human Rights Watch, above note 40.
69 Articles on State Responsibility, above note 31, Arts 5, 7.
70 The ICJ considered Article 8 as reflecting customary law: ICJ, Bosnian Genocide, above note 31, para. 398. For a critique of this finding, see Antonio Cassese, “The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, European Journal of International Law, Vol. 18, No. 4, 2007, p. 651.
71 ICJ, Nicaragua, above note 36, para. 115 (emphasis added).
72 ICTY, Prosecutor v. Tadić, Case No. IT-94-1, Judgment (Appeals Chamber), 2 October 1995, para. 131 (emphasis added).
73 ICC, The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment (Trial Chamber), 5 April 2012, para. 541; ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment (Trial Chamber III), 21 March 2016, para. 130. See also ICRC, Commentary on the First Geneva Convention:
prefer and apply the effective control test.\textsuperscript{74} This article will consider both the ICJ and the ICTY’s approach.\textsuperscript{75}

**Overall control of the group**

First, as posited in \textit{Tadić}, the overall control test applies in relation to the State’s relationship with military or paramilitary groups. For individuals or groups not organized into military structures, “courts … have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission”.\textsuperscript{76}

Not all community defence groups are organized militarily.\textsuperscript{77} Many community defence groups operate informally and lack an effective centralized command. The Arrow Boys, for example, have been described as “a network of mobilized community members rather than a military-style hierarchical armed organization”.\textsuperscript{78} As described by Koos:

Some overarching positions (e.g., county-level commander, information officer) were established to facilitate coordination between local [Arrow Boys] groups across Western Equatoria. However, these functions were not endowed with commanding power as they would have been in an army or other military-like organizations. Core decision-making power regarding operational decisions and cooperation among local groups remained with

\textsuperscript{74} ICJ, \textit{Bosnian Genocide}, above note 31, paras 404–407.

\textsuperscript{75} Alternative tests for attribution have been applied by other international and regional decision-makers. The European Court of Human Rights (ECtHR), for example, considered that acts of the Turkish Republic of Northern Cyprus could be attributed to Turkey on the basis of “effective overall control”: ECtHR, \textit{Loizidou v. Turkey}, Appl. No. 15318/89, 18 December 1996, para. 49; and see discussion in C. Kress, above note 2, pp. 107–109, 127–128; M. Milanovic, above note 2, pp. 345–346. The World Trade Organisation Appellate Body applies a test of “sufficient involvement” to determine whether acts of private entities may be considered “governmental”: see Alberto Alvarez-Jimenez, “International State Responsibility for Acts of Non-State Actors: The Recent Standards Set by the International Court of Justice in Genocide and Why the WTO Appellate Body Should Not Embrace Them”, \textit{Syracuse Journal of International Law and Commerce}, Vol. 35, No 1, 2007, pp. 15–18. See also the discussion in Kristen E. Boon, “Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines”, \textit{Melbourne Journal of International Law}, Vol. 15, No. 2, 2014, pp. 349–351, with regard to the applicability of control tests in relation to attributing acts of terrorism. In relation to the merits of the effective and overall control tests, the present author does not take a position on which test is to be preferred and refers readers to the differing views taken on this topic in M. Milanovic, above note 2, pp. 317–324; A. Cassese, above note 70; ICRC Commentary on GC I, above note 73, Art. 2, paras 268–271; M. Milanovic, “State Responsibility for Genocide”, \textit{European Journal of International Law}, Vol. 17, No. 3, 2006, pp. 585–588; M. Sassòli, above note 51, p. 408.

\textsuperscript{76} ICCT, \textit{Tadić}, above note 72, paras. 130–131. See also A. Cassese, above note 70, pp. 659–661.

\textsuperscript{77} See ICTY, \textit{Boskoski}, above note 24, paras 194–206, for a description of the indicators that a group is an organized armed group.

\textsuperscript{78} C. Koos, above note 14, p. 1047. See also C. Dufka, above note 23, p. 28.
the local chairman and, by extension, the traditional community leaders in the village.\(^79\)

If a community defence group is an organized armed group, according to Tadić, its conduct can be attributed to a State if the State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.\(^80\)

The “overall control” test is less onerous than the effective control test, but the level of control required is still high and goes beyond cooperation as allies.\(^81\) Example indicators of a State’s overall control over a community defence group might include:

- the State is paying stipends for the members, is providing uniforms and engaging in training activities and is engaged in the coordination and planning of the group’s activities;
- the State determines the direction that the community defence group takes – it decides the activities that the community defence group will undertake, and the community defence group depends upon the State to guide it as to what activities to pursue and what not to pursue; and
- funding and other support provided by the State is conditional upon the community development group following the plans provided by the State; the State supervises the activities and operations.\(^82\)

The overall control test does not, however, require that “the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as de facto organs of that State”.\(^83\) As posited in Tadić, the conduct of a group under the overall control of the State is attributable to the State as though its members were “agents” of the State,\(^84\) and the State is responsible “even when they act contrary to their directives”.\(^85\)

\(^79\) C. Koos, above note 14, p. 1048. See also the description of the Titweng and Gelweng in ICRC, above note 20, p. 57.

\(^80\) ICTY, Tadić, above note 72, para. 137.

\(^81\) Ibid., para. 151; ICTY, Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgment (Appeals Chamber), 24 March 2000, paras 138–145.


\(^83\) ICTY, Tadić, above note 72, para. 156.

\(^84\) Ibid., para 137; ICRC, Commentary on the First Geneva Convention, 2016, Article 2, para. 273.

\(^85\) ICTY, Tadić, above note 72, paras 121–122. For a critique of this aspect of the Tadić decision, see C. Kress, above note 2, pp. 128–129, 135–136; M. Milanovic, above note 2, pp. 319–320.
Effective control over the acts

Pursuant to the effective control test, the State is responsible where it directs or has control over the operation in which the wrongdoing has occurred. This might include where the operation is being conducted according to a plan established and led by the State, the community defence group members accept orders from the State in relation to the operation, and the State has the capacity to change its plans and the community defence group members will respond accordingly.

For example, the description given of the Yobe Peace Group by Kwaja would raise questions of potential responsibility. As described by Kwaja, members of the Yobe Peace Group “are attached to military battalions and deployed to flash points where army battalions are stationed”, and the State is “wholly responsible for the funding, allowance and maintenance” of the group. It would be useful to understand more precisely what is meant by “attached” and “deployed.” If the group is receiving orders and command from the armed forces for specific operations, its acts during such operations would be attributable to the State.

As with responsibility under Article 4 of the ASR, an additional question arises regarding the extent of the State’s responsibility. The State is responsible when it instructs a person or entity to commit the wrongful act. In relation to circumstances where the State exercises control, the situation is less clear. The ICJ refers to the State having control over “operations” rather than acts, which has been interpreted by some to include ultra vires acts committed in the course of the operation. In the ASR Commentaries, it is suggested that “[s]uch cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it”.


87 C. A. M. Kwaja, above note 12, pp. 64–65.

88 Articles on State Responsibility, above note 31, p. 47.

89 O. A. Hathaway et al., above note 86, pp. 552–553. Kress, on the other hand, notes that Article 7 does not address de facto organs and highlights an absence of international practice extending it thus: C. Kress, above note 2, pp. 135–136.

90 Articles on State Responsibility, above note 31, p. 48. See also the discussion by Cameron and Chetail, who suggest that “the incidental character of the unlawful act regarding the particular mission can be determined by weighing whether or not the unlawful act was done to assist in the accomplishment of the mission, which can then help to answer the question of whether the instructing state had accepted the likelihood of its occurrence”: L. Cameron and V. Chetail, above note 38, pp. 207–208.
Responsibility when exercising elements of government authority in the absence of the exercise by regular authorities

Article 9 of the ASR states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

The ASR Commentaries suggest three conditions for attribution under Article 9: that the conduct must involve the performance of governmental functions; that it must be in the absence or default of the State; and that “the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons”. As discussed above in relation to Article 5, it is foreseeable that some acts of community defence groups may involve the exercise of governmental authority, particularly those of a policing character, such as manning checkpoints on public roads, arresting persons suspected to be involved in organized armed groups, or engaging in interrogations. Further, in relation to the requirement of an “absence or default of the State” as discussed in the first part of this article, many community defence groups are created and/or mobilized as a result of the absence of functioning State security operations.

What is more difficult to ascertain is whether the circumstances would be such as to call for the exercise of elements of governmental authority by private persons. The ASR Commentaries suggest that such cases are “exceptional” and that “the principle underlying article 9 owes something to the old idea of the levée en masse” – a phenomenon that is narrowly defined. Yet, the examples given by the Commentaries of the “exceptional nature of the circumstances envisaged in the article” include situations which unfortunately are quite common – namely, situations of “armed conflict” and situations “where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative”.

An additional challenge in identifying the limits of attribution under Article 9 is posed by the reference in the ASR Commentaries to the Yeager decision of the Iran–United States Claim Tribunal. In that case, the Tribunal found

91 Articles on State Responsibility, above note 31, p. 49.
92 See, for example, C. Dufka, above note 23, p. 26, in relation to activities of the Dozo in Mali; D. E. Agbiboa, above note 7, pp. 14–16, in relation to the CJTF in Nigeria.
93 See, for example, C. Dufka, above note 23, pp. 15, 18, 19, in relation to Dogon and Bambara self-defence groups in Mali; C. A. M. Kwaja, above note 12, p. 28.
sufficient evidence on the record to establish a presumption that the revolutionary ‘Komitehs’ or ‘Guards’ after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.96

If this was applied as a test for Article 9, it would create a low threshold for attribution, namely by the State’s “tolerance” of the activities of the group, even in the absence of an assessment of whether the State was capable of controlling the behaviour of the group.97 Without a clear definition of the limits of this basis for attribution, it is difficult to entertain detailed analyses of its applicability.

**State responsibilities under primary rules of international law**

This section addresses the potential responsibility of States that arises from so-called primary rules of international law.98 The discussion invites closer examination into the acts and obligations of the State that are triggered by the conduct of community defence groups, even where the primary conduct of a group is not directly attributable to the State. The sources of primary responsibility discussed are IHL and IHRL.

**Responsibility for aiding and abetting human rights abuses; or encouraging aiding and assisting IHL violations**

Article 16 of the ASR provides that

a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

In the words of the Commentaries, there are three elements that would need to be established:

First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State

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96 Iran–United States Claims Tribunal, Yeager, above note 61, para. 104 (emphasis added).
97 C. Kress, above note 2, pp. 130–131. The ECtHR’s jurisprudence on “connivance” and “acquiescence” is discussed below in relation to aiding and abetting.
98 In the discussion of “aiding and abetting” that follows, we see overlaps between “primary” and “secondary” rules. See M. Milanovic, above note 2, pp. 229–301, for a discussion on the history and utility of these labels; and Bernhard Graefrath, “Complicity in the Law of International Responsibility”, Belgian Review of International Law, Vol. 29, No. 2, 1996, pp. 372–373, specifically in relation to aiding and abetting.
internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.  

The first two elements create a high threshold for triggering responsibility, as they require the assisting State to have knowledge of the wrongful circumstances and to have intended to aid or assist in the wrongful conduct. In addition, the aid or assistance provided must have “caused or contributed to the internationally wrongful act”. In this respect there is still ambiguity as to the threshold of support that triggers responsibility. The Commentaries suggest a low threshold, with even “incidental support” potentially triggering responsibility.

The level of intention or knowledge required for State responsibility for the acts of a non-State entity is not clear. When examining the question of whether Serbia was “complicit” in the genocidal acts of Bosnian Serb proxies, the ICJ considered the test as equivalent to “aiding and abetting” as provided for under Article 16, and that for an assisting State to be responsible, it must be proven that at the time the assistance was provided, the State had knowledge of the genocidal intent of the perpetrators.

It is not clear whether or how IHRL derivates from the aiding and abetting rule provided in Article 16. The UN Human Rights Committee held in 2006 that “a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party”. It did not, however, make reference to the ASR, and it is difficult to pinpoint whether this was because the Human Rights Committee considers that IHRL provides a modified knowledge/intent standard in relation to the general rule for aiding and abetting, or that IHRL provides an alternative basis for attribution of responsibility, or that responsibility stems from the primary wrong under IHRL (e.g. the obligation to prevent abuses, discussed below). Similarly, in relation to the European human rights framework under the

99 Articles on State Responsibility, above note 31, p. 66.
100 The text of Article 16 does not refer to intent, but the Commentaries are explicit in their inclusion of this requirement, which has also been adopted by the ICJ in the Bosnian Genocide case, above note 31, para. 431. See also H. P. Aust, above note 95, pp. 451–452; Erika de Wet, “Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request”, International and Comparative Law Quarterly, Vol. 67, No. 2, 2019, p. 301. Jackson and Moynihan, on the other hand, reject that “intent” is required under Article 16: see Miles Jackson, Complicity in International Law, Oxford University Press, Oxford, 2015, pp. 159–161; Harriet Moynihan, Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism, Chatham House, Royal Institute of International Affairs, London, 2016, p. 20.
101 H. P. Aust, above note 95, pp. 449–450. See also B. Graefrath, above note 98, p. 374; E. de Wet, above note 100, pp. 299–301.
102 Articles on State Responsibility, above note 31, p. 67.
104 ICJ, Bosnian Genocide, above note 31, paras 420, 423.
European Charter of Human Rights (ECHR), the European Court of Human Rights (ECtHR) considered in *Ilascu v. Moldova and Russia* that a State’s responsibility could be engaged in relation to the acts of third parties if “the acts were performed with the acquiescence or connivance of the authorities of the contracting State” – however, the Court did not expressly identify whether it was determining that the ECHR’s rule on aiding and abetting is *lex specialis* to the general rule in Article 16.106

If the requirement of knowledge and intent from Article 16 is imputed into the test for State responsibility for aiding and assisting human rights abuses of non-State actors such as community defence groups, it is unlikely to be satisfied.107 It would require that the State knew, when providing support, that the community defence group was intending on committing the abuses, that it provided the support with this in mind, and that it materially contributed to the wrongful act. It seems highly difficult to prove the wrongful intent of the State beyond reasonable doubt, and contrary to a State’s likely assertion that the support offered was intended for lawful activities of the community defence group.108

In relation to IHL, Article 1 common to the Geneva Conventions provides that States must “respect and ensure respect” for the Conventions.109 The obligation to “ensure respect” has been interpreted to include an obligation to act (a positive obligation) and to cease to act (a negative obligation) in relation to the conduct of others.110 In the *Nicaragua* case, the ICJ considered that the negative

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107 However, see Berenice Boutin, “Responsibility in Connection with the Conduct of Military Partners”, *Military Law and Law of War Review*, Vol. 56, No. 1, 2017–18, pp. 68–69. Boutin contends that the prohibition on aiding and abetting human rights violation is *lex specialis* and is triggered by the lower threshold of “actual or constructive knowledge”. The obligation to protect against and prevent human rights violations is discussed separately below.


109 See also ICRC Customary Law Study, above note 64, Rule 144.

obligation derives not only from common Article 1, but also “from the general principles of humanitarian law to which the Conventions merely give specific expression”. The International Committee of the Red Cross (ICRC) considered this negative obligation to be triggered in relation to common Article 1 if the State becomes “aware of the commission of violations of IHL by the supported forces” or if “there is an expectation, based on facts or knowledge of past patterns” that a specific operation would violate the Conventions. Under such an interpretation, common Article 1 is treated as a _lex specialis_ whereby unlike the general rule, there is no requirement of “intent”.

The circumstances creating an awareness or expectation will depend upon the regularity or predictability of the community defence group’s activities and the nature of the relationship between the State and the group. For example, if the State regularly receives into its custody persons who have been captured and ill-treated by a community defence group, this should create an expectation of continuing abuses in similar situations. A State might also acquire knowledge through other sources, such as receiving complaints about the group (e.g. complaints to the police) or through credible public channels of information such as investigative reporting by the media or international or non-government organizations. One interesting dynamic in relation to the knowledge trigger is that the obligations of the State as a whole may be triggered by the knowledge of just one of its agencies. For example, if the police investigate reports of abuses on the part of a community defence group that establish a predictable pattern of behaviour, all agencies of the State will be required to desist from providing support for the wrongful act.

An additional limitation in IHL is that both the negative and positive obligations (discussed below) are directed towards IHL violations. In relation to negative obligations, the State cannot encourage, aid or abet a third party to commit IHL violations. This would extend to any acts of members of community defence groups which amount to war crimes. It would also apply in circumstances where a community defence group has IHL obligations as an organized armed group and as a party to the conflict.

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Riccardo Pisillo Mazzeschi, who considers that in the few areas of international law where due diligence obligations could be considered to exist, there is no corresponding obligation to abstain: Riccardo Pisillo Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States”, _German Yearbook of International Law_, Vol. 35, 1992, p. 43.

111 ICJ, _Nicaragua_, above note 36, para. 220; ICRC Commentary on GC I, above note 73, Art. 1, para. 158.

112 _Ibid_.

113 _Ibid_. para. 184. See also H. P. Aust, above note 95, pp. 457–458. This is not uniformly accepted – see, for example, the discussion in T. Ruys, above note 110, pp. 27–28.

114 The obligation on States to prevent unlawful detention of persons by non-State entities is discussed below.

115 E. de Wet, above note 100, pp. 302–303, gives examples of knowledge triggers for States supporting other States.

116 Articles on State Responsibility, above note 31, Art. 4.

117 ICRC Commentary on GC I, above note 73, Art. 50, paras 2929–2930; ICRC Customary Law Study, above note 64, Rule 158, “ii. Perpetrators”.

118 See the above section entitled “Overall Control of the Group” for a discussion on community defence groups as organized armed groups. See also C. Drummond, above note 110, p. 65.
Obligation to prevent abuses and violations of IHRL and IHL

IHRL and IHL both require States to take protective measures to prevent abuses or violations of their respective bodies of law by private persons. In IHRL, the obligation to prevent violations of rights specified in the International Covenant on Civil and Political Rights (ICCPR) stems from Article 2, which provides an obligation on each State Party to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.119 This requires States to respond not only to the acts of State agents, but also to the acts of private persons.120

The obligation to prevent human rights abuses by third parties has been interpreted as a “due diligence” obligation, requiring States “to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State”.121

In IHL, similarly, a due diligence obligation to prevent IHL violations is considered to exist, stemming “from the general principles of humanitarian law”122 as well as common Article 1.123 As in IHRL, this obligation has been interpreted as extending to preventing IHL violations by private persons whose conduct is not attributable to the State.124 In IHL, the obligation is similarly

119 See also African Commission on Human and Peoples’ Rights (ACHPR), Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication No. 245/02, 39th Ordinary Session, 11–15 May 2006, para. 143; and the ECtHR’s invocation of the obligation on States to “secure to everyone within their jurisdiction the rights and freedoms” defined in the ECHR as underpinning the obligation to prevent violations, in ECtHR, El-Masri, above note 106, para. 198.


121 Human Rights Committee, General Comment No. 36, “Article 6: Right to Life”, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 21. See also Inter-American Court of Human Rights (IACtHR), Velásquez Rodríguez v. Honduras, 29 July 1988, para. 174; ECtHR, Osman v. United Kingdom, Case No. 23452/94, Merits, 28 October 1998, para. 116. By contrast, see ICJ, Corfu Channel (United Kingdom v. Albania), Merits, Judgment, 1949, ICJ Reports 1949, pp. 22–23, where the ICJ considered responsibility for the failure to act (omission) to be triggered by Albania’s knowledge of the laying of landmines. See, further, Articles on State Responsibility, above note 31, p. 35; ICJ, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Merits, Judgment, 2010, ICJ Reports 2010, para. 101.

122 ICJ, Nicaragua, above note 36, p. 114.

123 ICRC Commentary on GC I, above note 73, Art. 1, para. 167. See also K. Dörmann and J. Serralvo, above note 110, pp. 727–730. Other more specific due diligence obligations exist in IHL, for example in relation to situations of occupation under Article 43; the wounded, sick and shipwrecked in international armed conflicts; and prisoners of war: see L. Cameron and V. Chetail, above note 38, pp. 236–243. Not all accept that common Article 1 carries with it positive obligations. See, for example, Brian Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations”, International Law Studies, Vol. 92, No. 1, 2016, p. 245; but also Oona A. Hathaway and Zachary Manfre, “The State Department Adviser Signals a Middle Road on Common Article 1”, Just Security, 12 April 2016, available at: www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/.

considered to be triggered when there is a “foreseeable risk” that violations will be committed.125

The threshold for prompting the State to respond to prevent an IHL or IHLR violation is lower than that required for it to desist from “aiding and abetting” (as set out in Article 16 at least). For example, if a police station receives sporadic reports of human rights abuses by community defence groups, this may not, without further investigation, amount to “knowledge” of abuses requiring the immediate cessation of “aid or assistance”.126 However, it would prompt an obligation to act in response to the identified risk.127

The response required under both IHL and IHRL is one of conduct, not result. Under IHRL, in response to a real and immediate risk, authorities are required to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.128 The response to risk has been similarly interpreted in IHL as being dependent upon the specific circumstances, “the gravity of the breach, the means reasonably available to the State and the degree of influence it exercises over those responsible for the breach”.129

So, for example, the activities of a community defence group operating under the guise of (if not the actual) authority of the State may carry a generalized risk of harassment or exploitation of vulnerable communities. Examples of responses to reduce that risk could include strict arms control, vetting, making funding/partnerships/joint military operations conditional on compliance with a code of conduct, appropriate supervision, training, compliance mechanisms and sanctions.130 In circumstances where a community defence group has a practice of detaining persons to then hand them over to the State, the State would be required to address this, as this would prima facie involve an infringement of the detained person’s right to liberty.131 If the State wished for this practice to continue, it would need to provide appropriate protections, such

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126 But see the discussion above in relation to the ECtHR’s view of responsibility on the basis of “acquiescence or connivance”.
127 M. Hakimi, above note 120, p. 354.
128 ECtHR, Osman v. United Kingdom, Case No. 23452/94, Merits, 28 October 1998, para. 116; Human Rights Committee, above note 121, para. 21; Committee Against Torture, General Comment No. 2, “Implementation of Article 2”, UN Doc. CAT/C/GC/2, 24 January 2008, para. 18; IACtHR, Velásquez Rodríguez, above note 121, para. 175.
as a meaningful regulatory framework, vetting of persons or groups authorized to conduct the “arrest”, and ensuring accountability equivalent to that demanded of members of the State’s security services.132

If the State is providing firearms to community defence groups, this too should be considered a risk and should be accompanied with appropriate vetting of individuals, training and accountability.133 If the State authorizes a community defence group to use force, this increased risk must be matched with a commensurate response to address that risk—namely, ensuring that “strict and effective measures of monitoring and control, as well as adequate training, are in place in order to guarantee, inter alia, that the powers granted are not misused and do not lead to arbitrary deprivation of life”.134

Where community defence groups are operating without government support, the ability of the government to prevent abuses may be limited to generalized law enforcement activities. On the other hand, where the State and community defence groups are coordinating and meeting regularly and the State is providing financial support, the State can be expected to use its weight to protect people from foreseeable, immediate and real risks posed by the community defence group to the wider community.135 The greater the risk, and the greater the consequence of the risk, the greater the response required from the State within the means reasonably at its disposal.

Obligation to investigate and prosecute abuses and violations

The obligation to investigate and punish non-compliance can be seen in both IHRL and IHL as an extension of the obligation to prevent abuses and violations of these two bodies of law.136 In IHRL, this obligation is also considered implicit in the obligation to provide an effective remedy to victims of human rights violations.137 In IHL, States are obliged to investigate war crimes allegedly committed by their nationals or on their territory, and if appropriate, to prosecute the suspects.138

control as key to Germany’s non-fulfilment of its obligations to prevent the deprivation of liberty by non-State actors as well as the right to private life.

132 See O. A. Hathaway et al., above note 86, pp. 585–587; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 1984, Art. 10. For an example of a regulatory framework provided for community defence groups in Burkina Faso, see Decree No. 2020-0115, above note 35. Note that the training requirement for such “volunteers” is only two weeks.

133 Human Rights Committee, above note 121, para. 21.

134 Ibid., para. 15. In relation to best practice regarding training, see O. A. Hathaway et al., above note 86, pp. 586–587. See Brian Finucane, “Partners and Legal Pitfalls”, International Law Studies, Vol. 92, 2016, p. 426, in relation to the risks associated with partners that engage in the conduct of hostilities, including the absence of effective commanders or leaders able to exercise effective command and control over their members.

135 B. Boutin, above note 107, p. 74.

136 Human Rights Committee, above note 121, para. 21. See also Human Rights Committee, above note 120, para. 8; Inter-American Court of Human Rights, Velásquez Rodríguez v Honduras, 29 July 1988, para 176; ACHPR, above note 131, para. 22.

137 Human Rights Committee, above note 121, para. 27.

138 ICRC Customary Law Study, above note 64, Rule 158.
In IHL and IHRL, any investigation of violations must be independent, impartial, prompt, thorough, effective, credible and transparent. As the ICRC and Geneva Academy’s recently published Guidelines on Investigating Violations of International Humanitarian Law acknowledge, “[t]here should be no fundamental difference between the general principles of an effective investigation in armed conflict and outside it, as their application will depend on what is feasible in each situation”.

Conclusion

Developing a framework for assessing the potential responsibility of States in relation to the acts of community defence groups is not simply an academic exercise. In some contexts, community defence groups have become an important part of the security framework. Having a greater understanding of the State’s potential responsibility in relation to these groups can serve as an additional tool for mobilizing the State to reduce the risks associated with the work of such groups.

Quite reasonably, the instinct in assessing the obligations of a State in times of national crisis is to acknowledge the practical limitations that the State faces. Would it not be naïve to expect a State to robustly recruit, train and hold to account members of community defence groups, given that such groups are often most active when the security apparatus of the State is not well functioning? This article does not ignore the challenges that a State faces, but simply demonstrates that the operation of community defence groups providing security services is not necessarily a “simple solution” for the State. In certain circumstances addressed above, the acts of a community defence group may be directly attributable to the State. More commonly, a State will incur its own due diligence obligations to prevent IHRL and IHL violations in response to reasonably foreseeable risks associated with the community defence groups’ activities, and to investigate and, if appropriate, prosecute any violations.

In addition to reducing the risks associated with the work of community defence groups, increased State engagement with such groups may prevent them from becoming a source of future instability – another potential uncontrolled armed actor in a volatile security situation. Engaging in discussions about the State’s responsibilities can encourage from the outset a more forward-thinking assessment regarding the role of community defence groups in addressing both the immediate and future security needs of the community and the State at large.


140 ICRC and Geneva Academy, above note 139, para. 34. See also the discussion in T. Rodenhäuser, above note 131, p. 198.

141 L. Harriman, I. Drewy and D. Deng, above note 17, p. 13; D. E. Agbiboa, above note 7, pp. 18–19.
Additional Protocol II: Elevating the minimum threshold of intensity?

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Abstract

This paper examines the notion of intensity in the context of common Article 3 and Additional Protocol II (AP II) to the Geneva Conventions in order to establish whether AP II demands a different intensity threshold from the minimum threshold of intensity contemplated in common Article 3. The paper considers the question of whether the inclusion of the term “sustained” in the phrase “sustained and concerted military operations” intrinsic to the threshold in Article 1(1) of AP II introduces a temporal requirement in addition to mere protracted armed violence. The paper argues that the inclusion of the term “sustained” in Article 1(1) of AP II potentially demands prolonged protracted armed violence. The research aims to contribute to the existing literature on the notion of intensity demanded by the scope of application inherent in AP II through an interrogation of the phrase

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“sustained” military operations by employing the rules of treaty interpretation and by examining relevant case law and scholarly debate. In this way, the author hopes to contribute towards filling a lacuna with regard to the minimum threshold for intensity in the context of treaty law concerned with the classification of non-international armed conflicts.

**Keywords:** Additional Protocol II, intensity, sustained military operations, protracted armed violence, prolonged violence, duration of violence, non-international armed conflict.

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### Introduction

It is estimated that by mid-2020 there were more than fifty non-international armed conflicts in at least twenty-two different countries, of which at least six arguably meet the threshold requirements needed to trigger the application of Additional Protocol II to the Geneva Conventions (AP II).\(^1\) AP II remains significant as it is the most comprehensive treaty aimed at regulating non-international armed conflicts. It serves to supplement and develop the regime codified in common Article 3 to the Geneva Conventions.\(^2\)

This paper explores the relationship between the notion of intensity and the ability of an organized armed group to launch “sustained and concerted military

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operations” as necessitated by Article 1(1) of AP II. The paper aims to determine whether there is a necessary interaction between “sustained military operations” included in Article 1(1) of AP II and the minimum threshold intrinsic to the notion of intensity demanded to trigger the application of this treaty. The author of this contribution specifically questions whether the description “sustained military operations” presupposes that the notion of intensity demanded by AP II requires prolonged and protracted armed violence. If AP II necessitates a temporal requirement as intrinsic to its intensity requirement, it may be interpreted to mean that the notions of intensity under common Article 3 and AP II differ.

Two broad types of armed conflict exist: international armed conflict and non-international armed conflict. An international armed conflict occurs when there is fighting between the State armed forces belonging to two or more different high contracting parties, or in situations detailed in Article 1(4) of Additional Protocol I to the Geneva Conventions (AP I). Treaty law, however,

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3 Common Article 2 gives content to the notion of “international armed conflict” by determining that “[t]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” (emphasis added). In its Naganda decision of 8 July 2019, Trial Chamber VI of the International Criminal Court (ICC) defined an international armed conflict to exist “whenever there is a resort to armed force between states”: ICC, Situation in the Democratic Republic of the Congo, in the Case of The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment (Trial Chamber VI), 8 July 2019, para. 700. For a better understanding of the construct “international armed conflicts”, see Marco Sassoli, “Scope of Application: When Does IHL Apply?”, in M. Sassoli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, Edward Elgar, London, 2019, pp. 169–180.

4 The concept of non-international armed conflict is not defined in treaty law. The opposing sides in a non-international armed conflict must be either the armed forces of the territorial State opposing a non-State fighting unit or non-State fighting units opposing one another in the absence of State involvement. In the Tadić Opinion and Judgment, Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia (ICTY) determined that a non-international armed conflict in the context of common Article 3 exists when the fighting unit of the organized armed group involved in the conflict is sufficiently organized and the violence associated with the conflict is protracted in nature. ICTY, Prosecutor v. Duško Tadić AKA “Dule”, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber I), 7 May 1997, para. 562: “The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in common Article 3 focuses on two aspects of a conflict, namely the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” See also ICTY, Prosecutor v. Duško Tadić AKA “Dule”, Case No. IT-94-1-A, A.Ch, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 19 July 1998, para. 70; ICC, Ntaganda, above note 3, para. 703. For an overview of the distinction between international armed conflict and non-international armed conflict, see Kubo Mačák, Internationalized Armed Conflicts in International Law, Oxford Monographs in International Humanitarian and Criminal Law, 2018, pp. 9–23.

5 Common Article 2 to the Geneva Conventions gives content to the difference between the actors involved in an armed conflict that is deemed to be either “international” or “not international in character” within the scope of application of the Geneva Conventions: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

6 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978). AP I expands the notion of international armed conflict to include armed conflicts in which peoples oppose colonial governments, racist regimes or alien occupation, or are asserting a right to
provides for two distinct categories of non-international armed conflict. The first category is non-international armed conflicts that meet the minimum threshold requirements under common Article 3. The second category refers to those non-international armed conflicts that satisfy the material scope of application under AP II. The application of common Article 3 is triggered once an armed conflict not of an international character comes into existence. The Geneva Conventions do not define the concept “armed conflict not of an international character”, and the wording of common Article 3 does not explain which constitutive elements underpin it. In the Tadić case, however, the definitional criteria that serve to determine the existence of a non-international armed conflict or a common Article 3-type armed conflict were associated with two notions: the notion of intensity, and the notion that the organized armed group fighting in the conflict must possess a certain degree of organization.

It should be highlighted that the Tadić threshold is also the threshold that triggers the application of the rules of customary international humanitarian law (IHL) applicable to all non-international armed conflicts. The corpus of self-determination. Article 1(4) of AP I determines: “The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” The two categories are common Article 3-type non-international armed conflict and AP II-type non-international armed conflict. It is important to mention that the existence of distinct categories under treaty law does not mean that more than one category of non-international armed conflict exists under IHL.

Trial Chamber I of the ICTY refined the Tadić formula (see ICTY, Tadić, Decision on the Defence Motion, above note 4, para. 70) to serve as the definitive criterion for determining the existence of a non-international armed conflict under common Article 3, specifically in the Tadić Opinion and Judgment, above note 4, para. 562. For a discussion of the organizational criterion, see Martha M. Bradley, “Revisiting the Notion of ‘Organized Armed Group’ in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements”, African Yearbook on International Humanitarian Law, 2018, pp. 55–58. For an overview of the intensity requirement under common Article 3, see Martha M. Bradley, “Revisiting the Notion of ‘Intensity’ Inherent in Common Article 3: An Examination of the Minimum Threshold which Satisfies the Notion of ‘Intensity’ and a Discussion of the Possibility of Applying a Method of Cumulative Assessment”, International Comparative Law Review, Vol. 17, No. 2, 2017, pp. 13–27.

See Article 1(1) of AP II, which determines its scope of application.

See Yoram Dinstein, Non-International Armed Conflicts in International Law, Cambridge University Press, Cambridge, 2014, p. 38. Dinstein describes this moment when the application of common Article 3 is triggered thusly: “Whenever the preconditions of a NIAC [non-international armed conflict] are met, the first threshold is crossed. This threshold marks the timeslot when the bare bones of intra-state violence suffice for it to be classified as a NIAC. Once they are past the first threshold, common Article 3 – given the bland formula used in its chapeau … – is activated.”


ICTY, Tadić, Opinion and Judgment, above note 4, para. 562.

M. Sassòli, above note 3, p. 181.
customary law includes the rules of AP II that have achieved customary international law status. The two categories of non-international armed conflict that are distinguished exist in the realm of treaty law alone.

The second category of non-international armed conflict under treaty law refers to those armed conflicts that satisfy the scope of application under AP II. Articles 1(1) and 1(2) of AP II contain the material scope of application of this instrument. The parties to AP II-type non-international armed conflicts differ from the first category of non-international armed conflict in that one party to the conflict must be the State armed forces of the territorial State and the other an organized armed group that satisfies the requirements listed in Article 1(1) of AP II. Article 1(1) establishes that for AP II to find application to organized armed groups, an organized armed group should be under responsible command and should exercise control over territory. Territorial control should be exercised to the extent that the organized armed group can carry out concerted military operations and is able to implement AP II. Article 1(2) determines at the outset that situations of internal disturbance and tension, such as riots or isolated and sporadic acts of violence, are excluded from the material scope of application of AP II, as such situations do not constitute armed conflicts.

At this juncture it must be mentioned that the notion of “intensity” is not defined in any treaty. The notion was introduced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadić case. The notion of intensity serves simply to provide for a minimum level of fighting which must be present in order to satisfy the second constitutive element – the threshold of violence – of a non-international armed conflict. The purpose of the minimum threshold of violence test enshrined in the notion of “intensity” under AP II is to...

14 See Article 1(1) of AP II, which determines its scope of application.
15 AP II, Art. 1(1): “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”
identify two scenarios: situations that are regulated by domestic and human rights law (as depicted in Article 1(2) and excluded from the ambit of AP II) and conflicts that are regulated by AP II (arguably, the notion determined by Article 1(1) of AP II). Accordingly, Article 1(2) identifies scenarios that resemble an armed situation but where the fighting is insufficiently violent for it to elevate such situations above the law enforcement paradigm (regulated by domestic law and human rights law) and into the sphere of non-international armed conflict in general.19

This paper argues that the additional positive criteria listed in Article 1(1) of AP II do not relate exclusively to the organizational criteria necessary to transform the non-State party to the conflict into an organized armed group.20 At least, the requirement of the ability of an organized armed group to launch sustained and concerted military operations relates to the notion of “intensity”. 21

This paper is structured as follows. The following section of the paper explains why a better understanding of the notion of intensity under AP II is needed. The third section explores the notion of intensity under common Article 3 by examining specifically the relationship between protracted armed violence and the element of duration. As one of the research purposes of this paper is to establish whether or not AP II demands a higher or different intensity threshold than that insisted upon by common Article 3, this is a logical point of departure. The fourth section of the paper analyzes the way in which the ability of organized armed groups to carry out sustained and concerted military operations informs the notion of “intensity” necessitated to trigger the application of AP II. Therefore, this section aims to determine the content of the minimum threshold demanded by the notion of intensity under AP II and whether duration is a constitutive element of such intensity. In the fifth section, the paper compares the minimum threshold requirements associated with the notion of intensity under common Article 3 and AP II through the lens of duration and aims to determine whether Article 1(1) of AP II demands a level of fighting greater than “protracted armed violence”. At stake is an assessment of whether the inclusion of the term

19 International Law Association, above note 18, p. 15, fn. 67. For a discussion of the law enforcement paradigm as applicable to isolated and sporadic acts of violence, see Y. Dinstein, above note 10, pp. 22–23; A. J. Carswell, above note 11, p. 60, para. 2.3.3.5; 2016 Commentary on GC I, above note 18, para. 18, para. 431, fn. 138.

20 Factors indicating whether the organizational requirement has been met have been categorized to include the existence of a command structure; the military capacity of the armed group; the logistical capacity of the armed group; the existence of an internal disciplinary system and the ability to implement IHL; and the armed group’s ability to speak with one voice on its own behalf. ICTY, Prosecutor v. Boškoski and Tarculovski, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras 199–203; ICTY, Prosecutor v. Ramush Haradinaj Idriz Balaj Lahj Brahimaj, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 52. These factors, however, are indicative only, and it has not been clarified whether any of them are constitutive. ICTY, Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on the Motion for Judgment of Acquittal (Trial Chamber), 16 June 2004, paras 23–24.

“sustained” in the construct “sustained military operations” in AP II demands that the armed violence is “prolonged” as well as “protracted”. Lastly, a conclusion is drawn in the final section.

As the paper seeks to determine the content of the notion of “intensity” in the context of AP II specifically, the law of treaty interpretation as set out in Articles 31–33 of the Vienna Convention on the Law of Treaties (Vienna Convention) is frequently employed to facilitate the interpretation of the relevant provisions of these instruments. This methodology, which foregrounds doctrinal law, is employed together with an assessment of case law in order to offer a deeper understanding of the benchmark test inherent in the notion of intensity.

The value of clarifying the notion of intensity

Conflict classification is important.22 The armed forces belonging to the territorial State on whose territory a conflict is occurring may operate under the law of international armed conflict or the law of non-international armed conflict,23 and their conduct is governed by different rules depending on which law applies. Furthermore, in the event that the law of non-international armed conflict applies, different rules pertain depending on whether common Article 3 or AP II applies.24 The application of the regime under AP II, as part of the corpus of treaty law, for example, provides for more extensive obligations on parties to the conflict, which translate to the enhanced protection of civilians. Even though the majority of the norms codified in AP II are included in the corpus of customary IHL, and consequently apply to all non-international armed conflicts once the Tadić threshold has been met, the need for application of AP II under treaty law remains with regard to those provisions that fall outside the realm of customary IHL.

This paper specifically undertakes an inquiry into the notion of intensity under AP II, and the justification for this inquiry is threefold.

22 For a general overview of the importance of conflict classification, see M. M. Bradley, “Revisiting the Notion of ‘Organized Armed Group’”, above note 8, pp. 55–58; Carl Marchand and Gian Luca Beruto (eds), The Distinction Between International and Non-International Armed Conflicts: Challenges for IHL? 38th Round Table on Current Issues of International Humanitarian Law (San Remo, 3–5 September 2015), International Institute of Humanitarian Law, 2016, pp. 46–49; M. Sassoli, above note 3, pp. 168–203. For an overview of the differentiation of IHL applicable to international and non-international armed conflicts as well as the areas of contention owing to this differentiation, see Marco Sassoli, “International and Non-International Armed Conflicts”, in M. Sassoli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, Edward Elgar, London, 2019.

23 For a discussion of the meaning of the term “the law of non-international armed conflict”, see Y. Dinstein, above note 10, p. 3. For a breakdown and comprehensive discussion of the sources of the law of non-international armed conflict, see S. Sivakumaran, above note 18, pp. 101–152; L. Moir, above note 2, pp. 30–210. Under the law of non-international armed conflict, the legal rules applicable to a common Article 3-type conflict apply to all categories of non-international armed conflict.

The first justification is of a legal nature and highlights an existing gap in the understanding of what the minimum threshold of intensity is that is necessary to establish an AP II-type armed conflict. A survey of the existing literature reveals that scholarly work regarding the application of AP II is limited in scope.25 Although a select few authors clarify the meaning of the additional criteria that underpin the notions of “organized armed groups” and, to an even lesser extent, “intensity” for this instrument, questions with regard to the exact scope of some of these obligations remain unanswered.26 There are limited sources available that examine the criteria listed in Article 1(1) of AP II as it relates to the notion of intensity.

The second justification is that the battlefield reality demands it.27 AP II serves to supplement and develop the regime codified in common Article 3,28 and it is the only treaty that exclusively regulates and provides for obligations and therefore offers protection to civilians in non-international armed conflicts.29 This treaty has been in force for more than forty years, and its application remains essential. The need for AP II is evidenced by the desperate situation prevailing on the African continent as multiple complex conflicts coexist in single territories,30 such as the ongoing conflicts in the Central African

25 The available literature concerning AP II is limited compared to scholarly work about common Article 3; an insightful work into AP II is S. Junod, above note 21, p. 29. This neglect may be either because some scholars consider these additional criteria for its scope of limitation to be clear, or because this instrument is not frequently used. For a discussion of the application of AP II in practice, see L. Moir, above note 2, pp. 119–132. As this treaty is the most comprehensive instrument regulating the law of non-international armed conflict, an objective assessment of whether or not an AP II-type armed conflict exists is critical. For an overview of the content of this treaty, see L. Zegveld, above note 2, pp. 9–34; Antonio Cassese, “The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts”, International and Comparative Law Quarterly, Vol. 30, No. 2, 1981, available at: www.jstor.org/stable/759535; L. Moir, above note 2, pp. 109–132.


27 For an overview of contemporary armed conflict, see 2018 War Report, above note 1.

28 AP II, Art. 1(1): “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 …” (emphasis added). For a discussion of the drafting history of AP II as well as an analysis of its content, see L. Moir, above note 2, pp. 89–132; L. Zegveld, above note 2, pp. 9–34; A. Cassese, above note 25, p. 416. In essence, AP II expands on the contents of common Article 3 by including detailed rules regulating fundamental guarantees of humane treatment (Articles 4 and 5); judicial guarantees (Article 6); the treatment of the wounded, sick and shipwrecked (Articles 7 and 8); and the use of the red cross emblem (Article 12). AP II provides specific rules for the protection of children during non-international armed conflicts (Article 4(3)) and offers rules that provide for the protection of medical personnel and units as well as enabling medical personnel to perform their duties (Articles 9–12). AP II further provides rules for the conduct of hostilities, including for the protection of the civilian population against attacks (Article 13); for protecting objects indispensable to the survival of the civilian population (Article 14); for offering protection to works and installations harbouring dangerous forces (Article 15); and for protecting cultural objects (Article 16). AP II also prohibits the forced movement of civilians (Article 17) and allows for and regulates relief operations (Article 18).


30 Such complex conflicts exist outside the African continent—for instance, the situation in Syria. For a description of the situation in Syria as at the end of 2018, see 2018 War Report, above note 1, pp. 123–135.
Republic, the Democratic Republic of the Congo, Mali and South Sudan. As mentioned earlier, the application of AP II, specifically, can offer relief as it provides for more extensive obligations and therefore better protection than that under common Article 3 alone to civilians as well as to parties to the conflict.

Lastly, clear guidance facilitating the categorization of a situation is also necessary from an operational perspective. This is because military commanders and legal advisers face the task of planning operations in accordance with the applicable legal framework. Therefore, it is possible that the armed forces belonging to the territorial State on whose territory a conflict is occurring may operate under the law of international armed conflict or the law of non-international armed conflict, in which a distinction is made between the rules contained in common Article 3 and in AP II, depending on the enemy they engage.

Protracted armed violence and duration

The Appeals Chamber in Tadić understood “intensity” to require the level of violence to match that of “protracted armed violence”. Subsequent case law echoes this minimum threshold test. In the Tadić case, Trial Chamber I also

31 For an overview of the nature of the conflict in the Central African Republic and the parties involved, see ibid., pp. 82–92.
32 For an overview of the nature of the conflict in the Democratic Republic of the Congo and the parties involved, see ibid., pp. 93–101.
33 For an overview of the nature of the conflict in Mali and the parties involved, see ibid., pp. 102–116.
34 For an overview of the nature of the conflict in South Sudan and the parties involved, see ibid., pp. 116–123. The author wishes to note that the classification of situations by the Geneva Academy as cited in notes 30 to 34 should not be understood as representing the position of the ICRC.
37 For a discussion of the meaning of the term “the law of non-international armed conflict”, see Y. Dinstein, above note 10, p. 3. For a breakdown and comprehensive discussion of the sources of the law of non-international armed conflict, see S. Sivakumaran, above note 18, pp. 101–152; L. Moir, above note 2, pp. 30–210.
38 See M. M. Bradley, “Revisiting the Notion of ‘Organized Armed Group’”, above note 8, p. 57. It is important to emphasize, however, that at all times customary IHL also applies.
39 ICTY, Tadić, Decision on the Defence Motion, above note 4, para. 70. See also 2016 Commentary on GC I, above note 18, paras 423–435.
considered the use of “protracted armed violence” as a threshold as being “used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities which are not subject to international humanitarian law”.41 This finding echoes the intent of the drafters of common Article 3.42

The 2016 ICRC Commentary on Geneva Convention I (GC I) considers the understanding of the notion of intensity as construed in the Tadić case to be widely accepted.43 The 2016 Commentary interprets the minimum threshold of the intensity of violence test included in common Article 3 to be at a point at which situations formerly regarded as instances of “sporadic violence” are reclassified as being armed conflicts not of an international character in that they come to resemble “protracted armed violence”.44 In this regard, arguably the nature of the violence, a combination of factors associated with the notion of intensity inherent in the conflict in question, is relevant rather than the duration of the conflict alone. A contemporary understanding of the notion of “intensity” thus depends on the meaning of the term “protracted armed violence”.45 This part of the analysis now turns to comment on the minimum threshold of violence that has to be met in order to satisfy the notion of “protracted armed violence”.

The drafting history of the Geneva Conventions indicates that at the time it was the understanding of the drafters that a very high level of violence is required for

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41 ICTY, Tadić, Opinion and Judgment, above note 4, para. 562 (emphasis added). See also ICTY, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Judgment (Appeals Chamber), 17 December 2004, para. 341, in which the Court stated that the significance of the term “protracted” in relation to the term “violence” stems from the aim of excluding cases of mere civil unrest or single acts of terrorism from cases of armed conflict not of an international character. This formulation aligns with the wording adopted in Article 1(2) of AP II.

42 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section B, Federal Political Department, Berne, 1949 (Final Record), p. 45, available at: www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html: “[I]t was indispensable to distinguish between rebellion, which was more than an uprising but had not yet taken the proportion of a civil war, as was defined in international law.” Cf. ICTY, Boškoski, above note 20, para. 175; ICTY, Haradinaj, above note 20, para. 39.

43 2016 Commentary on GC I, above note 18, para. 435. The 2016 Commentary on GC I has been consulted to aid the interpretation of the construct “protracted armed violence”. Commentaries are important analytical tools, constituting “[a] teaching that explores the meaning of the provision—looking at its object and purpose, situating it in context, considering its drafting history, analysing subsequent practice, and canvassing relevant literature”. The ICRC Commentaries constitute an especially invaluable subsidiary source. Sandesh Sivakumaran, “The Influence of Teachings of Publicists on the Development of International Law”, International and Comparative Law Quarterly, Vol. 66, No. 1, 2017, p. 15. These Commentaries fill the role of publicist within the ambit of Article 38(1)(d) of the Statute of the International Court of Justice, TS No. 993, 26 June 1945 (entered into force 24 October 1945). See S. Sivakumaran, above note 18, pp. 3–5, 15–16, for an insightful review of the value of the ICRC’s scholarly work in general and its Commentaries in particular.

44 2016 Commentary on GC I, above note 18, para. 427.

The drafters imposed the minimum threshold of violence test applicable to common Article 3 at the time of drafting to demand the same level of intensity as was associated with the ferocity in fighting of either civil wars or international wars. However, no further clarification is provided for by the drafting history, nor is reference made to protracted or not. The indicative factors for protracted violence as was associated with the ferocity in fighting of either civil wars or international wars. However, no further clarification is provided for by the drafting history, nor is reference made to protracted or not. The indicative factors for “protracted violence” developed by the ICTY are considered an important contribution, and other international courts and tribunals have since adopted these. Importantly, these indicative factors as forming part of an assessment of the intensity requirement that the evaluation of this threshold requirement was not dependent on a subjective judgment by the parties to the conflict but that it was an objective test.”

See Bradley, who provides examples of international courts and tribunals employing this threshold test:

46 Final Record, above note 42, pp. 12, 42–43, 129; A. Cullen, above note 45, pp. 27–51; G. I. A. D. Draper, “Humanitarian Law and Internal Conflicts”, Georgia Journal of International and Comparative Law, Vol. 13, 1983, pp. 263–268. See also International Law Association, above note 18, pp. 42–43. The drafting history is employed because the application of Article 31 of the Vienna Convention was not helpful. Article 32 of the Vienna Convention provides that the drafting history may be employed as a supplementary means of interpretation.

47 It appears that the drafters deemed the term “armed conflict not of an international character” to be synonymous in meaning with the contemporary understanding of the term “civil war”. A. Cullen, above note 45, pp. 42–43: “The Report drawn up by the Joint Committee and presented to the Plenary Assembly interprets the term ‘armed conflict not of an international character’ as having the same meaning as ‘civil war’. … Although some delegations favoured a more flexible and expansive approach to the application of international humanitarian norms, it appears that none contested or objected to the use of the term ‘civil war’ as synonymous with ‘armed conflict not of an international character’.” (emphasis added). Final Record, above note 42, p. 129: “At the present Conference, the question immediately arose of deciding what was to be understood by ‘armed conflict not of an international character which may occur in the territory of one of the High Contracting Parties’. It was clear that this referred to civil war, and not to a mere riot or disturbances caused by bandits. States could not be obliged, as soon as a rebellion arose within their frontiers, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied” (emphasis added). The concept of a “civil war” was understood to be a conflict which in many instances was similar to an international armed conflict contemporary to the time of drafting, but which took place within the borders of one country and where only one of the armed forces confronting each other was the armed force of a state. Final Record, above note 42, p. 11: “As to civil war, the term ‘armed conflict’ should not be interpreted as meaning ‘individual conflict’, or ‘uprising’. Civil war was a form of conflict resembling international war, but taking place inside the territory of a state. It was not a conflict between a number of individuals.”

48 ICTY, Boskoski, above note 20; ICC, Lubanga, above note 40, para. 538; ICTY, Haradinaj, above note 20, para. 49; 2016 Commentary on GC I, above note 18, para. 432. For a discussion of case law promoting a better understanding of the notion of “intensity” under Common Article 3, see M. M. Bradley, “Revisiting the Notion of ‘Intensity’”, above note 8, pp. 17–27.

49 See Bradley, who provides examples of international courts and tribunals employing this threshold test: “Other international tribunals and courts, such as the International Criminal Court (ICC), have confirmed the indicative factors developed by the International Criminal Tribunal for the Former Yugoslavia in relation to ‘protracted violence’. For instance, in the Lubanga case the ICC contributed to the jurisprudence by explaining its understanding of ‘protracted violence’ in relation to Common Article 3. The ICC utilized the indicative factors used by Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Mrksic case to determine whether the violence was sufficiently protracted. The International Criminal Tribunal for Rwanda referred to these indicative factors as forming part of an ‘evaluation test’ which it employed to determine whether situations were mere internal disturbances and tensions or whether they constituted armed conflicts in the legal sense. In the Akayesu case Chamber I of the International Criminal Tribunal for Rwanda concluded in its assessment of the intensity requirement that the evaluation of this threshold requirement was not dependent on a subjective judgment by the parties to the conflict but that it was an objective test.” M. M. Bradley, “Revisiting the Notion of ‘Intensity’”, above note 8, pp. 21–22, referring to ICC.
factors are not conditions that need to exist concurrently.\(^{50}\) Duration in itself, for example, is not a decisive indicator but should be considered when making an assessment of whether or not a situation is sufficiently intense to satisfy the notion of “intensity” in terms of common Article 3.\(^{51}\)

The status of the requirement of “duration” as merely an indicative factor has been subjected to some scrutiny.\(^{52}\) The ICRC Commentary on GC I responds to this enquiry by explicitly posing the question of whether duration is an independent indicative criterion of “protracted armed violence”,\(^{53}\) and concludes that duration is but one element that should be considered in the assessment of the threshold intensity of armed confrontation.\(^{54}\) It specifically offers the *La Tablada* case, decided by the Inter-American Commission on Human Rights (IACHR), as an example of a situation where an international commission considered a short-lived armed confrontation (lasting merely thirty hours) to be a non-international armed conflict because other indicative factors of intensity, absent duration, were present to justify this conclusion.\(^{55}\)

In *La Tablada*, the IACHR had to determine whether an armed confrontation lasting a mere thirty hours was an example of an internal disturbance “or whether this confrontation constituted an armed conflict not of an international character”.\(^{56}\) In its evaluation of whether this incident satisfied the intensity requirement, the Commission considered a number of factors, including the concerted nature of the hostile acts and the nature and level of the violence attending the events in question.\(^{57}\) The Commission concluded that despite its brief duration, the clash between the Argentine armed forces and militants had triggered the application of common Article 3 and satisfied the intensity requirement by meeting the threshold of protracted violence.\(^{58}\)

Sivakumaran comments on the relation between the factors of “intensity” and “duration” as evaluated in the *La Tablada* case.\(^{59}\) He is of the opinion that if duration alone were to serve as an intensity threshold test, then a situation such as the incident at the La Tablada military base would not be deemed to meet the requirement of “protracted armed violence”.\(^{60}\) He stresses that duration alone cannot be determinative and raises the practical consideration that if duration

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\(^{50}\) M. M. Bradley, “Revisiting the Notion of ‘Intensity’”, above note 8, pp. 21–22; see also p. 19.

\(^{51}\) See M. M. Bradley, “Revisiting the Notion of ‘Intensity’”, above note 8, pp. 22–27, for a summary of the debate.

\(^{52}\) See 2016 Commentary on GC I, above note 18, paras 438–44; S. Sivakumaran, above note 18, pp. 167–8, paras 88–97.

\(^{53}\) For a discussion of the relationship between “duration” and “intensity”, see 2016 Commentary on GC I, above note 18, paras 43–44; S. Sivakumaran, above note 18, pp. 167–8, paras 88–97.

\(^{54}\) See 2016 Commentary on GC I, above note 18, para. 440.


\(^{56}\) *Ibid.*

\(^{57}\) *Ibid.*

\(^{58}\) *Ibid.*

\(^{59}\) S. Sivakumaran, above note 18, pp. 167–169.

\(^{60}\) *Ibid.*
was indeed determinative, any assessment of the nature of a situation could be made only after a period of time had elapsed. According to Lewis, jurisprudence illustrates that the duration dimension is often factored into the “broader analysis of the intensity of hostilities” as but a single criterion which is taken into account in the assessment of the existence of a non-international armed conflict. Dinstein cautions that the intensity of violence is not an alternative to protracted hostilities, and emphasizes that the approach followed in the Haradinaj case is correct. He argues that if duration was meant to be a compulsory indicator of “protracted armed violence”, then the Tadić formulation would have included it specifically as a third criterion. Dinstein is of the view that according to Tadić there are two threshold tests only, suggesting that duration is only one indicator of the existence of protracted armed violence.

Kebebew and Niyo question whether an instant non-international armed conflict is possible – or, to phrase it differently, if some time needs to elapse prior to the classification of an ongoing non-international armed conflict – and whether this is the case in the ongoing situation in northern Ethiopia, where tensions heightened subsequent to an attack by the Tigray People’s Liberation Front (TPLF) against the Ethiopian National Defence Force’s (ENDF) Northern Command. These authors employ the indicators highlighted in the Haradinaj case to assess that due to these factors at the time of publication of their blog post, protracted armed violence existed and common Article 3 applied to the situation. At the time of writing their blog post, the situation in Ethiopia as assessed by Kebebew and Niyo was still evolving. They conclude that to draw a parallel between the facts of the case in northern Ethiopia and the events that transpired in La Tablada means that an instant non-international armed conflict is possible – in other words, that time need not lapse prior to classifying an ongoing non-international armed conflict.

61 Ibid. Moir agrees with Sivakumaran. Moir interprets the case law of the ICTY to suggest that, in an assessment of protracted armed violence, indicative factors concerned with the method of fighting should bear more weight than duration, and confirms that he also considers duration to be only one factor. Lindsey Moir, “The Concept of Non-International Armed Conflict”, in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), The 1949 Geneva Conventions: A Commentary, Oxford University Press, Oxford, 2015, p. 410, para. 53.


63 Y. Dinstein, above note 10, pp. 34–35.

64 Ibid.

65 Ibid.


67 Ibid. The factors that Kebebew and Niyo identified included the death toll, injuries and property damage; the involvement of the ENDF; the TPLF’s use of air missile systems against airports in Behairdar and Gondar; and the recognition that more than 27,000 refugees had crossed into South Sudan at the time of publication of their blog post.

68 Ibid.
In the opinion of this author, the assessment made by Kebebew and Niyo that the situation in Ethiopia constitutes a protracted armed conflict despite its brevity (at the time of their writing) is indeed credible. This is because, as they point out, duration is but an element of protracted armed violence and not a deciding factor. This author therefore cautiously agrees that it is possible to make a determination of the nature of the conflict early on, and further, that it is possible that the situation in Ethiopia constitutes a non-international armed conflict.

The author of this contribution, however, cautiously questions the conclusion reached by Kebebew and Niyo that owing to the existence of an instant non-international armed conflict, the application of AP II is triggered so early on in an ongoing non-international armed conflict. Kebebew and Niyo maintain that “one could plausibly argue that the requirement for a temporal factor in determining the intensity threshold of violence is overridden by the clear, short, but amplified intensity and concentration of violence in the Tigray region”. The application of those rules of AP II that have attained customary status is correct in law, but an instant non-international armed conflict, or a conflict which reaches the Tadić requirements so quickly, would not necessarily trigger the application of AP II as a treaty. Whether or not AP II as a treaty finds application to a situation of so-called “instant” non-international armed conflict will depend on whether or not duration is required in addition to protracted armed violence in order to fulfil the notion of intensity under AP II. The relationship between the notion of intensity and the phrase “sustained military operations” is explored in the following section.

In summary, in the context of common Article 3 the notion of “intensity” required by common Article 3 is satisfied if the violence is of a protracted nature. Whether or not the level of violence that results from a conflict situation is sufficient to be equated to “protracted armed violence”, as contemplated in common Article 3, should be assessed on a case-by-case basis. The duration of the conflict may be a factor to be taken into consideration, but it is neither a compulsory nor a determinative element in an assessment.

The relationship between the terms “sustained military operations” and “intensity”: Understanding the term “sustained”

This section assesses what factor is operative in terms of the “sustained” nature of military operations in order to determine the minimum threshold of intensity that a situation has to fulfil in order to be categorized as an AP II-type non-international armed conflict.
armed conflict.73 This section does not analyze the word “concerted”, as this term closely relates to the notion of an “organized armed group”.74 The ordinary meaning of “concerted” essentially relates to the organisational ability of the organized armed group to plan sustained operations, and this will not be discussed here in further detail.75 The two elements of “sustained” and “concerted” are intertwined; military operations have the quality of being “sustained”, as they are planned (i.e., “concerted”).76

The adjective “sustained”, however, determines the level of intensity that a situation has to satisfy in order to trigger the application of AP II.77 The following analysis seeks to identify the minimum threshold of violence requirement that is suggested by the use of this word.78

At this juncture Article 1(1) is revisited to examine the term “sustained” in order to promote a better understanding of the notion of “intensity”, specifically as it is associated with sustained military operations. At the outset it should be clarified that the common Article 3 requirements (including the notion of “intensity”) are inherent in AP II.79

However, these common Article 3 benchmarks in themselves are not sufficient for AP II to apply. Four other requirements listed in Article 1(1) of AP II should be fulfilled in addition to the common Article 3 understanding of the Tadić benchmarks.80 It is evident that the notion of “intensity” inherent in AP II it is military operations (which can include preparations to launch a military attack) that need to be continuous, which is different from requiring that the attacks (violence) be continuous.

73 AP II, Art. 1(1).
74 The adjective “concerted” is defined as “agreement in a plan, or design; union formed by such agreement”; C. T. Onions (ed.), Shorter Oxford English Dictionary on Historical Principles, 3rd ed., Clarendon Press, Oxford, 1964, p. 361. Roget’s Thesaurus regards the term as synonymous with “concordant”, “synchronized” and “like-minded”; George Davidson (ed.), Roget’s Thesaurus, Penguin Books, London, 2006, para. 24. These terms highlight the collective nature of the armed group that is required to coordinate the military operation jointly. The phrase could read “synchronized military operation”. “Synchronized relates to the term “organized”; C. T. Onions, p. 361. The literal interpretation of “sustained and concerted military operations”, therefore, implies that an armed group under responsible command exercises such control over a part of its territory as to enable such an armed group to carry out continuous and organized or planned military operations (cf. AP II, Art. 1(1)). The ICRC gave content to its understanding of the term “sustained and concerted military operations” by proposing the following definitions: “‘Sustained’ (in French the reference is to opérations continuées) means that the operations are kept going or kept up continuously. The emphasis is therefore on continuity and persistence. ‘Concerted’ (in French: concertées) means agreed upon, planned and contrived, done in agreement according to a plan. Thus we are talking about military operations conceived and planned by organized armed groups.” Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949, ICRC, Geneva, 1987 (ICRC Commentary on APs), para. 4469. This interpretation echoes the literal interpretation that the term “concerted” relates to the organizational requirement.
75 ICRC Commentary on APs, above note 74, para. 4469. For a general overview of the minimum threshold requirements inherent in “concerted” military operations, see Martha M. Bradley, “Revisiting the Scope of Application of Additional Protocol II: Exploring the Inherent Minimum Threshold Requirements”, African Yearbook of International Humanitarian Law, 2019, pp. 105–111.
76 Cf. ICRC Commentary on APs, above note 74, para. 4469.
77 AP II, Art. 1(1).
78 Cf. ibid., Art. 1(1).
80 Ibid.
requires “protracted armed violence”, but what is questionable is whether Article 1 (1) necessitates something more than protracted armed violence alone. The fact that “protracted armed violence” is observed to be present satisfies the benchmark for the minimum degree of fighting needed to trigger common Article 3 as well as being a prerequisite under AP II, but the mere presence of protracted armed violence is insufficient, as is suggested by the use of the term “sustained”. “Sustained” is interpreted as adding a constitutive requirement to the notion of “intensity” for the application of AP II to be triggered; essentially, an additional factor by which the fighting is prolonged to the demand of a “protracted armed conflict”. The term “sustained” establishes that the demand represents a notion of “intensity” which is greater under AP II and implies that the benchmark test is to be “sustained” “protracted armed violence”.81

Black’s Law Dictionary defines the adjective “sustained” as “support[ed] or maintain[ed], especially over a long period”.82 The word “maintain” refers to the continuation of an action.83 A first reading of the word “sustained” seems to impose the element of duration on military operations and, consequently, the prolonging of intense violence resulting from these military operations. If Articles 1(1) and 1(2) of AP II are read in context, the fact that the literal meaning of “sustained” necessitates an element of prolongation of violence associated with military operations makes sense, as Article 1(2) clearly contrasts below-the-threshold situations, reflecting a low degree of violence for a brief period of time only, with “sustained military operations”.84

Article 33 of the Vienna Convention addresses the issue of the interpretation of treaties that are authenticated in two or more languages.85 At this point in the analysis, Article 33 proves helpful. Since the English-language version of AP II does not offer clarity,86 a look at another authentic text may shed light on the issue of “sustained military operations”. Article 33 determines that texts bear equal interpretive weight in each authenticated language,87 consequently, the terms of a treaty are presumed to have the same meaning in

81 AP II, Art. 1(1), read together with Art. 1(2).
84 See Y. Dinstein, above note 10, pp. 21–22, for a discussion of below-the-threshold violence.
86 AP II, Art. 1(1).
87 Vienna Convention, Art. 33(1): “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”
each authentic text. AP II has been authenticated in English, Arabic, Chinese, Spanish, French and Russian.

AP II was negotiated in both English and French. The French authenticated version of this Protocol is consulted in accordance with Article 31 of the Vienna Convention to establish whether an interpretation of the French text promotes a better understanding of the intended ordinary meaning of the word “sustained”. The French text refers to “opérations militaires continués”, which is translated into English as “sustained military operations”. Le Petit Larousse dictionary defines the term “opérations” in a military context “as ensemble des combats et des manoeuvres exécutés par les forces militaires dans une région en vue d’atteindre un objectif précis”. The adjective “continué” is defined as “sans interruption, dans le temps ou dans l’espace”. In light of the above definitions, the English translation of the term “opérations militaires continués” refers to fighting and military manoeuvres executed in a region in pursuit of a specific military objective which transpire without interruption in either time or in space. In this context, the adjective “continué” is synonymous in meaning to the English words “continuous”, “constant” or “unremitting”, emphasizing the temporal rather than spatial dimension of this term. The ICRC Commentaries confirm the literal interpretation of the English and French texts – namely, that the term “sustained” necessitates an element of the prolongation of violence resulting from the conflict, that the violence must be intense, and that such intensity must be ongoing over a period of time. The ICRC considers the

88 Ibid., Art. 33(3): “The terms of the treaty are presumed to have the same meaning in each authentic text.”
89 AP II, Art. 28: “The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish text are equally authentic, shall be deposited with the depository, which shall transmit certified and true copies thereof to all the Parties to the Conventions.”
90 See O. Dorr, above note 85, p. 594, para. 21: “That every authentic text is in a formal sense equally authoritative does not, however, mean that in practice, all of them would be attributed the same weight. For example, if the treaty was negotiated and drafted in only one of the authentic languages, it would seem natural, as a feature of practical usage, to place more reliance on that text as if it is least ambiguous.” Dorr argues that Article 33 allows some leeway as to practical considerations when interpreting a treaty provision where there is more than one authentic text. In the present case, this author chose to consider the French text as it was one of the negotiating languages of the treaty.
91 AP II (French version), Art. 1(1): “Article premier. Champ d’application matériel. 1. Le présent Protocole, qui développe et complète l’article 3 commun aux Conventions de Genève du 12 août 1949 sans modifier ses conditions d’application actuelles, s’applique à tous les conflits armés qui ne sont pas couverts par l’article premier du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I) 2, et qui se déroulent sur le territoire d’une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d’un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu’il leur permette de mener des opérations militaires continues et concertées et d’appliquer le présent Protocole” (emphasis added).
93 “[W]ithout interruption, in time or in space.” Ibid., p. 287.
94 This translation was done with the aid of the Larousse Dictionnaire Général: Francais/Anglais, Anglais/ Francais, Larousse, Paris, 1994.
95 Le Petit Larousse, above note 92, p. 287.
96 ICRC Commentary on APs, above note 74, para. 4469.
formulation to be an objective assessment, and that the drafters wanted to avoid the application of subjective judgement to AP II’s material scope of application.97

There is only one reference in the drafting history of AP II that provides limited insight into the relationship between the notion of “intensity” and the duration of hostilities.98 This reference is found in Pakistan’s proposed redraft of Article 1 of AP II.99 The Pakistani draft requires that hostilities should be of “some” intensity (which admittedly is not very telling).100 What is of particular interest is that such intensity is required to continue for a “reasonable period of time”.101 The drafting history does not elaborate on how long a “reasonable period” of time is considered to be.102 Scholars have commented on the significance of the fact that the meaning of neither “intensity” nor “duration” is explicit in the wording of AP II.103 A further analysis of the word “sustained” reveals that an intensity threshold test is nonetheless included in Article 1(1), albeit not explicitly, because the “notion of intensity” itself is an integral characteristic of the term “sustained”.104

In the Musema case, which was decided by the International Criminal Tribunal for Rwanda (ICTR), Alfred Musema was charged, inter alia, with counts of murder and torture in violation of common Article 3 and AP II and, consequently, with a violation of Articles 4(a) and 4(e) of the Statute of the ICTR.105 In its assessment of the applicability of AP II, Trial Chamber I made an interesting observation concerning the material requirement of territorial control and the ability of an organized armed group to exercise such control over territory and engage in sustained and concerted military operations.106 Its comment on this material requirement relates to the notion of “intensity”.107 The Trial Chamber formulated the requirement as follows: “[T]hese dissident armed

97 Ibid.
99 Ibid.
100 Ibid.
101 CDDH/I/26, above note 98, p. 6.
102 Ibid.
103 See S. Junod, above note 21, p. 37, para. 4; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 2nd edited reprint, Martinus Nijhoff, Leiden, 2013, para. 2.9; L. Moir, above note 2, p. 107, fn. 76; ICRC Commentary on APs, above note 74, para. 4469.
104 M. Bothe, K. J. Partsch and W. A. Solf, above note 103, p. 719, para. 2.9.
105 ICTR, Musema, above note 40, para. 285, counts 8 and 9.
106 Ibid., para. 258.
107 Ibid.
forces must be able to dominate a sufficient part of the territory as to maintain these sustained and concerted military operations and the insurgents must be in a position to implement this Protocol.\textsuperscript{108}

The use of the term “maintain” is significant. \textit{Black’s Law Dictionary} defines this verb to indicate a continuation of an action: “To continue (something).”\textsuperscript{109} As shown in this section, the literal interpretation of the adjective “sustained”, read together with the term “military operations”, confers a temporal element on those operations. The organized armed group has to be able to maintain military operations over a period of time.\textsuperscript{110} The terms “continued” and “sustained” imply an uninterrupted motion or a level of consistency through the persistent launching of violent military operations.\textsuperscript{111} This formulation of the intensity test in the \textit{Musema} case reflects both the literal interpretation and the ICRC interpretation of “sustained armed conflict”\textsuperscript{112}. It implies that military operations not only have to take place over a period of time but possibly that they should also be uninterrupted or continuous. This requirement sets a very high threshold of intensity that situations would have to satisfy in order to be classed as AP II-type armed conflicts.

It remains unclear how long military operations must continue in order to be considered “sustained”, thus satisfying the minimum threshold of intensity as required by Article 1(1) of AP II. Does the term “sustained” imply that no interruptions, however brief, in the fighting or launching of military operations are allowed? The Special Court for Sierra Leone (SCSL) provides some clarity in relation to this question in the \textit{Sesay} case.\textsuperscript{113}

In the \textit{Sesay} case, Trial Chamber I assessed whether or not operations undertaken by the Armed Forces Revolutionary Council and Revolutionary United Front (RUF) forces, which occurred between February 1998 and January 2000, were sufficiently violent to be considered “sustained” military actions within the material scope of application of Article 1(1) of AP II. The case specifically addresses the question of whether or not violence has to be uninterrupted in order to fulfil the notion of “intensity”.\textsuperscript{114} Trial Chamber I highlighted that territory had changed hands and that territory was lost and regained\textsuperscript{115} during the period concerned, and consequently, that military operations were at times interrupted\textsuperscript{116} and that the level of violence associated with these operations fluctuated.\textsuperscript{117} Nevertheless, the RUF always had control

\textsuperscript{108} Ibid (emphasis added).
\textsuperscript{109} \textit{Black’s Law Dictionary}, above note 82, p. 1039.
\textsuperscript{110} Ibid., pp. 696, 125. \textit{Black’s Law Dictionary} defines the word “sustain” as “to support or maintain, esp over a long period; to persist in making (an effort) over a long period”.
\textsuperscript{111} \textit{Black’s Law Dictionary} furthermore defines the adjective “continuing” to mean “uninterrupted”, and defines the noun “continuance” to mean “the act of keeping up, maintaining or prolonging, duration; time of continuing”: ibid., p. 393.
\textsuperscript{112} Ibid.
\textsuperscript{114} Ibid., para. 947.
\textsuperscript{115} Ibid., paras 12–17, 947, 980.
\textsuperscript{116} Ibid.
\textsuperscript{117} Ibid., para. 947.
over some territory\textsuperscript{118} and from time to time launched several “major” operations.\textsuperscript{119} These operations were not uninterrupted, but were not regarded by the Chamber as sporadic.\textsuperscript{120} In fact, the Chamber considered all these operations to be “sustained and concerted”, even though there were periods of no or low-intensity conflict,\textsuperscript{121} and found that AP II continued to apply throughout the period concerned.\textsuperscript{122}

In terms of Trial Chamber I’s assessment in the Sesay case, the requirement of the ability to launch “sustained operations” as it relates to the notion of “intensity” therefore does not demand the level of violence to be consistently high or on a permanent basis throughout the conflict. Nevertheless, sustained military operations should be conducted at least frequently or frequently enough not to be sporadic in nature.\textsuperscript{123} The application of AP II does not cease if there are brief interludes of lower-intensity fighting or brief periods of inaction when preparations are being made for the next series of military operations.\textsuperscript{124} It is important at this juncture to stress that once all four of the requirements listed in Article 1(1) of AP II have been met, AP II does not fade in and out in terms of applicability.\textsuperscript{125} The jurisprudence of the ICTY confirms that IHL applies until a peace settlement is reached and that a decrease in the intensity of fighting or the degree of organization of an organized armed group fighting in the conflict cannot be viewed as bringing to an end the applicability of IHL.\textsuperscript{126}

In essence, the minimum threshold of the notion of “intensity” inherent in the word “sustained” requires that military operations are prolonged in time. Case law illustrates that intense violence resulting from military operations does not necessarily have to be uninterrupted, but that a sequence or pattern of military operations should occur on a fairly frequent basis. As discussed previously in this contribution, the “instant” nature, or rather, instant evaluation of the armed conflict at its initial stages between the TPLF and the ENDF in northern

\textsuperscript{118} Ibid., paras 12–17, 947, 979–980.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid., para. 981: “The Chamber therefore finds that the requirements of Additional Protocol II have been proved beyond a reasonable doubt.”
\textsuperscript{121} Ibid., para. 980.
\textsuperscript{122} Ibid., paras 979–981.
\textsuperscript{123} Author’s interpretation of Sesay, above note 113, paras 947, 980, 981, read together with AP II, Art. 1(2).
\textsuperscript{124} Ibid.
\textsuperscript{125} Gabriella Venturini, “Temporal Scope of Application of the Conventions”, in A. Clapham, P. Gaeta and M. Sassòli, above note 61, p. 61, para. 53.
\textsuperscript{126} Venturini comes to this conclusion when reading Tadić, above note 4, together with Haradinaj, above note 20. See G. Venturini, above note 125, p. 61, para. 53. ICTY, Tadić, Decision on the Defence Motion, above note 4, para. 70: “International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there” (emphasis added). The instructive part of Haradinaj, above note 20, para. 100, reads: “[S]ince according to the Tadić test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period.”
Ethiopia, assessed by Kebebew and Niyo, is possible. However, at the time that Kebebew and Niyo considered the Ethiopian classification, the conflict was too brief to satisfy the notion of intensity under Article 1(1) of AP II and, owing to the brevity of its duration, the fleeting moments of territorial control exercised by the TPLF meant that there was a failure by this organized armed group to launch sustained and concerted military attacks.\textsuperscript{127} Of course, this ongoing situation could be reassessed after some time has passed, and indeed, such an assessment could lead to a different result. Unfortunately, the question of the length of the minimum duration of sustained military operations remains to be answered as only clear-cut cases have been decided by international courts and tribunals. A comparison between an interpretation of “protracted armed violence” and “sustained military operations” would possibly assist in refining the notion of “intensity” as it relates to “sustained armed conflicts”. This comparison is drawn below.

\section*{A comparison between “protracted armed violence” and “sustained military operations”}

The comparison conducted in this part of the paper focuses on answering the question of whether the minimum levels of intensity associated with violence resulting from a situation differ in the context of “protracted armed violence” (common Article 3) and “sustained (and concerted) military operations” (AP II).\textsuperscript{128} In other words, in the context of AP II, does the notion of “intensity” mean that violence must not only be protracted (as demanded by common Article 3) but also be prolonged (sustained)?

An interrogation of the meaning of “protracted armed violence” confirms that duration or a prolongation of fighting is not required to meet the minimum threshold of “protracted armed violence”. This realization is highlighted by the \textit{Haradinaj} case, in which it was determined that in assessing the interpretation of the criterion of protracted armed violence in practice in respect of whether or not a situation is “protracted”, greater attention is given to the intensity of the armed violence than to its duration.\textsuperscript{129} Consequently, in assessing whether a situation meets the criterion of protracted armed violence, greater weight is placed on the manner in which the fighting is conducted, as well as the consequences of the fighting, than on the duration of the fighting.\textsuperscript{130}

On the other hand, the notion of “intensity” associated with the violence resulting from “sustained military operations” (as examined above) entails that the violence should be sufficiently protracted so as also to be prolonged.\textsuperscript{131} It is

\textsuperscript{127} The author refers to the discussion by Kebebew and Niyo. See T. Kebebew and J. Niyo, above note 66.
\textsuperscript{128} The author refers to “sustained operations” for consistency. The relationship between the word “sustained” and the notion of “intensity”, as well as the interplay with the term “concerted”, which is an organizational characteristic, is discussed in above note 74.
\textsuperscript{129} T. Kebebew and J. Niyo, above note 66.
\textsuperscript{130} ICTY, \textit{Haradinaj}, above note 20, para. 49.
\textsuperscript{131} ICTR, \textit{Akayesu}, above note 40, para. 602.
not debatable that violence must be protracted to begin with in order for any type of non-international armed conflict to exist, including that defined by AP II. Article 1 (2) clearly excludes situations that fall short of being protracted from the material scope of application of AP II, and therefore, the requirement that there is protracted armed violence is not disputed.132

At this point in the analysis, the relevant question is whether or not the notion of “intensity” associated with the word “sustained” requires more than merely being protracted. At the heart of the comparison is the question of whether or not the notion of “intensity” under Article 1(1) of AP II demands an additional element to protracted armed violence. As is determined in this section, the notion of “intensity” in the context of “sustained military operations” requires that violence resulting from military operations should be long-lasting and should fulfill a temporal requirement. The difference between the two notions of “intensity” seemingly lies in the additional requirement necessitated by the word “sustained”, that military operations should be maintained, whereas “duration” is not a requisite to fulfill the minimum threshold of violence associated with “protracted armed violence”. Therefore, it is not surprising that the ICTR and the SCSL, both of which were afforded jurisdiction over crimes resulting from the criminalization of violations of AP II, answered in the affirmative the question of whether the notion of “intensity” differs in the contexts of common Article 3 and AP II.

In the Akayesu case, Trial Chamber I of the ICTR assessed whether the non-international armed conflict before it met the material scope of application of AP II.133 The Chamber specifically highlighted the offence as per count 15, which is charged under both common Article 3 and AP II.134 It therefore considered that it was not sufficient to apply common Article 3 and to take it for granted that AP II automatically was applicable to the situations before it.135 The Chamber consequently held that in the event that alleged offences are charged simultaneously under both common Article 3 and AP II, the prosecutor has to prove that not only the intensity threshold requirements under common Article 3 but also those under AP II have been met.136

In Akayesu, Trial Chamber I determined that the relationship between common Article 3 and AP II was such that common Article 3 continues to apply once the application of AP II has been triggered.137 When the higher threshold of intensity included in Article 1(1) of AP II is satisfied, both treaties apply simultaneously.138 In its determination, the Chamber implied that there are situations to which common Article 3 alone applies.139 This implied distinction

132 AP II, Art. 1(2): “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”
133 ICTR, Akayesu, above note 40, paras 606–607, 622–627.
134 Ibid., para. 607.
135 Ibid.
136 Ibid., para. 618.
137 Ibid.
138 Cf. ibid., para. 603.
139 Cf. ibid., para. 602.
refers to non-international armed conflicts in the traditional sense (armed conflicts not of an international character) where violence is protracted in nature only.\(^{140}\)

With reference to the SCSL, the *Sesay* case provides insight into the differing nature of the notion of intensity as it relates to “protracted armed violence” and “sustained military operations”.\(^{141}\) In *Sesay*, at the outset Trial Chamber I of the SCSL stated that the RUF had been sufficiently organized in terms of the requirement of AP II.\(^{142}\) In March 1991, the RUF launched its first attack in Sierra Leone\(^{143}\) with the support of the National Patriotic Front of Liberia from a training camp situated in Liberia.\(^{144}\) Only at the end of 1991 was the RUF able to exercise consolidated control over the Kailahun district in the east and parts of the Pujehun district to the south of Sierra Leone.\(^{145}\) The attacks by the RUF in March 1991 satisfied the minimum threshold of intensity as protracted armed violence existed from this point on in the territory of Sierra Leone,\(^{146}\) and consequently, the application of common Article 3 was triggered.\(^{147}\) Trial Chamber I found that the armed conflict in Sierra Leone was of a non-international character and that it existed between March 1991 and January 2002.\(^{148}\) Common Article 3 applied throughout the duration of this conflict.\(^{149}\)

The crimes of which Mr Sesay had been accused took place later in the conflict, after the end of 1991.\(^{150}\) The SCSL therefore did not have to comment on when exactly AP II became applicable to the conflict in Sierra Leone. However, for the sake of the comparison drawn in this analysis, AP II would have become applicable at the end of 1991 at the earliest, when the RUF exercised control over the Kailahun and Pujehun districts, which enabled it to launch sustained and concerted military operations.\(^{151}\) From this point on, both common Article 3 and AP II applied to the conflict as the intensity threshold had been met.\(^{152}\)

As is the case in the determinations of the ICTR and the SCSL, most scholars agree that AP II necessitates a higher degree of intensity than does common Article 3.\(^{153}\) Sivakumaran, however, questions whether it can be said with certainty that the criteria with regard to an organized armed group’s ability

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140 *Ibid*.
144 *Ibid*.
146 *Ibid*.
150 *Ibid.*, section IX.
151 See facts in *ibid.*, para. 14.
152 *Ibid*, para. 981. In the *Sesay* case, Trial Chamber I of the SCSL commented that since AP II has a higher threshold of application extending the two requirements inherent in common Article 3, a situation that satisfies the criteria of an AP II-type armed conflict logically would automatically satisfy the common Article 3 threshold.
to launch “sustained and concerted military operations” presuppose a higher level of violence than the degree of intensity of violence associated with the term “protracted armed violence”.\textsuperscript{154} Sivakumaran highlights two approaches to this question. The first approach flows from the reasoning in Trial Chamber II of the ICTY in the \textit{Boškoski} Trial Judgment, as well as the reasoning in Trial Chamber I of the ICTR in the \textit{Akayesu} Trial Judgment.\textsuperscript{155} In \textit{Boškoski}, Trial Chamber II stated that the level of organization required from an armed group to be able to launch sustained and concerted military operations is greater than the degree of organization required from such an armed group to engage in protracted violence.\textsuperscript{156} In \textit{Akayesu}, Trial Chamber I suggested that operations must be continuous, which may be interpreted as imposing a temporal requirement on the notion of intensity under AP II.\textsuperscript{157} Sivakumaran proposes that the reasoning of these courts indeed presupposes that “sustained armed violence” necessitates a level of violence higher than protracted armed violence.\textsuperscript{158} The author of this contribution aligns herself with this interpretation. Sivakumaran, however, cautions that a second approach to the issue challenges this interpretation.\textsuperscript{159}

Sivakumaran suggests this second approach in respect of clarification of establishing whether the minimum threshold of intensity under “sustained military operations” and “protracted armed violence” is the same.\textsuperscript{160} This approach is based on the reasoning that duration (implied by the use of the term “sustained”) is but one indicator of protracted armed conflict.\textsuperscript{161} Consequently, this element is already included in the idea of protraction, and therefore, the minimum threshold for the notion of intensity under AP II and common Article 3 is the same.\textsuperscript{162} According to Sivakumaran, it is possible that the degree of violence associated with the notions both of “protracted armed violence” and “sustained and concerted military operations” refers to protracted armed violence.\textsuperscript{163} The author of this contribution disagrees with this second approach,\textsuperscript{164} the reason being that “duration” is not an absolute requirement to

\begin{itemize}
  \item \textsuperscript{154} S. Sivakumaran, above note 18, p. 188. Sivakumaran reasons as follows: “Whether the notion of sustained and concerted military operations does indeed presuppose a higher level of violence than protracted armed violence depends in large part on the meaning attributed to the latter concept. Sustained is an element of duration and means ongoing rather than non-stop; and this notion is covered by the idea of protraction. Thus, it is not entirely clear that the Additional Protocol II notion does require a greater level of violence than that required for a non-international armed conflict \textit{simpliciter} ...”
  \item \textsuperscript{155} See Sivakumaran’s discussion of \textit{Boškoski} and \textit{Akayesu} in the context of the duration of intensity possibly necessitated by the wording “sustained military operations”. \textit{Ibid.}, p. 188; ICTY, \textit{Boškoski}, above note 20, para. 197; ICTR, \textit{Akayesu}, above note 40, para. 626.
  \item \textsuperscript{156} ICTY, \textit{Boškoski}, above note 20, para. 197.
  \item \textsuperscript{157} ICTR, \textit{Akayesu}, above note 40, para. 626.
  \item \textsuperscript{158} S. Sivakumaran, above note 18, p. 188.
  \item \textsuperscript{159} This author’s interpretation of Sivakumaran’s reasoning between notes 250 and 253. \textit{Ibid.}, p. 188.
  \item \textsuperscript{160} \textit{Ibid.}, p. 188.
  \item \textsuperscript{161} \textit{Ibid.}
  \item \textsuperscript{162} This author’s interpretation of Sivakumaran’s reasoning between notes 253 and 256. \textit{Ibid.}, p. 188.
  \item \textsuperscript{163} \textit{Ibid.}, p. 188.
  \item \textsuperscript{164} It is submitted that the “correctness” of Sivakumaran’s second approach depends on the understanding of the relationship between “protracted armed violence and duration, and that other scholars may deem such an interpretation as correct”.
\end{itemize}
be met to constitute a “protracted armed conflict”. On the other hand, as is argued by this author in the previous section of this contribution, duration is necessitated by the term “sustained”. The author, therefore, interprets as correct the approach followed in Sesay and the ICTR that “sustained” military operations demand a certain degree of duration and therefore differ from “protracted armed violence”.

To sum up this section, it has been argued that the degree of violence associated with AP II-type armed conflicts is prolonged and is ongoing as a result of sustained military operations as articulated in Article 1(1) of this treaty. The case study of events in the Democratic Republic of the Congo (DRC) will now be provided as a concrete representation of the requirements in order to clarify the abstract reasoning in the argument.

The DRC is bound by common Article 3 as well as by AP II, and thus, a non-international armed conflict or an internal conflict under common Article 3 and/or an AP II-type armed conflict can exist or coexist on the territory if the notion of “intensity” is satisfied. In respect of the DRC, a fleeting period of territorial control was documented when the National People’s Coalition for the Sovereignty of Congo (Coalition Nationale du Peuple pour la Souveraineté du Congo, CNPSC) briefly captured a number of strategic towns in June 2017 and controlled a kilometres-wide section of territory in the city of Uvira on Lake Tanganyika. This operation called for United Nations intervention and the deployment of the Armed Forces of the Democratic Republic of the Congo (Forces Armées de la République Démocratique du Congo, FARDC) to drive out the armed group. The situation as documented satisfies the definition of “protracted armed violence” under common Article 3. However, the brevity of the duration (approximately a month) falls short of the requirement of an armed group being able to use the territory under its control to launch “sustained and concerted military operations”. Practically, the brevity and the fleeting nature of territorial control in this case did not enable the CNPSC to give effect to the other requirements under Article 1(1) of AP II. It is unlikely that an armed group would be able to give effect to those requirements within the first month of fighting.

The fighting between the Ugandan Allied Democratic Forces (ADF) and the FARDC, by way of contrast, meets the level of intensity defined by “sustained protracted armed violence”, and AP II applies. The ADF controls territory in

165 See 2016 Commentary on GC I, above note 18, paras 438–440.
168 Ibid.
169 Ibid.
170 Ibid.; ICTR, Musema, above note 40, para. 258.
171 See reports concerning ADF and other attacks from October 2017 up to 17 June 2020 at Kivu Security Tracker, available at: https://kivusecurity.org/reports.
the North Kivu and Ituri provinces, which enables it to launch continuing military operations against the FARDC.\textsuperscript{172} The ADF continually manages to recapture strongholds and to rebuild its military capacity, and attacks occur frequently and on an ongoing basis.\textsuperscript{173} Evidence of such an attack was collected as early as 2013, and attacks are recorded as continuing until June 2020.\textsuperscript{174} For example, between November 2019 and March 2020, 393 civilians were killed,\textsuperscript{175} and from January 2020 until March 2020, at least 300 FARDC soldiers lost their lives and 40 ADF soldiers were killed.\textsuperscript{176} The violence resulting from the ongoing conflict between the FARDC and the ADF in the DRC meets the threshold of “sustained protracted armed violence”. The situations described demonstrate the difference between the definitions of “protracted armed violence” under common Article 3 and “sustained protracted armed violence” under AP II in that they indicate that in addition to violence being protracted, it also must be prolonged.

There is a cautionary element in that the exact temporal requirement necessitated by the term “sustained” is unclear. Only clear-cut cases have been observed before international criminal tribunals. In the view of this author, it is not feasible that one month’s worth of fighting is too short but several months are sufficient to be considered sustained military operations. Faced with the question of whether there is a practical way to measure whether military operations are sufficiently prolonged to fulfil the notion of intensity demanded by the inclusion of the term “sustained” in Article 1(1) of AP II, this author suggests a case-by-case assessment which takes into account all four requirements listed in AP II and specifically the relationship between territorial control and the existence of prolonged protracted armed violence as the benchmark for sustained military operations. It is once again highlighted that this assessment is important from a treaty law perspective only. Even if a situation is interpreted as not sufficiently prolonged to qualify as sustained military operations under Article 1(1) of AP II owing to the absence of a metric, the corpus of customary IHL, which includes the majority of rules codified in AP II, is triggered once the lower-intensity threshold of protracted armed violence is met and the sufficient degree of organization is satisfied.

The relationship between “sustained armed violence” and the notion of “intensity” under Article 1(1) of AP II links the word “sustained” to the notion of “intensity”. It is required that violence resulting from the fighting in an AP II-type armed conflict is prolonged and therefore that the military operations are ongoing for some period of time.

\textsuperscript{172} Kivu Security Tracker, “After the Death of At Least 77 Civilians, the Congolese Army’s Strategy Against the ADF is Called into Question”, 25 November 2019, available at: https://blog.kivusecurity.org/after-the-death-of-at-least-77-civilians-the-congolese-armys-strategy-against-the-adf-is-called-into-question/;


\textsuperscript{173} Kivu Security Tracker, “Congolese Army’s Optimism Undermined”, above note 172.

\textsuperscript{174} Ibid.

\textsuperscript{175} Ibid.

\textsuperscript{176} Ibid.
Conclusion

This paper examines the minimum threshold of violence that a situation must meet in order to satisfy the notion of “intensity” as demanded by AP II. It has argued that the requirement that demands that the armed group is capable of carrying out sustained and concerted military operations included in Article 1(1) informs the notion of intensity of this instrument and that it differs from mere protracted armed violence, the benchmark test for the application of common Article 3 and the corpus of the customary international law of armed conflict.

In order to determine whether the minimum threshold test inherent in the notion of intensity differs in the case of common Article 3 and AP II types of non-international armed conflict, specifically in the context of duration as a constitutive element of the notion of intensity under AP II, three central questions were asked. First, is duration a constitutive element inherent in the notion of intensity (protracted armed violence) demanded by common Article 3? This question was addressed in the second substantive part of this contribution. Next, does the inclusion of the term “sustained” in the construct “sustained and concerted armed violence”, as included in the material scope of application of AP II, inform the notion of intensity required to trigger the application of this instrument, and if so, does its inclusion consider duration as a constitutive element of this notion of intensity? This question was explored in the third substantive part of the contribution. Lastly, the question was raised of whether the relationship between duration and the notion of intensity differs under common Article 3 and AP II. This question was addressed in the final substantive part of the contribution.

An interrogation of the text of common Article 3 through treaty interpretation did not aid in reaching a better understanding of the notion of intensity inherent in this provision. The case law of the ICTY was instructive. The Tadić formulation provides that the minimum threshold for the notion of intensity under common Article 3 is equated to “protracted armed violence”. A survey of case law highlights the conclusion that several factors can aid an assessment of the fulfilment of the protracted armed violence criteria. None of these factors in itself is a constitutive element in the notion of intensity, and the list of factors is also not exhaustive. Case law emphasizes specifically that “duration” is but one factor to be considered in an assessment of whether or not an incident of fighting equates to protracted armed violence.

Next, the paper interrogated the meaning of the term “sustained”. The analysis revealed that from a treaty law perspective it is crucial for the application of AP II that there is a clear understanding of the content of the term “sustained”. In order to arrive at that understanding, the relationship between the notion of “intensity” and “sustained” military operations was examined. The results of treaty interpretation and a survey of case law demonstrate that the term “sustained” essentially requires that violence is prolonged in nature. The violence resulting from the military operations must be ongoing for a period of time as a consequence of the operations being launched in a
systematic way. Therefore, a degree of duration is a constitutive factor in the notion of “intensity” in terms of AP II.

An exact metric of a minimum period of fighting that qualifies as sufficiently prolonged to be “sustained” remains elusive. Case law takes into consideration only clear-cut situations. It is proposed that an assessment of the fulfilment of the intensity requirement under Article 1(1) of AP II should be complemented by a purposive approach which promotes the greatest protection of those most vulnerable to the consequences of non-international armed conflict.

As was explained in the fourth substantive part of this paper, the temporal requirement inherent in “sustained” military operations consequently demonstrates a situation that differs from “protracted armed violence”, which serves as the benchmark for the notion of “intensity” under common Article 3. In the context of common Article 3, “duration” is not considered a constitutive factor in fulfilling this notion. Therefore, the notion of intensity demanded by AP II elevates the minimum threshold of protracted armed violence to prolonged or sustained protracted armed violence.
Exploring foundational convergence between the Islamic law of armed conflict and modern international humanitarian law: Evidence from al-Shaybani’s *Siyar al-Kabir*

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**Abstract**

This paper compares and contrasts the Islamic law of armed conflict with the modern international humanitarian law, with the view of identifying foundational similarities between these two separate canons, drawing extensively from al-Siyar...
al-Kabir. To this end, it raises the question as to whether the Islamic law of armed conflict is compatible with its modern counterpart, and, if it is, to what extent. To address these interlinked questions, the study departs from the premise that in order to identify resemblance, it is necessary to enquire into the foundations (both legal and philosophical) of the Islamic and contemporary approaches vis-à-vis armed conflicts.

**Keywords:** Islamic law of armed conflict, al-Siyar al-Kabir, international humanitarian law.

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**Introduction**

This paper seeks to compare and contrast the Islamic law of armed conflict with the modern international humanitarian law (IHL), with the view of identifying foundational similarities between these two (historically and culturally) separate canons, drawing extensively from al-Siyar al-Kabir, a major work on the Islamic law of nations by Muhammad al-Shaybani, an influential Hanafi jurist known as one of the Imamayn (two imams), a term referring to two most important disciples of Imam Hanafi, the founder of the Hanafi school of jurisprudence. To this end, it raises the question as to whether the Islamic law of armed conflict is compatible with its modern counterpart, and, if it is, to what extent. To address these interlinked questions, the study departs from the premise that in order to identify resemblance, it is necessary to enquire into the foundations (both legal and philosophical) of the Islamic and contemporary approaches vis-à-vis armed conflicts.

Hypothesizing that the two approaches enjoy ontological resemblance, suggesting that they depart from similar foundational principles, and that they do not have to necessarily share the same material and linguistic content and scope

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1 Without referring to ontological resemblance, attempts to explore similarities between the Islamic law of war and modern IHL will probably fail in their quest for objectivity. In our view, the foremost reason underlying the identifiable points of convergence between the two legal bodies lies in the fact that decision-makers and commanders have to decide upon similar cases with similar priorities and worries. Every commander, barring only a few, strives to secure the safety and survival of his soldiers and subjects with a fairly realistic view to keeping their loyalties that will in turn enable the continuation of their power struggle. This in turn would normally cause the ruler to respect the enemy personnel in his own power, so that any retaliatory measures would not be meted to his own under enemy yoke. This decision-making modus operandi based on social fact offers a strictly secular yet practicable key to understanding the ontological resemblances without any overly idealistic or quasi-religious allusions, observance of which is just too tiresome to prove under the light of the historic experience. Herein lies the source of any resemblances between these legal bodies. Needless to say, any value attached to human dignity by Islam and/or the modern legal conception of IHL may have played a role in the formation of that praxis. Yet, these teachings also form at least partially the social fact of a given era. For a critical account of those attempts that claim that modern international law and the Islamic conception of law of nations are entirely separate fields of study that are blatantly foreign to each other, see David A. Westbrook, “Islamic International Law and Public International Law: Separate Expressions of World Order”, Virginia Journal of International Law, Vol. 33, No. 2, 1993.
due to what the circumstances of the time when they originated dictated, the paper elaborates on the very foundations of modern IHL through an analysis of the primary legal texts and of the views proposed by leading thinkers and scholars of modern times, and further identifies the principles enshrined in al-Shaybani’s work upon which the Islamic law of armed conflict has been built. Thus, rather than retelling what is covered in *al-Siyar*, its philosophical and legal reasoning as reflected in the content is identified in order to establish an association between the Islamic law of armed conflict and contemporary understanding in terms of what they seek to achieve and to regulate in a specific case of armed conflict.

The section that follows briefly recalls the historical encounter between the Islamic conception of law of nations and modern international law. To explore the areas of convergence, the paper then reviews the major legal texts constituting modern IHL, including The Hague and The Geneva Conventions (along with the relevant protocols), and refers to major principles of customary IHL and then analyses the primary contributions by leading scholars to the current understanding of humanitarian principles. The purpose of this review is to devise a compilation of major principles that serve as the basis of contemporary rules of armed conflict. The next section presents main features of the *siyar* as a scholarly field of inquiry and its place within Islamic studies. The study then presents an in-depth analysis of al-Shaybani’s work (only parts relevant to the rules on regulating an armed conflict) with specific reference to conformity with the humanitarian principles of modern times applicable to cases of conflict.

The study concludes that the Islamic law of armed conflict as depicted in *al-Siyar* and modern IHL are converged in many respects; the convergence is particularly identifiable in the principles upon which they have been built and developed. In doing so, this study makes a novel contribution to the existing literature which features extensive coverage of al-Shaybani’s work through a literal and textual analysis rather than framing its contribution within a historical context. Hence, this article distinguishes itself from scholarly accounts focused on the review of the Islamic law of armed conflict by offering a foundational analysis revolving around an examination of major principles that reflect the ontological stance and teleological assumptions of Islamic scholarship on the ethics and law of armed confrontations.

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2 What we mean is that rather than looking at the detailed content of both legal traditions (i.e. specific rules and injunctions which might be misleading), we believe that it is necessary to focus on the principles upon which these traditions are built (in other words, we argue it is safer to depart from what their ontologies tell us about what they try to achieve).

3 This study limits itself to the review of the foundational principles of the Islamic law of armed conflict. The early *siyar* studies did not make any distinction or classification within the subject matters that they covered; however, the main subjects covered include law of armed conflict, diplomatic immunities and treaty law. The authors deliberately study the law of armed conflict for better clarity. The same approach may also be employed to identify similarities between the Islamic understanding of law of diplomacy and the modern approach to diplomatic affairs by focusing on the foundational principles.

4 There is a vast literature focused exclusively on the Islamic law of war or armed conflict. Al-Dawoody’s seminal contribution to the literature provides a comprehensive coverage of the subject, along with a detailed bibliography of previous scholarly works in the field: Ahmed al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave, New York, 2011.
Historical encounters

Scholarly accounts focusing on the emergence and development of IHL fail to acknowledge the contribution of Islamic thinking in this particular field. Even views by renowned legal scholars who are considered as founders of modern international law on war and peace greatly resemble the major Islamic precepts. Particularly, the contact and interaction between the West and Islam in Andalusia have arguably narrowed the gap between the two civilizations. Though not an essential requisitite for the argumentation of this paper, it may be fair to argue that, as a result of this interaction, some of the Islamic principles on the conduct of war have been at least partially borrowed by Western thinkers and scholars.

Before the codification of the law of armed conflict in the West, Islam had prescribed some basic principles and tenets on the conduct of hostilities and warfare. An independent area of scholarly study, Siyar, for instance, refers to examination of the life of the Prophet Muhammad, as well as the battles he took part in; however, in a technical sense, it incorporates the rules and standards that must be observed in these battles. Most chapters of Siyar studies focus on how Muslim combatants are required to act during war and by which obligations and rules they are bound.

It is possible to identify striking and substantial similarities between the rules and standards spelled out in these studies and those codified within the modern law of armed conflict. Some of the forerunners of international law had at least partial interaction with the Islamic legacy of law and history in Italy and Spain where Islam has historically been influential. To name some, Francisco de Victoria, Baltazar de Ayala, Alberico Gentili and Hugo Grotius had some contact with this legacy of Islam. It will be an overgeneralization to argue that their ideas and theories of international law were shaped and determined by Islam, but there

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5 For a comparative account on the Islamic and Western view of war and peace, see John Kelsay and James Turner Johnson (eds), *Just War and Jihâd Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, Greenwood Press, New York, 1991. Also see Harfiya Abdel Haleem, Oliver Ramsbotham, Saba Risaluddin and Brian Wicker (eds), *The Crescent and the Cross: Muslim and Christian Approaches to War and Peace*, St. Martin’s Press, New York, 1998.


9 “Francisco de Victoria (1480–1546) and Suarez (16–17th centuries) were both Spanish nationals and were educated in the same country where Islamic theories had a potential influence on culture, jurisdiction and politics. Their work on the law of nations therefore benefited from the principles of Islamic international law, especially on the law of war. Similarly, the classical writer of international law Hugo Grotius (1563–1645) who is recognised by some European writers as the father of the law of nations in Europe, was a theologian and also studied Islamic law thereby benefited from the principles of Islam, especially concerning the law of war.” Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search*, Brill, Leiden, The Netherlands, 2011, p. 3.
should be at least some minor inspirations. Some scholars, for instance, argue that Grotius’s competence in international law could be attributed to his study of Islamic sources during his stay in exile in Istanbul.\textsuperscript{10} Others confirm that Islam has remained focused on law of armed conflict and the humane dimension of this law, adding that “a number of concerns identified with just war thinking are reflected in Islamic circles, as are certain features of moral reasoning”.\textsuperscript{11} It is often acknowledged that the Islamic approach to international law has certainly made an impact on the development of European understanding of law of armed conflict, and international law in general.\textsuperscript{12}

However, while this review would point out to convergences between the Islamic law of armed conflict and modern rules of warfare, areas of convergences have not been adequately addressed in the existing Islamic scholarship for two reasons: one is the way that Islamic law has been interpreted, and the other is the overall conviction among Muslim scholars and communities that nothing good may come out of Western thinking and reasoning. To identify the similarities, it is not necessary to go into the details of the rules of the Islamic law of armed conflict. One may find these so-called rules rather outdated and even brutal since, for instance, under these rules, even enslavement of prisoners may be allowed. However, reference to rules in isolated time frameworks would be just misleading given that Islamic laws, just like any other bodies of law, are progressive in nature, suggesting that they are inevitably affected by current circumstances and requirements. For this reason, attention should be paid to how Islam treats the notion of war, and how it approaches its justifications and consequences, rather than specific rules made or formulated in a certain period of history.

This indicates that Islamic law should be interpreted in a way to adopt progressive regulations and incorporate them into the practices. However, as it stands now, Islamic law is a corpus of “Islamic” scholars whose competence stems from their own justification and assertions. In other words, in its current form, Islamic law, and, of course, the Islamic law of armed conflict, is not suitable for codification and practicable in real-life incidents and events. For this reason, rather than the specific rules, the main determinants and dynamics of Islamic law should be taken into consideration to offer insights and comments on how a modern version of the Islamic law of armed conflict may respond to modern-time atrocities and wartime violations.\textsuperscript{13}


\textsuperscript{13} For a similar approach, referring to the concern that both contemporary militant Islamist groups and the modern Muslim scholars who denounce their militancy claim to have based their arguments on original sources of Islam, and thus encouraging for a critical examination of the foundational literature, see Nesrine Badawi, \textit{Islamic Jurisprudence on the Regulation of Armed Conflict: Text and Context}, Brill, Leiden, The Netherlands, 2019.
Once such an approach is adopted in law-making and legal reasoning, it would become clear that the Islamic law of armed conflict in fact considers two main principles in a battle: that the use of force must be proportionate and justifiable for the attainment of the military goals and that some places and groups of people must be protected. When these ground rules are established, it is easy to identify the details, as done in the modern-time international conventions and other legal mechanisms. Such an approach would also bridge the gap between the Islamic law of armed conflict as formulated centuries ago and current IHL.

Principles of international humanitarian law

Today, it is safe to claim that IHL is a fully established branch of law, principles of which have stood the test of time and been solidified in binding legal texts. The IHL of today is the embodiment of efforts to strike a balance between two countervailing considerations: namely the observation of military necessity and the protection of humanitarian values. At the heart of this amalgamation lies a realistic understanding of IHL and its duties, where the countervailing arguments are taken cognizance of, with a view to improving the implementation chances of IHL.

The principle of distinction

The International Court of Justice in its Advisory Opinion on the threat or use of nuclear weapons describes the principle of distinction between combatants and non-combatants as one of the “cardinal principles” of IHL that cumulatively constitute the very fabric of this branch of law. The Court reminds that this principle plays a crucial role by establishing the obligation to never make civilians and civilian objects the target of attacks. As the 1987 Commentary informs, this principle was included in the 1899 and 1907 Hague Conventions. However, the principle finds its nucleus in the St. Petersburg Declaration of 1868, which unmistakably delineates the legitimate objectives of attacks and the legal rationale

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17 International Court of Justice, ibid., p. 257, para. 78.
that should exist under any future military operations, namely, the weakening of the military forces of the enemy.\textsuperscript{18}

The principle of distinction concretized in Article 48 of Additional Protocol I offers a general protective cover for non-combatants and civilian objects.\textsuperscript{19} The principle of distinction has the status of customary law perfectly applicable for international as well as non-international armed conflicts.\textsuperscript{20}

The principle of proportionality

Following the designation of a person, a group of persons or a building as a military objective, a test of proportionality is, first of all, a requisite in every attempt to establish the legality of a soon-to-be executed military plan on the targeted objectives. It is an \textit{ex ante} test, since the law refers to expected or anticipated values to be compared with each other with a view to avoiding an excess between their conflicting values, which are expected loss of “civilian life, injury to civilians, damage to civilian objects, or a combination thereof” on the one hand, and “the concrete and direct military advantage anticipated” on the other. As the U.S. Department of Defense stresses: “The principle of proportionality acknowledges the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects … even with reasonable efforts by the parties to a conflict to minimize collateral injury and damage.”\textsuperscript{21}

Any comparison between values has to be quantified in the abstract and every process of signifying concrete beings in the abstract runs the risk of a brutal or reckless reification. That said, proportionality, with all its strings attached, is a vital test. Only after solidly establishing the military status of an objective should a planner run with this test, with a view to avoiding, or in any event, minimizing the collateral damage by taking all feasible precautions. Article 57 of Additional Protocol I creates a legal obligation for military commanders to take all feasible precautions to verify the military nature of the object of the planned attack as well as to avoid, or, in any event, minimize collateral damage on civilians and civilian objects.\textsuperscript{22}

Principle of military necessity

Another critically important IHL principle is military necessity.\textsuperscript{23} In today’s legal understanding, the principle of military necessity is expected to have a restraining


\textsuperscript{20} J. Crowe and K. Weston-Scheuber, above note 18, p. 71.


effect on battling parties, which are now solely allowed to weaken their opponents’ armed forces and their fighting capacity.\textsuperscript{24} IHL in its totality is the living negation of Cicero’s famous motto: “\textit{Inter arma leges silent.}” (“The laws of war are silent.”) On the contrary, it is the \textit{lex specialis} deliberately made for the necessities of war. As early as 1868 by the St. Petersbourg Declaration and in 1907 by the Hague Regulation, it was a proclaimed objective of IHL to alleviate the calamities of war and evils of war, at least as much as it was allowed in the wake of military necessities.\textsuperscript{25} One would be utterly right to claim that IHL is free of any blanket claims of military necessity as an excuse for potential violations of and derivations from the \textit{lex scripta}. IHL of today is a \textit{notstandsfest} body, in which military necessity can only kick in if and only if explicitly referred to in the applicable rules.\textsuperscript{26} The principle of military necessity as we understand it today is of customary nature, applicable to international and non-international armed conflicts alike.\textsuperscript{27}

\textbf{Principle of humanity}

Causing unnecessary suffering and inflicting superfluous injury is prohibited in IHL. The International Court of Justice reminds us vividly in its Advisory Opinion on the Threat or Use of Nuclear Weapons\textsuperscript{28} that “it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.”

In addition to the 1868 Declaration, this principle has been reaffirmed in a number of other IHL documents. Additional Protocol I offers a more actual restatement of the rule in its Article 35(2), which reiterates among basic rules that “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” An identical customary rule is applicable in international and non-international armed conflicts alike.

\textbf{Siyar as a field of study and al-Shaybani’s siyar}

Islamic scholars and jurists have devised a separate and semi-autonomous field of study, \textit{siyar}, that exclusively focuses on the legal aspects of the interactions between Islamic political authority and other political entities; more specifically,

\begin{itemize}
\item \textsuperscript{25} A. R. Ziegler and J. Baumgartner, above note 19, p. 588.
\item \textsuperscript{26} Bernhard Kempen and Christian Hillgruber, \textit{Völkerrecht}, Verlag C.H. Beck, Munich, 2007, p. 264.
\item \textsuperscript{27} Gökhan Güneysu, “Askeri Gereklilik İlişkisi ve Insancıl Hukuk”, \textit{Ankara Barosu Dergisi}, Vol. 4, No. 1, 2012, p. 99.
\item \textsuperscript{28} International Court of Justice, above note 16, p. 257.
\end{itemize}
however, siyar also refers to the legal study of armed conflicts from an Islamic perspective. More precisely, this particular field of study lays the legal ground for political and diplomatic engagements, as well as for the conduct of warfare by defining obligations for the followers of the Islamic faith. A scholarly endeavour, siyar has been devised by non-practitioners (such as lead scholars of hadith and influential jurists) but also been implemented (although not all the time in its entirety) unilaterally by the political authorities of Islamic suzerainty.

Imam A’zam Abu Hanifa (after whom the Hanafi School of jurisprudence is named) is cited as the first jurist to systematize the study of armed conflict in the history of Islamic scholarship.29 Abu Hanifa also solicited a work on the same subject, asking his disciple, al-Shaybani, to produce Siyar al-Saghir. Subsequently, Muhammad b. Hassan al-Shaybani also wrote one of the most influential works in this field, Siyar al-Kabir. This article, however, draws on Muhammad b. Ahmad al-Sarakhsi’s commentary to Siyar al-Kabir (Serh al-Siyar al-Kabir, hereinafter referred to as al-siyar) because the original text has not survived to the present time.31 Although Shaybani’s original text is not existent, the commentary’s authenticity and its attribution to Shaybani is not disputed. Sarakhsi’s commentary has been reproduced, expanded and translated into different languages. Because it is recognized as an authoritative text in the study of war and peace, the Ottoman State used the commentary as a textbook in the training of military officers; the commentary also served as a guideline to the conduct of war that the Ottoman army’s combatants should rely on during battle.32 Recent scholarly studies on Shaybani’s views on the Islamic law of nations, particularly law of armed conflict, also relied on Sarakhsi’s commentary.33

This article utilizes a Turkish translation of the commentary by a committee of Islamic scholars34 who, in addition to the original text, considered previous translations in different languages and original copies reserved in library holdings.35 The work arguably covers a wide range of issues mostly relevant to the law of nations. The subjects covered include the virtues of serving in the military along the borders, the rules that the military commanders are required to observe, the principles of deploying troops, use of flags and banners, a framework of calling opponents to either convert to Islam or to accept terms for peace, diplomatic interactions, rules on the spoils of war and prisoners of war (POWs)

34 To check authenticity, Arabic and English versions were also consulted; the annotated Turkish translation contains extensive details.
and agreements with other nations. Jihad as a form of warfare and as a religious duty for Muslims is extensively covered in al-siyar which seems to be endorsing a view of Islamic supremacy in both ethical and military terms.

Rich in terms of references to verses and hadiths of the Qur’an to substantiate the legal arguments, al-siyar offers a reliable sketch of the Islamic approach to the pursuit of peace with non-Islamic communities and, when necessary, to the conduct of warfare. Because it was produced in times of Islamic military and political supremacy, al-siyar does not pay much attention to prescribing rules that the opponents also have to follow, and, instead, adopts a unilateral approach by which only Muslim combatants are held responsible. However, siyar as an autonomous field of study does not confine itself to prescription of rules that are applicable to the interactions between Muslims, but also their acts in relation to non-Muslims, thus generating the norms that also “regulate external aspects of Muslims”. This is a direct outcome of viewing Islam as a dominant and superior (and universal) religion, seeking “to overcome ethnocentrism”.

Not only rulers, but also scholars and jurists in the Muslim world have been motivated since the Islamic rule started to expand to convey what they considered a universal message of ultimate salvation even if it means domination by the sword. This motivation manifests itself in the unilateral constraints in terms of how to deal with non-Muslims as the goal is to appeal to non-Muslims, rather than ensuring that they would submit to the Islamic rule. For this reason, recent scholarship tends to regard siyar as the Islamic law of nations, Shaybani’s al-siyar being at the epicentre of the scholarly inquiry. In reference to the premises of siyar, a conception of an Islamic international order is also proposed. Some accounts, on the other hand, rely on a more specific focus involving the Islamic perspective on war and peace.

38 Ibid.
Foundational principles of Islamic *jus in bello* in *al-Siyar al-Kabir*

A number of academic works have been produced to enquire into the Islamic view of warfare and the limitations and justifications it proposes; but only a small proportion of these studies try to identify the main principles that constitute the basis of the Islamic rules and standards applicable to the cases of armed conflicts. This paper further narrows down the scope, and places exclusive emphasis upon the Islamic principles applicable to ongoing armed conflicts with reference to al-Shaybani’s *siyar*. To this end, the authors comparatively analyse the Islamic principles as spelled out in *al-siyar* prescribing individual religious (and legal) responsibility.

A textual analysis reveals that *al-siyar* underlines the significance of *jihad* which serves as the epicentre of an Islamic identity. There are plenty of references in *al-siyar* to the virtue and salience of *jihad*, both as an institution of reaffirming Islamic domination (upheld by the central authority) and as an individual obligation. A religious/divine value is often attached to everything that is *jihad*-related, and *jihad* in the form of armed confrontation with the infidels or the enemies of Islam is praised as a sublime human behaviour. Just as *jihad* is prescribed as a religious/legal duty that particularly combatants are required to uphold (once armed struggle has been agreed upon and initiated by a legitimate political authority), individual responsibilities of the Muslim combatants during the armed conflict are similarly identified in reference to a broader conception of *jihad* which could only be performed in the name of Allah.

This means that Muslims, including the rulers and the subjects, are responsible to Allah who asks them to carry out *jihad* in conformity with certain rules. But it appears that at least in some instances, compliance with these rules is contingent upon how the enemy responds. Reciprocity is strongly advised in the case of bilateral agreements. Rules pertinent to individual responsibility, on the other hand, appear to be unilaterally binding; thus, they have to be honoured regardless of whether...
enemy combatants observe the same limitations. Whether or not these rules on individual religious responsibility applicable to the combatants are properly enforced and whether or not breach of these rules is adequately sanctioned remains unaddressed in Islamic legal and philosophical scholarship, including al-siyar.49

It should be recalled that al-siyar contains rules that only Muslims are required to uphold; thus, it prescribes unilateral responsibilities for the individuals without referring to the responsibilities of the adversaries. Thus, it is only natural that large segments of the book are reserved for the legal and religious obligations of Muslim individuals vis-à-vis the ruler, the Muslim community and their belief system,50 as well as for their rights as Muslims and benefits as fighters.51 Because it is not meant to prescribe responsibilities of non-Muslims, al-siyar does not have a separate section or discussion on what could be regarded as jus in bello that defines the obligations of the parties involved.

Although a number of scholarly accounts list numerous Islamic references to the humanitarian rules applicable to an armed conflict, the following commandments communicated by Caliph Abu Bakr to his commander summarize the overall gist of the Islamic approach on this matter:

Stop, O People, that I may give you ten rules for your guidance, in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy’s flock, save for your food. You are likely to pass by people, who had devoted their lives to monastic services, leave them alone.52

It is possible, based on this summary and the content of al-siyar, to identify general principles that may be associated with the main objectives and teleological roots of the Islamic law of armed conflict. It should be noted that we deduce these general principles from specific injunctions and discussions spelled out in Sarakhsi’s work, which does not move from these principles to the judgements it presents.

Principle of distinction

Al-siyar provides extensive coverage of the individuals and groups that are granted protection in conjunction with the principle of distinction. As a general rule, based on the verse in the Qur’an underlining that Muslims should fight only those who wage a war against them,53 those who clearly stay out of the war are immune to

49 In rare instances, al-siyar provides some coverage of individual punishments to those who violate the rules of law of armed conflict. For instance, if a dhimmi unlawfully kills an enemy combatant who was granted safe conduct and confiscates his assets, he not only repairs the damages but is also condemned to whipping as well as jail, the amount of time which is to be determined by the ruler. See al-siyar, Vol. 1, p. 298.
52 Sahih Muslim, Vol. 19, Hadith No. 4292.
53 Qur’an, Chapter 2, Verse 190.
any offensive or aggression by Muslim combatants. *Al-siyar* makes numerous explicit references to such persons simply because they are non-combatants. Monks may not be killed, for instance, as long as they remain in their monasteries for religious purposes. The same principle also applies to women who are not involved in the armed conflict by any means. However, exceptions to the immunity are also underlined: even slight or indirect involvement in the form of, for instance, encouraging the enemy combatants or raising their morale, renders the protection inapplicable. Broader leniency is recommended against the underaged (perhaps toddlers and adolescents); combatants are urged to take every precaution possible to avoid killing them even if they are somehow part of the conflict. The elderly, however, apparently are not covered in the same scheme of leniency since the Prophet Muhammad authorized his fighters to kill an old man who gave useful advice to the enemy combatants. Muslim military units are further required to distinguish themselves from *hors de combat* by carrying banners or flags whose colours are specifically indicated in the hadiths that *al-siyar* reports.

Non-Muslims who make a pact with Muslims are automatically considered non-combatants and treated by the rules applicable to non-combatants. *Al-siyar* specifically states that assets of non-Muslims who conclude a peace agreement with Muslims may not be forcefully confiscated, referring to the established rule that assets and properties of a Muslim may not be unlawfully seized. Similarly, even non-Muslims, particularly Christians and Jews, who live in the *dar al-harb* (abode of war) are respected and treated as equals to Muslims unless they are designated combatants. If, for instance, an enemy combatant declares that he was a Christian who was serving in the army but now is just a priest, he is then considered a non-combatant and granted immunity.

Prisoners of war (POWs) are also regarded as *hors de combat* and, thus, may not be killed. Even though compliance with the orders of the commander is strictly stipulated, the fighters will not be rendered responsible if they deny killing a POW upon such an order. Even though command responsibility in the modern sense cannot be identified, *al-siyar* narrates a report that the Prophet Muhammad required a commander who ordered killing of POWs pay reparations. While there seems to be an agreement on the prohibition of killing POWs, additional privileges attached to the status have changed depending on

57 *Al-siyar*, Vol. 1, p. 64.
62 *Al-siyar*, Vol. 4, p. 27.
the nature of the circumstances, thus affecting the juristic views and approaches on the matter. In the early years of Islam when the Prophet Muhammad needed to prove his lenience and mercy, POWs were recognized broad and extensive rights. In compliance with the verse, “set them free, either by grace or ransom”, revealed at the end of the Battle of Badr, Muslims had to free the enemy POWs either in exchange for Muslim POWs or for ransom. In response to complaints by enemy POWs at the end of the fight, the Prophet Muhammad instructed Muslims to offer good treatment to them; in a praise of how Muslims complied with this instruction, the Qur’an states, “they give food, for the love of Him, to the needy, the orphan, the captive”.

Those who are granted aman (which may be literally translated as “safe conduct”), a novel practice in the theory and practice of Islamic law that has its roots in pre-Islamic customs, the Prophet Muhammad’s hadiths and the Qur’an, are also entitled to the same treatment. Distinguished from POWs in the sense that those who are granted aman (musta’min) decide to stay out of armed confrontation while they are still able to carry out their functions as combatants. Closely relevant to the principle of military necessity, granting safe conduct to the enemy combatants is a preferable action to ensure attainment of the military objective by guaranteeing at least temporal removal of the military threat from adversaries. Al-siyar dedicates a relatively lengthy section on the details of who is entitled to granting and receiving aman, as well as rules governing this institution. As a general rule, a Muslim man, regardless of whether he is observant of all Islamic rules, is entitled to grant safe conduct to non-Muslims which then becomes binding upon all Muslims, thus effectively providing temporal assurance for the recipient. Referring to practices by the Prophet Muhammad and Caliph Omar, al-siyar further recalls that Muslim women may as well grant aman for non-Muslims, but adds that safe-conduct terms proclaimed by dhimmis are legally void even if they fight alongside the Muslims against enemy aliens, unless the commander of the military unit, or one of the Muslim combatants, grants authorization for them to do so.

66 Qur’an, Chapter 47, Verse 4.
67 Qur’an, Chapter 76, Verse 8.
70 Al-siyar, Vol. 1, p. 255.
71 Al-siyar, Vol. 1, pp. 256–7. Muslim slaves and children may grant safe conduct only if they are combatants. 
Because *aman* is a legally binding contract between all Muslim individuals (and the Islamic political and legal entity) and the non-Muslim granted privileges associated with it, any breach of the terms of the contract entails reparations. *Al-siyar*, for instance, notes that if a group of Muslim combatants attacks a group of unbelievers protected under such a contract, kill the men and spare the women and their assets, then they have to pay reparations for the unlawfully murdered.\textsuperscript{75} The safe-conduct terms, even in a broader context, apply to those who decide to convert into Islam even if the decision is taken under the pressing circumstances of the battle, i.e. during a siege that will probably result in a Muslim victory.\textsuperscript{76} The institution of *aman*, in both cases, serves the goal of avoiding unnecessary use of force and military resources to achieve the military objective. In the case it is employed, the enemy combatants are transformed into *hors de combat* who become entitled to protections specified under the Islamic law of armed conflict. The coverage of safe conduct is often considered extensive in such a way to include instances, for instance, where it may be granted to a POW who openly defies Caliph Omar, noting that they would not submit to Muslims just because a prophet has been chosen from among them.\textsuperscript{77} Envoys, on the other hand, are, according to *al-siyar*, entitled to exercising broad immunities without requiring provision of a safe-conduct agreement. In cases where full powers are provided, the envoys are regarded inviolable, even when they provide a sealed letter that was arguably produced by the enemy political ruler; Muslim combatants are strongly recommended to assume the authenticity of such a claim for the sake of caution.\textsuperscript{78}

**Principle of military necessity**

The principle of military necessity, in some instances, serves as a supplement to the principle of distinction whereas in some others, they seem to be upheld as if they are of equal significance. *Al-siyar* presents a number of rules and recommendations to ensure that the combatants are clearly distinguishable from the non-combatants. To this end, the ruler is strongly recommended to appoint a commander from among persons of high character and virtue to a military unit of any size.\textsuperscript{79} It is incumbent upon the ruler to choose a person who is an expert on war-related matters so that the war would be properly fought, that unnecessary casualties are avoided and that military objectives are fulfilled in the most optimal way possible.\textsuperscript{80} Subordinates in a military unit are, for the same purpose, required to follow and fully honour the orders by their commanders,\textsuperscript{81} with the exception that in the case it becomes

\textsuperscript{75} *Al-siyar*, Vol. 1, p. 261.
\textsuperscript{76} *Al-siyar*, Vol. 1, p. 263.
\textsuperscript{77} *Al-siyar*, Vol. 1, p. 265.
\textsuperscript{78} *Al-siyar*, Vol. 1, p. 290.
\textsuperscript{79} *Al-siyar*, Vol. 1, p. 79.
\textsuperscript{80} *Al-siyar*, Vol. 1, p. 80.
\textsuperscript{81} *Al-siyar*, Vol. 1, p. 82.
evident that the orders will lead to irreparable damage and complete destruction of
the army, the Muslim combatants are not obliged to comply with them.82

The focus and emphasis in these restrictions are not upon the sanctity of
human life, but rather on the fact that killing the non-combatants is unnecessary
and might be counterproductive. The same logic also applies to the restrictions
on the protection of the environment and livestock. Trees, for instance, should
not be unnecessarily cut down particularly if it is almost evident that the
battleground will fall under Muslim control.83 Likewise, cattle may not be
destroyed unless it is necessary to slaughter them for feeding the fighters.84
A review of the sections on the protection of the environment reveals that
Muslim fighters are strongly recommended to avoid widespread destruction,
particularly in the case that they will be near-future beneficiaries.85 However,
these restrictions do not apply to the incidents where it is essential for military
purposes to cut down trees or contaminate the water supplies.86

If deemed necessary in military terms, i.e., apt to accomplish the military
objective, a ruse, particularly in the form of vague statements, is allowed whereas
lying towards deception, or perfidy, broadly speaking, is not.87 To further elaborate
on the blurred boundary between a ruse and deception, al-siyar provides examples
in detailed narration. For instance, a Muslim fighter may give the impression
(without telling an explicit lie) that they have already won the battle so that the
enemy would surrender.88 In an account, al-siyar reports that when the Prophet
Muhammad was told during the Battle of the Confederates (also known as the
Battle of the Trench) about the decision of one of the communities in Medina to
terminate agreement and join the aggressors, he implied that they did so in
compliance with his request, ensuring that Abu Sufyan, commander of the Meccan
polytheists, would doubt the shift in the alliance.89 Plain lies are, however,
prohibited for Muslims during war. Al-siyar notes that if a Muslim combatant tells
people under siege that they have been granted safe conduct by the Islamic ruler
(while it is a lie), the aman (safe conduct) will become binding upon all Muslims,
including the ruler.90 Similarly, if a group of Muslims lie to a group of enemy
combatants that they are envoys authorized by their ruler to grant safe conduct or
to negotiate terms of peace and they are permitted to the enemy lands, they may
not kill anybody or seize any property during their stay.91

A critical review of al-siyar further reveals that those enemy combatants
who ask for safe conduct from Muslims are granted broad entitlements,
suggesting that the primary goal is to ensure that combatants will no longer pose

84 Al-siyar, Vol. 1, p. 65.
86 Al-siyar, Vol. 4, p. 58.
90 Al-siyar, Vol. 1, p. 344.
a military threat. By granting contractual immunities to the combatants, *al-siyar* seeks to minimize the potential damage to be caused by the military offensive and to expedite the achievement of military objective through a quicker surrender of the enemy. Safe-conduct immunities are granted even in cases where enemy combatants suffer from a relatively disadvantaged military position. An enemy combatant who is not protected in a fortress, for instance, is entitled to calling for a contractual safe conduct; according to *al-siyar*, the contract may even cover protection of his properties and family members that he will take from his hometown as well, except those in the battleground or areas that are under siege which will be considered spoils of war.

The institution of *aman* as reconceptualized in the Islamic law of armed conflict appears to be built upon two major premises: that as noted above, it seeks to expedite the accomplishment of the military objective; and its terms and conditions as spelled out in the contract are to be respected and honoured. In other words, the goal is not to show mercy for the enemy, but to give the message that once a contract has been made, Muslims will fulfil the legal obligations they undertook in association with that contract. *Al-siyar* narrates that if, in a military confrontation, the enemy combatants behind protective walls tell Muslim combatants that they will send a delegation for safe-conduct negotiation and that they will accept the terms the delegation will communicate with them, the terms negotiated with the delegation will be deemed binding. Therefore, if, for instance, the delegation secures a safe conduct for only themselves in return for a military surrender, Muslims do not have to grant safe conduct for those who remain in the fortress once they seize control, regardless of whether or not the delegation lied to their own military servicemen about the terms of the agreement they made with Muslims.

The same also applies to a hypothetical case involving a Muslim envoy authorized to negotiate with enemy combatants about the terms of a safe-conduct agreement. *Al-siyar* notes that if the envoy, despite that he has authorization to do so, tells the enemy commander that safe conduct will be granted to him, his relatives and his countrymen if he opens the gate, his words will be considered binding upon Muslims. Therefore, once the gate is opened, Muslim combatants may not take the people in the fortress prisoners or seize their properties. In this case, too, emphasis is placed upon the assurance that an agreement delivers to the contracting parties. Therefore, the strong conviction that the words of an envoy create for the enemies is further backed by subsequent conduct of the Muslims. Whether or not the envoy is a Muslim, a *dhimmi* or an enemy combatant who has been previously granted safe conduct does not affect the binding effect of his words. Granting safe conduct to a prisoner is also applicable, and legally binding upon all Muslims. However, in that case, the scope

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of the *aman* institution is fairly limited. Because the safe conduct has been granted at a time when the grantee was no longer a combatant, he is still considered a spoil of war; the only immunity he will secure is against possible execution.  

The contractual coverage of *aman* may, in certain cases, involve protection of the grantees. If, for instance, a group of people from the abode of war who have been granted safe conduct are attacked while in the abode of Islam by enemy combatants, and taken out of the Islamic land, Muslims are legally obliged to extend assistance to those covered by the *aman* agreement. This particular rule applies to the grantees of *aman* who are in the abode of Islam by virtue of which they become entitled to Muslim protection like the *dhimmis*. Thus, the enemy combatants already know that once they cease to fight against Muslims and seek a safe-conduct protection, their lives will not be compromised and Muslims will have to honour the safe-conduct agreement by taking any measures possible to ensure their protection. The goal in such extensive coverage is to offer a broad incentive for the enemy combatants to stop fighting against Muslims, thereby enabling the Muslims to attain the military objectives without causing unnecessary damage.

**Principle of humanity**

Islam (and naturally *al-siyar*) proceeds from the premise that the Islamic faith offers the path for eternal salvation and, thus, Muslims should strive to deliver its message to non-Muslims; this premise has broad manifestations in the behaviours of Muslims, even in times of armed conflicts, that as long as there is hope for possible conversion of the adversaries to Islam, caution and resort to peaceful means are recommended. Apart from this general code of conduct, Muslims are tacitly encouraged to maintain good relations with unbelievers, particularly if they are relatives. Similarly, in the battleground, a Muslim fighter is discouraged to kill his father who fights on the side of the enemy. In other words, *jihad* in the form of violent confrontation is not considered a free pass to kill the enemy, but rather refers to a political framework and set of rules constrained by legal and ethical priorities.

This approach manifests itself in the battleground as a moral requirement of showing respect to the enemy by virtue of them being created as human beings. Muslim combatants are encouraged by the *Qur’an* and the hadiths to take part in armed aggression, but only to fulfil what has been prescribed as a military objective; as such, they are discouraged from relying on revengeful acts including torture, summary execution and humiliation of bodies. Even POWs, according to the primary sources of Islam, have to be given a decent treatment:

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Do not handcuff or tie up the prisoners. Do not mutilate. Do not kill the wounded. Do not pursue one retreating or one who throws down his weapon. Do not kill the old, the young or their women. Do not cut down trees, unless you are forced to do so. Do not deploy poison in lands. Do not cut off the water supply.  

Despite diverse (and in some instances, conflicting) views on how POWs should be treated and what rules are applicable to them, Muslim scholars and jurists overwhelmingly suggest that they may not be subjected to scourging heat, excessive cold, thirst, hunger and any other forms of torture. Similarly, Muslim individuals and authorities, according to Muslim jurists, have to avoid inflicting degrading or inhumane treatment on the enemy POWs. Humane treatment that Muslims are recommended to grant to enemy POWs is compared to an act of charity.

Mutilation, dismemberment of the body organs, torture of any kind and other inhumane treatment of the body or persons alive is strictly forbidden and condemned in the Islamic tradition. Al-siyar narrates a report from Caliph Abu Bakr who expressed strong disapproval when the decapitated head of a lead enemy figure was brought to him. When told that this is exactly how the enemy treated the Muslim bodies, the Caliph underlines that it is still impermissible, thus suggesting that the prohibition of inhumane treatment remains regardless of whether or not the adversaries honour the same rules. A particular case that confirms Abu Bakr’s approach is the Battle of Uhud where, even though a number of Muslim bodies, including the Prophet Muhammad’s uncle’s, were severely mutilated, he did not authorize infliction of a similar harm to the bodies of the enemies. It should also be noted that mutilation of body organs and excessive torture that leaves permanent marks on the body were regular practices of warfare even in the times of the Prophet Muhammad who, however, strictly forbade them for the Muslims, resulting in the adoption of a strong rule within the Muslim community that remains unchanged in the subsequent centuries.

However, the Islamic conception of humanity that might be identified through a review of laws governing armed conflict does not place much emphasis upon the sanctity and protection of life; instead, Muslims are strongly recommended to refrain from what appears to be inhumane and excessively violent conduct. This is why providing the essential needs of POWs does not contradict, in the Islamic law of war, with the possibility of killing them. The

101 Hadith cited in M. Khadduri, above note 41, p. 106.
102 M. Hamidullah, The Muslim Conduct of State, above note 40, p. 214.
overall stance regarding POWs is that they might be killed, freed for ransom or spared as free men. The early scholars and jurists base this approach on the verse:

So when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either [confer] favor afterwards or ransom [them] until the war lays down its burdens.\(^\text{108}\)

Although not legally binding, Muslims are encouraged not to kill POWs. Prisoner exchange is specifically encouraged, particularly in cases where it is requested by the enemy and endorsed by the majority of the combatants in the battleground, because saving Muslim POWs is deemed one of the military objectives.\(^\text{109}\) In any case, however, the political or military authority holds the discretion on the fate of enemy POWs.\(^\text{110}\) Regardless of the decision (including a decision to kill), torturing POWs and depriving them of food and water are prohibited.\(^\text{111}\) There are instances involving the exercise of the most extreme options, ruled by the political authority. In the case of the surrender of the Banu Qurayza tribe, for example, the male POWs were killed whereas the others were enslaved. Because the Banu Qurayza accepted the offer, during the siege, that their fate would be determined by one of the leading Muslim figures, no contractual term was deemed to be violated. One of the close companions, Sa’d b. Muaz, made the judgement above, based on the terms of the surrender.\(^\text{112}\)

Once again, \textit{al-siyar} makes a distinction between those who have been granted contractual \textit{aman} and the POWs in terms of the scope and extent of the protection. \textit{Al-siyar} recalls that only those who have \textit{aman} or those who converted to Islam are protected against being killed. Additionally, the POWs remain enemy combatants even if they have been neutralized whereas those who are protected by \textit{aman} may not be legally combatants.\(^\text{113}\) In other words, the principle of military necessity applies to those who are granted safe conduct, but not to the POWs. The enemy combatants granted \textit{aman} contribute to the expedited achievement of the military goals which is not the case with the POWs. Islamic political authority is given broad discretion to determine how the POWs should be treated; Muslims are reluctantly discouraged not to kill POWs, but still this option remains; in the case the political authority decides that the POWs may be killed, however, they may not be burned in fire.\(^\text{114}\) Therefore, it is safe to argue that a partial (and restricted in practice) exercise of the principle of humanity is recommended in \textit{al-siyar}. In short, the principle of humanity is not fully operational in this case since the POWs may be killed and those who kill them even in the absence of authorization by the political ruler (unless they have

\(^{108}\) Qur’an, Chapter 47, Verse 4.
\(^{109}\) Al-siyar, Vol. 4, p. 159.
\(^{110}\) Al-siyar, Vol. 3, p. 75.
\(^{111}\) Al-siyar, Vol. 3, p. 79.
\(^{113}\) Al-siyar, Vol. 3, p. 76.
\(^{114}\) Al-siyar, Vol. 4, p. 50.
been appropriated to their new owners) do not face any punitive sanctions.\textsuperscript{115} That the same also applies to the cases involving unlawful killing of those who may not be killed including non-combatants (elderly, children, priests, etc.)\textsuperscript{116} suggests that the principle of distinction, rather than the principle of humanity, prevails during an armed conflict.

**Principle of proportionality**

It is, particularly when compared with items that may be associated with the other three principles, hard to identify a solid base in the Islamic law of armed conflict that places strong emphasis upon the principle of proportionality. Rather than making explicit references, however, both the Islamic law of war in general and *al-siyar* in particular give the impression that the conduct of warfare should be proportional in terms of seeking a balance between the military objective and the potential human or material losses. It seems that a proportional conduct is ensured through the versatility of the military deployment and stationing in Muslim armies and the usefulness and diversity of the tactics that they employed. The success of the Muslim armies, in terms of both securing a victory and observing proportionality, is also due to their ability to borrow a great deal from the pre-Islamic habits and customs in Arabia, and from Persia and the Byzantium.\textsuperscript{117}

*Al-siyar*, in addition to a number of normative rules, also contains details on the distribution of spoils of war to Muslim combatants. Although *jihad* is fought in the name of God, the possibility of entitlement to spoils is also a remarkable incentive for fighters. In the case of distribution of spoils, the Islamic law of war, in general, prescribes rights for Muslims.\textsuperscript{118} As long as the normative rules applicable to the non-Muslims and their properties are fully observed, the Muslim fighters, as part of the military offensive, may acquire the possession of the properties of the enemy combatants. A cardinal principle in the Islamic law of war governs this particular subject matter on the spoils of war which identifies the types, quality and quantity of spoils the fighters are entitled to.\textsuperscript{119} Also, because they are already aware of what to expect in terms of spoils of war, Muslim fighters avoid any tactics or military styles that could lead to total annihilation of their enemies. In other words, the legal and juristic texts make no explicit mention of the principle of proportionality; and yet because the proportions applicable to the distribution of the spoils are determined before the initiation of the war, combatants tend to avoid disproportionate action in the battleground.

Apart from these circumstantial constraints that might be identified through a review of the historical context and the primary motivations, the

\textsuperscript{115} *Al-siyar*, Vol. 3, p. 77.

\textsuperscript{116} *Al-siyar*, Vol. 4, pp. 8 and 22.


\textsuperscript{118} *Al-siyar*, Vol. 2, pp. 113–361.

\textsuperscript{119} *Al-siyar*, Vol. 2, pp. 113–45.
Islamic law of armed conflict, with specific reference to al-siyar, does not contain any references to prohibited weaponry or military tactics by virtue of being disproportional to the military objective. Al-siyar explicitly states that burning down the enemy fortresses, drowning the people (apparently without distinction), using catapults and contaminating their water are all permissible acts in the battle.120 Al-siyar further cites poisoned arrows as permissible weapons in the battle, noting that this may increase the chance of killing the enemy combatant.121 These are cited as wartime measures to defeat the enemy or ensure their surrender. Al-siyar further notes that these tactics may still be utilized even if the Muslims are aware that elderly, underaged, POWs, people granted aman and even Muslim POWs will be affected by such aggressive measures simply because such casualties are unavoidable.122

As long as the enemy combatants are able to carry out the fight under strong defence and protection, such measures are undisputedly employable by the Muslim fighters. Those Muslim fighters using these weapons or tactics will not be condemned whatsoever if, in such cases, Muslim merchants or POWs are killed due to the attack even if they stated beforehand that they might be a target as well.123 Similarly, in cases where enemy combatants use Muslim children as human shields, Muslims fighters may still carry on the offensive and they will not be held responsible if any of the children die.124 As noted, al-siyar does not list any prohibited weapon or military tactic that may cause mass casualties. However, it also states that such weapons or tactics should be identified as essential to accomplish the military objective.125

**Conclusion**

There are strong reasons to assume that the Islamic law of armed conflict and modern IHL have a common basis in terms of their focus and of on what principles they have been constructed.126 First, as a unique branch of international law, IHL places emphasis upon the individual in particular, and what bears close relevance to the individual. Similarly, Islamic law, even in its general outlook, is rather individual based, ascribing rights and obligations to their legal status as individuals. Whereas individual obligations may weigh

120 Al-siyar, Vol. 4, p. 49.
121 Al-siyar, Vol. 4, p. 55.
122 Al-siyar, Vol. 4, p. 49.
123 Al-siyar, Vol. 4, p. 53.
124 Al-siyar, Vol. 4, p. 54.
125 Al-siyar, Vol. 4, p. 53.
favourably against individual rights in other areas, siyar may be considered an exception as the primary focus in this field is to protect the individual. Second, close interaction between the Muslim world and some of the founders of modern international law, who have mostly pondered over attainment of peace and containment of war and its effects, suggests that there might be certain similarities in the approaches employed by Muslim scholars and jurists, and those who laid the foundations of modern IHL.

An inquiry into the possible areas of convergence is particularly meaningful given the dominance of two rather extreme and irreconcilable approaches in the literature on the nature and utility of Islamic law. At one end, Muslim scholars either praise the Islamic law of armed conflict, arguing that it covers many issues that are not adequately addressed even in modern times, or adopt an apologetic stance, suggesting, in an implied response to criticisms, that uncontrolled violence may not be associated with the concept of jihad. At the other end, the contribution by Islam to the development of the idea of a humane conduct of warfare is either ignored or underestimated. A number of scholarly accounts that fall in between properly engage with the main sources of Islamic law on the conduct of warfare and on the privileges and protections attached to relevant parties, in acknowledgement of the extensive coverage by Islam of rules pertinent to armed conflicts. While these studies succeed in exploring the content of these rules and identify the circumstances under which they have been made, they do not attempt at searching for foundational similarities or differences by comparing and contrasting the contemporary legal mechanisms on the law of armed conflicts and the Islamic approach.

This study sought to fill this gap by taking al-Shaybani’s Siyar al-Kabir as reference for its argument. Shaybani’s al-siyar has been extensively studied and examined in many respects, but not in terms of the principles it contains upon which further contributions by Islamic scholars have been based in later centuries. Compiling what is enshrined in the Qur’an and the hadiths, the primary sources of Islamic law, the siyar showcases the Islamic teleology as applied to the armed conflict, which apparently does not rule out its utility as an apparatus to disseminate the Islamic message but prescribes certain restrictions in

the case where controlled and justified violence is deemed necessary. While al-siyar does not make any discernible distinction between *jus ad bello* and *jus in bello*, the authors restrict the scope of the paper to the examination of the principles that gave birth to the rules to be observed in armed conflict, thus deliberately not raising a debate on the legal basis, under Islam, for the initiation of a war.\(^{132}\)

The authors, in an attempt to explore areas of convergence, first identified the principles that can be detected in the major texts of modern IHL. By examining recent literature, as well as the primary canon, we argued that the rules of contemporary IHL are based on the principle of distinction, the principle of proportionality, the principle of military necessity and the principle of humanity. Subsequently, they critically review al-Shaybani’s *al-siyar* to explore the existence of the same principles through a textual analysis, with a primary focus on the rules elaborated in the text that are relevant to the conduct of war rather than what justifies it.

Findings based on the review suggest that there are convergences to varying degrees. In particular, *al-siyar* places emphasis upon the distinction as a cardinal principle to avoid unnecessary harm to Muslim combatants and their adversaries as well. This emphasis is two-dimensional, referring to a utilitarian tendency to prevent waste of resources and to a divine purpose of protecting human life, as well as of keeping the option of conversion for the non-Muslims. From an Islamic law standpoint, boundaries between combatants and non-combatants have to be clearly drawn so that unnecessary casualties are prevented in the battle where the primary goal for Muslims is to achieve military objectives, often towards proving the superiority of the Islamic faith and conveying its message to others for them to experience the same privileges. Thus, for non-combatant immunity to be respected, proper measures should be taken to ensure distinction.

References in *al-siyar* to the principle of humanity also bear relevance to the sanctity of life. While it does not propose a cosmopolitan conception of humanity,\(^{133}\) *al-siyar* reminds of how the *Qur’an* and the hadiths depict life in its entirety and what obligations they prescribe for Muslims to protect and cherish it. Believers are considered superior, but only because of their belief which will entail a better treatment on a spiritual level; thus, they are equals to their opponents in the battleground because all lives matter. This, however, does not lead to a conception of a unified humanitarian identity that constructs the Islamic approach *vis-à-vis* the conduct of warfare. Additionally, because an armed conflict, by definition and by nature, involves increased likelihood of casualties, protection of life does not stand out as a primary objective. The focus on the upholding of the principle of humanity, thus, bears relevance to restrictions and obligations that require Muslim combatants to refrain from inhumane conduct such as torture, mutilation and dismemberment of body organs. As such, military

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\(^{133}\) For a study that argues otherwise, suggesting that the construction of Islamic belief presents a sense of humanism, see Marcel A. Boisard, *Humanism in Islam*, American Trust Publications, Oak Brook, IL, 2014.
necessity often prevails over recommendations towards observation of the humanitarian principles.

The principle of military necessity manifests itself in *al-siyar* in a technical and non-normative appearance. Rules pertinent to this principle serve a thorough observation and implementation of the rules constructed in reference to the principle of distinction. Sanctity of life is often (and heavily) underlined in the primary sources and the emphasis appears to have been conveyed to apply to the conduct of warfare as well. Restrictions to employment of acts, tactics and weaponry that would not seem to be necessary for the attainment of military objective, thus, serve this purpose. In the practical implementation of this principle, certain rules and recommendations are specified for Muslim combatants to observe during battle, including obligations to avoid total destruction of trees, fields and livestock; even though protection of the environment is not prescribed as an absolute requirement, whenever it is evident to stay out of the boundaries of military necessity, Muslims are recommended to take precautions towards its protection. The same also applies to weapons and tactics to be employed in the battle.

Based on the review above, it should be noted that the principle of proportionality is the least obvious and accentuated. As long as they are considered necessary, justifiable and essential to accomplish the military objective, any tactics or weapons are legally permitted for Muslims to utilize in battle. Priority is given to a military victory, or if possible, to surrender of the enemy; any tactic that secures such an outcome is listed as justifiable in *al-siyar*. Burning down a fortress, contaminating water supplies, using catapults and drowning people under siege are some of the extreme acts and tactics that *al-siyar* refers to as permissible. However, these acts are justified only when they are regarded inevitable towards attainment of the military objective. Thus, the principle of proportionality has partial enforcement, obviously in conjunction with the cases that display relevance to the principle of military necessity.

Findings in this study may make particular sense in the case of broader attempts to bridge the gap between Islam as a source of an international/global order and the modern understanding of international relations. Change and evolution in theoretical thinking, particularly in terms of how to approach the concept of *jihad*, and intensified interaction between Islam and contemporary IHL, as well as efforts to identify foundational similarities between world civilizations particularly in terms of normative contributions to the humanization

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134 For such attempts at presenting an Islamic political worldview, see, amongst others, J. Harris Proctor (ed.), *Islam and International Relations*, Frederick A. Praeger Publishers, New York, 1965.
of war,\textsuperscript{137} will add further momentum to such endeavours. Possible modes of theoretical thinking, on the other hand, include, among others, a relatively submissive approach that “the Muslims’ religious duty may be satisfied by applying a modern version of Islamic law that is consistent with peaceful international relations and respect for human rights...[that] will be derived from the fundamental sources of Islam, without being identical in every respect to historical Shari’a”,\textsuperscript{138} and an ambitious challenge that will introduce an alternative methodology of Islamic global international relations that abolishes a classical classification of political jurisdictions between \textit{dar al-Islam} (abode of Islam – peace), \textit{dar al-harb} (abode of war) and \textit{dar al-’adl} (abode of justice) and introduces a universally inclusive paradigm.\textsuperscript{139} Regardless of what option seems plausible and is chosen by Muslim thinkers, convergences between the Islamic law of armed conflict and contemporary IHL hold concrete prospects to rebuild a new world order that underlines commonalities rather than differences between world civilizations.\textsuperscript{140}

\begin{enumerate}
\setlength\itemsep{0em}
\item For an example of search for a common ground by a renowned contemporary Muslim scholar, see Sheikh Wahbeh al-Zühili, “Islam and International Law”, \textit{International Review of the Red Cross}, Vol. 87, No. 858, 2005.
\end{enumerate}
Armed groups, IHL and the invisible world: How spiritual beliefs shape warfare

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Abstract
“Secret societies”, “traditional hunters”, “charms” and “mystical weapons” are recurrent terms when analyzing some of the present armed conflicts in the Sub-Saharan region. However, though spiritual beliefs shape armed groups’ behaviour, and such beliefs are integrated into the modus operandi of some armed groups, the role of these beliefs in warfare is largely overlooked. Far from being something anecdotal or incidental, the invisible world plays a role in shaping armed groups’ behaviour and framing warfare dynamics. Spiritual beliefs might influence the respect afforded to international humanitarian law and international human rights law. Such beliefs may also serve various strategic functions, including for legitimation of the group, mobilization of support, control, cohesion, discipline, motivation and protection. Digging further into the matter and understanding how such beliefs impact the internal dynamics of armed groups and their external relations, including with the State, other armed groups and communities, is an essential part of understanding armed conflicts and their aftermath.

Keywords: spiritual beliefs, international humanitarian law, armed groups, Africa, witchcraft.

From spiritual powers to military strategies
“Secret societies”, “traditional hunters”, “charms” and “mystical weapons” are recurrent terms when analyzing some of the present armed conflicts in the

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Sub-Saharan region. The Dozos in West Africa, the Ugandan Lord’s Resistance Army (LRA), the Civil Defense Forces (CDF) in Sierra Leone, the Maï-Maï groups in the Democratic Republic of the Congo (DRC) and the Anti-Balaka in the Central African Republic are some examples of armed groups with links to mystical powers. However, though these groups are renowned for integrating spiritual beliefs into their modus operandi, the role that these beliefs are playing in warfare is largely overlooked.

Indeed, while the impact of some manifestations of spiritual beliefs on international human rights in peacetime is widely researched, much less has been explored about their role in armed conflicts and their impact on international humanitarian law (IHL).

Far from being something anecdotal, spiritual beliefs may serve different strategic functions for armed groups, including legitimation of the group, mobilization of support, increase of control and discipline, motivation, cohesion, protection and intimidation (see the section below entitled “The Invisible World in the Dynamics of Armed Groups”). It is essential to underline that spiritual powers do not replace other military strategies and conventional weapons, but reinforce and overlap with them.

Spiritual beliefs may also be a factor of influence on the battlefield. Individuals who undergo mystical rituals may be perceived as extraordinarily brave and cruel, and may be more inclined to take risks and feel no responsibility for their actions. Spiritual beliefs may contribute to restraint also, as the acquisition of mystical powers implies adherence to some norms and prohibitions (see the section below entitled “The Invisible World and Its Influence on Armed Actors’ Behaviour”).

For this article, the term “spiritual beliefs” will be used to encompass different beliefs and practices related to the unseen world and supernatural forces, noting that the concrete manifestations of these practices vary among communities, who have specific expressions to refer to different aspects and manifestations of their spiritual beliefs. Reference to spiritual beliefs evokes exoticism, fantasy, irrationality—and these tags are not innocuous. Simplifying and decontextualizing these beliefs and practices and ignoring their nuances and subtleties entails the risk of excluding them “from serious consideration in analysis of ‘rational’ activity such as military strategy”.

1 The Dozos are mainly present in Burkina Faso, the Ivory Coast, Mali, Guinea and Sierra Leone: United Nations Operation in Côte d’Ivoire (UNOCI), Rapport sur les abus des droits de l’homme commis par des Dozos en République de Côte d’Ivoire, June 2013, para. 8.


While this article focuses on the recent history of the Sub-Saharan region, the reported influence of mystical powers in armed groups and individuals and conflict dynamics is not confined to this geographic area. For example, a study conducted by Schwoerer in Papua New Guinea identified witchcraft and witchcraft accusations as “the most dominant triggers for the outbreak of intergroup armed violence” in many areas of the Eastern Highlands Province. Also, journalist accounts have described how several high-ranking officers of armed groups in Colombia (such as the FARC-EP, the ELN, and the paramilitaries), with entirely different ideologies, were involved in consultations with mediums and the use of protective amulets and rituals.

The interface between spiritual beliefs and the rules regulating armed conflicts

Religious beliefs contribute to mobilizing and shaping the development of rules of war, and religious leaders can play a crucial role in enhancing compliance with IHL. The interface between IHL and Islam or Buddhism, for example, is the subject of some analysis. Much less has been researched about IHL and spiritual beliefs.

There seems to be a reluctance to discuss the impact of the spiritual and unseen world in warfare (thus neglecting the spiritual dimension of armed groups).

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Pretending that the links to the invisible world in armed groups are just circumstantial also means ignoring the Sub-Saharan worldview, where the unseen and the visible world intertwine. “The invisible is not only the other face of the visible; it exists in the visible and vice versa.” These two worlds are interrelated and in constant interaction.

To contextualize these beliefs and their role in shaping the dynamics of armed groups, it is essential to consider the following observations.

First, spiritual practices such as oaths and initiation rituals rely on and intensify what are generally described as Sub-Saharan traditional values, such as a holistic world view, the importance of the community and kinship, respect for authority and hierarchy, loyalty, and secrecy.

Second, spiritual beliefs are frequently described as fictional or false. Whether spiritual forces are real or not is a question that not only goes far beyond the scope of this article (not to mention that either claim is unfalsifiable), but is also irrelevant. The invisible world “exists as a social and cultural reality” as something considered real by armed groups and the different actors that interact with them. Even if individuals might not fully understand the purpose or meaning of the different rituals that they perform, these beliefs impact on them, as illustrated in a study conducted by Kelly and others on Uganda: “Although respondents often did not know the purpose of the magical rites they experienced, they placed an emphasis on [magic’s] importance, and even after escaping from the LRA expressed a fear of its power.” Therefore, what matters is how these beliefs influence the individual and community narratives of warfare.

Third, beliefs in invisible forces are anchored in the social and cultural setting in which armed groups emerge. These beliefs are not created ex nvo in wartime but are an integral part of communities, also in peacetime. The invisible world is present in Sub-Saharan life, including in community relations, politics, economics, medicine, law and sports. The relevance of such beliefs continues in wartime.

Fourth, everyone has the right to freedom of thought, conscience and religion or belief. However, some manifestations of this belief may be restricted if these restrictions are prescribed by law and are deemed necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

11 Ibid., p. 6.
13 N. Wlodarczyk, above note 3.
Fifth, beliefs are ever-evolving; they are transformed and re-invented, and exposed to divergent interpretations. The intensity of the belief in spiritual forces varies within communities and individuals; it may even be in constant evolution during a person’s life. Controversies around different manifestations and interpretations of spiritual beliefs might also be a source of confrontation and discussions within a group.

Finally, asserting that armed groups resort to spiritual powers does not mean that they do not rely on conventional weapons and strategies. Spiritual beliefs may not be the foremost element mobilized by armed groups, but are one element that shapes their individual and group behaviour.

In this sense, it is interesting to note that the influence of spiritual beliefs on the dynamics of criminal networks has also been explored. According to Europol, ritual oaths constitute a “controlling element” for human traffickers, and a “significant obstacle” in dealing with victims of Nigerian networks involved in trafficking for sexual purposes. While research mainly focuses on the resort to ritual oaths and juju as a coercive means, these beliefs are reportedly playing a broader role in the network dynamics of trafficking (for example, traffickers may request juju priests to give them protection from the police or a positive outcome in judicial proceedings). According to Ellis, “the conviction that they are spiritually empowered is often an important part of the often-noticed dynamism and resilience of Nigerian criminals”. Ellis also mentions how such spiritual ties operate in drug rings, as couriers may swear a ritual oath of loyalty to limit the risk of betrayal. Using mystical forces to yield positive results is reportedly also a strategy among Nigerian cyber criminals.

The invisible world and armed conflicts: Seeking out connections

While this article focuses on the impact of spiritual beliefs on armed groups, there are also other ways in which the invisible world and armed conflicts are connected.


And during the armed group’s life. For example, during the Ongwen trial, an expert witness stated that spirituality was much more prominent within the LRA between 1986 and before Operation Iron Fist in 2002: International Criminal Court (ICC), Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Public Redacted Version of “Corrected Version of ‘Defence Closing Brief’, filed on 24 February 2020”, 13 March 2020, para. 712.


Ibid., p. 177.

There are reports of children being discriminated against, mistreated or killed as a consequence of witchcraft allegations. Armed conflicts are said to have contributed to this phenomenon by, among other things, increasing the vulnerability of children, disrupting family lives, breaking down social and family networks, and changing the perception of children. According to Foxcroft, witchcraft accusations, particularly against children, are likely to increase in post-conflict settings; he refers to Angola, the DRC and Liberia as examples of this. De Boeck notes that violence transformed traditional representations of children in the DRC, in 1997: “[W]hen Kabila seized power and child-soldiers (some aged under ten) entered Kinshasa, it was a totally new phenomenon and shocked many of the capital’s inhabitants.” Among other factors, the association of children with armed groups may have contributed to the change in the perception of children from vulnerable subjects to powerful and active social actors, becoming a source of danger both in the visible and the invisible world.

Some people accused of witchcraft are persecuted by armed groups. The United Nations (UN) Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reported that in October 2008 in the Central African Republic, the People’s Army for the Restoration of Democracy allegedly executed sixteen civilians, some of them following accusations of witchcraft. Reportedly, the Kamuina Nsapu also tried and executed alleged witches. The LRA’s rules proscribe witchcraft, on pain of death. In the International Criminal Court (ICC) trial against Dominic Ongwen, an ex-commander of the LRA, one witness stated that Ongwen had ordered a group of girls under his command to kill a girl accused of witchcraft, in order to dissuade others from practising witchcraft.

22 A. Cimpric, above note 10.
27 Understanding witchcraft as “the ability to harm someone though the use of mystical power”: A. Cimpric, above note 10, p. 1.
30 ICC, Prosecutor v. Dominic Ongwen, Situation in Uganda in the Case of the Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Prosecution’s Pre-Trial Brief (Trial Chamber IX), 6 September 2016, para. 586.
31 Ibid., para. 621.
Fieldwork conducted in Mozambique by Lubkemann and Watson shows how spiritual beliefs influenced post-conflict resettlement experiences and decision-making in the aftermath of the civil war.\textsuperscript{32} Schnoebelen’s research illustrates how the circumstances leading to displacement, whether due to natural disasters, armed conflicts or political unrest, and the challenging living conditions of refugees and internally displaced persons (IDPs) may cause them to rationalize their suffering by blaming others, leading to witchcraft accusations.\textsuperscript{33}

These accusations may affect living conditions in displacement settings; in 2007, for example, the Office of the UN High Commissioner for Refugees (UNHCR) reported that witchcraft allegations had led to episodes of violence, including assault and arson, in a refugee camp in Chad.\textsuperscript{34} Witchcraft accusations between the host community and refugees and IDPs may also undermine the process of integration or reintegration,\textsuperscript{35} and endanger refugee and IDP return. For example, in South Sudan some refugees returning from Uganda were reportedly rejected because they were believed to have embraced witchcraft practices during exile.\textsuperscript{36} The belief in the supernatural may also jeopardize safeguarding actions. In Zambia, for instance, an attempt to integrate unaccompanied minors with elderly refugees reportedly failed because the children feared the elderly were engaged in witchcraft.\textsuperscript{37}

Spiritual beliefs impact the treatment of the dead. Owusu describes how, during colonial times, the Asante used to remove the soldiers fallen from the battlefield, fearing that they could face decapitation by British troops, thus “leaving their souls defiled and condemned to perpetual limbo”.\textsuperscript{38} The work of Owino on the contribution of Kenyan soldiers in the Second World War in colonial Kenya describes the different approaches to death and the refusal of some communities to exhume and transfer the bodies of fallen soldiers.\textsuperscript{39} His work also analyzes how the war and the exposition to other cultures transformed the approach to death and burial of the Kenyan soldiers.

\textsuperscript{35} Jeff Crisp, “Witchcraft and Displacement”, \textit{Forced Migration Review Online}, October 2018.
\textsuperscript{36} J. Schnoebelen, above note 33, p. 27.
\textsuperscript{37} \textit{Ibid}, p. 22.
The invisible world in the dynamics of armed groups

“Armed groups do not emerge from or operate in a social vacuum”;40 they arise from a particular social and cultural context. Mystical powers are inherent to the Sub-Saharan world view, the manifestations of this belief being more prominent in unstable settings.41 Moreover, “in a situation where power becomes of primary importance to protect individual and community life— as in war— the desire to access power in its broadest and most potent form increases”.42 Spiritual forces are a source of power.

Wlodarczyk argues that spiritual beliefs serve three main sets of strategic functions in armed groups: mobilization and legitimacy, organization and discipline, and motivation and intimidation.43 The present article will also analyze the influence of spiritual beliefs on respect for the rules of war and on the process of demobilization and reintegration of armed actors.

Spiritual beliefs seem to impact with more vigour, and visibility, in armed groups embedded in the community,44 even if these beliefs also influence formal armed groups, including State armed forces.45 Further research is required on how the impact of these beliefs may differ and evolve depending on the sex, age, rank or function of the individual, and how factors such as the length of time involved in the conflict, the charisma of the leader, and the individual’s level of exposure to death or traumatic episodes may influence people’s attachment to these beliefs.

For example, one interlocutor with extensive experience working with children associated with armed forces and groups in the DRC mentioned that these beliefs play a stronger role for younger armed actors, particularly boys, as they are more exposed to direct combat roles.46 The interlocutor also noted that the effect might be more significant in commanders than in middle or low ranks.

In the ICC judgment in the Ongwen trial, the Chamber noted that the belief in Kony’s alleged spiritual powers was stronger in the young and new abductees, while it decreased and disappeared in those who stayed longer in the LRA.47 In the trial, former LRA members mentioned some factors that made them start to doubt Kony’s powers. These included the fact of getting older and thus “wiser”, observing people who were able to escape without being apprehended, and noticing Kony’s ordering of “all kinds of bad things”.48 For Titeca, an expert

41 A. Cimpric, above note 10, p. 9.
42 N. Wlodarczyk, Magic and Warfare, above note 3, p. 133.
43 Ibid., pp. 28 ff.
44 Following the categorization of armed groups described in ICRC, The Roots of Restraint in War, above note 8.
45 See the section below entitled “Intimidation: The Invisible World as a Weapon/Strategy against the Enemy”.
46 Anonymous interview with NGO worker, DRC, December 2019 (on file with author).
48 Ibid.
witness in the trial, the intensity of belief may be influenced by factors such as the length of time spent within the group (less intensity in those associated for a shorter time), the moment of becoming associated with the group (greater belief in those recruited as children) and the extent to which a person was already religious beforehand.49

Indeed, issues related to the role of spiritual beliefs in the dynamics of armed groups are being raised in international criminal courts. For instance, in the Ongwen trial, the defence highlighted “the ominous and overpowering role of spiritualism within the LRA”, basing part of its defence on that.50 Nistor, Merrylees and Holá, meanwhile, note that while in Ongwen’s trial “spiritual issues occupy the most prominent role in the history of international criminal justice”, spiritual-related issues had already been raised in other international criminal justice trials such as the Special Court for Sierra Leone (SCSL) in the Civil Defence Forces case, or during the Katanga and Ngudjolo trials at the ICC.51

Nistor, Merrylees and Holá refer to the Katanga judgment, in which the judges regretted that the prosecution did not go deeper into the spiritual issues involved, particularly the role of fetish-priests, stating that these “would have permitted a more nuanced interpretation of certain facts; a more accurate interpretation of some of the testimonies and, hence, a fine-tuning of the criteria relied on by the Chamber in assessing the credibility of several witnesses”.52 Kelsal asserts that the SCSL “proved deaf to an enormously important system of local magical belief”, failing to adjust to the cultural context.53 Titeca, who testified as an expert witness on spiritual beliefs in the LRA in the Ongwen trial,54 points out that international criminal law seems “underequipped” to deal with spiritual beliefs.55 Analyzing the Ongwen trial, Nistor, Merrylees and Holá describe the challenges of cross-cultural translations of spiritual concepts and warn that “local cultural concepts related to spirituality are often amputated [by the prosecutor, defence and victim’s representatives] from their context or stretched beyond their original meaning to fit the legal framework”.56

These risks are also present when analyzing the different functions of spiritual beliefs in armed groups and warfare dynamics. In addition, the general

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50 ICC, Ongwen, above note 15, para. 8.
54 ICC, “Dominic Ongwen Sentenced to 25 Years of Imprisonment”, press release, 6 May 2021, available at: www.icc-cpi.int/Pages/item.aspx?name=pr1590. On 6 May 2021, the ICC sentenced Dominic Ongwen to twenty-five years’ imprisonment, as he was found guilty of committing sixty-one offences comprising crimes against humanity and war crimes.
overview provided in this article, without analyzing the different particularities and context of each armed group, and with an exclusive focus on spiritual beliefs, implies multiple limitations. Among others, it leaves aside the nuances of each armed group and the different manifestations of spiritual beliefs, and other socio-economic, cultural and political factors that influence armed groups’ dynamics and their approach to spiritual beliefs. A deep and contextualized understanding of spiritual beliefs and practices is then required to find a balanced approach to the role of spiritual beliefs in armed groups and warfare dynamics, without misrepresenting, overestimating or underestimating the impact of these beliefs.57

Legitimization, mobilization and spiritual leaders

Having supposed spiritual powers may provide legitimacy to an armed group and contribute to the mobilization of new members or supporters. For example, the mystical powers attributed to the Dozo confer on them a special recognition by part of the authorities and the population.58 Ba-Konaré argues that armed groups in central Mali make reference to the classic imagery of the Dozos, presenting themselves as such, in order to benefit from the support of non-Fulani armed groups and legitimize their position as defenders of the local communities.59

Spiritual leaders are crucial for some armed groups due to their standing as moral and spiritual guides of their communities. They may provide not only mystical support for the armed groups but also tangible and strategic military advantages. Spiritual leaders’ support for armed groups may be key to securing those groups’ legitimacy and gaining support from the population.60 In South Sudan, for example, armed actors were said to look for collaboration with spiritual leaders in order to increase their leverage over youth and increase young people’s involvement in the armed conflict.61 The approval of spiritual leaders may enable armed actors to get community support without resorting to wide-scale violence.62 This mobilization capacity should not be dismissed, especially taking into consideration the African kinship system.

Through support from spiritual leaders, armed groups may also gain insight into the landscape, acquiring knowledge of secluded passages and hideaways and being allowed to cross and establish bases in sacred places.63

57 N. Wlodarczyk, above note 3, p. 7.
58 UNOCI, above note 1; Rodrigue Fahiramane Koné, La Confrérie des Chasseurs Traditionnels Dozo en Côte d’Ivoire: Enjeux socioculturels et dynamiques sécuritaires, June 2018, p. 21.
Spiritual leaders are also relevant actors of influence on the behaviour of armed groups. They may curse violations of moral codes, advise on norms of conduct, sanction offensives, promote internal cohesion and administer oaths and protection rituals. In the ICC Katanga trial, the Chamber noted that the fetish-priests “[held] sway over commanders and combatants alike” and that they were involved in the run-up to combat as, for the combatants, the involvement of fetish-priests directly affected the course of battle.

As a final point, there may be a hierarchy of spiritual leaders based on their powers, and the presence of different spiritual leaders might lead to competition among them for recognition and support.

Organization and discipline: Collective identity, control and group cohesion

Initiation oaths and rituals are generally steeped in mystery and secrecy and are embodied in symbolic ceremonies. These oaths are not mere agreements between two individuals but are “the expression of the totality of the relationship that exists between man and the cosmos”. Any conduct that leads to a breach of the covenant will unbalance the harmony. Therefore, these beliefs require strict adherence to certain rules and prohibitions.

There is no standard ritual. Initiation ceremonies may include scarifications, drinking potions, taking baths, or anointing with oil or other concoctions. Kamuina Nsapu militia initiation rituals reportedly involved drinking a potion made up of ingredients such as alcohol, crushed human bones, human blood or insects. The Truth and Reconciliation Commission for Sierra Leone reported that “organs, tissue, blood and flesh from the bodies of dead persons were used in Kamajor ceremonies of initiation”.

Some women are said to have undergone initiation rituals among the Dozo and Kamuina Nsapu. Wlodarczyk highlights that while some female fighters in the CDF “most likely received some magical protection, it seems unlikely that they were in fact initiated” as this would have been a break from tradition. An interesting contribution to this discussion on the role of women, although focused on colonial times, is Mwanzia’s work on gender and the Mau.

64 See, for example, V. Brereton, above note 61, pp. 30–31.
65 ICC, Katanga, above note 52, para. 1258.
66 Naomi Pendle, “Community-Embedded Armed Groups”, in ICRC, The Roots of Restraint in War, above note 8, p. 58; UNOCI, above note 1, paras 20 ff.
70 UNOCI, above note 1, p. 10. According to Ba-Konaré, only men can be initiated into Dozo confraternities: D. A. O. Ba-Konaré, above note 59.
71 Human Rights Council, above note 68.
Mau oaths. Mwanzia points out that the need to respond to the urgency of the moment led to a gender transformation in oathing, as the oath was traditionally only for men.

Initiation is intended to enhance collective identity and group cohesion, reinforcing loyalty and brotherhood between individuals. The work of Whitehouse and McQuinn shows that this sense of camaraderie increases when the members of the group have undergone low-frequency and high-intensity rituals: “Traumatic ritual ordeals increase cohesion and tolerance within groups, but they also seem to intensify feelings of hostility and intolerance towards outgroups.” This membership of a distinctive group is also recognized by outsiders, who acknowledge the added value (courage, mystical powers) of those belonging to the group.

Groups such as the Kamuina Nsapu, Dozo, Maï-Maï and Anti-Balaka also display their own identity visually through a particular dress code that includes protective charms. According to Ceriana, through these “dehumanizing” outfits, they build a warrior identity, bring cohesion to the group and spread terror.

Initiation rituals aim to instil courage and endurance and impress upon initiates the principles of the group, such as bravery, discipline, respect, loyalty and self-sacrifice. Initiation rituals may intensify superiors’ mental control over the recruits by “discouraging escape, inciting higher levels of motivation, providing legitimacy to the group and its commander, fostering group cohesion, and intimidating civilian populations”. At the same time, initiation may create a different superior–subordinate relationship between initiator and initiate, adding a spiritual dimension to the hierarchy.

Initiates must observe strict taboos and codes of conduct to preserve their acquired powers. Wlodarczyk explains that the infringement of these moral codes and the group’s exclusiveness may substantially impact initiates, creating the impression that affiliation to the group is the only option. Breaking the rules implies losing the powers conferred by initiation, which may mean getting wounded or killed.

Some commandants are said to have strong spiritual powers, which may increase their control over subordinates’ behaviour. For example, in the LRA, it...
is believed that spirits would indicate to its leader, Joseph Kony, where to find those who tried to escape. The purported powers of armed groups’ leaders may also affect the population. For example, the media reported on the Ugandan authorities’ statement that fear of Kony’s alleged spiritual powers “was so deep that people were scared to volunteer information to the government security forces lest Kony spiritually identifies and kill[s] them”.

Motivation: Protection and special powers

Bullet-proofing to gain protection against enemy fire is one of the most reported skills acquired through rituals. Invincibility or invisibility are other powers that are believed to be attained through rituals, as well as the capacity to distract the enemy or make him miss his target. Further reported abilities include shape-shifting and the ability to understand messages from animals, which are said to be sometimes presented as signs, leading the fighters and alerting them to any danger. For example, some members of the LRA claimed to speak to lions.

Gris-gris are the materialization of this protection, a visual and tangible symbol of these powers for both the initiates and their enemies. Although the charms and the reportedly acquired powers might not always work, this does not mean that they are completely ineffective. Considering the wide range of restraints that have to be respected, the person might believe that they have lost their protection for not strictly following these conditions, or because the enemy’s powers were stronger.

Manifestations of spiritual beliefs adapt to the needs and development of warfare. Research conducted by Nunn and Sánchez de la Sierra in the east of the DRC shows how “spells are continuously fine-tuned and adapted to the changes in the (natural and supernatural) warfare technology of the enemies. … For example, the anti-balle (bullet proofing) evolved from the anti-machete and anti-gun, aimed at rendering machetes and traditional guns ineffective.”

Nunn and Sánchez de la Sierra’s research team documented forty-six different “military spell variants”, including one that is aimed at stopping helicopters in the air. At an individual level, these powers may offer fighters courage to overcome the fear of dying in combat, even if that might actually increase the risk of the person being killed, as the acquired protection might

81 ICC, Ongwen, above note 15, para. 701.
84 E. Chitukutuku, above note 16, p. 328.
85 ICC, Ongwen, above note 49, p. 68.
86 Gris-gris are charms that are believed to protect fighters.
87 See the section below entitled “The Invisible World and Its Influence on Armed Actors’ Behaviour”.
89 Ibid., p. 8.
make the fighter underestimate the dangers of the fight; in return, from the perspective of the armed group, these rituals enable the mobilization of new individuals under the vow of getting support from the spirits, and help to foster group cohesion and discipline.90

These mystical powers may also allow fighters to maintain a degree of optimism, as they may interpret events to their own psychological advantage, assuming that the spiritual forces are working in addition to their military activities.91 In armed groups with basic military means, this spiritual dimension can become “an even greater resource to fill some of the material gaps in their supplies and training”.92 For example, the Office of the UN High Commissioner for Human Rights reported that the “generalized belief about the powers of Kamuina Nsapu and the fear it triggers among segments of the population … may partly explain why a poorly-armed militia … has been able to resist offensives by a trained national army”.93

Intimidation: The invisible world as a weapon/strategy against the enemy

As explained by Wlodarczyk, if a battle aims to force the enemy’s retreat, success may have “less to do with traditional military efficiency than with effectively outperforming the enemy in terms of the display of power”.94 This makes it possible that a shared belief in spiritual powers can contribute to military success, by motivating the fighters and intimidating the enemy.

In Nigeria, for example, media reported that Boko Haram95 members were fleeing the Sambisa Forest owing to spiritual attacks by snakes and bees:

[T]here are too many snakes and bees now in the forest. Once they bite, they disappear and the victims do not last for 24 hours. We were told that the aggrieved people who had suffered from our deadly mission, including the ghosts of some of those we killed, are the ones turning into the snake and bees.96

Popular tales and rumours about the strength of spiritual powers may be perfect propaganda, as demonstrated in a story related by Wild in the DRC, when three Mai-Maï equipped with spear and knives were reportedly fighting against 700 well-armed soldiers: “[T]he soldiers fired bombs …. The Mai-Mai heard the

90 Ibid., p. 4.
91 N. Wlodarczyk, above note 3, p. 129.
92 Ibid., p. 78.
93 UN Human Rights, above note 29, para. 54.
94 N. Wlodarczyk, above note 3, p. 128.
95 “Boko Haram” is not a label used by the group itself but is commonly used in media reporting to refer to the armed group People Committed to the Propagation of the Prophet’s Teachings and Jihad, or less often, to the Islamic State West Africa Province. For more information, see International Crisis Group, Facing the Challenge of the Islamic State in West Africa Province, Report No. 273, Belgium, 16 May 2019, available at: www.crisisgroup.org/africa/west-africa/nigeria/273-facing-challenge-islamic-state-west-africa-province.
noise of the bomb, they stood up and said, ‘Mai, victory is ours’. The bomb broke up high in the sky … and did not do any harm.”

This story not only reflects the popular conception of the mystical powers of armed groups but also fulfils some strategic objectives: boosting the confidence of the group, mobilizing new members, getting community support and ridiculing and scaring the enemy. Propaganda during hostilities is a useful resource for shaping popular opinion, gaining adherents to the cause, and dehumanizing and demoralizing the enemy.

While belief in mystical forces has a broader impact on non-State armed groups, it also influences State armed forces. It shapes the State armed forces’ response to these groups as a strategy, but also as a reflection of a shared cultural background with non-State armed groups. As expressed by one interlocutor, “regular armed forces might laugh about the alleged supernatural powers in public, but many of them strongly believe in them”.

The UN Expert Team on Kasaï described how Kamuina Nsapu spiritual practices shaped the response of the Armed Forces of the Democratic Republic of the Congo (Forces Armées de la République Démocratique du Congo, FARDC). Spiritual practices were addressed in propaganda disseminated by the FARDC to warn the population that spiritual forces would not prevent FARDC soldiers from killing Kamuina Nsapu members. The bodies of some of the militia were reportedly publicly exposed to show the community, but also the FARDC soldiers, that Kamuina Nsapu members were not invincible; and the killings of some militia were filmed by a FARDC soldier who argued that he made the video to encourage and comfort his colleagues, showing them that Kamuina Nsapu members were not invulnerable.

Some FARDC personnel, including high-ranking officers, are said to have gone through protection rituals to boost the morale of their troops, which reportedly created a break with those who did not believe in the ritual. In response, the Kamuina Nsapu would have reinforced their rituals to make them stronger than the ones performed by the FARDC.

The responses of political authorities may also integrate spiritual beliefs. In 2016, media reported that the Cameroon authorities called for the population to employ witchcraft against Boko Haram. In 2019, in Beni and Butembo (DRC), the media reported that the governor had launched awareness campaigns to dissuade youths from joining the Maï-Maï, claiming that the practices conducted

98 Anonymous interview, above note 46.
99 Human Rights Council, above note 68, para. 49.
100 Ibid., para. 105.
101 Ibid., paras 51, 360.
102 Ibid., para. 360.
by the Maï-Maï were “irrational” and “useless” and that only the army could defend them against Allied Democratic Forces incursions.104

Similar actions reportedly took place during colonial times. Luongo mentions how the British colonial government instituted de-oathing campaigns to cleanse those who took the Mau Mau oaths.105 Ranger describes how in the mid-1970s, after realizing how crucial spiritual beliefs were in the progression of the war, the Internal Affairs Department of Rhodesia drafted two documents with detailed information about every medium, shrine priest and sacred site.106 He explains that the Rhodesian authorities studied the communities’ customs and used them against the “guerrillas”, infiltrating poisoned food or clothes into areas where they were operating because it was an effective way of killing guerrillas but also because they knew death by poisoning would be interpreted as an effect of witchcraft. To the world the Rhodesian state claimed legitimacy as a bastion of Christian civilisation. To its African subjects it claimed to control the power of witchcraft. 107

The invisible world and its influence on armed actors’ behaviour

One important question is to what extent the manifestations of some beliefs may influence armed actors’ behaviour and thus, their respect for IHL and international human rights law. For example, research conducted among Maï-Maï groups in the DRC108 and the Anti-Balaka in the Central African Republic109 indicates that the role of many children associated with armed groups is to make gris-gris and distribute them to fighters, or being the messengers and guardians of the fetishes. Some of the children are reportedly directly used as porte-bonheurs in front-line duties or as guards for commanders, “as children are commonly perceived as being spiritually chaste and pure”.110 Children are thus exposed to recruitment to perform these activities.

The Roméo Dallaire Child Soldiers Initiative’s Handbook for Security Sector Actors warns that children who believe that they are invisible or invincible might pose a serious security threat, as they may appear to be particularly aggressive and fearless, and may be used by adult commanders as human shields or be sent into battle without weapons to confuse and intimidate the enemy.111 Individuals who have undergone immunization rituals may appear to be particularly

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107 Ibid., p. 367.
110 S. Whitman et al., above note 9, p. 39.
111 Ibid., pp. 81–82.
belligerent and may be more prone to taking risks. Findings of the Truth and Reconciliation Commission for Sierra Leone show that “initiation gave rise to ever-more irresponsible conduct on the part of those who underwent it. It artificially enhanced notions of the Kamajors’ human limits.”\textsuperscript{112}

The UN Expert Team on Kasai described how the Kamuina Nsapu militia exposed children: in the front line were the \textit{ya mama}, girls that were supposed to have the power to catch firearm projectiles with their skirts; in the second line were boys armed with sticks that were believed to have the ability to transform into lethal weapons; and in the last line were the better equipped, more experienced and older members of the group.\textsuperscript{113} Similar patterns have been described in the Ivory Coast, where the Dozos reportedly attacked front-line positions in joint operations with State security forces due to their supposed occult powers.\textsuperscript{114}

Spiritual powers might make armed actors feel no responsibility for their actions, as they are supposedly acting under the influence of mystical forces. In the \textit{Ongwen} case, the defence claimed that Ongwen, a former LRA commander, should be excluded from criminal responsibility due to the spiritual indoctrination that he was subjected to in the LRA.\textsuperscript{115} The Truth and Reconciliation Commission for Sierra Leone’s findings also revealed how the initiators “attempted to exonerate themselves from due culpability by referring to illusory whims from higher beings, through dreams and ‘divine’ messages”.\textsuperscript{116}

Accounts of fighters drinking blood and eating human body parts were reported during the war in Liberia.\textsuperscript{117} Similar patterns were described for the Kamuina Nsapu in the DRC: “The \textit{tshiotas} [initiation halls] were also favoured as places for beheadings, often performed by children, as well as for acts of cannibalism. Heads and other body parts of victims of attacks were brought there, along with their blood.”\textsuperscript{118} It is believed that the human body (e.g., blood, saliva, heart) contains powerful life forces.\textsuperscript{119}

Spiritual beliefs might also play a role as a deterrent to committing violations of IHL. The acquisition of mystical powers implies adherence to some norms and prohibitions, such as the prohibition of consuming specific food or hunting particular animals, or observing certain rules during the fight. It is believed that contravention of these rules provokes spiritual anger in the form of illness, madness, death, defeat, or other misfortunes.

\textsuperscript{112} Sierra Leone Truth and Reconciliation Commission, above note 69, para. 343.
\textsuperscript{113} Human Rights Council, above note 68, para. 63.
\textsuperscript{114} UNOCI, above note 1, para. 63.
\textsuperscript{115} ICC, \textit{Ongwen}, above note 15.
\textsuperscript{116} Sierra Leone Truth and Reconciliation Commission, above note 69, para. 346.
The protection of women and children is a recurrent norm of restraint. Other norms of restraint present in some armed groups include respect for older persons, not targeting or stealing from civilians, and not conducting attacks at night. Some places considered sacred are accorded specific protection. For example, among the Ugandan Holy Spirit Mobile Forces, it was proscribed to fight in the surroundings of their temple.

These norms of restraint may vary with the time, may be subjected to nuances and reinterpretations, and may not be homogenous across the armed group. According to Asadi, although some Mai-Mai previously believed sex would diminish their supernatural powers, in 2002 they began to claim sexual intercourse strengthens those powers. Pendle describes discussions among some armed cattle-keeper communities in South Sudan over whether to kill children and women in revenge. Wlodarczyk notes that during the Sierra Leone war, not all CDF commanders may have asked their fighters to respect the norms prohibiting looting and theft.

At the same time, the behaviour of these groups often contradicts the norms of restraint that they claim to be attached to. In practice, restraint is not consistent. Respect for these norms may vary over the time and within different units of the armed group, and may be influenced by multiple factors such as changes in the dynamic of the conflict, different interpretations of the norms, individual adherence to the norms, and the leadership and commitment of spiritual leaders and commanders to comply with the norms. Restraint may also decline as groups lose ties with their original communities or as groups became bigger, which may erode discipline. Analyzing the cattle-keeper defence groups in South Sudan, Pendle argues that “new weapons, new experiences of violence, and new political influences have all prompted shifts in patterns of restraint and debates about what violence is legitimate”. She notes how experience from other conflicts has introduced the targeting of women and

120 Note that the concept of the “child” in this context is linked with cultural notions of “childhood” and not with its legal definition.
122 N. Pendle, above note 16, p. 20.
123 N. Nunn and R. Sánchez de la Sierra, above note 88, p. 10; N. Wlodarczyk, above note 3, p. 79.
124 For example, among some cattle-keeper communities in South Sudan.
127 N. Pendle, above note 16, p. 15.
128 N. Wlodarczyk, above note 3, p. 79.
129 N. Pendle, above note 16, p. 18.
130 Ibid.; N. Wlodarczyk, above note 3.
131 N. Wlodarczyk, above note 3, p. 81; UNOCI, above note 1, para. 13.
133 N. Nunn and R. Sánchez de la Sierra, above note 88, p. 10.
134 N. Wlodarczyk, above note 3, p. 81.
children into the cattle-keepers’ imaginary of violence and how some actors try to legitimize attacks against certain women and children by redefining their identities as “enemies” and ignoring their identities as “women and children”.  

Despite all the challenges in defining and respecting the norms of restraint, the importance of the existence of this normative framework and space to reflect on the limits of warfare and “notions of humanity, dignity, life, and death” should not be neglected.

**Demobilization and reintegration into civilian life**

In the aftermath of armed conflicts, spiritual beliefs play different roles in the demobilization and reintegration into civilian life/return to civilian activities of armed actors. Spirituality may serve as a factor of resilience or a coping mechanism. Rituals may contribute to restoring relationships and “the social balance”, including “harmony with the ancestors”. According to Granjo’s research on post-war cleansing rituals in Mozambique, personal cleansing rituals generally precede common ones, aiming to overcome the situation rather than to attribute responsibility.

Individuals associated with armed groups may be considered (by the population and by the individuals themselves) to be “contaminated/polluted” and hunted by the spirits for having witnesses or perpetrated violence or for having being in contact with dead bodies. Such contamination is believed to lead to spiritual distress and misfortune that can also affect those who are close to the contaminated person; this belief may lead in turn to fear and stigmatization and may hamper demobilization and reintegration efforts.

Daxhelet and Brunet explain that before entering a centre that supports children formerly associated with armed forces and groups, children handed over their gris-gris. According to a study they conducted in the DRC, belief in the power of fetishes may support children in reducing their anxiety and dissociating them from the violence they have endured or committed during their

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136 Ibid., p. 18.
137 Ibid., p. 21.
140 P. Granjo, above note 139.
involvement in the armed conflict. However, the same authors note that this “dependency of the fetishes” may increase their anxiety in the process of demobilization and reintegration.

Concluding remarks

As explained in this article, far from being something anecdotal, spiritual beliefs play a crucial role in shaping armed groups’ behaviour and framing warfare dynamics. Spiritual beliefs can serve various strategic functions, including for mobilization and legitimacy, organization and discipline, and motivation and intimidation. In addition, spiritual beliefs may influence an armed group’s compliance with the rules of war and the process of demobilization and reintegration of armed actors.

An important part of understanding armed conflicts and their aftermath is to regard the different manifestations of spiritual beliefs as a subject for analysis and critique and to understand how such beliefs impact the internal dynamics of armed groups and their external relations, including with the State, other armed groups and communities. This might help develop better strategies to renew armed actors’ commitment to abiding by IHL and international human rights law.

Scholars have examined the connections between witchcraft allegations and violence, and the UN Human Rights Council has recently adopted a resolution on the elimination of harmful practices related to accusations of witchcraft and ritual attacks. Together with the work of scholars like Ranger, Behrend, Wlodarczyk and Pendle on war and spiritual beliefs, these steps form a solid basis for advancing our understanding of the impact of such beliefs in armed conflicts.

Understanding culturally specific practices and beliefs is a required step towards better understanding the sources of influence under which armed actors operate as individuals and groups. Unfortunately, often “mistaken opinions about the beliefs and practices of others have led to inappropriate actions”. To avoid misrepresenting, overestimating or underestimating their impact, a deeper and more contextualized understanding of such beliefs and practices is required. It is also important to translate this knowledge into action when interacting with different actors involved and affected by armed conflict. So far, most of these interactions have been intuitive and have relied heavily on individual sensitivity to spiritual beliefs, and on personal academic or professional interest in incorporating this spiritual dimension into working tools and practices.

A good understanding of these spiritual beliefs and their different manifestations may support relevant actors in, at least, preparing field negotiations/interventions/trainings with armed groups, identifying the right interlocutors, and

144 Ibid.
145 Ibid.
146 For example, B. Martinelli and J. Boujou (eds), above note 2.
147 HRC Witchcraft Resolution, above note 14.
framing the context and language of interactions, as spiritual beliefs are displayed in the way people frame their reality, build their narratives and communicate. More evidence is therefore needed for a more comprehensive, empirically based set of theoretical and practice-based tools on spiritual beliefs in armed conflict.
Breaking the silence: Advocacy and accountability for attacks on hospitals in armed conflict

Lara Hakki, Eric Stover and Rohini J. Haar*

Abstract
When hospitals are damaged or destroyed in armed conflict, the loss is far greater than the physical structures: safe spaces are lost, health outcomes worsen and trust in health institutions is undermined. Despite the legal protections afforded to medical units under international humanitarian law (IHL), attacks on hospitals are a recurring problem in armed conflict. In 2019, the Safeguarding Health in Conflict Coalition documented more than 1,203 incidents of violence against medical facilities, transports, personnel and patients in twenty countries. This article examines investigations of four post-Second World War incidents of attacks

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on hospitals in armed conflicts in Vietnam, Bosnia and Herzegovina, Palestine and Afghanistan, the role public advocacy campaigns played in bringing about these investigations, and how national and international authorities can work together to promote greater accountability for violations of IHL.

Keywords: international humanitarian law, laws of war, Geneva Conventions, attacks on hospitals, violence against health care, protection, medical neutrality, Vietnam, Bosnia, Palestine, Kunduz, Afghanistan, accountability, hospitals, armed conflict, war.

Introduction

Since the signing of the first Geneva Convention in 1864, a fundamental principle of international humanitarian law (IHL) has been that “[t]he wounded and sick shall be collected and cared for”.1 According to this principle, all wounded and sick persons, including civilians and wounded combatants who are considered hors de combat, are given a general protection.2 Geneva Convention IV (GC IV) on the protection of civilians, along with customary IHL, extends protection to civilian medical units where the wounded and sick are cared for, including hospitals.3 Any violation of this protection—including attacks “causing great suffering or serious injury to body or health” of persons who are protected under IHL, or leading to “extensive destruction and appropriation of property” that is likewise protected—will be considered a “grave breach” or a “war crime” and could potentially lead to individual criminal responsibility under international law.4

Despite this legal framework, countless attacks on hospitals in armed conflicts around the globe are met with impunity. In 2019 alone, there were at least 1,203 documented attacks in at least twenty countries.5 These attacks included direct violence in the form of bombings and raids, and the withholding of medical supplies.6 The vast majority of these attacks were not documented in a systematic manner, and few have been litigated in domestic or international criminal courts. Recent resolutions by the United Nations (UN) Security Council and General Assembly have reiterated the importance of protecting health-care

1 Art. 3 common to the four Geneva Conventions.
4 GC IV, Art. 147. All four Geneva Conventions of 1949 and Additional Protocol I (AP I) of 1977 set out specific “grave breaches”, or criminal violations, in relation to such attacks.
6 Ibid.
delivery during conflict and the need for systematic data collection and analysis to
document those responsible for such attacks and their impact on civilian populations.\textsuperscript{7}

Because legal rules are effective only if they can be enforced, the lack of
accountability for these violations of IHL has led scholars to question the utility
of the law. However, in this paper we argue that IHL has actually grown stronger
in the past century and that the legal norms of IHL are now integrated into the
domestic laws of more States than ever before.\textsuperscript{8} That said, what are missing in
this paradigm are more frequent and thorough independent investigations and
advocacy to ensure accountability of those responsible for ordering or carrying
out attacks on hospitals.

In this article, we examine four attacks on hospitals and the extent to which
measures were taken to investigate and prosecute those responsible. We chose to
focus on hospitals rather than other categories of health-care services because
hospitals are most frequently named and identifiable, and the destruction of
infrastructure can result in long-term loss of health-care services for the
surrounding community. The four incidents discussed in this article are those
that occurred in Quynh Lap Hospital, Vietnam (1965); Ko\v{s}evo Hospital, Bosnia
and Herzegovina (1992); Al-Shifa Hospital, Palestine (2014); and Kunduz
Hospital, Afghanistan (2015). We selected these cases because they represent a
broad geographic and chronological range, they took place during either a non-
international or international armed conflict where IHL applied, and they
involved a public campaign to expose violations of IHL and/or were formally
investigated by a court or other legal mechanism.

The authors wish to acknowledge that in each case study, the attacks were
perpetrated by State parties, but in reality attacks on hospitals are frequently
perpetrated by non-State groups. It is important to note that while IHL certainly
applies to State actors, it would also apply if the perpetrator were a non-State
actor through customary international law and Article 3 common to the four
Geneva Conventions, and Additional Protocol II (AP II) where applicable.\textsuperscript{9}
Additionally, medical units are protected in both international and non-
international armed conflicts, although the applicable legal rules differ slightly
depending on the classification of the conflict. As noted below, the nuances of
these legal rules are beyond the scope of this paper.

In each case study, we explored all publicly available literature, including
legal documents and critiques, advocacy reports, news media and scholarly
analysis. We also conducted open-ended interviews with jurists, military experts,
researchers and investigators affiliated with international organizations. These
interviews provided insights into the adequacy of legal responses taken in each of

\textsuperscript{7} UNCS Res. 2286, 3 May 2016.

\textsuperscript{8} International Committee of the Red Cross (ICRC), “Is the Law of Armed Conflict in Crisis and How to
Recommit to Its Respect?”, panel at the Conference on “Generating Respect for the Law”, 26 April 2016,

\textsuperscript{9} Waseem Ahmad Qureshi, “Applicability of International Humanitarian Law to Non-State Actors”, Santa
the cases. Our aim was to gain a historical perspective on how legal investigations of these attacks were initiated and conducted, as well as the degree to which the investigations promoted accountability. We also sought to understand whether public campaigns calling for accountability for such attacks promoted more robust investigatory responses from institutions mandated to enforce IHL. We chose to focus on cases where criminal accountability was pursued, but wish to recognize that investigations into attacks may also pursue other purposes, such as developing guidelines and procedures for the systematic documentation of attacks on hospitals.

Our case studies reveal three pressing needs that the international community should address in order to promote greater adherence to IHL. First, to promote accountability, national and international investigations into attacks on hospitals and other violations of IHL must be conducted in an independent, robust and transparent manner. Second, there is a need for greater civil society engagement and publicity to press for investigations into violations of IHL. Without public awareness or calls for investigations by both local and international organizations, accountability is far less likely to occur. For example, with the advance of mobile technologies and social media, a growing number of civil society organizations have begun conducting investigations using publicly available online data in an effort to document and publicize attacks on hospitals in armed conflict. Finally, where possible, international or national actors should pursue criminal prosecutions for such attacks.

Applicable law

What follows is an overview of the protection afforded to hospitals under IHL. The authors wish to note that this section provides only a high-level overview of the applicable law, since this article focuses on an analysis of four historical case studies. Other scholars have undertaken a deeper analysis of IHL and international human rights law issues surrounding hospitals, other health-care facilities, and health-care personnel.10

As mentioned above, medical units such as hospitals are afforded protection under IHL; however, this protection is not absolute.11 When hospitals are used outside of a humanitarian function, their protection may be lost.12 For example, if hospitals are “used to commit, outside their humanitarian duties, acts harmful to the enemy”, then attacks against them are not expressly

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prohibited, so long as the attacks also conform to the rules on proportionality and precaution. While other scholarly articles more thoroughly explore the notion of “acts harmful to the enemy” under IHL, this paper does not explore the legal notion fully. It is sufficient to understand that hospital misuse—such as using a hospital to gain a military advantage or to shield military objectives from attack—removes the protection for hospitals under IHL. Article 19 of GC IV states that hospitals shall not lose their protections under IHL “unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy”. Examples of such acts include “the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition store, as a military observation post, or as a centre for liaison with fighting troops”. These transgressions can lead to the withdrawal of protection.

Under IHL, “attacks” are defined as “acts of violence against the adversary, whether in offence or in defence”. All parties to an armed conflict have a legal duty to “respect and ensure respect for” IHL. While the laws proscribing attacks on hospitals are clearly defined in IHL, the mechanisms and protocols for investigating alleged attacks are less clear. The duty to respond to alleged violations of IHL can come from various sources, including human rights law, international criminal law, laws governing States’ responsibilities, and IHL itself. This paper focuses on the duty to examine and investigate under IHL, since the incidents we examine took place in situations of armed conflict where IHL is considered lex specialis—the law governing a specific subject matter.

The scope of this duty is important—the duty to examine and investigate is only triggered when there is an alleged violation that could rise to the level of a “grave breach” of IHL or a war crime. However, some attacks on civilians or

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16 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 49(1).

17 Art. 1 common to the four Geneva Conventions.


19 In contemporary international law, “grave breaches” only apply to international armed conflict, but war crimes can be committed in both international and non-international armed conflicts. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 49; ICRC Customary Law Study, above note 2, Rule 158: States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and if appropriate, prosecute the suspects.
civilian objects, even if they result in death or injury, may nevertheless be lawful under IHL. For example, if a hospital were in fact to be misused, an attack on that hospital would not necessarily rise to the level of a war crime and would not need to be investigated. Nevertheless, the attacker must still prove that the hospital was misused, presumably through an investigation. Furthermore, in case of doubt, there should be a presumption of civilian status.

Although the duty to investigate is clear, the law does not require States to investigate alleged war crimes, and nor does it specify exactly how they should do so. For example, Article 90 of Additional Protocol I (AP I) provides for the establishment of an international fact-finding commission (called the International Humanitarian Fact-Finding Commission, or IHFFC), which could “inquire into any facts alleged to be a grave breach” of the Geneva Conventions. State Party adherence to Article 90 means recognizing the competence of the IHFFC to investigate allegations by another party. However, State Party adherence to Article 90 is optional: out of the 179 States that have signed AP I, only seventy-seven have made a declaration accepting the IHFFC’s competence to investigate alleged breaches. More recently, in May 2016, the UN Security Council adopted Resolution 2286, which condemns attacks on hospitals and

strongly urges States to conduct, in an independent manner, full, prompt, impartial and effective investigations within their jurisdiction of violations of International Humanitarian Law related to the protection of the wounded and sick, medical personnel and humanitarian personnel exclusively engaged in medical duties.

However, the Syrian American Medical Society (SAMS) and other organizations have questioned the usefulness of this resolution, which has no legal power to require such investigations. In fact, after Resolution 2286 was passed, SAMS reported that the rate of attacks on hospitals and health workers in Syria increased by 89%.

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21 AP I, Art. 52(2). A belligerent has the burden of establishing in a definite manner that an armed attack was launched against it by a specific attacker and that its response was necessitated as a matter of last resort. It also must establish that its targets are lawful. See, for example, International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, *ICJ Reports* 90, para. 51.

22 AP I, Art. 52(3).

23 *Ibid.*, Art. 90: “An International Fact-Finding Commission … consisting of fifteen members of high moral standing and acknowledged impartiality shall be established to inquire into any facts alleged to be a grave breach as defined in the 1949 Geneva Conventions and AP I or other serious violation of the 1949 Geneva Conventions or of AP I.”


25 UNSC Res. 2286, 3 May 2016.


With this understanding of the key legal obligations involved, we now examine four cases that illustrate how States have investigated alleged attacks on hospitals over the past five decades.

Case studies: Vietnam, Bosnia and Herzegovina, Palestine and Afghanistan

In each case study, we examine the context of the attack; international reactions – including publicity campaigns – to the attack; what formal investigation(s), if any, were carried out; and the outcomes. We include details from the literature review and insights from our key informant interviews where possible, and conclude with a critical review of the findings and their impact on IHL.

Quynh Lap Hospital, Vietnam

During the Vietnam War, the United States conducted widespread attacks in populated areas, which in some cases hit civilian infrastructure and hospitals.\(^{28}\) These attacks were part of a broader strategy to erode civilian order and the morale of the North Vietnamese army.\(^{29}\) Declassified US Air Force manuals that were released after the Vietnam War show that hospitals, schools and churches were listed as “psycho-social targets”.\(^{30}\) A former US Army intelligence specialist explained that hospitals were rated highly as strategic targets because they were often protected by company- or battalion-sized troop units. So “the bigger the hospital” – i.e., the higher the military gain – “the better it was to attack”.\(^{31}\)

One such attack took place on the night of 12 June 1965, when US planes bombed the Quynh Lap leprosarium, the largest centre for the research and treatment of leprosy in the Democratic Republic of Vietnam (DRV), constructed on an isolated island far removed from other civilians and industrial centres. The entire health-care complex consisted of 160 buildings and treated as many as 2,600 patients at any given time.\(^{32}\) The complex was well recognized by the international community as a health-care facility and was prominently marked with the red cross emblem, the international emblem of health services.\(^{33}\)

After the initial attack on 12 June, the health workers did not immediately evacuate the patients since they believed the attack must have been a mistake and that US forces would soon realize they had attacked a health-care

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30 Ibid.


However, over the next ten days, US forces continued to attack the leprosarium with rockets, machine guns and cannon fire. The US air raids destroyed approximately one third of the buildings in the health-care complex. The patients at Quynh Lap were forced to evacuate to caves located 6 kilometres from the leprosarium. The attacks killed 139 patients and nine medical personnel, wounded approximately 1,000 people, and deprived more than 2,000 patients of medical care. Further investigations also found white phosphorous, a deadly chemical historically utilized as a weapon and sometimes as a smokescreen, at the site.

**Investigations and outcomes**

On 14 July 1965, the DRV Ministry of Public Health issued a public statement denouncing these attacks on a clearly defined health-care facility that bore the red cross symbol. A week later, the president of the Red Cross Society of the DRV, Vu Dinh Tung, sent a letter to the president of the International Committee of the Red Cross (ICRC), Samuel Alexandre Gonard, claiming that the United States had violated IHL by bombing hospitals and using chemical weapons. The letter referred specifically to the attacks on the Quynh Lap leprosarium as “grave crimes.” The letter also described the attacks as deliberate and insisted that they could not have been part of any military objective, since “the [Johnson government] cannot claim there was any confusion that our hospitals clearly carried the symbol of the Red Cross on their doors or on their roofs”. Since the United States had signed and ratified GC IV, which designates civilian hospitals as objects benefiting from special protection, Tung urged the ICRC to address these violations. Despite the outcry, US planes returned on 22 July and attacked new buildings in the Quynh Lap health-care complex, killing thirty-four and wounding thirty more individuals.

In response to the earlier letter, the US Mission to International Organizations sent a letter on 24 September 1965 to Gonard denying the allegations that US aircraft had bombed medical facilities in Vietnam or employed toxic chemical products. The letter indicated that a “most careful investigation by the United States Government indicates that United States aircraft attacked no targets we could identify as medical facilities”. However, the
letter did not describe how this investigation had been conducted, or by whom.\textsuperscript{46} Moreover, the letter justified the attacks by stating that the locations mentioned— including Quynh Lap— had been “identified from a variety of military intelligence sources as the location of military installations”.\textsuperscript{47} The letter also claimed that the US government had photographs showing that the “medical installations were not marked by distinctive Red Cross emblems clearly visible from the air as required by the Geneva Conventions and that they were placed in close proximity to military targets in violation of the conventions”.\textsuperscript{48} The letter urged the ICRC to conduct an on-the-ground investigation to examine whether “all medical facilities were properly marked and verified, and that such facilities were not located with military establishments”.\textsuperscript{49} The results of this investigation were not publicly available at that time.

In 1966, British philosopher and Nobel Prize winner Bertrand Russell organized a private independent tribunal to investigate and evaluate US foreign policy and military intervention in Vietnam. The commission, called the Russell Tribunal, also included French philosopher and writer Jean-Paul Sartre and was conducted in two sessions. The Russell Tribunal’s final report described the bombing of the leprosarium at Quynh Lap and concluded that attacks on DRV health-care facilities amounted to “[U.S imperialist aggression in Vietnam [that] breaks all rules of health recognized by the world]”.\textsuperscript{50} While the Russell Tribunal brought international attention to the conflict, it had no legal authority to determine individual liability, and was largely ignored by the US authorities. Because the Tribunal was not a government body or a treaty organization, it had neither the legal authority nor the means to carry out a formal investigation, let alone render a verdict.\textsuperscript{51}

After the Vietnam War officially ended in 1973, the Senate Armed Services Committee established a commission to investigate the conduct of the air war in Vietnam. Another former US Army intelligence specialist, Alan Stevenson, testified that he had routinely listed hospitals as targets during the war.\textsuperscript{52} In fact, as mentioned above, the classified US Air Force bombing manual defined hospitals, schools and churches as “psycho-social targets” useful for the destruction of civilian order and morale.\textsuperscript{53} Despite this testimony, the commission did not extrapolate intention on the part of the US forces to

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid.
\textsuperscript{50} J. Duffett and B. Russell, above note 28, p. 181.
\textsuperscript{52} G. Grandin, above note 31.
\textsuperscript{53} M. E. Getleman \textit{et al.}, above note 29, p. 464.
deliberately target hospitals. The commission thus did not result in any prosecutions or convictions directly related to aerial attacks on health care.

Discussion

While it is clear that US air raids in Vietnam resulted in attacks on hospitals and, subsequently, some attempts at a public trial, there was no overwhelming public outcry or awareness about these specific attacks. The North Vietnamese Red Cross attempted to raise awareness of these attacks, but the statements and correspondence were not made public at the time. The correspondence illustrates an important awareness and recognition by both the United States and the DRV of the alleged IHL violations, but despite this awareness, neither party conducted formal independent investigations.

The Vietnam War marked an important historical turning point where civil society began to question State actions during wartime and demand impartial information. Developments in photographic journalism helped civil society groups investigate and document later situations of armed conflict. Although there is no question that civil society became emboldened after Vietnam to call for investigations and State accountability for alleged violations of the law in war, this case study suggests that even with publicity campaigns, general public awareness of violations of IHL is limited and future campaigns may be more successful if they directly advocate for formal investigations.

Formal governmental engagement and independent investigations are critical to acknowledging these incidents and holding perpetrators accountable. The Quynh Lap Hospital case study illustrates the importance of independent and transparent investigations for all alleged violations of IHL. Although the US Mission to International Organizations claimed it had conducted a “most careful investigation”, the US government did not indicate how it reached the conclusion that none of the air strike targets were identifiable as medical facilities. The authors acknowledge that the means of verifying lawful military targets have become more sophisticated since the Vietnam War and that the lack of a robust investigation into these attacks may have been due in part to the lack of evidence available at the time. Even so, accountability mechanisms in this case were inadequate. While the Senate investigation raised public awareness about US attacks on health-care facilities, it was not conducted in a systematic process. And while the Russell Tribunal attempted to promote awareness, it lacked legal authority and resources and, in our view, may have even undermined efforts to press for a more formal accountability mechanism.

54 These letters are now publicly available in the ICRC archives at: www.icrc.org/en/archives.
56 Ibid.
Košev Hospital, Bosnia and Herzegovina

Ethnic tensions in the Republic of Bosnia and Herzegovina came to a head after the country declared independence in 1992. Serb nationalists, who opposed independence, formed the Army of the Republika Srpska (Vojske Republike Srpske, VRS) and attacked Bosnian Muslim and Croat enclaves inside the capital city of Sarajevo in April 1992, beginning what came to be known as the Siege of Sarajevo. The VRS encircled most of the city, blocking humanitarian aid, including food, water, electricity, heating fuel and medicine, and targeted civilian sites, including homes, schools and medical complexes. Reports indicate that over the course of the four-year siege, the VRS carried out an average of 329 distinct attacks each day on the city, using snipers, artillery, tanks and small arms. The siege officially ended in December 1995 when NATO forces brokered a peace agreement.

Between 1992 and 1995, the VRS repeatedly shelled Košev Hospital, the main medical facility in Sarajevo (which still functions today). By early 1993, the hospital had been shelled a total of 172 times. A UN commission tasked with investigating violations of IHL in the Balkan conflict reported in 1994 that “as the hospital is clearly visible from Bosnian Serb positions, at least some of those impacts must be considered intentional”.

According to Asim Haraćić, a surgical resident at Košev during the siege, the hospital’s trauma unit, located on the third floor of the hospital, served as many as fifty to 100 wounded civilians a day, most of whom were suffering from burn injuries and gunshot wounds. Dr Haraćić recalled that during the worst times of the conflict, when there was no ceasefire, ten to fifteen patients would die each day as a direct result of attacks. On several occasions, the hospital was forced to close or move some of its surgical team underground to avoid the shelling. One of the most flagrant military attacks on the Košev Hospital clinic complex took place in May 1992, when Bosnian Serb forces repeatedly shelled the children’s clinic at close range from their position 50 metres from the clinic.


64 Telephone interview with Asim Haračić, November 2018.

65 *Ibid*.

66 *Ibid*.
In March 1992, the UN dispatched peacekeeping forces with the hope of discouraging future attacks by Serbian forces. However, the UN could not protect its own vehicles or supplies and was forced to evacuate the city in May 1992. While the peacekeepers were seen as ineffective, the UN did establish a commission of experts to investigate and collect evidence of “grave breaches of the Geneva Conventions and other violations of humanitarian law”. The commission collected evidence from news agencies and human rights organizations, including Physicians for Human Rights. Following the commission’s First Interim Report at the end of 1992, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) to investigate and prosecute war crimes and other serious crimes in the former Yugoslavia. Six years later, the ICTY charged General Stanislav Galić, the commander of the VRS Sarajevo-Romanija Corps, with the war crime of terrorizing a civilian population. Critically, the ICTY’s chief prosecutor did not bring a separate charge for the crime of attacking a medical facility.

The defence claimed that civilian losses were “unavoidable” and “collateral to legitimate military actions”. In particular, Galić asserted that he never ordered the direct shelling of Košev Hospital, only the surrounding area, and only “as a response to … military activities from that area”, which made it a legitimate military target. The Trial Chamber dismissed these claims. It concluded that only a small fraction of the incidents could have been accidents and added that the attacks had “no discernable significance in military terms”. It based this finding on ten witness testimonies and a number of UN reports testifying to thirteen specific attacks on the hospital, acknowledging that there were “numerous other times” between 1992 and 1995 that the hospital or its grounds had been shelled. However, the Trial Chamber did find evidence that mortar fire had come from “the hospital grounds or its vicinity”. Later the Appeals Chamber held that at least some of the attacks were justified where the hospital had been used “as a base from which to fire at Galić’s forces”. The Chamber concluded that this “fire from the hospital turned it into a target” but clarified that this type of misuse did not turn a protected facility into a permanent target.

68 Ibid., p. 18.
69 UNSC Res. 780, 6 October 1992.
70 UNSC Res. 808, 22 February 1993.
71 ICTY, Galić, above note 59. The ICTY charged the crime of terrorizing the civilian population on the basis of Article 51(2) of AP I and Article 13(2) of AP II, both of which state that “the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.”
73 Ibid.
74 Ibid.
75 Ibid.
76 Ibid.
military target—rather, the hospital remained a legitimate target “only as long as it [was] reasonably necessary for the opposing side to respond to the military activity”.\textsuperscript{77} The Appeals Chamber judgment also articulated conditions that do not deprive medical units of their special protected status, including if they are used to treat sick and wounded combatants and if arms are present inside the units.\textsuperscript{78}

On 5 December 2003, the ICTY convicted Stanislav Galić of ordering “attacks on civilians and acts of violence with the primary aim of spreading terror among the civilian population” under Article 3 of the ICTY Statute.\textsuperscript{79} Galić was sentenced to life imprisonment. However, the ICTY Trial Chamber did not pursue further prosecutions associated with attacks on hospitals during the siege, and no separate charge for the crime of attacking a medical unit was ever brought. While this may have been a decision based on prosecutorial discretion, it reflects a missed opportunity to underscore the importance of protecting hospitals.

\textit{Discussion}

While the Galić conviction was one of the few made by an international tribunal for violations of IHL, the verdict made only passing reference to attacks on Koševno Hospital during the Siege of Sarajevo. Instead, the ICTY considered the attacks as part of the broader campaign of terrorizing the civilian population, not separately as an attack on “an object enjoying special protection under IHL”.\textsuperscript{80} It is not clear why the ICTY did not pursue a separate prosecution for the attacks on Koševno Hospital. Perhaps this decision was in part due to the fact that the Tribunal could not establish that the hospital was never misused, since at one point, mortar fire did come from “the hospital grounds or its vicinity”.\textsuperscript{81} The Appeals Chamber considered a variety of sources, including eyewitness reports from UN military observers, and did conclude that while the hospital was at times misused, some of the attacks on the hospital were illegitimate attacks on civilians.\textsuperscript{82} A prosecution for targeting the hospital would have to address the timing of the misuse and the attacks, and make a determination about when exactly the hospital regained its special protected status, which may have been difficult. Perhaps the ICTY did not want to separate and classify attacks on hospitals from generally protected civilian objects. Perhaps, also, the prosecutors chose to include this attack in the broader charge of “terrorizing a civilian population” which addressed the full extent of violence against civilians.

\textsuperscript{78} Ibid., p. 147.
\textsuperscript{81} Ibid.
\textsuperscript{82} ICTY, \textit{Galić}, above note 77, p. 150.
Nevertheless, the Galić conviction fell short of sending a strong signal about the special protected status of hospitals. As the prosecution argued, the deliberate assaults on medical care and facilities should be considered as violations of the laws of the war and should be prosecuted alongside murder and other crimes. While Galić was not charged specifically for his attacks on Koševno Hospital, the Tribunal did advance the law protecting hospitals by clarifying the types of hospital misuse that can and cannot justify attacks. It also reinforced the legal rule that one instance of hospital misuse does not justify making a hospital a permanent military target.

The Galić case illustrates how UN commissions, working with international human rights organizations, can document attacks on hospitals and bring these violations to the attention of judicial authorities. The case also reveals how investigations into violations of IHL became more impartial and transparent as tribunals, such as the ICTY, were established. Additionally, the Galić trial is important because it was one of the few successful prosecutions by an international tribunal for war crimes related to attacks against hospitals. Though it did not bring direct accountability for attacking health care, the Appeals Chamber’s decision clarified the notion of hospital misuse and reinforced the gravity of such a crime. These outcomes support the importance of criminal accountability for violations of IHL.

Al-Shifa Hospital, Palestine

After Hamas, a Palestinian Sunni-Islamic organization, won the Palestinian legislative election in 2007, Israel, in an attempt to crack down on what it considered a terrorist group, began a blockade of the Gaza Strip, which undermined the local economy and severely restricted the rights of Palestinians. In the summer of 2014, widespread protests and violent clashes ensued between organized armed groups based in the Gaza Strip and the Israeli Defense Forces (IDF). Palestinian forces launched rockets into Israel in June and July 2014, and IDF forces retaliated by launching Operation Protective Edge on 7 July 2014. The IDF’s stated objective was to attack Hamas and destroy its military capabilities. The hostilities lasted fifty-one days, resulting in more than a thousand deaths and widespread destruction of the Gaza Strip.

On 28 July 2014, Israeli forces bombed Al-Shifa Hospital, the main referral hospital for the Gaza Strip. At the time of the attack, a surgical team with Doctors Without Borders (Médecins Sans Frontières, MSF) was working in the hospital.

84 E. Mikos-Skuza, above note 80, p. 227.
86 Ibid.
Shortly afterwards, MSF condemned the attack, calling it “completely unacceptable and a serious violation of International Humanitarian Law”.

The MSF head of mission in the Occupied Palestinian Territories stated that “[w]hatever the circumstances, health facilities and medical staff must be protected and respected. But in Gaza today, hospitals are not the safe havens they should be.”

The IDF also bombed three other hospitals in Gaza: the European General Hospital, Beit Hanoun Hospital and Al-Aqsa Hospital, a 190-bed government hospital that was treating civilians who had sought safety inside the facility.

Israel justified these attacks, specifically its attack on Al-Shifa Hospital, by claiming that Hamas had established a “large underground bunker equipped with sophisticated communications equipment” underneath the hospital, which would qualify as an “act harmful to the enemy”. The same day, one hour after Al-Shifa was attacked, another strike landed near the hospital and hit Al-Shati refugee camp. This strike killed ten Palestinians, nine of them children. Israel denied responsibility for the attack and instead blamed the attack on Hamas.

The IDF later released a statement saying:

Al-Shifa hospital was struck by a failed rocket attack launched by Gaza terror organizations. A barrage of three rockets that were aimed towards Israel, struck the hospital. At the time of the incident there was no Israeli military activity in the area surrounding the hospital whatsoever.

That same day, the official IDF Twitter account stated: “A short while ago, terrorists in Gaza fired rockets at Israel. 1 of them hit Al-Shifa Hospital in Gaza. The other hit Al-Shati refugee camp.”

These conflicting reports, first justifying and then denying the attacks, were never properly investigated.

Investigations and outcomes

Following the conflict in the summer of 2014, then UN Secretary-General Ban Ki-Moon criticized the “low rate of investigations” into the alleged violations of IHL in the Gaza Strip. Various human rights groups in Israel, including B’Tselem, have

89 Ibid.
93 L. Westcott, above note 91.
criticized the inadequacy of Israeli military investigations. A year later, the Office of the United Nations High Commissioner for Human Rights set up an Independent Commission of Inquiry to investigate whether war crimes had been committed in Gaza. Israel did not cooperate with the Commission or allow the UN to conduct investigations in Israel or the Gaza Strip. As a result, the Commission had to base its report on written testimony and hundreds of witness interviews conducted remotely. The Commission’s report, released in June 2015, found evidence that both parties to the conflict may have committed war crimes.

The Commission found that Israeli forces conducted more than 6,000 air strikes during Operation Protective Edge, firing approximately 50,000 tank and artillery shells and killing 1,462 Palestinian civilians—a third of whom were children. In addition to the civilian casualties, there was enormous destruction of civilian infrastructure, including seventy-three medical facilities and many ambulances.

Notably, the report did not look specifically into the attack on Al-Shifa Hospital; rather, the Commission examined several incidents, “including attacks on shelters, hospitals and critical infrastructure, in which artillery was used”. It found that the use of “weapons with wide-area effects” against “targets in the vicinity of specifically protected objects (such as medical facilities and shelters)” could violate the principle of distinction. The report added that “depending on the circumstances, indiscriminate attacks may qualify as a direct attack against civilians, and may therefore amount to a war crime”. Further, the Commission found that Israeli political and military leadership did not change its course of action, despite considerable information regarding the massive degree of death and destruction in Gaza, [which] raises questions about potential violations of International Humanitarian Law by these officials, which may amount to war crimes.

In particular, the Commission took issue with the indiscriminate nature of many of Israel’s attacks on civilian infrastructure. The report called on all parties to respect IHL, especially the principles of distinction and proportionality. In not specifically reporting on findings for each hospital that was attacked, the Commission may have tried to balance the investigation and avoid individual scapegoating, but ultimately may have limited the strength of the evidence.

98 Ibid., p. 6.
99 Ibid.
100 Ibid., p. 6.
101 Ibid., p. 7.
102 Ibid., p. 12.
103 Ibid., p. 20.
104 Ibid., p. 12.
Following the Commission’s report, Human Rights Watch called for the International Criminal Court (ICC) to open a formal investigation into whether war crimes had been committed by either party during the conflict. On 16 January 2015, the Office of the Prosecutor at the ICC opened a preliminary examination of the situation, in order to establish whether the Rome Statute criteria for opening an investigation were met. Israel had previously rebuffed efforts by the ICC to investigate events in the Israeli–Palestinian conflict.

The ICC can only investigate alleged crimes in countries that have ratified the Rome Statute, or in a country that accepts the Court’s jurisdiction, or if a particular armed conflict or country situation is referred to the Court by the UN Security Council for further investigation. Although Israel has not ratified the Rome Statute, Palestine ratified the Statute in April 2015 and gave the Court a mandate back to June 2014. On 20 December 2019, The ICC’s chief prosecutor, Fatou Bensouda, concluded the preliminary examination and found that all the statutory criteria under the Rome Statute for the opening of an investigation had been met, so a formal investigation could be opened. On 30 April 2020, Bensouda reaffirmed her position that the ICC has jurisdiction over the Occupied Palestinian Territory, and requested Pre-Trial Chamber I to rule on this decision. On 5 February 2021, Pre-Trial Chamber I decided, by majority, that the Court’s territorial jurisdiction extends to the territories occupied by Israel since 1967 – namely Gaza and the West Bank, including East Jerusalem. This decision marks an important step towards achieving international criminal accountability for crimes committed against Palestinians.

Discussion

Calls from international civil society members such as Human Rights Watch and MSF to investigate potential war crimes, and the force of the UN Commission of Inquiry, may have influenced the ICC prosecutor and the Pre-Trial Chamber’s incredibly important decision to find jurisdiction over grave crimes committed in Palestine. As Fatou Bensouda announced, her decision marks a “long overdue step to move the process forward towards an investigation, after nearly five long

109 ICC, above note 106.
and difficult years of preliminary examination”. However, at the time of writing, it is unclear whether or not the attacks on Al-Shifa Hospital will be included in the prosecutor’s indictment.

**Kunduz Trauma Centre, Afghanistan**

On 3 October 2015, US forces carried out an aerial bombardment of a trauma hospital operated by MSF in Kunduz, Afghanistan. In the fall of 2015, Taliban forces attempted to seize the city of Kunduz, which was then controlled by Afghan security forces. This was the first time since 2001 that the Taliban had taken control of a major city in Afghanistan. On 29 September 2015, Afghan forces, supported by US Forces Afghanistan, began a counter-attack. Four days later, US troops conducted a combat operation that struck the Kunduz Trauma Centre.

MSF opened the Kunduz Trauma Centre in 2011 as the only trauma facility in northeast Afghanistan. The facility provided free, high-quality care to patients, including those suffering from conflict-related injuries such as gunshots or bomb blasts. In the five years that it was operational, the trauma centre provided emergency care to 68,000 patients. A 2015 study determined that the centre had played a critical role in the region, saving 154,250 disability-adjusted life years in total through its operative care.

Since the establishment of the Kunduz Trauma Centre, the Afghan government and relevant armed opposition groups had agreed to respect the neutrality of the medical facility. Per the agreement, all parties to the conflict would follow specific rules of IHL, including protection for medical patients and staff. Specifically, the agreement guaranteed that all wounded and sick patients would be treated without discrimination and that there would be no weapons inside the facility. In turn, MSF would comply with its ethical obligation to ensure that all people were treated regardless of their political or religious affiliation, and the facility would not be used for any military activities.

The Kunduz Trauma Centre treated both civilian and military patients, including Afghan government and police forces and Taliban fighters. Until

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114 Ibid., p. 2.  
115 Ibid.  
116 Ibid.  
118 MSF, above note 113, p. 3.  
September 2015, the centre had treated mostly government forces; then, as fighting intensified in Kunduz, the centre began to see an influx of wounded Taliban forces.\(^{120}\) By late September 2015, approximately half of the patients treated at the facility were wounded Taliban fighters.\(^{121}\) On 1 October 2015, a US government official sent a message to MSF inquiring as to whether a “large number of Taliban were ‘holed up’” in the Kunduz Trauma Centre or in other MSF facilities in Afghanistan.\(^{122}\) MSF responded that it treated wounded Taliban fighters per the terms of medical neutrality in the hospital’s mandate. In response, the US military liaison recommended that all staff stay within the GPS coordinates of the hospital.

On 29 September 2015, MSF reaffirmed its coordinates and sent them via email to the US Department of Defense (DoD), the Afghan Ministry of the Interior and Defence, and the US Army in Kabul. DoD officials confirmed their receipt of the coordinates and assured MSF that they had been sent to the appropriate parties.\(^{123}\) After the attack, the DoD reaffirmed that “multiple individuals at all levels of command were notified of the MSF Trauma Center’s location via MSF or through U.S. chain-of-command”.\(^{124}\)

On the night of 3 October 2015, US air strikes hit and destroyed the main hospital. MSF later reported that the first room to be hit was the intensive care unit, where staff were caring for a number of immobile patients, including two children.\(^{125}\) Of the 105 patients being treated at the trauma centre, approximately twenty were wounded Taliban fighters.\(^{126}\) Meanwhile, a propeller plane shot doctors and medical staff as they tried to flee the main building, including a wheelchair-bound man who died of shrapnel injuries. The DoD and MSF reports conflicted in terms of the number of casualties and injuries.\(^{127}\)

**Investigations and outcomes**

In the days following the attack, the US military justified its actions by claiming that its forces had “come under fire in the vicinity of the hospital”.\(^{128}\) It later retracted this statement. Afghan officials similarly presumed that the air strike was targeted
at Taliban fighters hiding in the hospital. Soon thereafter, MSF launched an internal investigation to determine “whether [the] hospital lost its protected status in the eyes of the military forces engaged in the attack – and if so, why”. MSF concluded that the attack was deliberate and that the US knew it was targeting the trauma centre. The organization came to this conclusion based on information it had obtained indicating that the US knew Taliban fighters were nearby and believed that they were present in the facility. Based on its initial internal review, MSF concluded that hospital staff were in full control of the facility before and after the attack and that there were “no armed combatants within the hospital compound” and no evidence of “fighting from or in the direct vicinity of the trauma centre”. MSF called for an independent investigation into the incident, referring to it as “not just an attack on our hospital, [but] an attack on the Geneva Conventions”.

Soon thereafter, the US commander at the time of the strike, General John Campbell, launched an investigation to determine “the cause of the incident and whether the use of force complied with the law of armed conflict and the applicable rules of engagement”. Campbell appointed over a dozen “subject matter experts” to the investigatory team, and the investigation lasted over five months. In its 726-page report, the team concluded that the attack did not constitute a war crime. Although the team recognized that the attack violated the applicable IHL rules of engagement, it found that the United States was unaware that it was striking a medical facility, and therefore none of the individuals involved should be liable for war crimes. The United States did admit that around the time of the attack it was aware that Taliban insurgents had taken over parts of the city of Kunduz, and admitted that its goal was to “retake the city”. The report concluded that while the United States had received the official coordinates of the trauma centre and had entered them into a “no strike list” database, the aircrew did not have access to the database at the time of the strike due to a critical communications systems failure. As a result, the aircrew mistook the facility for a lawful military target.

While MSF claims that there were two MSF flags in full view on the roof of the hospital and one at the entrance of the building, the US report claimed that the facility did not have an “internationally recognized symbol to identify it as a medical

130 Ibid.
131 Ibid.
132 Ibid.
133 “Use of Force and Arms Control”, above note 127, p. 579.
134 Ibid., p. 580.
135 Ibid.
136 Ibid.
facility, such as the Red Cross or Red Crescent that was readily visible to the aircrew at night”. Therefore, the report concluded, the personnel involved did not know they were striking a medical facility.

The US report dismissed MSF’s contention that US forces had committed a war crime by intentionally striking the hospital, and instead focused on the systems errors that caused the attack. The US report also confirmed that “no individuals there were committing hostile acts”, and that US forces failed to comply with the rules of engagement by not determining that the Kunduz Trauma Centre was a lawful military objective before attacking. Additionally, the report found that the United States did not follow the Pentagon’s Law of War Manual, which reinforces the IHL principle of proportionality, because the aircrew “failed to take precautions to reduce the risk of harm to individuals they could not positively identify as combatants”. Nevertheless, the United States concluded that the aerial bombardment did not amount to a war crime because that legal determination is “typically reserved for intentional acts”. Accordingly, none of the US military members involved were referred for criminal prosecution.

Brigadier-General Shane Reeves, deputy head of the Department of Law at West Point, confirmed in an interview for this article that the US investigation followed standard protocol. In addition to the US national investigation, the NATO and Afghan-partnered Combined Civilian Casualty Assessment Team also conducted an investigation. The findings of both reports were generally consistent, though there were differences on the number of casualties. Since the full reports are not publicly available, neither a full comparison of the reports nor a deeper assessment of how the investigations were conducted is possible at the time of writing. Brigadier-General Reeves explained that the US military wishes to be transparent in its commitment to investigating alleged violations of IHL, which is why it made its findings public. He also explained that the internal investigation was not in response to external complaints, but was a routine matter. DoD Directive 2311.01(e) provides that “all reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual [should be] reported promptly, investigated thoroughly and, where appropriate,

138 ICRC, “Afghanistan, Attack on Kunduz Trauma Centre”, How Does Law Protect in War?, available at: https://casebook.icrc.org/case-study/afghanistan-attack-kunduz-trauma-centre. See also GC I, Art. 42; GC IV, Art. 18; E. Mikos-Skuza, above note 80, p. 207 (international law requires military hospitals to be marked with a protective emblem, such as the red cross or red crescent; civilian hospitals are also required to mark themselves with protective emblems, but must first get State authorization and recognition); “Use of Force and Arms Control”, above note 127, p. 579.

139 “Use of Force and Arms Control”, above note 127, p. 582.

140 Ibid., p. 584.

141 Ibid., p. 585.

142 Ibid.

143 Telephone interview with Shane Reeves, Deputy Head of the Department of Law at West Point, New York, March 2019. These views are Brigadier-General Reeves’s alone and do not reflect those of the DoD, US Army or United States Military Academy.

remedied by corrective action”. Moreover, the DoD Law of War Manual sets out the State’s duties and obligations under IHL. However, since the United States is not a party to AP I, it has not consented to any investigations of alleged violations of IHL made by other States Parties.

Discussion

Unlike in the Quynh Lap case, the United States could not claim that the attack on the Kunduz Trauma Centre was due to a misidentification as it had received the coordinates of the facility before the air strike. The Kunduz case is significant because it received considerable public attention, which prompted multiple investigations. After the US findings were released, the non-governmental organization (NGO) community, including MSF and Human Rights Watch, openly questioned the conclusion that no war crime had occurred (because the attack was considered a systems failure and not an intentional attack) and called for further investigations and public access to the reports. Again, since the full reports are not publicly available and no comparable public reports exist, neither a full comparison of the reports nor a deeper assessment of how the investigations were conducted is possible.

The Kunduz case also brings to light the tensions that can arise when determining if attacks on hospitals should amount to war crimes even if they are not deliberate. MSF’s president articulated this tension:

The threshold that must be crossed for this deadly incident to amount to a grave breach of International Humanitarian Law is not whether it was intentional or not. … [A]rmed groups cannot escape their responsibilities on the battlefield simply by ruling out the intent to attack a protected structure such as a hospital.

While the Rome Statute of the ICC only attaches criminal liability for war crimes if they are “intentional”, some legal scholars argue that customary international law (CIL) and international case law do not follow this standard. CIL interprets the term “intentional” in the Statute to also include a lower “recklessness” standard. Using this standard, the action taken by the United States in Kunduz could be deemed reckless: 211 artillery shells were unleashed on a hospital without any hostile threat being confirmed. The ICC’s Office of the Prosecutor stated that “[a]lleged crimes committed in Kunduz during the September–October 2015 events will be further examined by the office”, and on 5 March 2020, the Appeals Chamber unanimously voted to commence an investigation into alleged crimes committed on the territory of Afghanistan since 1 May 2003.

146 “Use of Force and Arms Control”, above note 127, p. 586.
147 ICTY, Prosecutor v. Delalić case, Case No. IT-96-21-T, Judgment (Trial Chamber II), 16 November 1998, paras 437, 439.
This case highlights the urgent need for recognition of the practical rules under which hospitals operate in armed conflicts. Although the United States did not justify its attack based on misuse, the Geneva Conventions and CIL are clear that wounded fighters must be treated without discrimination and that a hospital does not lose its protected status for fulfilling its obligation to care for wounded fighters as it does for all other patients.

**Conclusion**

In this article, we set out to understand how IHL protects hospitals in armed conflict. In each of the four case studies, we examined the weaknesses and strengths of IHL and the subsequent investigation(s), if any, that were conducted to determine if IHL had been violated. The case studies reveal three actions that could help promote greater accountability for violations of IHL.

First, independent, robust and transparent investigations are necessary to convict or exonerate alleged perpetrators of attacks on hospitals in armed conflict. As we explained in the cases of Al-Shifa and Kunduz, an unbiased understanding of the events and any potential criminal accountability for individual actors is impossible without complete and transparent investigations. While accountability was lacking in both cases, thorough investigations into violations of IHL can serve to clarify the law and strengthen the expectation that States should formally investigate alleged attacks on hospitals. As the ICRC and Geneva Academy’s *Guidelines on Investigating Violations of International Humanitarian Law* explain:

Taking steps to determine whether a violation of international humanitarian law has occurred, and if so, to remedy it, is the primary responsibility of States. It should be noted, however, that when accountability failures occur or are thought to have occurred, international or regional bodies and processes (such as fact-finding missions, commissions of inquiry, tribunals), may be triggered to examine events and recommend or require action.\(^\text{150}\)

While States must fulfil their obligation to investigate possible violations of IHL, investigations by independent NGOs are also beneficial. For example, media and civil society organizations, such as Amnesty International and the UC Berkeley Human Rights Center, are using open-source techniques in an effort to document and investigate violations of IHL. In October 2019, the *New York Times* published an article attributing hospital bombings in Syria to Russian forces based largely on an open-source investigation conducted by the newspaper’s Visual Investigations team. The team’s findings added to the growing body of evidence.

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proof that Russia may have recklessly or intentionally bombed hospitals in the Syrian conflict.151

Second, civil society is vital to ensuring that violations of IHL are brought to the attention of the public and potentially investigated. When State or formal legal mechanisms are lacking, public “naming and shaming” may be the only available means of obtaining some semblance of accountability. As such, civil society acts as the custodian of IHL by ensuring that the plight of victims and their communities is not ignored and forgotten. Civil society organizations may uphold IHL principles by articulating the immediate and long-term benefits of respecting IHL and by promoting more compelling non-legal arguments, particularly at the policy level.152

Finally, criminal prosecutions for those responsible for violations of IHL are necessary to strengthen respect for the laws of war. Those who violate the law should be held accountable, but as we have seen, attacks on hospitals often go unpunished. One important way to achieve accountability for violations of IHL is through criminal prosecutions. The fact that Galić in Bosnia and the Israeli military justified their attacks using language from IHL instruments itself implies an acceptance of these legal instruments. Thus, we can conclude that the frequent violations of IHL do not signal a deterioration of the legal principles, since in almost every case study, the ensuing public condemnation of the attacks on hospitals promoted the integrity of IHL. In sum, existing IHL rules can protect hospitals in armed conflict but what are lacking, in addition to greater State adherence to the laws of war, are more robust mechanisms for investigating and prosecuting the individuals responsible for violations of IHL.

Investigatory mechanisms should be strengthened both internationally and nationally. Although the laws of war require States to “examine” and “investigate” alleged violations, our case studies show that actual investigations are often not uniform or are only undertaken at the discretion of States. To ensure that all breaches of IHL are investigated impartially, States should formally recognize the importance of independent commissions of inquiry. Many States have done this by adhering to Article 90 of AP I, which recognizes the competence of the IHFFC to investigate allegations by another party, even though the IHFFC is an imperfect mechanism. Otherwise, the international community should continue to promote other fact-finding or reporting mechanisms to investigate alleged breaches of IHL. While the UN Security Council, through its Resolution 2286, urged States to adopt independent impartial investigations within their domestic jurisdictions, there is little evidence that it has been effective. As several legal scholars have suggested, the UN must work towards resolving the issues found by commissions of inquiry and other independent monitoring and reporting mechanisms.153

While they are robust, the laws of war can and should be strengthened. First, IHL must adapt to the changing landscape of armed conflicts. Today, armed conflicts often take place in cities and densely populated environments. As a result, medical facilities and personnel may be in close proximity to legitimate military targets. And while the 2016 Commentary on Geneva Convention I regards “the placing of a medical unit in proximity to a military objective with the intention of shielding it from the enemy’s military operations” as an “act harmful to the enemy,” this opinion, while cautionary, should not be used as a justification for attacking medical facilities when such units may have no other option but to operate near military sites. Even if hospitals are misused and become legitimate military targets (which could have been the case in Kunduz if the hospital truly did shield armed Taliban fighters), the IHL principle of precaution still requires parties to take all feasible precautions to minimize civilian harm, and the principle of proportionality may mean that an attack on a hospital in a densely populated area is not justified if civilian casualties outweigh the military advantage.

Second, the international community should evaluate the subjective intent of State actors whenever they try to justify their attacks on the basis of misuse. As our case studies illustrate, perpetrators of attacks on hospitals often attempt to justify their orders by claiming hospital misuse or unintentional targeting—but while there was evidence that could have suggested misuse in the Bosnia and Afghanistan cases, there was also evidence to the contrary. The requirement of warning hospitals before attacking is meant to evaluate the subjective intent of the act harmful to the enemy. In the above case studies, the attackers did not confirm whether the hospital misuse was intentional, or send the requisite warnings before attacking. The international community should therefore investigate thoroughly any instances where hospital misuse is given as a justification for attacks, especially when there is no evidence of intent. Conversely, there needs to be more clarity surrounding the intentionality of the attack. Individual criminal liability before the ICC requires a deliberate, knowing attack, but the Geneva Conventions do not. IHL attributes responsibility to States party to armed conflicts while international criminal law attributes responsibility to individual perpetrators. We recommend that in all instances, parties investigating attacks on health care closely scrutinize the intention of the alleged perpetrators. Focusing on the intentionality of the parties involved will certainly strengthen IHL and the goal of protecting health care overall. It is important to determine the intentionality behind alleged attacks; because little is known about how military decision-makers verify the activities taking place within the confines of a health-care facility, robust independent investigations—undertaken with due

155 ICRC Commentary on GC I, above note 12, Art. 21, para. 1842.
156 N. W. Mull, above note 154, p. 504.
consideration of national security implications – must be conducted to shed light on how these decisions are made and later justified.

Finally, since criminal prosecutions of alleged IHL offenders are infrequent and generally take years to complete, the international community should utilize other accountability mechanisms, such as launching public advocacy campaigns to end impunity for offenders. While attacks on hospitals are rarely prosecuted, the laws protecting hospitals are some of the strongest in IHL and should serve to incentivize prosecutors and civil society members to continue to carry out investigations and to hold perpetrators accountable.

As the scholar Leonard Rubenstein puts it: “It’s too simplistic to say [IHL] has failed. Everything is a step … [but] it doesn’t mean you throw in the towel. [We must] put pressure on governments to [uphold IHL].”

157 Telephone interview with Leonard Rubenstein, November 2018.
Protecting the global information space in times of armed conflict*

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Abstract
The legal implications of information activities in the context of armed conflict against the background of the digital transformation have so far received only scarce attention. This article aims to fill this gap by exposing some of the legal issues arising in relation to mis- and disinformation tactics during armed conflict in order to provide a starting point for further debate in this respect. Specifically, it explores the existence and content of existing limits imposed by international humanitarian law on (digital) information operations and inquires whether the current framework adequately captures the humanitarian protection needs that arise from such conduct.

Keywords: digital information operations, information activities, misinformation tactics, disinformation tactics, international humanitarian law.

Introduction
The growing number of allegations of foreign influence activities over the past couple of years, carried out by a variety of international actors, directed against democratic

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decision-making processes in other States have put the problem of adversarial information operations, broadly understood as “any coordinated or individual deployment of digital resources for cognitive purposes to change or reinforce attitudes or behaviours of the targeted audience”, high on the international agenda. The interference in the 2016 US and the 2017 French presidential elections as well as that in the 2016 Brexit referendum in the UK are only the most prominent examples. The phenomenon is certainly neither abating nor geographically limited: in late 2020, for instance, Somalia expelled Kenya’s diplomatic staff after accusations of electoral meddling. Since the beginning of 2020, an unprecedented surge of misinformation and disinformation surrounding the COVID-19 pandemic has added a new sense of urgency while at the same time expanding the scope of the legal questions. However, so far the ensuing debate among scholars and policy-makers has been focused on international human rights law and other questions of peacetime international law, such as whether and under which circumstances an (online) disinformation campaign targeting audiences abroad may amount to a violation of the target State’s sovereignty, the principle of non-intervention, or even—in extreme cases—the prohibition of the use of force. The legal implications of digital information warfare in the context of armed conflict, on the other hand, have so far received scarce attention. This contribution aims at filling this gap by exposing some of the legal issues arising in relation to mis- and disinformation tactics during armed conflict in order to serve as a starting point for further debate in this respect:

What, if any, limits exist concerning adversarial information operations in armed conflict? Does the humanitarian legal framework adequately capture the humanitarian protection needs that arise from these types of (military) conduct? Where and how to draw the line between effects and side-effects of digitalized information warfare that should remain either within or without the protective ambit of international humanitarian law (IHL)? What are, or

5 The Oxford Statement, above note 1, notes: “The conduct of information operations or activities in armed conflict is subject to the applicable rules of International Humanitarian Law (IHL). These rules include, but are not limited to, the duty to respect and ensure respect for international humanitarian law, which entails a prohibition against encouraging violations of IHL; the duties to respect and to protect specific actors or objects, including medical personnel and facilities and humanitarian personnel and consignments; and other rules on the protection of persons who do not or no longer participate in hostilities, such as civilians and prisoners of war.”
what should be, the limits of disinformation campaigns, “fake news”, deep fakes, and the systematic manipulation of a given information space in times of armed conflict? Does IHL, which is traditionally and primarily focused on preventing physical harms, sufficiently account for, and is capable of mitigating, potentially far-reaching consequences that such types of operations can have on societies? If not, should it?

While the laws of armed conflict have proven to be flexible enough to anticipate technological innovation in general and are applicable also to new means and methods of warfare, as thoroughly discussed in relation to the application of IHL to cyber warfare,\(^6\) it is less obvious whether the protection they provide remains adequate in all instances in which novel forms of warfare are employed. And while it is certainly true that disinformation campaigns, ruses and other methods of deception and propaganda have always been part and parcel of warfare, recent technological developments, especially in the fields of cyber and artificial intelligence, are to be seen as a veritable gamechanger of (dis-)information warfare. Considering the scale, scope and far-reaching effects of peacetime information activities, and taking into account the constantly increasing level of military cyber capabilities, this article argues that the traditional assumption that military influence operations have always been an immanent feature of warfare and are thus generally permissible during armed conflict\(^7\) should be revisited. The intention is to start a debate and to question whether the long-standing practice of psychological and influence operations, considering how powerful and damaging some of these operations have become in the wake of global digitalization, is still to be seen as a “common feature of war” with only few constraints in IHL as it stands today.

After presenting a few brief scenarios of possible (military) information operations in situations of armed conflict to illustrate what is potentially at stake, the main part examines whether and to what degree existing rules of IHL put limitations on the conduct of information warfare. A short look at international criminal law and international human rights law follows before the article concludes with an outlook on potential paths to advance the debate.

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Mapping the threat landscape: Risks to the information space in contemporary armed conflict

Psychological and influence operations in the context of armed conflicts can occur in vastly different contexts and can have a variety of different effects on the targeted societies and civilian populations, depending on the mode of conduct, namely the technologies employed, the scope, scale and sophistication of the operation or campaign, the target audience, and the aims pursued. In order to illustrate the matter, a set of hypothetical scenarios – loosely based on past events – follows below.

Scenario A: Social media-enabled foreign electoral interference

The governmental armed forces of State A are involved in a protracted, low-intensity non-international armed conflict with Insurgent Group G, which controls parts of the territory of State A. In the months prior to a general election in State A, the military cyber unit of neighbouring State B—which has been supporting Insurgent Group G with weapons, logistics and covert special forces operations over the course of the conflict—sets up a concerted disinformation campaign on social media in close coordination with domestic groups belonging to G. Employing tools such as fake accounts, bots, and micro-targeting algorithms, the operation disseminates misleading and false political content to State A’s electorate in order to discredit the incumbent and boost support for her contender, who publicly supports the main demands of Insurgent Group G, including secession, and a close future alliance with State B. Despite having trailed in the polls for months, the contender surprisingly wins the election and assumes the presidency.

Scenario B: Large-scale distortion of the media ecosystem

During a situation of sustained political tension between State A and State B, the military information operations unit of State B starts an open propaganda campaign, disseminated via social media, video streaming platforms and State-owned television channels, that attempts to undermine public support in State A for the policies of its government vis-à-vis State B by highlighting arguments that contradict the official justification of the government’s positions. As the campaign does not seem to yield discernible results, the military of State B launches a limited number of missiles against the territory of State A while the military information operations unit spreads a video via social media—using fake accounts that appear to belong to ordinary citizens of State A—stating that ostensibly shows a high-ranking political leader admitting that the armed conflict was actually initiated by State A under false pretences. Shortly thereafter, the military of State B starts a large-scale cognitive warfare operation aiming at the distortion of the entire online media ecosystem of State A. The content on the websites of all of the most important public broadcasting services and the leading newspaper publishers is subtly, and at first virtually imperceptibly, falsified and manipulated,
in line with the official position of State B. At various points, the leading news websites furthermore suffer from seemingly random DDoS attacks that render them inaccessible for considerable amounts of time. The military information operations unit even carefully rewrites the main points of already published expert opinions and academic studies dealing with political issues that are points of contention between the two countries. The combined operation leads to a lasting corrosion of the media ecosystem of State A and results in widespread and sustained confusion among the civilian population. As the official language of State A is the lingua franca of much of the globalized markets, science and scholarship, and international diplomacy, the manipulation of the State’s news media even has ripple effects across the globe. Although the original content can gradually be reinstalled and it eventually turns out that the video had been fabricated using “deep fake” algorithms, support for the government and the war effort in State A drop significantly. Eventually, the military of State A is forced to retreat. The upheaval in the country proves to be lasting due to the loss of public trust in both the media and political structures, resulting in a sustained period of political instability that is further exploited by State B to achieve its own goals at the expense of State A.

Scenario C: Manipulation of civilian behaviour to gain military advantage

While a severe respiratory disease pandemic is spreading across the globe, State A and State B are engaged in an armed conflict that mainly revolves around disputed territory that is a province of State A but claimed by State B. The information operations unit of the armed forces of State B gains access to private groups on a social media platform that are used and frequented mainly by members of the armed forces of State A. Pretending to be soldiers of State A, the unit disseminates the false information that ingesting methanol helps to prevent contracting the virus. Although the information is only shared within the closed groups, screenshots quickly spread all across the social network, which leads to the death of both members of the armed forces and civilians who drink pure methanol after having been exposed to the false information.

Further on, the information operations unit of State B disseminates via various social media platforms the false information that the contested territory has seen several large and severe outbreak clusters of the disease and that for that reason, the authorities of State A have imposed new health guidelines for the province, including a total lockdown for fourteen days. The information leads to confusion and fear among the resident civilian population. While the government of State A tries to correct the disinformation and re-establish order, the armed forces of State B exploit the confusion and the lockdown to make extensive territorial gains.

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8 A “distributed denial of service” (DDoS) attack utilizes a number of computers to overwhelm the target systems to render them unavailable for legitimate users.
Scenario D: Compromising and extorting civilian individuals through information warfare

During an armed conflict between State A and State B, the cyber operations unit of State A hacks into servers that store sensitive personal information about D, who is the chief executive officer (CEO) of a large defence contractor in State B. The unit subsequently starts to disseminate the information via social media platforms and to journalists working at major news outlets in State B; while most of the information is factually correct, the unit also subtly falsifies a number of documents and photographs to further compromise D. Finally, the cyber operations unit conveys the message to D that it will release the most intimate, embarrassing and humiliating information unless D agrees to delay the further development of an advanced fighter jet by his company.

Scenario E: Disinformation as incitement to violence

State A has been ravaged by a protracted civil war that has mostly been fought along ethnic lines. The military, which is primarily composed of members belonging to the majority ethnic group, starts using a social media platform, which serves as the dominant means of communication and information in State A, to disseminate dehumanizing disinformation about one of the minority ethnic groups which the government considers not to be part of the “legitimate people of State A”. At least partly as a result of the sustained disinformation campaign, openly hostile attitudes towards the minority group among the majority population increase considerably. After the military suffers from some setbacks in its combat operations against various rebel groups, it begins to spread false rumours about certain members of the minority group having raped a woman belonging to the majority ethnicity. This false information, which spreads quickly and widely via the platform, leads to severe violence against the minority by civilian members of the majority population.

Protecting information spaces under existing legal frameworks

As the brief scenarios show, the manipulation of specific pieces of information and the distortion of the digital information ecosystem in an entire country, a region, or even globally can take a variety of modes and manifestations. All of the above examples are, to a greater or lesser extent, based on real-world cases, although most of them did not occur in the context of an ongoing international or non-international armed conflict. However, how such scenarios could play out as part of a military campaign is easily imaginable and it is only a question of time before at least some of them will occur during armed conflicts. The subsequent section analyses the legal implications of such operations within the framework of existing IHL. As already mentioned in the introduction, the article thereby applies a broad understanding of the concept of “adversarial information
operations” that follows the recently adopted “Oxford Statement on International Law Protections in Cyberspace: The Regulation of Information Operations and Activities”, which defines such conduct as “any coordinated or individual deployment of digital resources for cognitive purposes to change or reinforce attitudes or behaviours of the targeted audience”.\(^9\)

### International humanitarian law

In the following, it will be examined whether and to what extent existing IHL offers protections against adversarial information operations and other forms of cognitive warfare that target the civilian population in situations of armed conflict. For the purpose of legal analysis, a distinction between the specific elements of such operations has been suggested, as different rules and legal consequences might attach. These identifiable elements are, at least: (1) the content of the communicative act; (2) the mode of disseminating the information; (3) the target audience; and (4) the (actual or foreseeable) consequences of the communicative act.\(^10\)

The correct observation that “[t]he conduct of information operations or activities in armed conflict is subject to applicable rules of [IHL]”\(^11\) notwithstanding, the pertinent legal frameworks of the laws of armed conflict address communication and information activities only tenuously and non-systematically. This is primarily a consequence of IHL’s traditional focus on the physical effects of armed conflicts.\(^12\) Thus, for instance, while Article 79 of Additional Protocol (AP) I clearly states that journalists “shall be considered as civilians” and “be protected as such under the Conventions and this Protocol”, it has been pointed out that the scope of this specific protection only covers the individual journalists as natural persons, but not (at least not directly) “their journalistic activities or products, such as content posted on a website”.\(^13\)

When it comes to questions regarding the content of information more broadly, the Tallinn Manual submits that the general rule is that “psychological operations such as dropping leaflets or making propaganda broadcasts are not prohibited

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12 See Michael N. Schmitt, “Wired Warfare 3.0: Protecting the Civilian Population During Cyber Operations”, *International Review of the Red Cross*, Vol. 101, 2019, p. 344: “International humanitarian law was crafted in the context of means and methods of warfare, the effects of which were to damage, destroy, injure or kill. While the civilian population might have suffered as a result of military operations that did not cause these consequences, the threat of harm was overwhelmingly from such effects. Thus, IHL rules are grounded in the need to shield civilians and civilian objects from them, at least to the extent possible without depriving States of their ability to conduct essential military operations.” The author speaks insofar of the “cognitive paradigm of physicality”, see *ibid.*, note 69.
13 M. N. Schmitt, above note 6, rule 139, para. 3; to clarify, this encompasses the information (as data) itself and not the physical infrastructure necessary to display the information; physically destroying the server that stores the journalistic website content, as a civilian object, would be subject to the principle of distinction just like a newspaper printing house; this is a function of the conceptual distinction between the physical and the non-physical, and IHL’s principal focus on the former.
even if civilians are the intended audience”.\footnote{M. N. Schmitt, above note 6, rule 93, para. 5.} In line with this, it has been suggested that “through the longstanding, general, and unopposed practice of States, a permissive norm of customary law has emerged, which specifically permits” such operations “as long as [they] do not violate any other applicable rule of IHL”.\footnote{See International Cyber Law: Interactive Toolkit, “Scenario 12: Cyber Operations against Computer Data”, 22 May 2020, available at: https://cyberlaw.ccdcoe.org/wiki/Scenario_12:_Cyber_operations_against_computer_data.} For example, the German law of armed conflict manual states that “[i]t is permissible to exert political and military influence by spreading—even false—information to undermine the adversary’s will to resist and to influence their military discipline (e.g. calling on them to defect, to surrender or to mutiny)”.\footnote{German Ministry of Defence, above note 7 (emphasis added).}

At the same time, there are a number of specific rules in existing IHL that impose limits on certain forms of information operations. As will be shown below, principal among these rules are the prohibition of perfidy, the prohibition to terrorize the civilian population, the prohibition to encourage violations of IHL, the obligation to treat civilians and persons hors de combat humanely, as well as the obligation to take constant care of civilians and civilian objects during military operations. What is more, information operations that qualify as military operations, and especially information operations that amount to an attack in the sense of IHL, are subject to additional legal constraints.

The problem in all of this, however, is that many of these rules entail limiting criteria or thresholds that sit oddly with 21st-century digital disinformation campaigns. The relevant rules are anchored, understood and interpreted in light of 20th-century warfare practices. Typically, these rules are linked, in one way or another, to violent activity. Their rationale is to protect the integrity of IHL (perfidy), to limit violence and its most drastic psychological effects (prohibition of encouragement of IHL violations, prohibition of terrorizing civilians), or are focused on the protection of individuals (human dignity, humane treatment). These protection rationales undoubtedly continue to be relevant and these rules impose important limits for certain types of information campaigns in times of armed conflict. However, they are not aimed at protecting national or even the global “civilian” information space as such. This is particularly relevant when discussing military information operations, the aim of which is not to terrorize, incite violence or to expose targeted individuals but to degrade information spaces during armed conflict, systematically undermine public trust in a country’s public institutions, media and democratic decision-making processes, and to spread large-scale confusion among the civilian population (Scenario B above). Of course, in keeping with IHL’s overarching rationale to mitigate the worst—but not all—humanitarian impacts of war, it may well be argued that such effects should remain outside the protective realm of IHL even under the conditions of 21st-century warfare. And clearly, noting that the first victim of war is the truth, overly restrictive limits on information operations during armed conflict would be utterly unrealistic. At the same time, the nature, scope and impact of manipulative
information operations occurring in peacetime and their long-lasting divisive and corrosive effects on public trust and societal stability require that more attention be given to these types of operations during armed conflict. Does IHL impose any limits on such adversarial information operations?

**Digital perfidy and ruses of war**

For one, whereas generally speaking an information operation would be lawful if it were to be qualified as a permissible ruse, it would violate IHL if amounting to a (prohibited) perfidious act. “Perfidy”, in accordance with Article 37(1) of AP I, is an act that invites “the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence”. As is quite obvious, the scope of this prohibition – especially when considered against the backdrop of modern disinformation practices as described in the scenarios above – is relatively narrow. It has been emphasized that “the perfidious act must be the proximate cause” of the death, injury or capture of a person belonging to the adversary party. This will only ever be relevant in relation to very specific information operations that directly aim at such (physical) consequences with a particular mode of deception. Ruses of war in the sense of Article 37(2) of AP I, on the other hand – understood as “acts intended to mislead the enemy or to induce enemy forces to act recklessly” have a broader scope of application that generally includes psychological warfare activities. This is implied by the provision’s phrasing, which explicitly mentions “misinformation” as a type of permissible ruse, loosely understood as the dissemination of any type of information aimed at misleading the enemy. Jensen and Crockett present the example of “a deep-faked video including inaccurate intelligence information [which] might significantly impact the conduct of military operations”. Such deception of the adversary by way of a communicative act must, however, not be in conflict with any other applicable rule of the laws of armed conflict.

Notably, however, the examples typically provided for permissible ruses of war refer to instances in which new information – in whichever form – is distributed, rather than existing and trustworthy sources of information (e.g. a country’s online news environment) that are being manipulated or falsified. Thus, when talking about a permissive norm of customary law it might be necessary to draw further distinctions between different types of information operations. What is more, like in the German law of armed conflict manual cited above, which speaks of “the

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17 M. N. Schmitt, above note 6, rule 122, para. 5.
18 M. N. Schmitt, above note 6, rule 123, para. 2.
21 ICRC Commentary on APs, above note 19, para. 1521.
22 M. N. Schmitt, above note 6, rule 139, para. 3.
adversary’s will to resist” as well as “military discipline”, there is often a reference to an overarching military purpose of the information operation without it being clear whether such a limitation is considered to be somehow prescribed by IHL or whether it is rather to be seen as simply reflecting the typical context in which such operations are likely to occur. It is telling that the 1987 Commentary on Additional Protocol I defines a ruse of war as consisting “either of inducing an adversary to make a mistake […], or of inducing him to commit an imprudent act” and therefore appears to understand ruses of war as practices that have at least a nexus to concrete military operations against enemy forces.23 The Commentary lists “simulating the noise of an advancing column”, “creation of fictitious positions”, “circulating misleading messages” and “simulated attacks” as examples of ruses of war.24 On the basis of this definition and the examples of ruses provided above, actively corroding a civilian information space with the aim to spread confusion and uncertainty among the civilian population and without any direct link to combat activity – e.g. by manipulating content in all major online newspapers in a given country – does not qualify as a permissible ruse of war.

**Personality rights**

The obligation of humane treatment might constitute one of the rules that prohibit certain types of information operations in situations of armed conflict. Pursuant to Article 27 of Geneva Convention (GC) IV, “[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” The International Committee of the Red Cross (ICRC) has submitted that such public exposure is prohibited even when it “is not accompanied by insulting remarks or actions” as it is “humiliating in itself”.25 Crucially, it has clarified that “[i]n modern conflicts, the prohibition also covers … the disclosure of photographic and video images, recordings of interrogations or private conversations or personal correspondence or any other private data, irrespective of which public communication channel is used, including the internet”.26

The 1958 Commentary to the Fourth Geneva Convention calls the obligation of humane treatment the “leitmotiv” of all four Conventions.27 For

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23 ICRC Commentary on APs, above note 19, para. 1515 (emphasis added).
24 Ibid., para. 1516.
26 Ibid.
this reason, “[t]he word ‘treatment’ must be understood in its most general sense as applying to all aspects of man’s life”.28 Rule 87 of the ICRC Customary Law Study stipulates a general obligation to treat civilians and persons hors de combat humanely under customary international law. What is more, in the context of non-international armed conflicts, Article 3 common to the four Geneva Conventions prohibits outrages upon personal dignity, in particular humiliating and degrading treatment. The ICRC’s 2016 Commentary lists, inter alia, “forced public nudity” and “enduring the constant fear of being subjected to physical, mental or sexual violence”, as relevant acts violating this prohibition.29 Therefore, one may argue that an adversarial information operation targeting a civilian and amounting to a violation of that person’s personal dignity, such as the operation in Scenario D that aims at humiliating the CEO in order to blackmail him, would be in violation of the customary law obligation to treat civilians humanely. However, the pertinent treaty and customary rules relating to the obligation of humane treatment require the affected person to be “in the hands of” (Article 4 of GC IV) or “in the power of” (Article 75 of AP I; Customary Rule 87) the enemy. Prima facie, it is difficult to sustain the contention that this applies to the CEO, given that it is only his personal data that is in the hands of the adversarial party but not he himself. At the same time, considering the object and purpose of the obligation and the fact that the digital transformation has vastly expanded the possibilities to negatively impact a civilian person’s dignity, an expansive interpretation that encompasses such conduct might be justifiable in light of the “leitmotiv” function of humane treatment in situations of armed conflict.

**Incitement of violence**

Pursuant to Article 1 common to the four Geneva Conventions as well as Article 1(1) of AP I, parties to an armed conflict are under an obligation to respect and ensure respect for the rules of IHL “in all circumstances”. While some aspects regarding the interpretation of common Article 1 remain controversial, it is widely accepted that common Article 1 entails a prohibition to encourage violations of IHL.30 According to the ICRC Commentary, the rationale of this negative obligation is that “[i]t would be contradictory if common Article 1 obliged the High Contracting Parties to ‘respect and ensure respect’ by their own armed forces while allowing them to contribute to violations by other Parties to a conflict”.31

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28 Ibid.
This implies that a State would violate this rule in a situation of armed conflict if it disseminated information that induced combatants or civilians to attack and harm other civilians, for instance in inter-ethnic violence in the course of a civil war.\footnote{32} Despite the fact that some existing law of war manuals of armed forces, for example the German law of armed conflict manual, employ the terminology of “instigating” (“Aufforderung”),\footnote{33} it can hardly make a difference whether the encouragement to violate IHL is made explicitly or implicitly. Thus, it is argued that the inducement can be carried out by way of disseminating inciting disinformation via social media as described in Scenario E, which is modelled after recent events in Myanmar.\footnote{34} There are therefore good reasons to conclude that such violence-inciting types of disinformation in armed conflict would amount to a violation of existing IHL.\footnote{35}

**Terrorizing**

The prohibition against terrorizing civilians might also provide protection against certain adversarial information operations in armed conflict.\footnote{36} According to Article 51(2) of AP I, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. This rule is furthermore accepted as part of customary IHL, applying to all kinds of armed conflicts.\footnote{37} However, two aspects of this rule considerably limit its scope vis-à-vis this type of military conduct. For one, the communicative act in question must either amount to an attack within the meaning of IHL or a threat thereof.\footnote{38} Whether an information operation may constitute an attack in and of itself at all will be discussed below; either way, it seems indisputable that typically most such conduct will not reach this threshold. Thus, even if disseminated disinformation spreads fear and terror among targeted civilians, the operation will not automatically come within the protective ambit of Article 51(2) of AP I if it does not, at the same time, constitute or threaten an act of violence. A “threat” is a purposely directed speech act “that suggests to the addressee the future occurrence of a negative treatment or event”.\footnote{39} The mere exploitation of a state


\footnote{33} German Ministry of Defence, above note 7, para. 487.


\footnote{35} See Oxford Statement, above note 1.


\footnote{38} See M. N. Schmitt, above note 6, rule 98, para. 3.

\footnote{39} P. Winther, above note 10, p. 148.
of fear and terror or the spreading of fear for general destabilization as in Scenario C, whether related to the aim of gaining a military advantage or not, will therefore typically not suffice to trigger the prohibition in the absence of an actual or threatened act of violence. Furthermore, it must be the primary purpose of the act or threat of violence to spread terror. This implies that in situations where other motives and objectives take precedence, the prohibition (as it currently stands) is not applicable even if the result of an information operation is extreme fear among the civilian population on the receiving end. In light of the far-reaching and terrorizing effects that digital information warfare campaigns can have in the 21st century, it should be reconsidered whether such operations, whenever it is their (primary) purpose to spread terror among the civilian population, should not be explicitly prohibited regardless of whether or not they can be qualified as an act or threat of violence.

“Military information operations”: Constant care to spare the civilian population

Furthermore, adversarial information operations in armed conflict might violate the obligation of constant care as stipulated by Article 57(1) of AP I: “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” The International Law Association’s Study Group on the conduct of hostilities agreed that “the obligation to take constant care to spare the civilian population applies to the entire range of military operations and not only to attacks in the sense of Art. 49 AP I”. Against this backdrop, at least those communicative acts by armed forces that aim at furthering military goals could be considered “military operations” within the ambit of the provision, in line with the legal position put forward in certain military manuals such as the US Department of Defense law of war manual, which deals with military operations and includes a section on “propaganda”. This broader reading of the notion of military operations does not align with traditional interpretations of the term that, in keeping with 20th-century warfare practices, understood it to refer to physical military operations (such as manoeuvres or troop movements). However, the term’s natural meaning does not preclude the possibility to interpret it in a way as to include communicative acts such as military

41 See also Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 13(I); J.-M. Henckaerts and L. Doswald-Beck, above note 30, rule 15.
43 See P. Winther, above note 10, p. 131.
information operations affecting the civilian population. In view of the object and purpose of the precautions regime entailed in Article 57 of AP I, namely, to mitigate impact on the civilian population as much as possible, a more expansive reading seems defensible.\footnote{Likewise, M. N. Schmitt, above note 6, rule 92, para. 2.}

At the same time, even if we accept the applicability of the obligation to take constant care to military information operations in principle, it is questionable how far-reaching this protection really is in view of the possibilities of contemporary digital technologies to deeply affect a target population in a variety of ways. Again, given that IHL is traditionally focused on the violent physical effects of warfare,\footnote{See the “International Humanitarian Law” section.} the question is whether the existing rules still suffice. Jensen and Crockett suggest that the use of deep fake video technology to deceive the civilian population ahead of an attack with kinetic force with the result that the number of incidental civilian casualties rises would violate the obligation.\footnote{E. T. Jensen and S. Crockett, above note 20.} However, in situations that are not followed by such destructive events, as in information operations that target democratic decision-making processes or promote a general sense of uncertainty and a loss of trust in media sources or a national information space as a whole (see Scenario B in particular), the protective reach of the rule is much less obvious. After all, even if it is accepted that the notion of military operations can be interpreted broadly to include certain types of military information operations, the question remains what “sparing the civilian population” means and whether the interpretation can be expanded beyond violent effects in a more traditional sense. While there is no conceptual barrier to such an interpretation, there is hardly any State practice to support it. Opening up the interpretation as to which effects the notion of “sparing the civilian population” might entail beyond violent effects immediately raises difficult line-drawing and definitional questions. After all, an obligation to avoid all detrimental impacts on the civilian population in times of armed conflict, even considering the relative due diligence nature of the constant care obligation, would be unrealistic and would go too far, certainly in the eyes of most States. Here is not the place to flesh out these issues in full, also considering that by and large the obligation to exercise constant care to spare the civilian population has generally remained somewhat underexplored. For the purposes of the present article, it suffices to conclude that while Article 57(1) of AP I and its customary law pendant may impose limits also on military information operations, at the present juncture the exact protective reach of these provisions \textit{vis-à-vis} digital disinformation campaigns is unclear.

\textit{Information operations reaching the threshold of an attack}

As hinted at above, the last aspect to be considered is the question whether certain information operations may even qualify as “attacks” within the meaning of IHL,
making them directly responsive to the rules on targeting, such as the principle of distinction, the principle of proportionality, and the principle of precautions in attack. According to Article 49 of AP I, attacks are “acts of violence against the adversary, whether in offence or in defence”. The concept of “violence” in this regard may concern either the conduct or its effects, which implies that even means of warfare that do not by themselves use physical force, such as biological or chemical agents, fall within the scope of “attack” in this sense.\(^{47}\) In this context, it is noteworthy that most recently, in the context of health-related misinformation campaigns in the course of the COVID-19 pandemic, Milanovic and Schmitt argued that “[d]epending on the scale of the sickness or death caused and the directness of the causal connection, a cyber misinformation operation even could rise to the level of a use of force”.\(^ {48}\) Whereas this contention concerns the *jus ad bellum* rather than the *jus in bello* under scrutiny here, the argument’s rationale might be suitable to being applied to the question at hand. As described previously, the *Tallinn Manual* 2.0 defines a “cyber attack” as “a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects”.\(^ {49}\) While it has been argued above that information operations are *per se* analytically distinct from cyber operations, even if conducted by digital means, the same consideration should pertain to this type of conduct.

Therefore, just like other types of military violence, if the causal nexus between an instance of disinformation and physical harm is sufficiently strong so as to render such operation an attack, it “must respect the distinction, precaution, and proportionality triad”.\(^ {50}\) If this contention is accepted in principle, one might be inclined to make the argument that Scenario C involves an “attack” by means of an information operation as the false information led members of the armed forces and civilians to ingest harmful methanol. To be sure, causation is of course the decisive issue. Whether or not an “attack” occurred in this scenario hinges on the question of whether the causal relationship between the piece of information and the death of the persons is sufficiently direct for the operation to be considered an “attack”. After all, as opposed to a cyber operation against an information technology system that triggers a physical chain of events that leads to damage, an instance of disinformation requires the targeted audience to act upon the received information and because of that inflict harm on itself. This is in any case an entirely different type of causal connection, and it is not inherently obvious that this type of “attack” was meant to fall within the ambit of existing IHL. In the context of international criminal law in regard to “instigation” as a


\[48\] M. Milanovic and M. N. Schmitt, above note 4, p. 269.

\[49\] M. N. Schmitt, above note 6, rule 92.

speech act that mentally induces the target audience to act in a harmful manner—
which in this sense is similar to disinformation in its causal mechanics—the
International Criminal Tribunal for the Former Yugoslavia (ICTY) and the
International Criminal Tribunal for Rwanda (ICTR) have held that while it is
“not necessary to demonstrate that the crime would not have occurred without
the accused involvement”, the (instigating) speech act needs to have been a
“substantially contributing” factor for the crime to occur. Analogously, one may
perhaps ask whether the piece of disinformation substantially contributed to the
harmful event, in this case the ingestion of the methanol. To be sure, this analogy
requires that the standard of causality applied by the Tribunals in the context of
“instigation” is appropriate for the context under scrutiny, i.e. the necessary
causal proximity between the piece of disinformation and the harmful event
(ingestion of methanol) for the conduct to qualify as an “attack” within the
meaning of IHL. This question does not seem to have been addressed in
the literature or in State practice to date, and a different standard might be
considered more suitable. At any rate, the absence of any engagement with the
particularities of causation again shows that the modes of military conduct
analysed in this article fall outside the ambit of what traditionally has been
considered to be subject to the law of armed conflict.

If one supports the conclusion that the dissemination of disinformation
might qualify as an “attack”, it must be asked whether the operation was in
compliance with the rules pertaining to the conduct of hostilities. Given that
the disinformation was targeted at members of the adversarial armed forces, the
principle of distinction was arguably observed. At the same time, it is questionable
whether the same holds true as regards proportionality and precautions in attack
in view of the fact that it was probably reasonably foreseeable that the harmful
disinformation would not stay confined to the soldiers’ closed groups on social
media but instead further spread to civilian audiences as well. Information is by
definition difficult to contain once it has been published.

With reference to the Tallinn Manual 2.0, it has furthermore been
suggested that an information operation might also amount to an “attack” within
the meaning of IHL if it merely causes the psychological condition of “severe
mental suffering”, which supposedly follows from the phrasing of the already
mentioned Article 51(2) of AP I, prohibiting acts or threats of violence, the
primary purpose of which is to spread terror among the civilian population.
Certainly, there is no reason to exclude mental injury from the protective ambit
of IHL as a matter of principle. The problem, however, is that the degree of
mental suffering is difficult to establish, given that, for instance, “[i]nconvenience,
irritation, stress, [and] fear are outside of the scope” of the proportionality principle.\textsuperscript{55} It should follow that at least not every psychological reaction to an information operation can be sufficient to render the conduct an attack. In order to make such an expansive interpretation of the protective rules of IHL workable, one would have to find clear, reliable and detectable criteria to enable the assessment of mental injury caused by an adversarial information operation. Either way, it is argued that many conceivable operations, as demonstrated by above scenarios, will not lead to a sufficient degree of distress. In this context, it may be suggested that this calculation may shift towards the assumption of “severe mental suffering” if a large-scale information operation – as for example in Scenario B above – leads to widespread confusion and sustained insecurity among the civilian population of the target State. However, even in such a scenario, the rule’s ambit would still be concerned with the mental well-being of (a number of) individual civilians, but not with the integrity of the targeted information space as such. Again, it may thus be asked whether existing IHL remains sufficient to adequately protect civilian societies and their digital information spaces against the perils of novel modalities of modern warfare.

International criminal law

In the context of the use of information operations in situations of armed conflict, it is worth mentioning briefly that some forms of disinformation may not merely constitute breaches of IHL but may also rise to the level of an international crime. For example, disinformation about protected individuals or groups with the aim of instigating members of the armed forces or civilians to attack them can be qualified as inducing a war crime or another crime within the jurisdiction of the International Criminal Court: Article 25(3)(b) of the Rome Statute stipulates that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … induces the commission of such a crime which in fact occurs or is attempted”.\textsuperscript{56} Recently, the United Nations (UN) Human Rights Council presented a detailed fact-finding report on the situation of the Rohingya in Myanmar that laid out the ways in which dehumanizing disinformation can be weaponized in situations of inter-ethnic tensions.\textsuperscript{57}

Relatedly, the Rome Statute furthermore provides in Article 25(3)(e) that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … directly and publicly incites others to commit genocide”. Incitement, too, is a mode of criminality that can – and often will – be committed by way of disseminating hateful disinformation about a targeted group. Note that as opposed to instigating or inducing the commitment

\textsuperscript{55} M. N. Schmitt, above note 6, rule 113 para. 5.


of a crime, incitement does not require the genocide to actually have occurred; for criminal liability to be established, it is sufficient to show that the inciting speech act created the risk of genocidal acts to be carried out by the recipients.58

**International human rights law**

Adversarial information operations are obviously also capable of implicating the human rights of targeted civilian populations. A piece of disinformation disseminated by a State via social media that urges people to ingest methanol in order to avoid contracting a deadly virus *prima facie* violates the right to bodily integrity and the right to life, as guaranteed by virtually all existing human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights.59 A State-run disinformation campaign that pursues the purpose of interfering in the democratic decision-making process in another State might be considered a violation of the right to vote in elections that guarantee “the free expression of the will of the electors” (Article 25(b) of ICCPR) and of the collective right to self-determination, which is enshrined in Article 1(1) of ICCPR as well as Article 1(1) of the International Covenant on Economic, Social and Cultural Rights.60 More generally, it may even be worth inquiring whether and under which circumstances State-led adversarial disinformation from abroad interferes with a person’s right to information pursuant to Article 19(2) of ICCPR.

However, the application of these and other human rights is contingent on two conditions: first, it needs to be established whether and to what extent States’ human rights obligations apply extraterritorially, in view of the fact that the ICCPR, for example, stipulates that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” (Article 2(1) of ICCPR).61 Some authors have recently re-emphasized that there are persuasive reasons to assume that States have an obligation not to infringe upon the rights of individuals located in other States given that the digital transformation as well as recent developments of weapons technologies have vastly increased the possibilities of States to endanger and compromise the enjoyment of human rights of persons abroad who otherwise possess no link to the acting State.62

61 Also see Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Art. 1.
62 In the context of disinformation and cyber operations, see M. Milanovic and M. N. Schmitt, above note 4, pp. 261–266.
Second, information operations and other forms of hybrid warfare add renewed urgency to the question of the relationship between the application of the laws of armed conflict (IHL) and international human rights law in situations of armed conflict. If the current state of the debate is that on a case-by-case basis, the *lex specialis* principle “determines for each individual situation which rule prevails over another” depending on the degree of detail the rule provides *vis-à-vis* the situation, one may conclude that novel forms of warfare such as the ones presented in this article allow for a broader consideration of the human rights implications of adversarial military operations given that the law of armed conflict, as shown throughout, does not address many of the relevant legal questions that arise in the context of adversarial information activities in armed conflict. After all, at least election interference or the coercion of individual civilians by way of an information operation is nothing that the Geneva Conventions or their Additional Protocols envisaged—with the possible, albeit in any case limited, exception of the law of military occupation as laid down in GC IV. Of course, a possible and potentially rather sweeping counterargument against a stronger reliance on human rights protections regarding information operations during armed conflict could be IHL’s explicit recognition of permissible ruses of war. If “ruses of war are not prohibited”, as stated by Article 37(2) of AP I, IHL could potentially be invoked as the *lex specialis* in times of armed conflict whenever an information operation qualifies as a ruse of war. The same provision, however, clarifies that permissible ruses are limited to operations “which infringe no rule of international law applicable in armed conflict”. This forestalls any sweeping invocations of the *lex specialis* argument and leaves considerable room for human rights law in the assessment of wartime information operations.

**Conclusion: The limits of existing law and options for advancing the debate**

The protection of civilian populations against the consequences of armed conflict is a central object and purpose of IHL. IHL’s anchoring in 20th-century kinetic warfare and its traditional focus on the physical impact of military operations still pervade contemporary understandings and interpretations of the humanitarian legal framework. The extent of this “physical anchoring” marks the linchpin in current debates about accommodating and mitigating the far-reaching intangible harms (potentially) inflicted by 21st-century modes of warfare.

Shifts in the nature of conflict have seen an emergence of new modes of hybrid warfare combining the employment of traditional kinetic force, cyber operations and disinformation campaigns to destabilize or gradually demoralize the adversary. Digital technologies allow for information operations that can

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deeply affect targeted civilian populations and public structures in ways that were hitherto inconceivable.

On the other hand, it is still very much an open question whether the adverse (intangible) consequences on modern interconnected societies and information spaces are humanitarian concerns in the sense that contemporary IHL should be the legal regime addressing them. Are the potential harms laid out in this article in fact reflective of protective gaps that humanitarian law should fill? If so, should such protection be achieved on the basis of existing rules and via links to traditional forms of violence or physical or mental impacts on individuals? Or are systemic values such as “the integrity of national or global information spaces” or “public trust” increasingly to be seen as 21st-century humanitarian values that IHL should protect as such—at least against the worst types of impact when disinformation campaigns are designed to systematically corrupt and corrode informational spaces nation-wide?

There are essentially two paths available to move forward from here: one is to accept such adverse consequences as in principle within the ambit of the raison d’être of IHL, which would imply the need for a more progressive re-interpretation and (potentially) development of the existing body of the laws of armed conflict.

The other one is to consider threats from contemporary information operations beyond the (deliberately limited) reach of IHL given that it is the principal task of these rules to provide fundamental protection (rather than full-scale protection) against the worst (and not all) perils of war. In that case, other rules would have to step in lest civil societies were left without clear legal protection against some of the most consequential forms of modern conflict, as exemplified in Scenario B. The long-running but as-yet unsettled questions of the extraterritorial (“virtual”) and substantive reach of international human rights law in situations of armed conflict, however, suggest that States remain reluctant to proceed with the second option.

As far as information operations are concerned, however, most States so far do not seem to be prepared to treat their consequences as humanitarian concerns either. In part, this may be due to the difficult line-drawing and definitional questions inherent in any attempt at broadening classic IHL understandings to include intangible impacts that for the time being might be seen to militate against any such ostensibly “radical” extensions. In fact, despite growing engagement within the community of international legal scholars, there is a palpable reluctance to address the issue within the framework of international law at all. While there is an increasing trend among States to publicly position themselves in regard to the application of international law to cyber operations, the same cannot be said about the growing phenomenon of adversarial conduct against a target State’s information ecosystem, i.e. operations that are carried out solely on the content layer of network infrastructures without affecting the physical or logical layers as well. Regarding the legal implications of such

64 There are a few noteworthy exceptions: see Norwegian Military Manual, p. 200; French Military Manual, p. 68.
operations, States have so far by and large remained silent and abstained from any nuanced categorizations. In line with this reluctance to employ the language of international law, States and regional organizations have so far preferred an approach that focuses on monitoring adversarial campaigns by other States and disseminating counter-information to correct distorting or false media narratives.

The present article has shown that digital communications technologies open up entirely new possibilities to affect the adversary, societies and the civilian population of a given area, State, region or even globally in situations of armed conflict. The foregoing analysis of existing legal framework allows for the following conclusions:

(1) Certain kinds of adversarial information operations in a situation of armed conflict and their consequences are covered by existing rules of IHL, in particular in regard to incitement, de-humanization of the adversary and the terrorization of a civilian population.

(2) The legal concepts of “constant care” and “attack” allow, in principle, for an expansive interpretation that encompasses certain modes of information operations and resulting harms, such as the spreading of false health information that prompts the target audience to engage in directly harmful behaviour, as exemplified in Scenario C and further analysed in the sections “Military information operations: Constant care to spare the civilian population” and “Information operations reaching the threshold of an attack”. Such expansive understanding is contingent on corresponding mutual consent of the relevant international actors and should be supported.

(3) Adversarial conduct during armed conflict against the information space of a belligerent party beyond these relatively narrowly circumscribed scenarios finds only scarce (clear) limitations under existing legal frameworks. To a certain extent, this is a reflection of IHL’s unusually explicit permissive stance on ruses of war and a widespread sentiment that information operations (against the adversary) must remain legal. At the same time, recent developments suggest a significant shift towards more pervasive, all-encompassing operations that may lead to a large-scale corrosion of public information spaces without discernible military necessity. With the ever-increasing digitalization of societies across the globe, the adverse impact of such conduct might be too sustained and too grave to remain unaddressed by IHL. Given the further observation that in information warfare the lines between times of war and times of peace become increasingly blurred, there even appears to be an emerging need—and room—for a broader rule against systematic and highly corrosive military information operations against civilian information spaces that is not limited to situations of armed conflict but spans the entire spectrum of peace and war.


To be sure, I am under no illusion about the prospects of such a rule materializing any time soon. Instead, all of this first and foremost calls for a policy debate about humanitarian values on the future digital battlefield. If anything, we need to move on from the current widespread instinctive perception that the general rule is one of permissibility of adversarial influence activities during armed conflict, as demonstrated at the outset of the article. In view of the possibilities and adverse impacts of digital information warfare in the 21st century, and for the sake of protecting civilian societies in the digital era, such an attitude can no longer reasonably be upheld. Therefore, avoiding or mitigating the worst and most disruptive impacts that digital information warfare can have on civilian populations and societies should be considered a central humanitarian objective in 21st-century warfare.
“For private or personal use”: The meaning of the special intent requirement in the war crime of pillage under the Rome Statute of the International Criminal Court

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Abstract

Legislating for international courts and tribunals is a delicate and complex process, which sometimes results in unintended consequences. Arguably, the inclusion of a special intent requirement, also known as dolus specialis, concerning “private or personal use” in the definition of pillage under the Rome Statute of the International Criminal Court is one such consequence. But this is not the only reason why the war crime of pillage deserves special attention. On closer

* The views expressed in this article are those of the author and do not necessarily reflect the views of the ICC. The author would like to express her gratitude to Matthew Cross for his insights, and Nikila Kaushik for her prior collaboration and research assistance.
examination, other questions arise concerning its interpretation and application. What is the meaning of “military necessity” and “necessity” in relation to pillage, and how do they correlate with the special intent requirement? To answer these questions, the article examines the drafting history, law and current practice relating to the crime’s ambiguous new element. It then proposes several avenues to address the recurring uncertainty regarding its meaning: conservative, radical and pragmatic.

**Keywords**: pillage, plunder, International Criminal Court, Rome Statute, Elements of Crimes.

**Introduction**

This article explores the legal contours of the war crime of pillage in international and non-international armed conflicts under Articles 8(2)(b)(xvi) and 8(2)(e)(v) of the Rome Statute of the International Criminal Court (ICC). It focuses on the special intent of pillage, which was introduced during the drafting of the ICC Elements of Crimes. This novel element requires that the perpetrator intended to appropriate the property “for private or personal use”. To understand its meaning, the article also examines the notions of “military necessity” and “necessity”.

The meaning of the crime’s special intent requirement remains obscure more than two decades after the adoption of the ICC Statute and the Elements of Crimes. Pursuant to Article 9 of the ICC Statute, the Elements of Crimes shall assist the ICC in the interpretation and application of Article 8, consistent with the Statute. But has it been the case with pillage? The article addresses this question building on the current jurisprudence of the ICC and other international tribunals, as well as academic literature.

The core ICC jurisprudence on pillage consists of trial judgments in the cases of *Katanga* (2014), *Bemba* (2016), *Ntaganda* (2019) and *Ongwen* (2021). Consistent with the current prevalence of non-international armed conflicts, the four cases concern pillage under Article 8(2)(e)(v) of the ICC Statute. The verdicts in the first three cases have become final, but following the appellate acquittal in *Bemba*, there are just two final convictions for pillage at the moment: *Katanga* and *Ntaganda*. At the time of writing, the *Ongwen* case was pending resolution on appeal.

This modest track record concerning one of the most common crimes in armed conflicts is the centerpiece of this review. Current jurisprudence provides a good foundation for understanding the crime’s elements, but as discussed below, it does not give a clear and exhaustive interpretation of the special intent requirement. Meanwhile, the existing academic literature on the crime’s special intent is somewhat limited or dated. While commentators have paid much attention to pillage in the form of exploitation of natural resources, the ICC cases mostly concern basic items: food, household goods, furniture, building materials and clothes.

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1 The research and writing of this article concluded on 1 September 2021.
Thinking forward, the article considers three possible avenues to address the unresolved issue concerning the crime’s scope. It first suggests factors that could be indicative of the perpetrator’s special intent concerning “private or personal use”. As an alternative, it considers the possibility of replacing the special intent requirement in the Elements of Crimes. Finally, it argues that even without a legislative amendment, it is open to the ICC to disregard the “private or personal use” element, which would be consistent with the “established framework of the international law of armed conflict”.

Pillage in the International Criminal Court law and practice

Property crimes such as pillage remain a feature of modern armed conflicts around the world. Before delving into its special intent requirement (dolus specialis), the central question of this article, this section discusses pillage in the ICC law and practice. As an introduction, it recalls the crime’s definition under the ICC Statute and its constituent elements under the ICC Elements of Crimes, including their drafting history. It also gives a brief overview of pertinent ICC cases, focusing on the four cases that have been tried on pillage charges to date: Katanga, Bemba, Ntaganda and Ongwen.

The definition and legal elements of pillage

In simple terms, pillage means theft during armed conflict.2 Pillage is otherwise known as looting, plunder, sacking or spoliation, although the exact definition of these terms remains elusive.3 All these concepts refer to an unlawful appropriation of any property during an armed conflict against the will of the rightful owner.

The ICC Statute criminalizes pillage under Articles 8(2)(b)(xvi) and 8(2)(e)(v). Its drafters categorized pillage as “[o]ther serious violations of the laws and customs” applicable in international and non-international armed conflicts “within the established framework of international law”. Save for the contextual elements, the legal elements of pillage in international and internal armed


3 International Criminal Tribunal for the former Yugoslavia, Delalić et al., Judgment, IT-96-21-T, 16 November 1998, para. 591; Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland regarding the text prepared by the International Committee of the Red Cross on Article 8, para. 2(b), (c) and (e) of the Rome Statute of the ICC, PCNICC/1999/WGE/INF.2, 14 July 1999 (hereafter Request from the Governments), p. 41. See also Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary, Cambridge University Press, Cambridge, 2003, p. 273.
conflicts are identical and raise the same legal questions. On that basis, this article makes no distinction between the two.

Articles 8(2)(b)(xvi) and 8(2)(e)(v) prohibit “[p]illaging a town or place, even when taken by assault”. Stewart observes that the language adopted in the ICC Statute is archaic and superfluous, adding “nothing of contemporary relevance”. It mirrors the language of Article 28 of the Hague Regulations Respecting the Laws and Customs of War on Land (1907), which states that “[t]he pillage of a town or place, even when taken by assault, is prohibited”. In February 1997, the US proposed to the Working Group on Definition of Crimes that this language be included in the draft text of the ICC Statute. It eventually prevailed over the simple phrasing of New Zealand and Switzerland, whose proposal was “pillage”. Another unsuccessful proposal, which the Working Group on Definition of Crimes included in its draft consolidated text for war crimes in February 1997, was “plunder”.

The ICC Elements of Crimes then dropped that archaic language, similar to Article 33 of the Fourth Geneva Convention (1949), which declares in absolute terms that “[p]illage is prohibited”. But the Elements of Crimes added other peculiar features, most notably the “private or personal use” requirement, as discussed in the coming sections.

In addition to proof of the crime’s nexus to an armed conflict and the perpetrator’s awareness of the existence of an armed conflict, which are common to all war crimes, the core legal elements of pillage under the ICC Elements of Crimes are:

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.

This specific set of elements is the result of extensive negotiations at the Working Group on Elements of Crimes concerning war crimes. Its official records show that the elements of pillage went through various stages of metamorphosis. The ICC Preparatory Commission received several proposals in the course of its work on the elements. The US proposal for the elements of  

5 In relation to military authority over the territory of the hostile state (occupation), Article 47 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land states that “[p]illage is formally forbidden”, and Article 46 states that “private property […] must be respected” and “[p]rivate property cannot be confiscated”.
9 For example, in a non-international armed conflict, the final two elements require that: “4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”
10 See also Ntaganda, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1027.
pillage from February 1999 replicated its suggested core elements for the war crime of destruction or appropriation of property:11

2. That the accused intended to destroy or appropriate certain property that did not constitute a military objective and whose destruction or appropriation would not serve a military purpose.

3. That the accused destroyed or appropriated that property.

4. That the destruction or appropriation was without, and the accused knew it was without, lawful justification or excuse.

5. That the amount of destruction or appropriation was extensive.

It also included a comment that destruction or appropriation justified by military necessity would not result in culpability since either the “without lawful justification or excuse” or the military purpose element would be satisfied. To define the elements of pillage, the US proposal suggested adding an extra requirement that it be “carried out in an arbitrary manner, devoid of concern for the consequences”.

In July 1999, the International Committee of the Red Cross (ICRC) presented its comprehensive paper on war crimes “in order to assist the [ICC Preparatory Commission] in elaborating the text on the elements of crimes” through Belgium, Costa Rica, Finland, Hungary, South Korea, South Africa and Switzerland. It identified the following core elements of pillage in international armed conflict:

Material elements

(1) The perpetrator appropriated or obtained against the owner’s will [by force] [either through taking advantage of the circumstances of armed conflict or through abuse of military strength] private or public property in a town or a place.

(2) The conduct was not permissible as lawful acts of, in particular, seizure, levying contributions, requisitions or taking war booty.

Mental element

(3) The act is committed wilfully with the specific intention [of unjustified gain] [to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner].12

Introduced in July 1999, the joint proposal of Costa Rica, Hungary and Switzerland with respect to international armed conflicts replicated the above elements from the ICRC text.13 Following the ICRC’s example, it removed the reference to lawful acts such as seizure, levying contributions, requisitions or

12 Request from the Governments, above note 3, pp. 1 and 42.
13 Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8, para. 2(b), of the Rome Statute of the ICC: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi), PCNICC/1999/WGEC/DP.8, 19 July 1999, p. 3.
taking war booty in the context of internal armed conflicts. The Japanese proposal dating July 1999 had just one core element, other than the contextual element, which read: “The accused pillaged a town or place.”

On the basis of the submitted proposals and discussions, the Preparatory Commission agreed on two core elements in December 1999:

2. The accused appropriated or seized certain property.
3. The appropriation or seizure was not justified by military necessity and was committed with intent to deprive the owner thereof.

There are common elements between the December 1999 text and the final text: the fact of appropriation of certain property and the intent to deprive the owner of such property. Hosang observes that the “need for such intent was disputed by a number of delegations”. He also notes that the term “seized”, which was briefly introduced into the elements, was later considered to be a superfluous addition to “appropriated”. Although the text that the ICC Preparatory Commission adopted in December 1999 included “military necessity” as an express exception, it was eventually downgraded to a footnote, which will be discussed later. In the text adopted in November 2000, the elements appear in their current form, and the footnote no longer makes exceptions for situations of military necessity.

Pillage is a property crime, similar to destruction or appropriation (seizure) of property. During sentencing, the Katanga Trial Chamber distinguished murder and attacks on civilians as “violence to life” from destruction and pillage of property as “threat to property”, holding that there should be a more severe penalty for the former. At the same time, it described the charged property crimes as “very serious crimes under particularly cruel conditions and committed in a discriminatory manner”. The Ntaganda Trial Chamber also recognized that “crimes against property are generally of lesser gravity than crimes against the life and/or bodily integrity of persons”.

Other international criminal tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), did not elaborate on

14 Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8, para. 2(e), of the Rome Statute of the ICC: (v), (vi), (vii), (viii), (xi), (xii), PCNICC/1999/WGEC/DP.11, 19 July 1999, p. 1; Request from the Governments, above note 3, pp. 122–3.
17 See also K. Dörmann, above note 3, p. 273.
20 See also Delalić et al., Judgment, IT-96-21-A, 20 February 2002, para. 732.
21 Katanga, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG, 22 September 2015, paras 143 and 145.
the definition of the crime in their core legal texts. The ICTY Statute does not mention pillage at all: it criminalizes “plunder of public or private property”. The task of defining the crime of plunder under Article 3(e) of the ICTY Statute, as well as pillage under Article 4(f) of the ICTR Statute and Article 3 of the SCSL Statute, was left entirely to judges through jurisprudence. In Delalić et al., later affirmed in Kordić & Čerkez, the ICTY Trial Chamber defined plunder as follows:

all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as “pillage”.23

The ICTY Trial Chamber in Hadžihasanović & Kubura endorsed the above definition, explaining that there is plunder “when public or private property is acquired illegally and deliberately”.24 It also cited Kordić & Čerkez, stating that plunder covers “both widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain.”25

Such considerable textual differences between the definition of pillage under the ICC Statute and plunder under the ICTY Statute invite the question if references to the jurisprudence of other tribunals are appropriate here. Besides, the Delalić et al. trial judgment implies – without explaining its reasoning – that plunder encompasses pillage. One possible interpretation is that the definition of plunder is broader than pillage, although there is no support for this distinction in the literature.26 Arguably, both terms refer to the same or comparable unlawful acts. Since the ICC applies the “established principles of the international law of armed conflict” under Article 21(1)(b) of the ICC Statute, this article consults the jurisprudence of other international criminal tribunals on discrete issues.

Overview of the International Criminal Court cases on pillage

Trial judgments in the Katanga, Bemba, Ntaganda and Ongwen cases constitute the most authoritative jurisprudence on the crime of pillage under the ICC Statute. Apart from the dissenting opinion of Judges Monageng and Hofmański in Bemba, the ICC has so far produced no appellate jurisprudence on pillage. The four cases concern pillage in the context of internal armed conflicts under Article 8(2)(e)(v) of the ICC Statute.27 While it is consistent with the growing prevalence

27 Apart from the Katanga & Ngudjolo case, which was later split, the ICC Prosecutor has brought no pillage charges in international armed conflict under Article 8(2)(b)(xvi) of the ICC Statute.
of internal armed conflicts in modern times, this charging pattern is the result of case selection from among the available situations under investigation.

The first ICC conviction on pillage charges came over a decade after the ICC Statute had entered into force. In March 2014, the Trial Chamber found Germain Katanga guilty as an accessory to the crime of pillage as a war crime under Articles 8(2)(e)(v) and 25(3)(d) committed during a February 2003 attack on the village of Bogoro, Ituri District, Democratic Republic of the Congo (DRC).28 Mr Katanga and the Prosecution did not appeal the verdict, allowing the trial judgment to become final. The Trial Chamber sentenced him to a joint sentence of twelve years of imprisonment,29 including ten years for pillage as a war crime.30

The second case was overturned on appeal, but produced valuable jurisprudence. In March 2016, the Trial Chamber convicted Jean-Pierre Bemba Gombo under Articles 8(2)(e)(v) and 28(a) as a person effectively acting as a military commander for the crimes of murder, rape and pillage in the Central African Republic in 2002–2003. In June 2016, the Trial Chamber sentenced Mr Bemba to sixteen years of imprisonment for pillage out of a total of eighteen years, taking into account all relevant factors.31 In June 2018, the Appeals Chamber, Judges Monageng and Hofmański dissenting, overturned the conviction and Mr Bemba was acquitted of all charges, including pillage, on various grounds.32 Treating pillage as an incidental issue, the appeals judgment did not discuss the crime’s legal elements.

The third case consolidated and further developed the jurisprudence on pillage. In July 2019, the Trial Chamber found Bosco Ntaganda guilty of eighteen counts of war crimes and crimes against humanity committed in the Ituri District, DRC in 2002–2003, including pillage as an indirect co-perpetrator under Articles 8(2)(e)(v) and 25(3)(a).33 It sentenced Mr Ntaganda to a joint sentence of thirty years of imprisonment, including twelve years for pillage.34 In March 2021, the Appeals Chamber confirmed his conviction and sentence.35

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28 Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, paras 658–9. Earlier, in April 2013, the Trial Chamber acquitted his co-accused, Mr Ngudjolo, of all the charges. See Ngudjolo, Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/12-3-tENG, 26 December 2012, p. 197.
29 Katanga, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG, 22 September 2015, paras 146–7.
30 Pursuant to Article 78(3) of the ICC Statute, when a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment.
31 Bemba, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para. 94.
32 Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3636-Red, 8 June 2018.
33 Ntaganda, Judgment, ICC-01/04-02/06-2359, 8 July 2019.
34 Ntaganda, Sentencing Judgment, ICC-01/04-02/06-2442, 7 November 2019, paras 155 and 246.
35 Ntaganda, Public Redacted Version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled “Judgment”, ICC-01/04-02/06-2666-Red, 30 March 2021; Ntaganda, Public Redacted Version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled “Sentencing Judgment”, ICC-01/04-02/06-2667-Red.
The latest ICC jurisprudence on pillage arrived in February 2021, when the Trial Chamber convicted Dominic Ongwen of more than sixty counts of war crimes and crimes against humanity. He was found guilty of pillage as an indirect co-perpetrator under Articles 8(2)(e)(v) and 25(3)(a) committed during attacks on four internally displaced people (IDP) camps in northern Uganda between October 2003 and June 2004.36 The Trial Chamber, Judge Pangalangan dissenting, sentenced him to eight years of imprisonment for pillage in each of the four camps out of a joint sentence of twenty-five years.37 At the time of writing, the appeal proceedings were ongoing.38

The ICC practice concerning pillage is not limited to the four cases. The Prosecution has charged pillage as a war crime in other cases, as outlined in Table 1. The cases of Abd-Al-Rahman and Yekatom & Ngaïsson, which remain at the pre-trial and trial stages of proceedings, are expected to complement the current jurisprudence on pillage in the coming years. The cases of Al Bashir, Banda, Harun, Hussein, Kony & Otti and Mudacumura are dormant because the suspects remain at large and the ICC does not permit trials in absentia. If these suspects are arrested and prosecuted, their cases would further test the legal contours of pillage under the ICC Statute. Since all of them are factually comparable to Katanga, Bemba, Ntaganda and Ongwen, it remains to be seen if they will bring clarity to the meaning of the special intent requirement.

Although the Prosecution has also charged pillage in the cases of Abu Garda and Mbarushimana, the Pre-Trial Chambers declined to confirm the charges and the cases did not proceed to the trial stage. Evidence of other property crimes in connection with the charged crimes is also present in such cases as Lubanga and Al Mahdi. Given their lesser relevance to the issues examined here, the article will devote limited attention to them.

**The meaning of the three core elements**

This section examines the three core elements of pillage under the ICC Elements of Crimes. It focuses on the special intent (dolus specialis), which requires that the perpetrator intended to appropriate the property “for private or personal use”. Currently, its meaning remains unsettled in jurisprudence and academic literature. In an attempt to remedy this uncertainty, the article proposes several alternative avenues to address the issue concerning this ambiguous new element: conservative, radical and pragmatic.

The meaning of appropriation without the owner’s consent

The first and the third elements of pillage under the ICC Elements of Crimes require that the “perpetrator appropriated certain property” and that the “appropriation...
was without the consent of the owner”. These requirements are a common denominator between most definitions of pillage. According to the ICC Elements
of Crimes, these elements concentrate on the conduct and circumstances associated with pillage, respectively.\textsuperscript{39}

The \textit{Cambridge Dictionary} defines the term “appropriation” as the “act of taking something that belongs to someone else”.\textsuperscript{40} Further to the \textit{Katanga}, \textit{Ntaganda} and \textit{Ongwen} trial judgments, the pillaging of a town or place comprises all forms of appropriation, public or private, including organized and systematic appropriation, as well as acts of appropriation committed by combatants in their own interest.\textsuperscript{41} In \textit{Katanga}, the Trial Chamber observed that pillage was a common practice in Ituri District, DRC during the charged period and constituted a method of warfare and a form of “pay” or gain for the attackers.\textsuperscript{42}

In its 1958 Commentary to Article 33 of the Fourth Geneva Convention (1949), the ICRC explained that the prohibition “concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay”.\textsuperscript{43} The 1987 Commentary to the Additional Protocol II to the Geneva Conventions (1977) noted that the prohibition of pillage under Article 4(2)(g) of the Additional Protocol II was based on Article 33(2) of the Fourth Geneva Convention. It covers both organized pillage and pillage resulting from isolated acts of indiscipline, and applies to all categories of property: state and private. It is prohibited to issue orders authorizing pillage.

The \textit{Ongwen} Trial Chamber has rightly observed that although the jurisprudence is not uniform on this point, “there is no requirement that appropriations must occur on a large scale basis” to constitute the crime of pillage.\textsuperscript{44} Indeed, any quantitative qualifiers are conspicuously absent from the crime’s definition under the ICC Statute and the Elements of Crimes. Scale may, however, be a factor for admissibility of a case based on gravity under Article 17 (1)(d) or determination of sentence under Article 78(1).

It is interesting that in the \textit{Katanga} \& \textit{Ngudjolo} confirmation decision, and to a lesser degree in the \textit{Bemba} trial judgment, appropriation was interpreted to have taken place after “property has come under the control of the perpetrator”.\textsuperscript{45} In practice, it may be difficult to establish the exact moment when property comes

\textsuperscript{39} Elements of Crimes, General Introduction, para. 7(a).
\textsuperscript{40} \textit{Cambridge Business English Dictionary}, available at: https://dictionary.cambridge.org/.
\textsuperscript{42} \textit{Katanga}, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01-07-3436-tENG, 7 March 2014, para. 519.
\textsuperscript{44} \textit{Ongwen}, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2764.
\textsuperscript{45} \textit{Katanga} \& \textit{Ngudjolo}, Decision on the confirmation of charges, ICC-01/04-01-07-717, 14 October 2008, para. 330; \textit{Bemba}, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 115.
under the control of the perpetrator, while in some instances, the moment of it coming under the perpetrator’s control and the moment of appropriation may coincide in time. This debatable interpretation has thus far been inconsequential in litigation, and appears to have been silently abandoned in the Katanga, Ntaganda and Ongwen trial judgments.

The Trial Chamber in Katanga and Pre-Trial Chamber in Mbarushimana have pointed out that the war crime of pillage does not require that the pillaged property belong to an “enemy” or “hostile” party to the conflict. The Katanga Trial Chamber concluded that appropriation of private property belonging to combatants but not justified by military necessity constitutes the crime of pillaging. This is an important correction of an earlier jurisprudence on the issue, where the Pre-Trial Chamber in Katanga & Ngudjolo effectively read a new element into the crime’s definition.

Consent is defined in the Cambridge Dictionary as “permission or agreement”. The perpetrator’s knowledge of a lack of the owner’s consent may be inferred from the facts and circumstances. The Katanga Trial Chamber considered the circumstances, in particular that the appropriation was effected as part of the attack. It concluded that the appropriation took place without the consent of the owner of the property as civilians were attempting to flee or hide. The evidence showed, for example, that houses were pillaged in the absence of their owners and that captives, particularly women, were forced to transport the pillaged property. The Trial Chambers in Bemba, Ntaganda and Ongwen reiterated that lack of consent could be inferred from the absence of the owner or coercive circumstances.

Building on the current ICC jurisprudence, and borrowing from the elements of sexual and gender-based crimes where lack of consent is an express requirement, this article suggests that the following factors could be indicative of a non-consensual appropriation:

- Statements of the perpetrator before, during or after the appropriation;
- Use or threat of force or coercion;
- Coercive environment or circumstances of appropriation;
- Deception;
- Verbal and non-verbal statements of the owner;

46 Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, footnote 430; Mbarushimana, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, footnote 411.
47 Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 907.
48 Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 954. See also Katanga & Ngudjolo, Decision on the confirmation of charges, ICC-01/04-01/07-717, 14 October 2008, para. 337.
49 Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 121; Ntaganda, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1029; Ongwen, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2766 and 2844.
50 Arts 7(1)(g)-1, -3, -5 and -6 (crimes against humanity), Arts 8(2)(b)(xxii)-1, -3, -5 and -6 (international war crimes) and Arts 8(2)(e)(vi)-1, -3, -5 and -6 (non-international war crimes) of the ICC Statute.
Absence of the owner during appropriation;  
Physical or mental incapacity to give genuine consent.

Although the perpetrator’s use of violence may be indicative of the lack of the owner’s consent, the Trial Chamber in Bemba explained that the ICC’s legal framework does not include any requirement of violence as an element of the appropriation.51 This important, albeit obvious, clarification helps delineate between lawful and unlawful acts, and avoid conflating pillage with crimes against the life or bodily integrity of persons.52 But the judges may consider this factor as an aggravating circumstance in their determination of the sentence under Rule 145 of the ICC Rules of Procedure and Evidence.

The requirements that the perpetrator appropriated certain property and did so without the owner’s consent adequately define pillage as a war crime “within the established framework of the international law of armed conflict”. The instances where property appropriations are lawful under international humanitarian law are discussed in the later section. With the addition of a new requirement concerning “private or personal use” in the ICC Elements of Crimes, the definition of pillage became narrower and more difficult to prove.

The meaning of appropriation “for private or personal use”

In addition to the mental elements in Article 30 of the ICC Statute, the Elements of Crimes require that the “perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use”.53 The Elements of Crimes explain that this element of pillage focuses on the consequences followed by a “particular mental element”: special intent.

Dörmann notes that the second element of pillage was introduced during drafting and negotiations as a result of difficulties to define the crime in the ICC Elements of Crimes.54 Hosang recalls that “it was agreed that the requirement that the appropriation be for private or personal use distinguished pillage from the otherwise similar crime of destroying or seizing property”.55 In Bemba, the Trial Chamber observed that the “private or personal use” requirement is specific to the ICC, and is not reflected in customary or conventional international humanitarian law, or in the jurisprudence of other international criminal tribunals.56 At the same time, the judges in Bemba reasoned that the special intent requirement allows the ICC to better distinguish pillage from seizure,

51 Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 115.
52 In Ntaganda, for example, the Trial Chamber found that pillaging of protected objects does not constitute an attack against protected objects (such as hospitals and churches) under Article 8(2)(e)(iv) of the ICC Statute.
53 Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, paras 772 and 913.
56 Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 120. See also J. G. Stewart, above note 2, pp. 20–1; Brima et al., Judgment, SCSL-04-16-T, 22 February 2008, paras 753–4; Fofana & Kondewa, Judgment, SCSL-04-14-T-785, 2 August 2007, para. 160.
booby or other types of lawful appropriation,57 and from other crimes under the ICC Statute concerning the expropriation of property.58

Since other international tribunals did not restrict pillage to “private or personal use”, it permitted them to prosecute a broader category of unlawful appropriations as pillage. In Hadžihasanović & Kubura, the ICTY Trial Chamber recalled that international law did not allow “arbitrary and unjustified pillage for army purposes, or for the individual use of army members, even if the property seized can be used collectively or individually”.59 In Brima et al., the SCSL Trial Chamber went further and expressly stated that “the requirement of ‘private or personal use’ is unduly restrictive and ought not to be an element of the crime of pillage”.60

Based on this particular element, the ICC Chambers have held that pillage under the ICC Statute occurs when the perpetrator appropriated items for personal use (use by him- or herself), or for private use by another person or entity, assuming all other legal elements have been met.61 Besides, it must be demonstrated that the perpetrator intended to prevent the owner from having or using his or her property.62

In Katanga, the Trial Chamber explained that the “volitional element can be inferred from the specific conduct of the perpetrator of the deprivation”, drawing inferences about the perpetrators’ intent from their conduct. In so doing, it recalled witness testimony that the attackers had “acted in their own interest” and “acted as they wished”, seizing the spoils and using them as they pleased.63 The Trial Chamber concluded that they were motivated by “private or personal gain” when they took property during the attack. Mr Katanga himself had testified that the combatants had no salary, and pillaging was a form of remuneration. In the Trial Chamber’s view, “even where food alone was involved, the pillaging was […] not perpetrated out of military necessity, […] but out of personal gain”.64

In Bemba, the Trial Chamber considered all relevant factors when determining that items had been appropriated for private or personal use, including the “nature, location and purpose of the items, and the circumstances

57 Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 120.
58 Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, Dissenting Opinion of Judges Monageng and Hofmanński, ICC-01/05/01-08-3636-Anx1-Red, 8 June 2018, para. 561.
60 Brima et al., Judgment, SCSL-04-16-T, 20 June 2007, para. 754. However, the SCSL Appeals Chamber held that “[s]eizure is distinct from pillage because seizure is the appropriation of property for public purposes, whereas pillage is for private purposes”. See Fofana and Kondewa, Judgment, SCSL-04-14-A, 28 May 2008, footnote 770.
61 Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 124; Ntaganda, Judgment, ICC-01/04-02-06-2359, 8 July 2019, para. 1030.
62 Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 119; Ntaganda, Judgment, ICC-01/04-02-06-2359, 8 July 2019, para. 1029.
63 Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, paras 913 and 951.
64 Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, paras 951–2. Footnotes omitted.
of their appropriation”. It found that Movement for the Liberation of Congo (MLC) soldiers had “personally used” pillaged goods, such as food, beverages and livestock, as well as furniture and wooden items. It also found that MLC soldiers had traded some pillaged items for other items, such as alcohol, or forced civilians to buy back goods taken from them or their neighbours. The Trial Chamber considered that the nature of the appropriated items – personal effects, household items, business supplies, tools, money, vehicles, and livestock – indicated that the perpetrators had intended them for private or personal use.65

On appeal, the Defence in Bemba argued that appropriations conducted in relation to any military purpose, or even in a military context, would not be appropriations for “private or personal use”. Such expansive interpretation blurs the lines between the permissible and impermissible acts, making it hard to investigate and prosecute pillage. It goes beyond the notion of military necessity in armed conflicts, as will be explained in the next section. Unsurprisingly, Judges Monageng and Hofmański rejected this argument in their dissenting opinion, but the majority did not address it in the appeals judgment.66

In Ntaganda, the Trial Chamber also construed the phrase “private or personal use” in opposition to military use. It considered whether the appropriated property could serve a military purpose. It noted that some of the items taken by soldiers, such as vehicles and medical equipment, could potentially serve a military purpose. Without evidence of the manner in which the items were used, the Chamber was unable to conclude that their appropriation had been intended for private or personal use. Conversely, it found that items such as chairs, beds, mattresses, radio and television sets, clothing, livestock, corrugated roofing sheets and gold did not serve an “inherently military purpose”. It concluded on that basis that the items had been appropriated for private or personal use. It also noted that goods taken to Mr Ntaganda’s residence were clearly appropriated for private or personal use.67

The Ntaganda trial judgment underscores that, with the exception of a certain category of items that do not serve an “inherently military purpose”, which the Trial Chamber did not define or explain, it is insufficient to demonstrate that property as such had been appropriated. There must be clear, positive evidence that the appropriation had as its purpose private or personal use. Given the volatile nature of armed conflicts, tracing the use of some pillaged items could be a complicated task. In some instances, however, the Bemba, Ntaganda and Ongwen Trial Chambers permitted drawing inferences about the intended purpose of appropriation based on the nature and destination of items.

In Ongwen, the Trial Chamber elected to be economical in its interpretation of the law on pillage and military necessity. Using succinct language, it recalled the

65 Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, paras 125 and 643–4.
66 Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, Dissenting Opinion of Judges Monageng and Hofmański, ICC-01/05-01/08-3636-Anx1-Red, 8 June 2018, para. 566.
67 Ntaganda, Judgment, ICC-01/04-02/06-2359, 8 July 2019, paras 1041–2.
material and mental elements of the crime, distinguishing it from appropriations dictated by military necessity.\textsuperscript{68} For each charged incident, it listed facts pointing towards the special intent of the perpetrators, but refrained from elaborating on the legal requirements as such. Importantly, it did not conflate the special intent requirement with the distinct notion of military necessity, simply stating that the “circumstances of the appropriation do not allow for consideration of military necessity as a justification”.\textsuperscript{69} Although the streamlined approach of the Trial Chamber in Ongwen is preferred for its clarity and simplicity, it does nothing to explain the ambiguous issues.

\textbf{Avenues to address the issue of special intent requirement}

The current ICC jurisprudence does not give a clear and exhaustive interpretation of the “private or personal use” requirement. Neither does it elaborate on its relation to “military necessity”, which appears to be interpreted in rather broad terms. In stating the law, the ICC Trial Chambers have limited themselves to the specific facts of the cases at hand. This article suggests several alternative avenues to address the situation.

Despite a flaw in the current phrasing of the special intent, the ICC could pursue a conservative approach and continue interpreting the crime of pillage with reference to the “private or personal use”. In that case, building on the existing ICC jurisprudence, this article suggests that the factors indicative of the perpetrator’s special intent include:

(i) Statements of the perpetrator before, during or after the appropriation;
(ii) Nature, location and purpose of the appropriated property;
(iii) Destination of the appropriated property;
(iv) Declared and actual use of the appropriated property;
(v) Reporting concerning appropriation or its lack via the chain of command.

However, this conservative approach concerning the special intent requirement would not fully resolve the problem. Public or official use of appropriated items appears to be excluded from the definition of pillage. Adding to the confusion, the ICC jurisprudence conflates private and personal with public and official, defining personal use as one’s own but private use as another person’s or entity’s. This is problematic because in an attempt to address restrictive language, it risks giving the terms an amorphous meaning. However, if the ICC distinguishes between “private” or “personal” and “public” or “official”, giving the terms their ordinary meaning, it may be detrimental to future cases.

The question of “private or personal use” is particularly acute with respect to non-state armed groups, which may have limited access to resources and infrastructures. The line between private or personal on the one hand and public...
or official on the other becomes less pronounced in practice and more elusive in evidence. For example, could the appropriation of FM radios be considered as serving a private or personal purpose if they are occasionally used for gathering military intelligence? What about those armed groups where private and public life are merged into one? It becomes hard to demand the same degree of distinction in the case of non-state armed groups with more fluid structures and fewer resources.

Commentators agree that the “private or personal use” requirement is problematic and could lead to a restrictive application of the prohibition. For example, Dam-de Jong observes that confining pillage to appropriation of natural resources for private or personal use seems to exclude the exploitation of natural resources for the purpose of funding an armed conflict.70 Gillett concurs, noting that “[w]arring factions will regularly use misappropriated property to fund their military campaigns, rather than for personal ends”.71 Radics and Bruch point out that “it is challenging to disentangle the symbiotic relationship that often exists between exploitation activities that are done in furtherance of an armed conflict—either by government or rebel groups—or for strictly personal gain and enrichment”.72 These examples illustrate the difficulty of prosecuting certain cases as pillage due to its current dolus specialis.

Given these considerations, it is worth exploring other, more adequate solutions. With sufficient interest and support, the optimal solution would be for the ICC Assembly of States Parties to consider removing the unduly restrictive requirement that the perpetrator intended to appropriate property “for private or personal use” from the Elements of Crimes. Although a radical step, it would eliminate the risk of a restrictive interpretation and application of the prohibition in the future. To avoid the chance of penalizing lawful appropriations, it could be replaced with language prohibiting appropriation “for arbitrary purposes” or “for unjustified gain”. The latter would partly resurrect the ICRC’s original proposal, which it made to the ICC Preparatory Commission in July 1999.73

Another available avenue requires no changes to the Elements of Crimes. Even without legislative amendments, it is open to the ICC to interpret the legal elements of pillage in line with the “established framework of the international law of armed conflict”. Article 9 of the ICC Statute makes it clear that the Elements of Crimes shall assist the ICC in its interpretation and application of war crimes in Article 8. Since the Elements of Crimes cannot restrict the ICC in its interpretation of pillage, it is open to the ICC to disregard the “private or

73 Request from the Governments, above note 3, p. 40.
personal use” requirement as inconsistent with the established framework of international humanitarian law. This would honour the ICC Statute’s object and purpose, whose Preamble declares that “the most serious crimes of concern to the international community as a whole must not go unpunished”. To distinguish pillage from lawful appropriations, which will be discussed next, the ICC could follow the ICTY’s example and define the crime as “arbitrary”, “illegal” or “unlawful” appropriations.

The relation of pillage to lawful appropriations

In certain cases, wartime appropriations are permissible if justified by military necessity. Although the drafters of the ICC Statute attempted to clarify the difference between lawful and unlawful appropriations by including a footnote to the crime of pillage, they seem to have inadvertently introduced more confusion for the practitioners.

“Military necessity” appropriations are not pillage

Footnote 47 to Article 8(2)(b)(xvi) and footnote 62 to Article 8(2)(e)(v) in the Elements of Crimes read, “[a]s indicated by the use of the term ‘private or personal use’, appropriations justified by military necessity cannot constitute the crime of pillaging”.

The sole purpose of footnotes 47 and 62 is to explain the second element of the crime of pillage, namely that the perpetrator intended to “appropriate [the property] for private or personal use”. Trial Chambers in Bemba and Ntaganda indicated that the reference to “military necessity” in footnote 62 does not provide for an exception to the absolute prohibition on pillage. Rather, it clarifies that military necessity is incompatible with the requirement that the perpetrator intended the appropriation for private or personal use. On the contrary, military necessity would require its use to be directed at furthering the war effort and thus being used for military purposes. In other words, pillage and military necessity are mutually exclusive concepts.

The interpretation in Bemba and Ntaganda reflects the drafting and negotiations history. Hosang recalls that the footnote initially explained that the term “private or personal use” necessarily excluded appropriations justified by military necessity. During negotiations, various delegations either contested or strongly defended this phrasing. Given these disagreements, the footnote was redrafted to take its present shape. Hosang concludes that the need for the footnote remains obscure, but concedes that it would be hard to imagine

75 Ntaganda, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1030; Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 124. See also Ongwen, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2767.
appropriations that are both justified by military necessity and intended for private or personal use.\textsuperscript{76}

Pursuant to the Lieber Code (1863), cited in Katanga and Bemba, “[m]ilitary necessity […] consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.\textsuperscript{77} It flows from the above definition that appropriations of property during attacks directed against civilians and civilian objects, which are in turn utilized to conduct further attacks on civilians and civilian objects, cannot be justified by military necessity because these attacks are unlawful.

Based on footnote 62, the Defence in the Katanga and Bemba cases argued that the Prosecution must disprove military necessity. The Trial Chambers have rightly dismissed that reasoning as unjustified under the ICC Statute, despite an earlier holding of the Mbarushimana Pre-Trial Chamber.\textsuperscript{78} The Bemba Trial Chamber confirmed that the Prosecution is not required to disprove the existence of “military necessity”.\textsuperscript{79}

This reading is consistent with the Elements of Crimes. Absence of military necessity is not an express element under Articles 8(2)(b)(xvi) or 8(2)(e)(v). This distinguishes pillage from war crimes of “destruction and appropriation of property” under Article 8(2)(a)(iv), “destroying or seizing the enemy’s property” under Article 8(2)(b)(xiii) or 8(2)(e)(xiii), and “displacing civilians” under Article 8(2)(e)(viii) of the ICC Statute. Unlike pillage, these crimes include an explicit language requiring that the Prosecution disprove the existence of military necessity.\textsuperscript{80}

In their dissent to the appeal judgment in Bemba, Judges Monageng and Hofmański explained that the Hague Regulations, as well as the Geneva Conventions and Additional Protocols, do not provide an absolute protection for public or private property in armed conflicts. They concluded that the prohibition on pillage is not the same as the prohibition on appropriation of property without the consent of the owner \textit{per se}. Rather, the prohibition targets a particular type of wartime looting by soldiers.\textsuperscript{81}

The crime of pillage is conceptually different from requisition, seizure or other lawful appropriations, which can be justified by military necessity.\textsuperscript{82} According to Articles 51–3 of the Hague Regulations Respecting the Laws and Customs of War on Land (1907), cited in the ICTY’s Naletilić & Martinović trial

\textsuperscript{76} H. B. Hosang, above note 18, p. 177.

\textsuperscript{77} Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Art. 14.

\textsuperscript{78} Mbarushimana, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 176.

\textsuperscript{79} See Bemba, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 124.

\textsuperscript{80} For example, Article 8(2)(a)(iv) of the ICC Statute requires that “[r]e destruction or appropriation was not justified by military necessity”.

\textsuperscript{81} Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, Dissenting Opinion of Judges Monageng and Hofmański, ICC-01/05-01/08-3636-Anx1-Red, 8 June 2018, para. 560.

\textsuperscript{82} The Cambridge Dictionary defines requisition as the “act of officially asking for or taking something”. It defines seizure as “the action of taking something by force or with legal authority”.
judgment, forcible contribution of money, requisition for the needs of the army of occupation, and seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle.83

Pursuant to Article 52 of the Hague Regulations, requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, not involving the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash. If not, a receipt shall be given and the payment of the amount due shall be made as soon as possible. As evident from the above, the scope of lawful appropriations in armed conflict is well defined in law and there is no carte blanche.

The 1958 Commentary to the Fourth Geneva Convention (1949) also noted that the prohibition on pillage “leaves intact the right of requisition or seizure”.84 The ICTY jurisprudence is instructive here. In Delalić et al., the ICTY Trial Chamber observed that “whereas historically enemy property was subject to arbitrary appropriation during war, international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party”.85

In Hadžihasanović & Kubura, the ICTY Trial Chamber found that plunder occurred when appropriation was unlawful and deliberate. In contrast, property seized as war booty, requisitioned, or whose seizure was justified by necessity were exceptions to the principle of protection of public and private property.86 In Simić et al., the ICTY Trial Chamber described the permissible contours of requisition and seizure as follows:

The Trial Chamber notes that in certain circumstances, property may be requisitioned lawfully under international humanitarian law. These circumstances are defined by The Hague Regulations and are limited to the following: taxes and dues imposed within the purview of the existing laws, or requisitions for the needs of the army of occupation, which shall be proportional to the resources of the country. Private property also may be seized if it is needed for the conduct of military operations and should be returned and compensated upon termination of the conflict. Monetary contributions may be collected only under a written order issued by the commander-in-chief in accordance with the tax rules in force and for every contribution a receipt should be issued.87

Besides, the crime of pillage must be distinguished from the ancient concept of booty in warfare. Under customary international law, a belligerent party in an

83 Naletilić and Martinović, Judgment, IT-98-34-T, 31 March 2003, para. 616.
85 Delalić et al., Judgment, IT-96-21-T, 16 November 1998, para. 587.
86 Hadžihasanović & Kubura, Judgment, IT-01-47-T, 15 March 2006, para. 56.
87 Simić et al., Judgment, IT-95-9-T, 17 October 2003, para. 100. Footnotes omitted.
international armed conflict may capture an enemy’s movable property on the battlefield—such as weapons and military equipment—as war booty.88 Dörmann points out that captured property, according to some military manuals and domestic legislation, must be handed over to authorities.89

In sum, the established framework of the international law of armed conflict makes it plain that under limited circumstances, property appropriations may be permissible. Requisition, seizure and war booty are lawful and do not constitute pillage. The current reading of the special intent requirement suggests that these permissible appropriations do not fall within its scope. However, the ICC jurisprudence should take it further and explain the correlation between “military necessity” and the requirement that the perpetrator intended to appropriate the property for “private or personal use”. Even if the ICC eventually drops the special intent requirement, as this article proposes, “military necessity” calls for a more in-depth discussion of its meaning in the context of pillage under the ICC Statute. In any event, this concept should be construed narrowly, in line with its meaning under the Lieber Code.

“Necessity” can exclude criminal responsibility for pillage

Necessity (duress) can be raised as a ground for excluding criminal responsibility under Article 31(1)(d) of the ICC Statute.90 It should be distinguished from the notion of “military necessity”, which features in the footnote to the legal elements of pillage. Necessity under Article 31(1)(d) of the ICC Statute does not make the appropriation lawful, unlike military necessity. It thus requires demonstrating that appropriation was intended for private or personal use. However, it removes the ensuing legal consequences for committing the crime.

In Hadžihasanović & Kubura, the ICTY Trial Chamber acknowledged that under certain conditions, necessity could be a defence against plunder:

The Chamber is of the view that, in the context of an actual or looming famine, a state of necessity may be an exception to the prohibition on the appropriation of public or private property. Property that can be appropriated in a state of necessity includes mostly food, which may be eaten in situ, but also livestock. To plead a defence of necessity and for it to succeed, the following conditions must be met: (i) there must be a real and imminent threat of severe and irreparable harm to life existence; (ii) the acts of plunder must have been the only means to avoid the aforesaid harm; (iii) the acts of plunder were not disproportionate and, (iv) the situation was not voluntarily brought about by the perpetrator himself.91

89 K. Dörmann, above note 3, p. 277.
90 Article 31(3) of the ICC Statute allows raising other grounds for excluding criminal responsibility, in accordance with the procedure elaborated in Rule 80 of the ICC Rules of Procedure and Evidence.
In Katanga, the Defence argued that criminal responsibility must have been excluded under Article 31(1)(d) of the ICC Statute on the grounds that appropriations were essential to survival. It argued that the Trial Chamber must take into account the circumstances in which the property was appropriated because survival was at stake.\(^9\) The Trial Chamber, however, pointed out that such assessment cannot be made in abstract and must be done on a case-by-case basis.\(^9\)

The Katanga Trial Chamber endorsed the above reasoning in Hadžihasanović & Kubura, and held that in certain circumstances, “appropriation of livestock and food could, indeed, and on its own, constitute a response to a grave, ongoing or imminent threat to physical integrity”.\(^94\) It pointed out that the pillaged property in the case sometimes consisted of livestock, but mainly included roofing sheets, furniture or personal belongings. Having acknowledged that the attackers were enduring a very difficult situation at the time, which had forced people to go to other villages to pillage, it found no indication that they were in a situation of grave, ongoing or imminent threat to their existence comparable to a famine.

It is unclear what such situations of grave, ongoing or imminent threat to existence comparable to a famine entail in practice. It would have been helpful if the Chamber clarified whether the test for threat assessment rests on a subjective view of the perpetrator or an objective evaluation, or some combination of the two. In the Katanga case, the Trial Chamber appears to have followed an objective test. Irrespective, establishing a “grave, ongoing or imminent threat to existence comparable to famine” could prove a delicate task in some cases.

Necessity was once raised as a ground for excluding criminal responsibility under Article 31(1)(d) of the ICC Statute in the Ongwen case.\(^95\) During trial opening submissions, the Defence argued necessity to pillage food from civilians in the following terms:

\[
\text{[T]he IDP camps became the only place where food could be found in the whole of northern Uganda. Therefore, out of necessity, your Honours, the LRA [Lord’s Resistance Army] had to find a way of getting this food from the IDP camps.}\]

\[
\text{The only LRA attack which involved civilians, especially the IDP camps, were not targeted at civilians, per se. They were aimed to look for food out of necessity. And, your Honours, isn’t it the saying that necessity obeys no law.}\]

\(^9\) Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, para. 949.

\(^9\) Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, para. 955.

\(^9\) Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/03-01/07-3436-tENG, 7 March 2014, para. 956.


The Ongwen Trial Chamber did not specifically address necessity in relation to pillage, focusing instead on a discrete notion of military necessity.\(^{98}\) It discussed duress as an overarching ground for excluding criminal responsibility, which Mr Ongwen raised in relation to all crimes, finding that it was not applicable to his criminal conduct.\(^{99}\) This leaves the Katanga trial judgment as the sole authoritative jurisprudence on necessity to pillage under the ICC Statute.

Considering that military necessity under the Lieber Code requires demonstrating “necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”, arguing necessity under Article 31(1)(d) might prove a better strategy in situations where appropriations target food and similar essential items. The interpretation of “private or personal use” based on the nature of the appropriated items in Katanga, Bemba, Ntaganda and Ongwen seems to support this conclusion. In such cases, Hadžihasanović & Kubura could offer a blueprint for understanding necessity in the context of pillage under Article 31(1)(d) of the ICC Statute.

**Conclusion**

After the adoption of the ICC Statute in July 1998, the judges have been shaping the legal contours of the war crime of pillage through jurisprudence. Despite the crime’s recurring presence in the ICC cases, some legal ambiguities remain unresolved, in particular the element concerning “private or personal use”. This article aims to contribute to the discussion regarding the crime’s meaning under the ICC Statute.

The current ICC jurisprudence does not provide a clear and exhaustive interpretation of “private or personal use” and does not elaborate on its correlation with “military necessity”. In stating the law, the ICC Trial Chambers have limited themselves to the specific facts of the cases at hand. To date, there has been no appellate jurisprudence on substantive issues concerning pillage. Building on the existing ICC jurisprudence, the article suggests that several factors could be indicative of the perpetrator’s special intent in relation to “private or personal use”: (i) the perpetrator’s statements, (ii) nature, location and purpose of the appropriated property, (iii) destination of the appropriated property, (iv) declared and actual use of the appropriated property, and (v) reporting via the chain of command.

This conservative step would not entirely address the problem with the special intent requirement. Being overly rigid and restrictive, it limits the unlawful acts to a narrow category of those appropriations that are intended “for private or personal use”. The issue is particularly acute in situations of internal armed conflicts, where non-state armed groups may have no sustainable access to infrastructures and resources, unlike most governmental authorities. The line

\(^{98}\) Ongwen, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2767 and 2873.

between private or personal on the one hand and public or official on the other hand becomes less pronounced in practice and more elusive in evidence.

Given these practical difficulties, and since no such requirement is present “within the established framework of the international law of armed conflict”, it is open to the ICC to take more fundamental steps to address the issue. Ultimately, the Assembly of States Parties may decide to remove the unduly restrictive intent requirement of appropriation “for private or personal use” from the Elements of Crimes and replace it with a more inclusive language. However, even without this legislative amendment, there is a simple and practical avenue, which the ICC Trial Chambers have thus far overlooked. The ICC could elect to interpret the legal elements of pillage in line with the established framework of international humanitarian law, which requires no special intent concerning private or personal use.
On prisoners, family life and collective punishment: The Namnam case

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Abstract

This article examines the 2019 decision by the Supreme Court of Israel (the Court) in the Namnam case, upholding a ban on family visits to Gaza prisoners incarcerated in Israel and affiliated with Hamas. This ban was adopted as part of Israel’s attempt to pressure Hamas into an exchange of Palestinian detainees and prisoners against missing Israeli civilians and the bodies of Israeli soldiers, apparently being held by Hamas in Gaza. The Court examined the measure primarily in light of Israeli administrative law, and held that it had no grounds to intervene. It held that an analysis under international law would have yielded the same result.

This article examines the decision of the Court in light of the applicable international law. It considers the Court’s decision in terms of the permissible restrictions on the right to family life and draws on the Court’s reasoning for an in-depth analysis of various unarticulated aspects of the prohibition on collective punishment. The article concludes that an international human rights law analysis might have led to a different outcome, and that had the Court applied the prohibition on collective punishment properly, it would have had to declare the measure unlawful. The article then places the decision in the broader context of the Court’s engagement with international law in disputes relating to Palestinians residing in the West Bank and Gaza.

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Keywords: international human rights law, right to family life, collective punishment, Israel, Hamas, Gaza, prisoners’ rights, Supreme Court of Israel.

Introduction

In the course of the Gaza War in the summer of 2014 (Operation “Protective Edge”), two Israeli soldiers went missing in action. While it was not clear whether the soldiers had been captured alive or killed in battle, within a few days both were declared by Israel to be “fallen soldiers whose place of burial is unknown”. Over the following four years, three Israeli civilians crossed the fence into the Gaza Strip. All were reported to have been suffering from mental disabilities, and were declared missing by the Israeli authorities. To date, negotiations between Israel and Hamas on a return of the dead and missing in exchange for Gaza prisoners held in Israel have not come to fruition.

In January 2017, the government of Israel decided on various measures intended to pressure the Hamas regime in Gaza into returning the missing Israeli civilians and the bodies of Israeli soldiers. One measure was the withholding and temporary burial of the bodies of “terrorists belonging to Hamas” and “terrorists who committed particularly exceptional terrorist incidents”. Two other measures were the denial of entry into Israel to Hamas family members from Gaza seeking medical treatment, and the abolition of visits by Gaza residents to the Temple Mount (Haram a Sharif). In a fourth measure, the government authorized a ministerial team headed by the prime minister to examine and decide on the conditions of incarceration in Israel of Hamas prisoners from Gaza, including in regard to receiving family visits. The ministerial team subsequently endorsed a ban on family visits to the said prisoners, including visits by immediate family members, for an unlimited period of time and subject to periodic review. This ban was the subject of the Namnam case.

January 2017 was not the first time that the government of Israel had adopted measures relating to Palestinian prisoners on a group basis in order to exert pressure on Palestinian militant groups. In 2011, following consultations on measures to expedite the release of an Israeli soldier taken captive by Hamas in...
2006, the government decided to withdraw various privileges accorded until that time to prisoners incarcerated in Israel following convictions for security offences. One of these privileges was distance learning with the Open University. This measure was upheld by the Supreme Court of Israel (the Court) in 2013 (by which time the captured soldier had already been released).

The Namnam case

The petitioners in the Namnam case argued that the ban on family visits was contrary to both Israeli and international law. They claimed, *inter alia*, that it infringed disproportionately on their right to family life, violated the prohibition on collective punishment, and unlawfully used them as bargaining chips.

The Supreme Court of Israel denied the petition. It held that under Israeli law, prisoners do not have a right to family visits, since imprisonment “inherently involves substantive limitations on the prisoner’s personal liberty, freedom of movement and scope of interaction with the outside world”. The Court relied on its earlier case law to hold that visits “are not deemed part of the recognised rights of the prisoner”. Hence, said the Court, family visits are a privilege. As such, they are not subject to a constitutional (human rights) review, and may be denied by executive action, provided that the executive authority’s decision is based on relevant considerations and is reasonable and proportionate. The Court held that the ban on family visits to Gaza prisoners affiliated with Hamas complied with these requirements, noting that return of the missing individuals and the bodies was a legitimate State security interest, that only some 100 prisoners were affected by the ban, and that these prisoners had alternative means of contact with the outside world, such as correspondence and visits by legal counsel and clergy. Furthermore, the ban was subject to periodic review. The Court further noted the authorities’ commitment to considering individual

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6 The term “security offences” refers to offences under the Antiterrorism Law, offences under the Penal Code relating to treason, espionage, sedition and illegal association, offences under the 1945 Defence (Emergency) Regulations, and offences under the Penal Code committed on nationalist motives. Prison Service Commission Order 04.05.00, 1 May 2001.
7 Supreme Court of Israel, *Salah v. Prison Service*, Case No. FHHJ 204/13, 14 April 2015.
9 Supreme Court of Israel, *Namnam*, above note 1, para. 6. The notion of “inherent limitations” is discussed below. One may ask whether the listing of all three limitations together is justified. The limitations on personal liberty and freedom of movement are not only inherent to imprisonment but are the very essence of it. Limitation on the scope of interaction with the outside world is not an intentional part of imprisonment, and therefore the analogy from the obviously inherent character of the former limitations to it is misleading.
10 Supreme Court of Israel, *Younes v. Prison Service*, Case No. ReqAp 6956/09, 7 October 2010, Concurring Opinion of Justice Procaccia, para. 7. Justice Procaccia herself expressed reservation as to the compatibility of the arrangement under Israeli law with constitutional law (para. 8). The Court in *Namnam* disregarded the lead opinion by Justice Danciger, which considered visits an element in exercising the right to family life: Supreme Court of Israel, *Younes*, Opinion of Justice Danciger, para. 43.
11 Supreme Court of Israel, *Namnam*, above note 1, para. 7.
concrete requests for exemptions if those indicate “exceptional and special humanitarian grounds”. Thus, the Court concluded, the denial of the privilege passed the tests of reasonableness and proportionality.

The Court then turned to international law. It held that since there is no absolute prohibition under international law on denial of visits to prisoners (as the petitioners themselves had conceded), an international law analysis would have resulted in the same conclusion as the analysis under Israeli administrative law. With regard to the prohibition on collective punishment, the Court held that denial of privileges to convicted terrorists serving a prison sentence does not constitute collective punishment. The Court did not directly address the argument relating to the use of the petitioners as bargaining chips.

The applicable legal framework

In what follows, I address the Court’s analysis in light of the right to family life. I also examine it in light of the prohibition on collective punishment, which, in the present case, consisted of the prisoners’ family lives serving as “bargaining chips”. These norms are entrenched in two bodies of international law. One is international human rights law (IHRL), the applicability of which is beyond doubt in the present case, since at issue was a measure implemented within Israel. Another relevant body of law is international humanitarian law (IHL). The applicability of this body of law to relations between Israel and Gaza is also not in dispute, although views differ on the specific rules of IHL that apply. One controversy is over whether Gaza prisoners are residents of an occupied territory. Over the years, the Court has aligned itself with the government’s position that Israel no longer occupies Gaza. For present purposes it is unnecessary to take a position on the issue, since the law of occupation does not contain provisions that pertain directly to the question before the Court. Views also differ on whether the ongoing armed conflict between Israel and Hamas is international or non-international. In 2006 the Court determined that the conflict was an international armed conflict due to its cross-border character. The law of international armed

13 Ibid., para. 12.
14 Ibid., para. 12.
15 Ibid., para. 15. The detailed argumentation on this issue is considered below.
16 This does not mean that the Court should have applied IHRL, but that its decision should have been in accordance with IHRL.
17 Starting with Supreme Court of Israel, Al-Bassiouni Ahmed v. Prime Minister and Minister of Defence, Case No. HCJ 9132/07, 30 January 2008, para. 12.
19 Supreme Court of Israel, Public Committee against Torture in Israel v. Government of Israel, Case No. HCJ 769/02, 14 December 2006 (Targeted Killings), para. 18. In subsequent cases the Court noted that the law of armed conflict applied without specifying which class of armed conflict. Supreme Court of Israel, Al-Bassiouni Ahmed v. Prime Minister and Minister of Defence, Case No. HCJ 9132/07, 30 January 2008, para. 12; Supreme Court of Israel, Yesh Din v. IDF Chief of Staff, Case No. HCJ 3003/18, 24 May 2018, Opinion of Justice Melcer, para. 51, and Concurring Opinion of Chief Justice Hayut, para. 2.
conflict includes provisions relating to protected persons, namely individuals finding themselves in the hands of a party to the conflict to which they do not belong. One of those provisions is the prohibition on collective punishment.20

The government of Israel has refrained from taking a position on the characterization of the conflict,21 and claims to be acting in accordance with rules applicable in both types of conflict.22

The Namnam petition was submitted on behalf of the prisoners themselves.23 Since the Court may only deal with arguments presented to it, numerous issues have not been addressed. Had the petition concerned the rights of the family members who were themselves denied visits, the Court might have been required to decide on the legal status of Gaza, on the legality of incarcerating Gaza residents in Israel,24 and on the rights of children. The present article focuses on the Court’s engagement with the questions that did come before it. One of the issues raised by the petitioners was the claim of discrimination in the imposition of the ban. Since this article maintains that the ban on family visits constitutes unlawful collective punishment, it does not address the petitioners’ additional claim of discrimination in determining the target population on which this measure was imposed.25

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20 It is possible that the Court’s position in the Targeted Killings case, above note 19, that the conflict was international was limited to issues relating to the conduct of hostilities (which was the issue before the Court). However, it is difficult to maintain that the conflict should be classified as international for the purpose of allowing targeted killings under the law of hostilities (which would be impermissible in a non-conflict situation) but should not be classified as international for the purpose of protecting individuals in the hands of the State party to the conflict. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 75, expands the protection from collective punishment, which this article addresses, from “protected persons” to all persons in the power of a party to a conflict. However, AP I is applicable only in international armed conflicts, and moreover, Israel is not party to it (although it is bound by its customary provisions).


22 Ibid. It notes specifically the rules on distinction, precautions and proportionality in hostilities, with which this article is not concerned.

23 The petitioners also invoked their relatives’ right to family life but did not substantiate it. The Court did not address the matter. In 2008, a 2007 ban on family visits to Gaza prisoners held in Israel was challenged by family members residing in Gaza. The Court rejected the petition on the grounds that it would not intervene in the authorities’ policy regarding entry from Gaza into Israel. In that case the Court did not directly address the rights of the prisoners. Supreme Court of Israel, ‘Anbar v. Commander of the Southern Command, Case No. HCJ 5268/08, 9 December 2009. In 2012 the ban was lifted.

24 Previously considered by the Court in Saidiya v. Minister of Defence, Case No. HCJ 253/88, 8 November 1988; and Yesh Din v. IDF Commander in the West Bank, Case No. HCJ 2690/09, 28 March 2010. Note, however, that the denial of visits would have been technically possible even if the prisoners were incarcerated in occupied territory, as the Court implies in Namnam, above note 1, para. 15.

25 For other cases raising this matter, see Supreme Court of Israel, State of Israel v. Quntar, Case No. ADA 1076/95, 13 November 1996; Supreme Court of Israel, Salah, above note 7.
The right to family life

Visits by immediate family members as a component of the right to life

Neither IHRL nor IHL contain express provisions relating to family visits for prisoners. Geneva Convention IV (GC IV) provides the right of internees (individuals detained on security grounds by a power involved in an international armed conflict) to receive “visitors, especially near relatives, at regular intervals and as frequently as possible”.26 However, no equivalent right to visits is explicitly provided for persons imprisoned following a criminal conviction. GC IV Article 76, which addresses the conditions of detention and imprisonment on criminal offences specifically in occupied territory, stipulates the right of prisoners to receive visits by delegates of the Protecting Power and the International Committee of the Red Cross (and, implicitly, by clergy), but does not mention family visits.

While prisoners are not explicitly entitled to family visits as such, they do have a right to family life. Both the Hague Regulations and GC IV stipulate the obligation to respect “family rights”.27 Under Article 17 of the International Covenant on Civil and Political Rights (ICCPR), every person has the right to be protected against arbitrary interference with their family. The 1957 Standard Minimum Rules for the Treatment of Prisoners, widely regarded as reflecting customary standards, provide that “[p]risoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits”.28 The same view is held by the United Nations Human Rights Committee.29 The European Court of Human Rights (ECtHR) has held in a number of cases that restrictions on frequency, duration and forms of family visits to prisoners are an interference with the right to family life,30 thereby confirming that such visits are a

26 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 116. This provision applies to internees both in the Detaining Power’s territory and in occupied territory.
27 Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land, 205 CTS 277, 18 October 1907 (entered into force 26 January 1910) (Hague Regulations), Art. 46: “Family … rights … must be respected.” GC IV, Art. 27: “Protected persons are entitled, in all circumstances, to respect for their … family rights.”
28 Standard Minimum Rules for the Treatment of Prisoners, adopted in ECOSOC Res. 663C(XXIV), 31 July 1957, and ECOSOC Res. 2076(LXII), 13 May 1977, Rule 37. Also see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UNGA Res. 43/173, 9 December 1988, Principle 19: “A detained or imprisoned person shall have the right to be visited by … members of his family … subject to reasonable conditions and restrictions as specified by law or lawful regulations.”
30 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, 4 November 1950 (entered into force 3 September 1953) (ECHR), Art. 8, considered in, e.g., ECHR, Messina v. Italy (No 2), Appl. No. 25498/94, Judgment, 28 September 2000, para. 61; ECHR, Klamecki
component of the right to family life. Thus, the question that the Court should have asked itself is whether the right to family life encompasses in-person contact with immediate family members, and if so, whether a complete ban on visits by immediate family members was within the scope of permissible restrictions on rights under IHL and IHRL.

The view adopted by the Court, that the penalty of imprisonment inherently entails substantive limitations on the prisoner’s interactions with the world and is thus exempt from a human rights analysis, was previously considered by the ECtHR in a number of cases involving European States. However, even the ECtHR ultimately rejected the argument that the (factually) inevitable consequences of imprisonment under a court conviction implicitly affect the scope of rights. Rather, rights that are set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) but are not defined in it, as is the right to family life, may be subject to “limitations permitted by implication” through state regulation. Such restrictions are not violations of the right so long as they do not “injure the substance of the right … nor conflict with other rights enshrined in the Convention”. Thus, restrictions on the number of family visits constitute, according to the ECtHR, interferences with the right to family life. Moreover, notwithstanding the inherent limitations that imprisonment entails, “it is an essential part of a detainee’s right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family”. Similarly, according to the Human Rights Committee, “[p]ersons deprived of their liberty enjoy all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment”. Hence, there is nothing in international law to support the Supreme Court of Israel’s view that (lawful) imprisonment affects the very scope of the right rather than merely entailing (inevitable) practical obstacles to exercising the right. Such obstacles to family life must be in accordance with the law, necessary and proportionate, and must remain subject to judicial review. Their being “unavoidable” in a prison environment fulfils the requirement of “necessity”, but they must still pass the proportionality test. Nor is the Court’s view defensible. Holding that the rights of any category of persons are from the outset narrower than those of others would...
allow the authorities to impose restrictions on such persons without a specific legal basis while denying those persons the right to judicial review over those restrictions.37

Restrictions on the right to visits by immediate family members

*General*

The right of prisoners to family life, including the right to visits by immediate family members, is not absolute and may be restricted. Under ICCPR Article 17, restrictions on the right to family life must not be arbitrary. The Human Rights Committee has interpreted “arbitrariness” to include elements of inappropriateness, injustice, lack of predictability and lack of due process of law. Non-arbitrary restrictions must be reasonable, necessary and proportionate.38

Since the Court maintained that prisoners are not entitled to family visits as of right,39 it did not conduct an enquiry framed in human rights terms. However, the Court did examine the ban on visits in light of Israeli administrative law, which, it acknowledged, required that the measure pursue a legitimate purpose, be reasonable and not arbitrary, and be proportionate. Given the similarity between these administrative standards and those of IHRL, a consideration of the Court’s reasoning can indicate whether, as the Court claimed, it would have reached the same conclusion had it applied international law.

One implication of the characterization of family visits as a right is that they may be restricted only by specific law. However, unlike written correspondence and visits by legal counsel and clergy, which are guaranteed as rights, with regard to visits the Israeli Prison Service Ordinance provides only that they may be permitted.40 Such visits are regulated only in secondary legislation and in internal Prison Service orders.41 In the *Namnam* case, the Court held that the minister’s

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38 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 17; Human Rights Committee, General Comment No. 16, “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies”, UN Doc. HRI/GEN/1/Rev.1, 1994, p. 21, para. 4; Human Rights Committee, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, part VII, para. 3. Article 8 of the ECHR contains an exhaustive list of specific grounds that may allow restrictions on the right; since Israel is not party to the ECHR, these will not be discussed in detail. American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 (entered into force 18 July 1978), Art. 11(2); Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990), Art. 16.


41 Prison Service Commission Order 03.02.00, 15 March 2002, on the rules regarding “security prisoners”, stipulates (section 17) that “in accordance with Article 116 of GC IV, in general, prisoners will be allowed to receive visits by immediate family only, in accordance with the rules stipulated in this section”. As noted earlier, Article 116 does not concern prisoners. Israel maintains that as a matter of policy it acts in accordance with this provision: see 2014 Gaza Conflict Report, above note 20, para. 371.
instruction to the Prison Service to impose a ban on visits lay within his authority to instruct the Prison Service on matters of security. This non-specific authorization, which the Court found to be sufficient for denying family visits as a matter of privilege, would probably not have sufficed had the ban been considered a restriction on a human right.

Other implications of family visits being a right rather than a privilege concern the substantive limitations on the authorities’ power to restrict such visits. First, while rights may be restricted, they may not be nullified. The measure upheld by the Court consists of a complete ban on visits (as opposed, for example, to allowing them on rarer occasions) for an indefinite period of time. Formally this restriction is temporary (until the bodies and missing persons are returned to Israel), and it may also end following the periodic review to which it is subject (although it is not clear what the review should examine and what the criteria are for discontinuing the measure). Nonetheless, a measure that does not have an expiration date is effectively indefinite, and experience indicates that the matter at hand—negotiations over repatriating captured soldiers—can last for years on end. Accordingly, the complete and indefinite ban on family visits may be said to exceed the permissible limits of the authority to restrict rights.

**Purpose: Repatriation as security**

While the legitimate grounds for limiting the right to family life under general IHRL are not specifically enumerated, they must be interpreted according to the relevant provisions of IHL, which is *lex specialis* in situations of armed conflict. The Hague Regulations do not contain any specific rules or standards regarding restrictions on family life. GC IV Article 27(4) stipulates that notwithstanding the entitlement of protected persons to respect for their family rights in all circumstances, parties to the conflict “may take measures of control and security in regard to protected persons as may be necessary as a result of the war”. This

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42 Supreme Court of Israel, *Namnam*, above note 1, para. 8.
43 Human Rights Committee, General Comment No. 16, “Article 17 (Right to Privacy)”, 1988, para. 8.
45 The 2011 Shalit exchange took place five years after his capture. The bodies of three soldiers killed in 2000 in a capture operation on the Lebanon border were repatriated four years later. In 1996, Israel carried out an exchange deal for the return of the bodies of two soldiers captured in 1986 (and declared dead in 1991).
46 A related doctrine, adopted by the ECtHR, is that of absolute protection for the “core”, “essence” or “substance” of rights. Contact with the family is at the core of the right to family life, but the denial of visits does not destroy that core, so long as written communication continues. Given the specificities of the permissible restrictions on the right to family life under the ECHR, this matter will not be discussed in detail here. For a critique of the “essence of rights” doctrine, see Sébastien Van Drooghenbroeck and Cecilia Rizcallah, “The ECtHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?”, *German Law Journal*, Vol. 20, No. 6, 2019.
narrow scope for limiting rights calls for a closer consideration of the purpose underlying the ban on family visits.

According to the Court, the direct purpose of the measure is “to pressure Hamas, in an attempt to further the return of Israeli nationals and the bodies of IDF soldiers held for years by the organisation – while lowering the price that Israel would be required to pay for them”. The Court characterized the measure as required for the “maintenance of state security”.

Furthering the prospects of a prisoner exchange is a legitimate purpose. However, its connection to security as required under GC IV Article 27(4) is tenuous at best. First, the examples in the 1958 Commentary on GC IV of measures envisaged under the provision – movement restrictions in occupied territory, a requirement to carry identifying documents, and, in extreme cases, internment and assigned residence – suggest that the provision assumes a security risk emanating from the protected persons themselves. The ban on visits has no pretension of addressing such a risk. If it pursues security, it does so only in the broadest sense of the word.

The question of whether the term “security” should be interpreted broadly or narrowly arose before the Supreme Court of Israel in the Bargaining Chips case in 2000. It, too, concerned measures adopted in order to facilitate a prisoner exchange. Petitioners were prominent members of the Lebanese armed group Hezbollah who had completed their prison sentences and were held under administrative detention in Israel in order to exert pressure on Hezbollah to release missing Israeli soldiers or provide information about them. Views in the Court differed on whether the term “security reasons” in the legislation authorizing administrative detention should be interpreted narrowly, so as to mean a security reason emanating from the individual being detained, or broadly, encompassing security interests external to the detainees. The majority among the Court did not dispute that a prisoner exchange was a security interest, but held that in light of the right to liberty under Israeli constitutional law, the term “security reasons” should be interpreted narrowly and, unless specifically stipulated otherwise, could not extend to security risks that are external to the individual. Accordingly, the legislation did not allow detention for the purpose of maintaining leverage in negotiating a prisoner exchange.

While GC IV Article 27(4) and domestic Israeli legislation seem to raise the same question, the answer might differ between them. The rationale for the narrow interpretation adopted in the Bargaining Chips case was that the deprivation of liberty is a harsh measure and should therefore be available only rarely. Article 27(4) concerns a host of measures that are less injurious than

48 Supreme Court of Israel, Namnam, above note 1, para. 11.
49 Ibid., para. 8.
51 Supreme Court of Israel, A v. Minister of Defence, Case No. FHCr 7048/97, 12 April 2000 (Bargaining Chips).
deprivation of liberty. A broader interpretation of “security” might therefore be plausible, including one that encompasses risks external to the individuals directly affected by the measures. The Gaza prisoners are a case in point. For example, allowing them family visits requires letting foreign nationals into the territory of Israel.\(^{52}\) It stands to reason that such visits would be restricted in various ways, even though the risk emanating from them is not from the prisoners themselves.

A second question is whether repatriation of the dead soldiers and missing civilians is a matter of “security” in the broader sense. While generally speaking, the welfare and safety of soldiers themselves is a military (and security) interest, it is not obvious that the same can be said for the repatriation of captured soldiers.\(^ {53}\) In the Court’s case law, the welfare of captured and missing soldiers, including their repatriation, has been cited as a security interest,\(^ {54}\) with some judges noting the importance of the State’s commitment to repatriating soldiers or their remains for military morale\(^ {55}\) and others highlighting the State’s moral obligation towards its soldiers.\(^ {56}\) The difference between security interests and other interests has therefore been somewhat glossed over. Indeed, in the \textit{Namnam} case the respondent authorities did not claim that at issue was a security interest. Rather, the purpose of the ban, according to them, was “the repatriation of the sons”. It was only the Court that reframed the matter as one of security. In addition, a distinction is required between the release of soldiers and the release of civilians. Repatriating civilians is a legitimate purpose, but not a military or a security interest. In the circumstances of the \textit{Namnam} case, the two categories of persons are indistinguishable. The Court, for its part, made no mention of this difference.\(^ {57}\)

\textbf{Means: Instrumentalization of individuals}

The ban on visits to the Gaza prisoners is, as the Court candidly stated, a bargaining tactic. The expectation is (presumably) that the prisoners or their family members will pressure Hamas leaders to strike a deal with Israel for the return of the missing and dead in exchange for the reinstatement of visits, and for the withdrawal of the other measures adopted by the government. In addition, if such a deal includes the release of prisoners, those will number fewer than if the various measures had not been adopted.

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\(^{52}\) Those who maintain that Gaza is occupied would point to GC IV Article 76, which provides that protected persons convicted of offences shall serve their sentences in the occupied territory.

\(^{53}\) See, for example, the view of the district court reported in Supreme Court of Israel, \textit{A v. Minister of Defence}, Case No. ADA 10/94, 13 November 1997, para. 3. This issue is even less clear with regard to the repatriation of the bodies of soldiers.

\(^{54}\) \textit{Ibid.}, para. 10; Supreme Court of Israel, \textit{Alayan}, above note 4, Opinion of Chief Justice Hayut, para. 21.

\(^{55}\) Supreme Court of Israel, \textit{Bargaining Chips}, above note 51, Dissenting Opinion of Justice Cheshin, para. 3, and Dissenting Opinion of Justice Kedmi, para. 1.

\(^{56}\) \textit{Ibid.}, Dissenting Opinion of Justice Cheshin, para. 10, and Dissenting Opinion of Justice Tirkel, para. 3.

\(^{57}\) See, for example, Justice Elron, stating: “In the same manner that protection of the state’s residents and soldiers is a supreme security interest – so the state must act for their return after falling into the hands of the enemy.” Supreme Court of Israel, \textit{Namnam}, above note 1, Concurring Opinion of Justice Elron, para. 2.
Restricting an individual’s rights in order to induce a third party to act in a particular manner runs contrary to the very foundation of human rights law, which postulates, based on the inherent human dignity of the individual, that persons should never be treated as means to an end.\(^{58}\) However, IHRL does not explicitly prohibit measures that instrumentalize individuals. Moreover, most human rights may be subject to restrictions. It therefore stands to reason that the rejection of the instrumentalization of individuals, too, is not an absolute rule, and that there may be circumstances, albeit exceptional, in which it could be set aside in order to realize a legitimate purpose of supreme importance. Indeed, the Court noted that even if the ban on family visits had constituted a restriction on a right, the case at hand would have been different from the *Bargaining Chips* case, because of the different severity of the restrictions that each case concerned.\(^ {59}\) Thus, by implication the Court conceded that instrumentalization of the individual is not categorically prohibited, but is subject to a proportionality test.

According to the Court, the ban on visits for the purpose of advancing a prisoner exchange passed the proportionality test (while detention could not\(^ {60}\)). First, the Court found that in the circumstances it had no grounds to intervene in the authorities’ assessment as to the potential effectiveness of the ban (addressing the question of whether the choice of measure was rational). Second, in a bizarre application of the “least intrusive measure” requirement, the Court held that the prisoners had alternative means to family visits for communicating with the outside world.\(^{61}\) It further noted that only 100 prisoners were affected by the measure. This reasoning turns the requirement on its head: rather than being satisfied that the authorities had no alternative means at their disposal to achieve their purpose but to restrict the right, the Court examined whether the prisoners had alternative means to exercise their right (glossing over the character of the right itself – clergy and lawyers are no substitute for family). Moreover, the share of prisoners affected by the measure is irrelevant to the extent of harm caused to each of them individually.\(^ {62}\)

While instrumentalization as such is not categorically prohibited,\(^ {63}\) in some instances it may violate specific prohibitions such as the prohibition on cruel, inhuman and degrading treatment.\(^ {64}\) This would depend, *inter alia*, on the


\(^{59}\) Supreme Court of Israel, *Namnam*, above note 1, para. 10.

\(^{60}\) In the *Bargaining Chips* case, above note 51, the majority opinion noted that even if the legislation had contained explicit authorization for detaining a person for purposes external to him, the order in question would not have passed the proportionality test due to its severity in the circumstances.

\(^{61}\) See the main text at above note 12.

\(^{62}\) Supreme Court of Israel, *Namnam*, above note 1, paras 11–12.


\(^{64}\) ICCPR, Art. 7.
nature, purpose and severity of the treatment applied. Instrumentalizing measures may also be regarded as unjust and lacking due process of law, and therefore arbitrary. Thus, a ban on family visits that may be legitimate in some circumstances may constitute a violation of rights by virtue of its imposition in order to affect a third party’s conduct.

Unlike IHRL, the rules of IHL leave explicit room for instrumentalization. This is demonstrable, for example, in the legality of incidental injury to civilians and civilian objects. However, certain instances of instrumentalization are absolutely prohibited. Specifically, IHL prohibits the meting out of collective punishment on protected persons. This prohibition applies both directly and, as a factor in the interpretation of what constitutes a lawful restriction on a human right. If a measure is unlawful in itself, the questions of its purpose, necessity and proportionality become immaterial. Thus, if the ban on family visits constitutes collective punishment, it is prohibited directly under IHL, and in addition it is an unlawful interference as a matter of IHRL. Hence, the next section examines whether the denial of visits by immediate family members constitutes collective punishment.

The prohibition on collective punishment under IHL

Collective punishment is prohibited under GC IV Article 33, which stipulates that “[n]o protected person may be punished for an offence he or she has not personally committed”. The Supreme Court of Israel developed its jurisprudence on the prohibition on collective punishment largely in the context of punitive house demolitions. The Court rejected the argument that such demolitions constitute collective punishment. Its primary reasoning was that such demolitions do not constitute “punishment” because they are a preventive deterrent. It further held that they could not be regarded as “collective”, by

65 Human Rights Committee, General Comment No 20, “Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 1992, para. 4.
66 A specific norm that is grounded in the rejection of instrumentalization but that does not apply in the present case is the prohibition in the taking of hostages, as defined as “seiz[ing] or detain[ing] and threaten[ing] to kill, to injure or to continue to detain another person … in order to compel a third party … to do or abstain from doing any act”. International Convention Against the Taking of Hostages, 1316 UNTS 205, 17 December 1979 (entered into force 3 June 1983), Art. 1(1). Hostage-taking is prohibited at all times, including specifically in situations of armed conflict. GC IV, Art. 3: “To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities, including those placed hors de combat]: … (b) taking of hostages”; GC IV, Art. 34: “The taking of hostages is prohibited.” The definition of hostage-taking by reference exclusively to security of the person rather than to other characteristics and aspects of humanity reinforces the view that instrumentalization is not unlawful in itself.
67 Further support for the view that instrumentalization of individuals is not absolutely prohibited is the fact that GC IV Articles 33(1) and 33(3) only refer to protected persons, suggesting that similar measures towards non-protected persons may be lawful. The difference between GC IV Article 33(3) and AP I Article 20 highlights this further.
68 Also see Hague Regulations, Art. 50.
drawing a (flawed) analogy between the detriment that is caused to innocent persons dependent on a person who is imprisoned following a conviction in a criminal offence, and the detriment that is caused to innocent persons related to an alleged perpetrator of a security offence whose house is demolished. The Court disregarded the difference between the unintentional and incidental causing of detriment in the former case and the intentional and direct causing of detriment in the latter.

The non-persuasiveness of these arguments has been discussed elsewhere. Moreover, in the Namnam case, neither was directly applicable. There was no claim that the ban on visits was intended to serve as a deterrent, nor were the prisoners claimed to be directly linked to the capture of the soldiers or civilians. The Court nonetheless rejected the collective punishment claim, drawing on numerous problematic arguments. First, the Court held that the denial of visits is not punitive because it is “an administrative measure in nature” rather than being judicially imposed. However, it has long been established, including by explicit stipulation, that GC IV Article 33 (and later Additional Protocol I Article 75) refers not only to judicial sentencing but to sanctions of any kind. More generally, the nature of a sanction is not determined by the type of State organ authorized to impose it. The type of authority imposing the sanction is therefore beside the point.

Second, the Court stated that the ban was a “legitimate” measure “for security purposes”. Yet it was not the purpose of the measure that was

69 See Supreme Court of Israel, Shukri v. Minister of Defence, Case No. HCJ 798/89, 10 January 1990, para. 6 (on deterrence); Supreme Court of Israel, Daijas v. IDF Commander in Judea and Samaria, Case No. HCJ 698/85, 24 March 1986, para. 3; and most recently Supreme Court of Israel, Kabha v. Military Commander of the West Bank, Case No. HCJ 480/21, 3 February 2021 (on collective character); as well as the cases discussed in D. Kretzmer and Y. Ronen, above note 18, pp. 384–391.


71 Arguably, a measure intended to induce action by a third party may be comparable to a measure intended to deter action by a third party. They may differ in that evaluating the effectiveness of a measure ought to be easier in the former case, as whether action took place is clearer than whether action that would have taken place did not. However, despite the occasional engagement of the Supreme Court with it in the context of punitive house demolitions, the effectiveness of collective punishment is immaterial to its illegality.

72 Supreme Court of Israel, Namnam, above note 1, para. 15, perhaps echoing the Shukri case, where the Court said that “[t]he authority is administrative, and its exercise is designed to deter and thereby to maintain public order”. Supreme Court of Israel, Shukri, above note 69, para. 6.


74 For IHRL, see Human Rights Committee, General Comment 32, “Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial”, UN Doc. CCPR/C/GC/32, 23 August 2007, section III, para. 2. With regard to GC IV Article 33, see Commentary on GC IV, above note 50, p. 225; D. Kretzmer and Y. Ronen, above note 18, p. 391.

75 Supreme Court of Israel, Namnam, above note 1, para. 15. It is interesting that the Court took a position on the matter rather than refusing to intervene in a political-security matter. See D. Kretzmer and Y. Ronen, above note 18, p. 491. For a different approach in similar circumstances, see Supreme Court of Israel, ‘Anbar, above note 23, para. 4.
challenged before the Court, but the means of pursuing it. Since the end does not always justify the means, the Court’s statement merely begged the question of whether the measure was legitimate.

Third, the Court relied heavily on its classification of family visits as a privilege rather than a right. According to the Court, a withdrawal of a privilege does not constitute “punishment”. The fallacy of this premise – that family visits are only a privilege – has been discussed above. The logic of the conclusion is also questionable. Granted, the suffering caused to the individual by measures that restrict rights is assumed to be greater than the suffering caused by measures that restrict mere privileges; indeed, historically the debate over the permissibility of collective punishment has concerned egregious violations of rights, such as mass killings, the taking of hostages, torture, and the destruction of whole villages. However, the psychological and social significance of punishment lies not in the formal, legal classification of the detriment it causes, but in the pain, suffering, loss or unpleasantness caused by the intentional imposition of some burden or deprivation of some benefit. These depend on factors such as the severity of the measure, the purpose that it seeks to serve, its expected effectiveness, and the affected population. In fact, the Court itself noted the rule that even long-standing privileges cannot be denied without relevant justification, and must be reasonable and proportionate. This rule reflects the need to respect legitimate expectations, even when those are not grounded in rights. Classifying family visits as a privilege therefore does not detract from the painful effect of their denial. Indeed, if the authorities did not claim that the ban on visits had a painful or unpleasant effect that might prompt action by Hamas, they would not have imposed it in the first place. Equally, the Court could not have upheld the ban on visits as potentially effective (and therefore, according to its view, reasonable) without acknowledging that it caused suffering and deprivation. How, then, when considering the legality of the ban under a norm that prohibits the causing of certain forms of suffering and deprivation, could the Court dismiss those as falling below a significant threshold because at issue was merely a privilege? Just as the suffering that a measure causes does not depend solely on whether it concerns a right or a privilege, neither does its legality.

Fourth, the Court classified the ban on family visits as a denial or prevention of privileges “where the prisoner does not fulfill the conditions to receive them”. The Court did not indicate which conditions the Hamas prisoners had failed to fulfill. In fact, it candidly acknowledged that the ban has

76 Supreme Court of Israel, Namnam, above note 1, paras 6, 15.
80 Supreme Court of Israel, Namnam, above note 1, para. 6.
81 Ibid., para. 15.
nothing to do with the conduct of the petitioners. The “condition” that they failed to
fulfil was not to belong to Hamas. All they “did” was be members of a group from
which they could not exclude themselves once captured.

A final argument of the Court concerns the collective element in the denial of
family visits. The Court sought to distinguish the ban on family visits from punitive
house demolitions by reference to the “double effect” doctrine. This doctrine
maintains that sometimes it is permissible to cause a harm as a side effect (or “double
effect”) of bringing about a good outcome, when it would not be permissible to cause
such a harm intentionally as a means of bringing about the same good outcome.82
The Court was responding to the critique that punitive house demolitions are
collective punishment since they fail to fulfil the doctrine’s requirements, because the
outcome itself – the demolition – infringes on the right to property (among others) of
third parties and is thus “wrong”. Relying on its own view that the ban on family
visits “does not infringe on a vested right”, the Court concluded that such denial
“raises no difficulty even at the level of the outcome”.83 However, even if the denial of
visits had not infringed on a right, exercising it as leverage in negotiating with Hamas
fails a separate condition of the double effect doctrine: just like punitive house
demolitions,84 the detriment caused by denial of visits is not a side effect of the act,
but an intentional and direct effect that the authorities seek to obtain. The intentional
causation of detriment to persons who bear no legal or moral responsibility is “wrong”
in itself. The double effect doctrine therefore does not suffice to overcome the wrong
in the instrumentalization of the prisoners.

The Court’s use of an *a fortiori* argumentation from punitive house
demolitions is disappointing, not least because punitive house demolitions
present the Court with two impediments to intervention in government action
that do not arise with regard to denial of family visits. One is that the authorities
seek to justify punitive house demolitions as vital for security.85 The other is the
concern that declaring punitive house demolitions to be collective punishment
would imply admission that for many years the Court has allowed the use of an
unlawful measure (which may amount to a war crime).86 Neither impediment
would have arisen in the context of the ban on family visits. No immediate
security concern was claimed to be at stake, nor was there previous practice on

82 Alison McIntyre, “Doctrine of Double Effect”, in Edward N. Zalta (ed.), *Stanford Encyclopedia of
83 Supreme Court of Israel, *Namnam*, above note 1, para. 15. The Court was responding to an argument by
Harpaz and Cohen regarding the double effect doctrine. Harpaz and Cohen refer to the Court’s reasoning
in upholding punitive house demolitions as non-collective on the grounds that the act itself is good or at
least not wrong, and that the harm caused to non-perpetrators is incidental rather than intended. As
Harpaz and Cohen note, this reasoning does not bear scrutiny, because punitive house demolitions are
“wrong” in themselves, being an infringement on the right to property that is not justified by military
operations; and because the harm caused to non-perpetrators is intended rather than incidental. Guy
Harpaz and Amichai Cohen, “On Dynamic Interpretations and Stagnant Rulings: Reassessing the
Israeli Supreme Court’s Jurisprudence on House Demolitions” *Bar-Ilan Law Studies*, Vol. 31, No. 3,
2018, p. 1012.
84 Ibid., p. 1012.
86 Ibid., 416–417.
the matter that would obviously constitute a war crime. Nonetheless, rather than taking the opportunity to reduce the harmful consequences of its existing case law on collective punishment, the Court opted to interpret the prohibition on collective punishment restrictively so as to allow the practice more broadly.

In considering the Court’s playing down of the legal significance of banning the visits as “punishment”, it is important to note that the measure was not a response to any alleged wrongdoing by the prisoners.\(^{87}\) Ostensibly this excludes the matter altogether from the purview of the prohibition on collective punishment, since GC IV Article 33 prohibits the punishment of a person “for an offence” that they have not personally committed, as well as pre-emptive measures “to forestall breaches of the law”.\(^{88}\) In contrast to these, the ban on visits was imposed in order to induce lawful action. However, the reason that the prohibition explicitly addresses reactions to unlawful conduct is that at the time of its adoption, it was already agreed that collective measures other than in reaction to unlawful conduct were prohibited, following the *nullum poena sine crimen* principle.\(^{89}\) The debate concerned only the differentiation of collective responsibility from individual responsibility when some illegal conduct had taken place.\(^{90}\) Thus, the fact that no blame is attached to the prisoners and that the matter is technically outside the scope of “punishment”, as the Court says,\(^{91}\) exacerbates the illegitimacy of the measure rather than licenses it.

One may argue that the ban on family visits is a reaction to Hamas’ violation of IHL when it refuses to repatriate the bodies and the missing. Israel has not made this argument, possibly because Israel itself is keeping bodies of Hamas fighters as a negotiating tool. In the 2019 ‘Alayan case, the Supreme Court held that this practice is not contrary to international law.\(^{92}\) The situation regarding the Israeli soldiers in Hamas hands is somewhat different in that Hamas has deliberately refused to provide information as to the fate of the soldiers, including whether they are alive or not. This refusal itself may qualify as hostage-taking since it puts the safety of the soldiers at risk.\(^{93}\) At the same time,

\(^{87}\) The denial of visits concerns prisoners convicted of security offences, but it is not imposed as a reaction to those offences.

\(^{88}\) Commentary on GC IV, above note 50, pp. 225–226.

\(^{89}\) In this vein, Garner notes an instance in the South African War in which measures were taken against communities for damages committed upon railway and telegraph lines by “small parties of raiders”. He points out that it is not clear whether the offenders were lawful belligerents or non-combatants; in the former case, he notes, “their acts were not violations of the laws of war and therefore they were not legally punishable”, even if actual violations could be punishable collectively. James W. Garner, “Community Fines and Collective Responsibility”, *American Journal of International Law*, Vol. 11, No. 3, 1917, p. 514. See also p. 532: “If the act was committed by a person belonging to the Belgian military forces, it was a lawful belligerent act for which the community was not liable to punishment.” Also see S. Darcy, above note 73, pp. 26–27, noting that under Hague Regulations Article 50, collective measures were permitted in a limited manner, provided they responded to conduct that was at least in violation of an occupying army’s law, if not of the laws of war.

\(^{90}\) Issues of controversy were the interpretation of requirements such as *mens rea* and proportionality. J. W. Garner, above note 89, pp. 529–531.

\(^{91}\) Supreme Court of Israel, *Namnam*, above note 1, para. 10.

\(^{92}\) Supreme Court of Israel, ‘Alayan, above note 4. For a similar view, see A. Margalit, above note 47, pp. 589–591.

\(^{93}\) A. Margalit, above note 47, p. 587.
Israel’s declaration of the soldiers as fallen may preclude it from claiming violation of the law in this regard. The holding by Hamas of Israeli civilians, who do not present a serious risk to its security, is clearly an arbitrary deprivation of liberty, and therefore a violation of international law. To the extent that release of these civilians is contingent upon the release of Palestinian detainees or prisoners held by Israel, it constitutes hostage-taking and thus a war crime.94 However, characterizing Hamas’ conduct as criminal would simply render the ban on visits a “classic” case of collective punishment, falling within the purview of the prohibition in GC IV Article 33.

Conclusion

A thorough examination under international law of the ban on family visits would have led the Court to a different conclusion from the one that it reached. The Court would have found that the right to family life, guaranteed under both IHRL and IHL, encompasses visits by immediate family members. As with most rights, the right to family visits may be subject to restrictions, but it may not be nullified, nor may it be restricted in a manner which violates the prohibition on collective punishment. The Court would have further found that the ban on visits by immediate family members to Palestinian prisoners affiliated with Hamas and serving sentences for security offences, imposed in anticipation of negotiating a prisoner exchange, nullified the right to family visits, violated the right to family life more broadly, and constituted collective punishment.

The Court’s light and problematic treatment of international law is not surprising. As a political organ of the State, it is reluctant to intervene in policies of the executive branch. As a court of a State involved in armed conflict, the Court is particularly reluctant to intervene in policies and actions relating to enemy individuals and dealing with matters perceived as relating to security. The Namnam case concerns an issue that has furthermore always been emotionally charged among the Israeli public, namely negotiations over the repatriation of dead and captured soldiers and civilians. It involves a controversy over the legitimacy and terms of prisoner exchanges, and, in the present case, also over the unsettled circumstances in which the soldiers were killed and the manner in which they or their bodies came into the possession of Hamas.95 The matter having been addressed by the highest political echelons, the Court’s scope for intervention in the matter was extremely limited. There is therefore constant tension between the Court’s innate commitment to the national audience and its


interests, and to its commitment to a rigorous enforcement of the law in order to protect individual rights.\(^96\) Examination of the \textit{Namnam} case against the decisions on the other measures adopted by the government in order to apply leverage on Hamas illustrates this tension and the manner in which the Court deals with it.

As mentioned, in the ‘\textit{Alayan} case the Court upheld the policy of holding the bodies of dead Hamas fighters, noting, \textit{inter alia}, that the practice is not prohibited under international law.\(^97\) Petitioners in that case were family members of dead Hamas fighters, who invoked their right to dignity and the right of the deceased to dignity. The 2018 \textit{Chiam} case concerned the denial of entry by Hamas family members from Gaza into Israel for the purpose of medical treatment. This measure was challenged by five individuals, relatives of Hamas members, who needed life-saving treatment that was not available in Gaza. The Court held that the refusal of entry, not grounded in security considerations and adopted on the basis of a general policy without regard to the specific circumstances, was highly unreasonable. It ordered the authorities to allow the individuals entry into Israel for the treatment.\(^98\) This rare instance of intervention by the Court in policy adopted by the authorities may be explained by the exceptional circumstances: at issue were the very lives of specific individuals. Moreover, the Court did not challenge the policy as a matter of principle, but only its implementation in the circumstances. Its decision did not have principled implications.

Like the ‘\textit{Alayan} case, the \textit{Namnam} case called for a principled decision on general policy. Yet unlike in ‘\textit{Alayan}, in \textit{Namnam} the petitioners’ lives were directly affected by the disputed measure, and at issue was a recognized human right. The \textit{Namnam} case therefore presented a greater challenge for the Court to navigate between government policy and the protection of individual rights than did the ‘\textit{Alayan} case. In contrast, the right at stake in the \textit{Namnam} case was to family life, which, notwithstanding the absence of any strict hierarchy among rights, ranks lower than the right to life on which revolved the \textit{Chiam} case. Another difference from the \textit{Chiam} case is that in the \textit{Namnam} case the Court was presented with no individual cases but only with a question of principle. It was therefore easier for the Court to uphold the policy. Nonetheless, by leaving the door open to exemptions on “exceptional and special humanitarian grounds”,\(^99\) the Court avoided—at least formally—categorically denying a right from any individual.

A review of the Court’s case law relating to the West Bank and Gaza and their residents reveals the range of means by which the Court evades confrontation with the authorities, especially in matters relating to security. These means include disregard of international law, substitution of international law by

\(^97\) Supreme Court of Israel, ‘\textit{Alayan}, above note 4, Opinion of Chief Justice Hayut, paras 30–34.
\(^98\) Supreme Court of Israel, \textit{Chiam v. Prime Minister}, Case No. HCJ 5693/18, 26 August 2018.
\(^99\) Supreme Court of Israel, \textit{Namnam}, above note 1, para. 12.
domestic law, and the contrived interpretation of international law. All are evident in the Namnam case: from the dismissal of international law as irrelevant, through the resort to administrative law rather than to the constitutional guarantees of human rights, through the characterization of the measure as one of security, to the adoption of a forced interpretation of the prohibition on collective punishment that is in line with neither the letter nor the spirit of the law. At the end of the day, the Namnam case illustrates well the broader pattern in the Court’s exercise of judicial review over government conduct relating to the West Bank and Gaza and their residents: its attempt to avoid intervention in policy and action, without appearing to abdicate its obligation and commitment to protect individual rights.

100 D. Kretzmer and Y. Ronen, above note 18, pp. 492–494.
The impact of attacks on urban services II: Reverberating effects of damage to water and wastewater systems on infectious disease

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Abstract
This article investigates the effects that attacks during armed conflict which damage water and wastewater services have on the outbreak and transmission of infectious disease. It employs a lens of uncertainty to assess the level of knowledge about the reverberations along this consequential chain and to discuss the relevance to military planning and targeting processes, and to the laws of armed conflict. It draws on data in policy reports and research from a wide variety of contexts, and

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evidence from protracted armed conflicts in Iraq, Yemen and Gaza. The review finds a strong base of evidence of the impact of attacks on water and wastewater services, and a high level of confidence in information about the transmission of infectious disease. One clear risk identified is when people are exposed to water supplies which are contaminated by untreated wastewater. Obtaining a similar level of confidence about the cause and effect along the full consequential chain is challenged by numerous compounding variables, though there are a number of patterns related to the duration of the armed conflict within which the attacks occur. As the conflict protracts, both the risk of the spread of infectious disease and the evidence base for gauging the reverberating effects becomes stronger, for example. The article concludes that the reverberating effects of damage from an attack can be foreseen in some contexts and can be expected to become more foreseeable over time. The analysis suggests that the most pragmatic path for military institutions and those involved in targeting operations to take this knowledge into account is through a “precautionary approach” which assumes the existence of the reverberating effects, and works them in to the standard information-gathering and planning processes.

**Keywords:** urban services, water and war, infectious disease, public health, protracted armed conflict, critical infrastructure.

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**The quest to reduce civilian harm**

War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty.

— Carl von Clausewitz

The number of dead and injured has been a measure of war for as long as bodies have littered battlefields. As the news and the injured reached home, however, societies realized that the effects of battles reverberate far beyond the combat zone and long after the dust has settled. As Plato is said to have declared: “only the dead have seen the end of war”.

In seeking a better measure of the human cost of war, military and other institutions now seek to gauge “civilian harm”. Along with research, human

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rights, and humanitarian organizations, they investigate the relative impact of conventional versus asymmetric and urban warfare, and of short, intense military campaigns versus long, drawn-out ones. Much of the discussion of this collective effort centres around data: what quantitative data is required, how to collect it, how to complement it with qualitative data, and what indicators serve best as proxies for what is not readily measurable.

As the first article in this series discussed, the evidence base required to detail the impact of an explosion upon water or wastewater services can be generated with considerable technical data and institutional or engineering expertise. Considerably more information and skills are required to determine the effect that the damaged water service has on indirect impacts, however – such as a reduction in livelihoods or as a driver of their displacement. This is because of the great number of variables involved; the local economy may have already been in a poor state, for example, and the decision to flee could be more related to security and/or greater opportunities for child education, than concerns about drinking contaminated water. In most cases, and certainly in the protracted urban armed conflicts that this article focuses on, the desired evidence base is not at hand. The process leading to the decision to carry out attacks in these contexts is necessarily based on the best available intelligence, and not on perfect intelligence. This uncertainty is part of the “fog of war” which famously engulfs the options which are perceived to be available to combatants.

This article tackles the challenge of improving the database: first, by detailing how the damage caused by an attack impacts upon the quality of public service delivery; and second, by investigating how and the extent to which that impact translates into further civilian harm. More specifically, it queries the quality of information and evidence base for the impact that attacks in protracted armed conflict have on the quality of water and wastewater services, and the extent to which the effects of the attack on the degraded service reverberate onto the outbreak and transmission of infectious disease. The data reviewed comes from policy and research papers (primarily technical engineering reports), observations and a review of the impact of explosive weapons in Basrah, Yemen and Gaza. These are interpreted within uncertainty theory and discussed in

6 Yvan Guichaoua and Jake Lomax, Fleeing, Staying Put, Working with Rebel Rulers, Institute of Development Studies and the University of East Anglia, July 2013, available at: https://assets.publishing.service.gov.uk/media/57a08a4940f0b64974003510/60719_3_Yvan__FINAL.pdf.
relation to international humanitarian law (IHL), standard military operational planning processes, and intelligence-gathering and decision-making procedures in the midst of armed conflict, including prior to attacks.

The review establishes that there is a strong evidence base of the consequences of attacks using explosive weapons on the functioning of water/wastewater services, and a high level of confidence in information about the consequences of degraded services on infectious disease. Attaining a similar level of confidence in the knowledge of reverberating effects of an attack along this consequential chain (i.e. how sure are we that attack x has caused disease y?) would require a damage assessment of the physical integrity of the infrastructural asset and the impact it has on the delivery of the service, disease monitoring and geo-referenced epidemiological data on non-communicable diseases on the affected population, and a robust method to control for the influence of the great number of compounding factors involved.

Acknowledging that the evidence base is not likely to be of the quality desired when targeting decisions are made, the analysis identifies a number of patterns that may guide and inform the military operational planning and targeting processes. For water/wastewater services in particular, for example, the clearest risk of an outbreak or spread of cholera arises when people consume water which has been contaminated with wastewater (which is referred to as “cross-contamination”). The article also discerns several patterns related to the duration of the conflict within which the attack occurs. For example, as the conflict become protracted, the resilience of the service is expected to degrade, because battle damage accumulates and routine operations and maintenance are no longer carried out; the risk of an outbreak or spread of infectious disease is expected to increase, as exposure to hazards (such as cross-contamination) becomes more likely; and the evidence base for gauging the reverberating effects is expected to improve, as the effects become more visible, familiarity with the systems is gained, and more effort into intelligence gathering can be invested.

The article concludes that, in general, the reverberating or indirect effects caused by attacks on water/wastewater infrastructure can be foreseeable in some contexts and become more foreseeable as the conflict prolongs. The most pragmatic path for military institutions and those involved in targeting operations to take this into account is through a “precautionary approach”, which assumes the existence of the reverberating effects, and which seeks to identify and understand them through intelligence preparation of the operating environment (IPOE), and standard military operational planning processes.

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7 As noted later in the article, the “precautionary approach” referred to in this article stems from research and policy on mitigating environmental harm of infrastructure projects, and is distinct from those specific IHL obligations that require parties to conflict to take a range of precautions in attack and against the effects of attacks to protect civilians and civilian objects. See, for example, Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 57 and 58; and Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 15–24, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1.
Reverberating effects

Some definitions of the terms are in order, given the complexity of the challenge that has been laid out. Based on their decades of experience, humanitarian water engineers assert that the impact of armed conflict on a service can be measured in terms of direct, indirect or cumulative impact, and can occur on the people, hardware and consumables which keep the service running. The services in question could be health care, education, solid waste removal, financial flows, or the so-called “lifeline services” of electricity, water and wastewater. Most services are dependent on other services for their proper functioning, and some are very highly interdependent (e.g. effective treatment of patients at a hospital typically requires electricity and clean water). The impact of an attack during armed conflict can result in damage to a service, which can be measured in terms of the direct effects and the reverberating effects. Such attacks can take various forms, such as targeting of service provider personnel or supply-lines of consumables, cyber-attacks on infrastructure systems, and the use of explosive weapons on or affecting the service systems (the latter of which is most commonly considered in this article).

In a general sense, the impact of an attack or an explosion is understood in terms of the marked “impression” or “footprint” of an attack, while the effect of an attack refers to the consequences that follow it. Table 1 exemplifies the terms in order to distinguish the differences. Traditionally concerned with the functioning of a particular service, the humanitarian engineering view of the reverberating effects of an explosion or attack are seen to extend to the functioning of other services that the service is dependent on, or which depend on it.

IHL (also known as the laws of armed conflict) obliges those planning or deciding upon attacks to take into account all reasonably foreseeable incidental harm when considering questions of proportionality and precautions in attack. Such “harm” includes both direct effects of an attack (e.g. deaths, injuries, or damage to civilian objects) as well as reverberating effects (also known as indirect or cumulative effects). The cumulative impact of armed conflict is in many ways more significant than both the direct and indirect impact of armed conflict (ICRC, above note 8), and likely to be more significant than the reverberating effects of attacks. As the effects of attacks often conflate with the cumulative impact of armed conflict, their impact is more readily understood from within the protracted conflict context the attack occurs – particularly in the protracted urban armed conflicts that this article focuses on.

10 The authors acknowledge that the cumulative impact of armed conflict is in many ways more significant than both the direct and indirect impact of armed conflict (ICRC, above note 8), and likely to be more significant than the reverberating effects of attacks. As the effects of attacks often conflate with the cumulative impact of armed conflict, their impact is more readily understood from within the protracted conflict context the attack occurs – particularly in the protracted urban armed conflicts that this article focuses on.
11 M. Zeitoun and M. Talhami, above note 5.
as the indirect consequences). IHL jurists also note that the extent to which the resulting incidental harm can be foreseen depends on, *inter alia*, the circumstances of the attack and the target, and that “patterns of incidental harm can be foreseen based on the past effects of urban warfare”. Similarly, the disarmament research community refers to the range as first-level, second-level and third-level impacts – which by definition extend to all interdependent services.

The example of a damaged drinking water service in Table 1 helps to distinguish use of the terms, and further notes how the effects of an attack reverberate in time and across space. The immediate impact of an explosive

### Table 1. Measures of the impact and reverberating effects of an attack classed according to expected distance and duration, with examples from a water treatment plant

<table>
<thead>
<tr>
<th>Examples</th>
<th>Damage sustained</th>
<th>Impact on services</th>
<th>Civilian harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Engineering” definition</td>
<td>Direct impact</td>
<td>Reverberating effects</td>
<td>Reverberating effects</td>
</tr>
<tr>
<td>IHL definition</td>
<td>Direct effect</td>
<td>–</td>
<td>Reverberating effects</td>
</tr>
<tr>
<td>Disarmament research definition</td>
<td>1st-level impacts</td>
<td>2nd-level impacts</td>
<td>3rd-level impacts</td>
</tr>
<tr>
<td>Distance</td>
<td>Closest ←---------------------------------- → Furthest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Duration</td>
<td>Shortest ←----------------------------------→ Longest</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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16 C. Wille and A. Malaret Baldo, above note 2.
weapon that detonates near a water treatment plant could result in physical damage to the pumps which push the treated water to consumers. The consequences of the damage to the water service could extend to the health service, if less water is pumped throughout the water network and a nearby hospital is without water in its taps. Some of the consequences of the lack of clean tap water in a hospital include the lack of adequate sterilization of surgical instruments, and (so) a greater number of infections of patients’ wounds. Data collection efforts aimed at better gauging civilian harm would class all such consequences as “reverberating effects” (while the number of people infected could also be classed as a “third-level” impact).

The previous article in this series explains how the spatial extent of the reverberating effects of an attack depends primarily on the hierarchy of the component suffering the direct impact (i.e. “upstream” components, e.g. water treatment plants; “mid-stream” components, e.g. water transmission lines supplying water to neighbourhoods; or “downstream” components, e.g. household water piping or rooftop storage tanks). The duration of the reverberating effects depends on the “baseline resilience” of the service before the explosion, which is itself a function of system redundancies and emergency preparedness and response. The baseline resilience of a service is also referred to as the “underlying conditions” or “pre-crisis vulnerability” of a service. In brief, and as Figure 1 shows, the less resilient the service is when the attack occurs, the greater the impact and the reverberating effects are expected to be. As a jab to a boxer in the twelfth round is likely to cause more damage than a jab in the first, an attack on a service that has experienced years of neglect and which is not likely to be rebuilt immediately is expected to cause more disruption than it would on a well-maintained service with full emergency-preparedness measures in place.

Uncertainty and (pre)caution

Though the examples discussed are straightforward, most reverberating effects are not. Like the tornado caused by the flap of the proverbial and distant butterfly’s wings, the reach of the consequences of an attack are almost without limit. As discussed earlier, an assertion that an explosion near a water treatment plant results in mass displacement cannot be made with any confidence, because there are dozens of other reasons which can explain reductions in economic activity or displacement.

The reasoning follows the classic adage of unforeseen consequences: “for the want of a nail, the kingdom was lost”. As the number of factors that shape an outcome increase, so does our ability to prove causality decrease. In other words, the longer that the chain of consequences under question is, the less confidence

17 Attacks on upstream components are the furthest reaching. M. Zeitoun and M. Talhami, above note 5.
we can have in the information we have about it. Climate scientists refer to this compounding of factors as a “cascade of uncertainty”.

The relevant question generated by uncertainty theory is: if an observed association between factors cannot be proven with confidence, does that mean it does not exist? The related policy question is: If an association is observed but has not been “proven”, should policy be designed to incorporate its possibility, or to ignore it? The range of answers from different institutions will vary from reckless to cautionary, depending mostly on the costs of getting it wrong, and how familiar they are in dealing with the absence of the desired level of knowledge.

It is in this sense that the quest for ever more data about civilian harm is an attempt to reduce uncertainty. With precisely this in mind, simulation models feed on data to quantify risks and probabilities. The logic is compelling: a model could predict the strain that will be placed on Hospital X (measured in terms of the staff and beds) when 5000 civilians who contracted cholera following the bombing of Wastewater Treatment Plant Y compete for health service resources which are already allocated to caring for the 400 combatants who were wounded directly from the fighting. Targeting processes could then assign the wastewater treatment plant a corresponding level of importance. The number of civilian lives that would be spared could be estimated, and the reduction in civilian harm extrapolated accordingly.

Models have their downsides, however, as studies of wargaming and other models have shown. The most well known of these is that the quality of the output

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of the model directly reflects the quality of the data entered into it – regardless of how sophisticated the algorithms and modelling process. “Garbage in, garbage out” is the undeniable if inelegant heart of modelling processes.

Even in the most wealthy, stable and well-ordered societies, public service providers do not have all the information they would like, and so cannot rely fully on modelling. Even as they continue to monitor and collect more information, most institutions develop an approach to policy that is “comfortable” with uncertainty. For example, health, civil engineering and disaster risk-reduction guidelines usually choose to “err on the side of caution” by assuming that any negative impact of their projects will reverberate widely, and then establish measures to prevent or contain them. This manner of developing policy in uncertain operating environments is widely known as the “precautionary approach”.

Military decision making and intelligence gathering follows much the same approach. Because armed conflict in cities is the normal operating theatre of seasoned military institutions, the processes developed to prepare for and to be more effective in battle are designed to make best use of the information that is available. For instance, risks can be calculated and then fed into the targeting procedure, which can then inform the proportionality assessments and weaponeering decisions. The US military, for example, reduces the uncertainty of a complex operating environment by identifying, assessing and controlling risks arising from or during military operations throughout the targeting cycle (e.g. find, fix, track, target and engage) and as part of the IPOE. In the sense that the term is used here, such procedures are “precautionary”.

The measures taken by military institutions through these procedures puts them in a stronger position to achieve military objectives with less civilian harm, as


25 Other militaries also follow a similar procedure, with different terminology (e.g. NATO employs decide, detect, track, deliver and assess); see Giulio Di Marzio, “The Targeting Process… This Unknown Process (Part I)”, *NRDC-ITA Magazine*, 2009, available at: https://www.nato.int/nrdc-it/magazine/2009/0911/0911d.pdf. See Joint Chiefs of Staff, above note 23.
well as compliance with the principles of IHL. As previously noted, however, such
compliance rests on gauging the extent to which reverberating effects are
“reasonably foreseeable” in the sense that they “may be expected” (Art. 51(5)(b)
of Additional Protocol I).26 The task for those who seek to better gauge (and, so, minimize) civilian harm is thus to map out the extent to which the reverberating effects of an attack may be expected.

Cause and effect between attacks, water, wastewater and
disease

The extent to which the reverberating effects caused by attack play out on water/
wastewater services can be gauged first by determining the level of confidence in
information about the impact on the services, and the subsequent influence on
the outbreak and transmission of infectious diseases.

Links between water and wastewater, and disease

The evidence base supporting the importance of clean drinking water for reducing
the risk of outbreak or rate of transmission of infectious disease is by now so well
established that it is no longer questioned very much. One of the greatest
concerns is when wastewater contaminates drinking water. The spread of the
Spanish flu through the mud, faeces and wastewater which lined the trenches of
the First World War is considered to have killed more people than both world
wars combined, for example. Similarly, the lack of clean water and adequate
wastewater evacuation in the refugee camps of the Democratic Republic of Congo
is blamed for the epidemics of dysentery and cholera which claimed over 40,000
people from Rwanda in 1994. In fact, the outbreak and transmission of cholera
was linked to bugs in the water more than a century earlier, through pioneering
efforts to contain the spread in London.27 While the orthodox scientific
knowledge of the day held that cholera was spread through the air, those who
persisted in sampling drinking water prevailed, and the study of the ways that
pathogens and environmental contaminants travel (epidemiology) was born.
Chlorine was quickly found to be the best way to kill these pathogens; its
addition to Tokyo’s drinking water service led to a drop in the infant mortality
rate of 18,000 per year in 1915 to less than 1000 by 1998, for example.28

Like other diarrhoeal diseases, cholera and dysentery originate from a number of sources, are usually contracted by contaminated water or food, and are readily spread in water and wastewater, and are just as deadly. The World Health Organization (WHO) estimates that they caused over 1.5 million deaths of children under the age of 5 years in low- or middle-income countries in 2002. Indeed, children under the age of 5 years are “more than 20 times more likely to die from diarrhoeal disease linked to unsafe water and sanitation than violence in conflict”.

The transmission routes of these and related diseases are very well known. As in Figure 2, the cross-contamination of wastewater and drinking water is in fact just one of several potential routes of disease transmission (diarrhoeal or otherwise). Just some of the variables that compound the complexity—and, so, reduce certainty about the main drivers—include the presence of a new strain of disease in inward-migrating people, pathogens transmitted by flies or animals, and direct physical contact with contaminated surfaces.

Policy and operational responses designed to tackle the water-related transmission and exposure routes focus on interrupting them, through, for example, chlorination and handwashing, or prevention. The cardinal rules that humanitarian water engineers follow to avoid an outbreak of infectious disease is to chlorinate, so that the pathogens are eliminated, and to ensure that drinking water pipes and raw wastewater systems are kept physically separate (i.e. to prevent cross-contamination). Such interventions are effective. A systematic review of over 2000 interventions to prevent diarrhoea found that all of them reduced the risk. However, cholera and the more common forms of diarrhoea persist. In rural areas, the risk of cross-contamination arises from buckets dipped into an unprotected (and unchlorinated) village water well. In urban areas, the concern is when the wastewater is not treated adequately (because the treatment plant has been run down), a malfunctioning pumping station means the wastewater is not evacuated from a built up area, or when leaks from wastewater drainpipes seep into drinking water sources—particularly if the chlorination of the latter is below par.


32 At least for the forty-six of 2120 publications which met the stringent requirements of the systematic review.

The impact of attacks affecting water and wastewater services

Of course, different types of attacks affect water and wastewater services in different ways. A cyber-attack that aims to disrupt the services’ operating system may inflict damage that is much less visible than an air-to-surface missile attack on an isolated component of the infrastructure, for example. Explosive weapons employ low- and high-explosive substances to create blast, and commonly fragmentation, in order to achieve a particular effect. The damaged caused by the use of explosive weapons in protracted urban armed conflicts, where population density and foot traffic are high, is not only a result of the blast itself, but also of the fragmentation and heat which are produced by the detonation. These three mechanisms can also cause extensive harm to civilians and infrastructure through penetration, ground shock, cratering, secondary fragmentation and fire.

Researchers and humanitarian water engineers have documented such damage from armed conflicts that have taken place all over the world, the latter usually as an internal reporting requirement for the institution which employed them or as a means to request a pause in hostilities in order to ensure safe access for the operation, maintenance or repair of infrastructure. The dozens of reports detailed in Table A in the Annex cover a very wide range of impact and follow no common methodology. Read collectively, however, they do reveal a number of

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34 Adapted by the authors from WHO, Guidelines on Sanitation and Health, Geneva, 2018.
patterns which offer a snapshot of the “working knowledge” which backs the authority they have developed on the topic over the decades of their careers.\textsuperscript{36} Each of the reports documents the extent of direct damage to water infrastructure, at a minimum—possibly because this form of damage is the most visible and easiest to repair. The quality of the service prior to the attack may be inferred from this direct impact, particularly when the documentation spans a number of attacks, or when the same case is revisited years later by the same author (or a new author with access to the prior reports). The measures of this “baseline resilience” are defined generally by the level of inherent infrastructure redundancies in the systems, by the existence of an emergency preparedness plan (EPP), and the capacity of the service personnel to execute the EPP (or simply to maintain or restore the service in face of long-term degradation or short-term interruption).\textsuperscript{37}

The evidence base of Table A further reveals patterns of deterioration of wastewater treatment plants (which are usually prone to partial or total failure because of the lack of sophisticated replacement parts on the open market, as in Kabul, Monrovia, Brazzaville and Grozny) and malfunctioning chlorination systems (which often fail to lack of sophisticated replacement parts or chlorine gas, tablets, or liquid on the open market, as in Dilli, Huambo, Novi Sad and Baghdad). The concern for cross-contamination of wastewater and drinking water can be inferred in each of the engineers’ reports, and is prevalent in several. The concern is most notable where sewage ponds develop in public areas (and surrounding drinking water pipes) after drainage lines back up when booster pumps fail (Kabul, Beirut, Basrah, Mogadishu, Novi Sad). A further pattern that can be gleaned from the reports which is of direct relevance to the topic at hand is that the concern shown for degraded water and wastewater systems stems not from evidence but from assumptions that the public health risks increase accordingly. Data is collected from within the “silos” of professional expertise; humanitarian engineers and health workers rarely mix, and even less frequently with munitions experts and epidemiologists.

The chain of consequences that reverberate from damage to water and wastewater services and infectious disease

To summarize findings to this point: over a century of epidemiological study of transmission routes has developed a robust scientific body of knowledge that infectious diseases can spread through water and wastewater, and a more recent body of knowledge has documented how attacks can damage water and wastewater services in ways which facilitate cross-contamination between the two.

It is when seeking causation along the attack–water/wastewater service–infectious disease chain of reverberating consequences that the uncertainty begins to cascade. Indeed, a systematic review of nearly 4000 research articles (published

\textsuperscript{36} Comprehensive documentation on the effects of armed conflict on water infrastructure is to be found, for example, in P. Giorgio Nembrini’s \textit{Thirsty Cities in War} collection – see Table A in the Annex.

\textsuperscript{37} M. Zeitoun and M. Talhami, above note 5.
between 1980 and 2014) on the effectiveness of water and sanitation interventions to improve health outcomes in “humanitarian crises” found the evidence base to be “extremely limited”. Only six papers found interventions to produce change that was significant enough to be counted.39

The bulk of investigations into the consequences of the attack–water/wastewater service–infectious disease chain remains associative, and very tricky to untie from the effects of the armed conflict within which they occur. Studies have shown, for example, how outbreaks of hepatitis A during the 1990s war in Bosnia are attributed – in part – to the virtual collapse of “the hygienic [read water and wastewater] infrastructure which was intended to protect against enteric disease”. The outbreak was followed by “staggering” (and relatively well-documented) rates of diarrhoea and dysentery. In a similar vein, the impact of the US/UK invasion of Iraq on public health was considered to work its way “through specific diseases and conditions” such as AIDS and cancer. Epidemiologists blame water-related pathogens (like *Vibrio cholerae*, which results in cholera) for 85% of the 50,000 deaths after the sudden influx of nearly one million refugees from Rwanda into the Democratic Republic of Congo in 1994, though do not link it with attacks on water and wastewater services. And while there is clear association between periods of high-intensity armed conflict, damage to water and wastewater systems, and spikes in diarrhoea in Aleppo and Idlib (Syria), “multiple confounders” mean that no direct co-relation can be drawn. Interpreting such associations as consequential chains with any certainty requires the deeper understanding provided by case studies.


Reverberating effects of attacks in protracted armed conflict

This section reviews public-domain literature on Iraq, Yemen and Gaza to gauge the extent of confidence in information about the attack–water/wastewater service–infectious disease chain. Because of the importance that the “baseline resilience” of any service (Figure 1) plays in determining the extent of civilian harm, attacks are considered within the protracted armed conflict in which they occur.

Water/wastewater and cholera in Basrah, Iraq

As shown in Figure 3, the decades-long decline of Basrah’s drinking water system from world-class to “worst-class” has been attributed mostly to the accumulation of indirect impact of armed conflict, rather than to by parties to armed conflict per se. As attacks precipitated each degradation, their reverberating effects should be considered, particularly for links with the thousands of cases of cholera and other water-related disease in 2015 (if not the “water riots” three years later).

Even when it was of top quality, Basrah’s drinking water system was vulnerable to disruption due to its heavy reliance on a single source and means of delivery – the al-Bada’a water canal which brought freshwater hundreds of kilometres from the Euphrates River to a large reservoir that then supplied raw water to a series of treatment plants where the water was cleaned and pumped into the network in Basrah. This source was developed after the raw water quality in the original source (the nearby Shatt al-Arab river) had started to deteriorate (mainly due to salinization, as far back as the 1980s). The canal and related distribution pipes were damaged by


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attacks in 2003, thereby setting off a heavy reliance on locally desalinated and unregulated water supply services. Over 4500 cases of cholera were reported in Iraq in 2007, primarily in Baghdad. The baseline resilience of the wastewater service was compromised to a greater extent as the wastewater treatment plant was never completed (because construction was halted as the foreign contractors fled the instability that followed hostilities in 1991). The sewers and wastewater pumping stations that had been completed on the very flat city filled up, and, as a result, standing wastewater puddles have been present in populated areas for decades.

As the quality of the water and wastewater services declined, the risk of both contamination of the water and public exposure of untreated wastewater in populated areas increased. By 2015, the water authorities were obliged to return to the extremely salty Shatt al-Arab river as an alternative source. Water engineers who faced the challenges were certain of cross-contamination of the wastewater and drinking water, and many were warning of the possibility of an

Figure 3. The long and predictable decline of the quality of the drinking water service in Basrah. Draft based on Zeitoun et al. 2017.
outbreak of communicable disease. Over 2000 cases of cholera were reported soon afterwards.\textsuperscript{54} By 2018 over 110,000 cases of diarrhoea, vomiting and other ailments were reported.\textsuperscript{55} These have been attributed to a combination of ageing filtration media for water treatment, failing pumps (indirect impact) and the temporary discharge of wastewater to the Shatt al-Arab river (which had by that time become a source of drinking water).\textsuperscript{56}

Wastewater and cholera throughout Yemen

Subject to armed conflict since 2015, the worst outbreaks of cholera globally this century have occurred in Yemen.\textsuperscript{57} Over two million cases and 3500 deaths were reported during the identifiable waves of 2016 and 2017.\textsuperscript{58} While some have attributed this to changes in rainfall,\textsuperscript{59} most concur that the outbreaks are due to failures in the water and wastewater services, which are a result of the destruction of and damage to critical infrastructure that enables these services.\textsuperscript{60}

In response to the outbreak, humanitarian actors have stressed the importance of improving the “underlying conditions” (read “baseline resilience”) of the health and safe drinking water, sanitation and hygiene (WASH) sectors.\textsuperscript{61} The country does not have much water to draw on in the first place,\textsuperscript{62} with coastal cities suffering from saltwater intrusion\textsuperscript{63} and cities in the highlands, such as Ta’iz, famously running out of drinking water in 1996.\textsuperscript{64} Only about 50 to 60\% of people in the country had access to safe piped water services before the hostilities.\textsuperscript{65} Indeed, well before the start of the current hostilities, one of the main actors in the development of Yemen’s water sector was advocating the importance of alleviating the effects of the earlier crisis in 2011. Gesellschaft für Internationale

\textsuperscript{56}UNICEF, Water Scarcity Crisis in Basra, 2019.
\textsuperscript{57}For longer-term trends and comparison with other countries, see knoema.com/infographics/xknpzhb/cholera-outbreak-in-yemen.
\textsuperscript{60}For example, Fekri Dureab, Khalid Shibib, Yazoumé Yé, Albrecht Jahn and Olaf Müller, “Cholera Epidemic in Yemen”, Lancet Global Health, Vol. 6, No. 12, 2018.
\textsuperscript{65}Humanity & Inclusion, above note 14.
Zusammenarbeit GmbH (GIZ) notes that the hostilities in Ta’iz city led to a sharp decrease in water supply (from 80% in 2014 to 38% by 2017) and wastewater services (from 70% in 2014 to 38% in 2017). This kind of deterioration does not bode well in a country where cholera is endemic. The same report also notes that water consumption in twelve out of seventeen governorates in Yemen had fallen below 50 litres per person per day by 2016, which is the level of access required to maintain health concerns at “low” levels, coupled with a rapidly collapsing health system. Compounding the pressure, roughly 270,000 Yemenis had fled to Ta’iz governorate by 2017, some of whom may have carried different strains of the disease. It is therefore not surprising that Ta’iz was among the governorates that reported the highest suspected cholera cases (over 31,000 as of 3 August 2017 for the period between 27 April 2017 to 3 August 2017).

The very many routes through which the resilience of the drinking water systems in Yemen was compromised are shown in Figure 4. This emphasizes how specific elements of the water and energy infrastructure and other aspects of the service were vulnerable on one level to armed conflict, and at a second and even more profound level to the adaptations undertaken by individuals and service providers in order to continue to benefit from water or electricity.

Figure 4 suggests that private water vendors may be filling an essential need, but also unwittingly spreading cholera – because of the distribution of untreated (and possibly cholera-contaminated) water. The baseline sanitation conditions also do not help. Fewer than half of Yemenis had access to the soap so crucial to interrupt disease transmission routes. Only the major cities are served by wastewater treatment plants, and less than half of the homes have “adequate” sanitation. The resilience of both water and wastewater services are known to be linked to the electrical power supply. When fuel shortages spiked during the economic blockade, operation of

70 World Bank, above note 63, p. 120.
71 OCHA, above note 61, p. 94.
water and wastewater, health and many other services was undermined. To make matters worse, there was a lack of cholera vaccine stockpiles.

By 2019 over 145 airstrikes on WASH facilities had been recorded. By 2020, ten of the country’s thirty-three water treatment plants and five of the


country’s twelve wastewater treatment plants had been damaged or destroyed.79 Access to safe water at the household level dropped in every governorate.80 The general paucity of electricity and fuel for generators is judged to have seriously undermined the quality of the water and sanitation services.81 As such, the potential for untreated wastewater to cross with drinking water was high,82 and the spread of cholera was entirely predictable.83 As a United Nations Children’s Fund (UNICEF) employee stated, “we are just one airstrike away from an unstoppable epidemic”.84

Though humanitarian agencies mobilized, the cholera outbreak still came, in no small part because – as in Basrah – of the mixing of untreated wastewater and drinking water. “(T)he accumulation of stagnant water in the streets due to frequent sewer backups are precipitating the spread of diseases such as cholera, vector-borne diseases, and parasites.”85 Indeed, the greatest number of cases appear to have come from the areas where wastewater treatment plants were not functional,86 and were also associated with increased incidence of diarrhoea.87

Wastewater and diarrhoea in Gaza (before May 2021)88

Subject to numerous episodes of armed conflict since 1948, and to full territorial closure and naval blockade since at least 2006, Gaza is notoriously bad both in terms of public health89 and of quality of drinking water.90 There furthermore appears to be a strong association between the incidence of diarrhoea and the attacks carried out during the “summer war” of 2014 (see Figure 5).

79 Indirect impacts of the longer-term aspects of the war were felt on the water providers’ governance systems, bill-collection rates and staff: GIZ, above note 66. The impact on staff was due in part to the lack of salaries paid and also because of brain drain: World Bank, above note 63.
81 World Bank, above note 63.
85 World Bank, above note 63, p. 72.
88 The documentation and analysis was completed before the May 2021 hostilities in Gaza.
The “underlying conditions” of water and wastewater services in Gaza are as well studied as they are concerning.\(^92\) Over 90% of the drinking water supplied by the municipality exceeds WHO drinking water guidelines for nitrates (and 79% for chlorides).\(^93\) Roughly 40% of water sampled at taps from two hospitals was found to be biologically contaminated in 2020.\(^94\) This is not surprising, considering how rife the conditions for cross-contamination with wastewater are.\(^95\) Less than half of the

Figure 5. Comparison of reported cases of acute diarrhoea, for 2014 (including the July “summer war”) and 2016.\(^91\)

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wastewater is routinely treated, and most regularly seeps into the sea or into Gaza’s main source of drinking water: the aquifer located between one and fifty metres below the sand surface.

The direct impact from the hostilities in 2008–2009, 2012, and even more extensive damage caused in 2014 seems likely to have contributed to the conditions required to communicate disease. One of the anaerobic ponds of the Gaza City wastewater treatment plant was hit in 2009, for example, thereby creating a small flood (over 55,000 square metres) of partially treated wastewater in the surrounding fields. Alongside damages to a considerable amount of water and wastewater infrastructure, the nearly completed North Gaza wastewater treatment plant was damaged in 2014.

Any evaluation of the likely risk of cross-contamination should also consider the (likely greater) risk of exposure from the great extent of degradation of the water and wastewater services. Routine operations and maintenance become neglected, as the water authorities struggle to get people to pay their bills, fuel shortages are chronic, spare parts are very difficult to import past the blockade and administrative buildings themselves are attacked. Like the water services, the quality of the health services is furthermore clearly tied to the (poor) levels of electricity available. As state-supplied power cuts are scheduled, hospital and wastewater treatment plants use diesel-driven electrical

100 Office of the Quartet, Report to the Ad Hoc Liaison Committee, Jerusalem, June 2020.
102 S. Arie, above note 89.
103 CMWU, Damage Assessment Report for CMWU Main Building & Al Nusirat Pump Station, Gaza City, 2011.
generators for power in between. When there is not enough diesel to operate the generators, several of the municipal or hospital wastewater treatment plants discharge over the surrounding soil – and into the aquifer or the sea.

The conditions for cholera are so rife and predictable that journalists and think-tanks have drawn attention to the risks faced by Israel. The decline in the baseline resilience of water and wastewater services in Gaza creates a system-wide vulnerability such that if any single point of failure is rendered inoperable, the entire service risks collapse, while coping mechanisms to safeguard public health are largely inadequate in face of the lack of safe alternatives.

Consequences and implications

Considered together in Table 2, the review of policy and research papers, observations, and the impact of explosive weapons in the protracted urban armed conflicts in Iraq, Yemen and Gaza reveals several conclusions that may be drawn about how effects reverberate from an attack on water/wastewater infrastructure through to the outbreak and transmission of infectious diseases. As previously noted, any conclusions drawn should be done from within the context of the protracted armed conflict in which they occur.

Amongst a considerable amount of other findings, a comparison of the cases reveals a clear association between the risk of cross-contamination between drinking water and wastewater, and the observed outbreak or transmission of infectious disease. There was significant information in each of the cases about the degradation of the baseline resilience of the water and wastewater services, and, in the case of Basrah, this is detailed to a considerable extent.

The pattern is reflected in the blue lines of Figure 6, which plots a typical pattern of degradation of water and wastewater services against much more general trends of increasing risk of cross-contamination, risk of outbreak or transmission of disease, and quality of the evidence base about the reverberating effects. The trend of increased risk of cross-contamination (shown in blue) is not detailed because of the very many potential determinants which are not related to an attack (e.g. the lines were not separated by design, the materials used were faulty, etc.). The increased risk of transmission of infectious disease (shown in red) is directly related to the risk of cross-contamination. Further detailing of this trend would require controlling for the previously discussed non-attack-related variables (such as endemic pathogens, new strains introduced to a population, environmental factors, etc.).
Table 2: Parsing of the cases in the “Reverberating effects of attacks in protracted armed conflict” section, in relation to establishing the level of confidence of the knowledge about reverberating effects along the attack–water/wastewater service–infectious disease chain

<table>
<thead>
<tr>
<th>Case</th>
<th>Relevant direct impact</th>
<th>Expected changes in level of confidence in the consequential chain</th>
<th>Associated reverberating effects on disease transmission</th>
<th>Underlying conditions/baseline resilience of water/wastewater services</th>
<th>Level of confidence in the attack–water/wastewater service–disease consequential chain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basrah</td>
<td>2003: Damages to main drinking water supply channel; leaking transmission pipes</td>
<td>The transmission of cholera ceased/greatly decreased when crucial repairs were carried out</td>
<td>Cholera outbreaks in Basrah, Over 4500 cases in 2007 – over 2000 cases in 2015 in Basrah Governorate</td>
<td>Water scarcity, water quality low, lack of alternative sources of water, safe wastewater treatment low, inadequate electricity supply, aging infrastructure, and health system low. Cholera is endemic.</td>
<td>The decline of WASH services over decades is very well documented. The cholera outbreaks were predicted. The high rate of diarrhoea is very well documented.</td>
</tr>
<tr>
<td>Yemen</td>
<td>Damage to or destruction of wastewater and drinking water supply infrastructure throughout the country</td>
<td>Level of confidence is expected to increase. Current levels of documentation are much greater now than at the beginning of the hostilities</td>
<td>Cholera outbreaks 2016, 2017 &gt; 2 million cases</td>
<td>Water scarcity, lack of proper wastewater collection and treatment, unreliable and intermittent electricity supply, lack of alternative sources of water. Compounded by unregulated alternative.</td>
<td>Once cholera had broken out the first time, and following battle damage assessments of the conditions of WASH services, the further spread of cholera is expected to increase.</td>
</tr>
<tr>
<td>Case</td>
<td>Relevant direct impact</td>
<td>Underlying conditions/ baseline resilience of water/wastewater services</td>
<td>Associated reverberating effects on disease transmission</td>
<td>Level of confidence in the attack–water/wastewater service–disease consequential chain</td>
<td>Expected changes in level of confidence in the consequential chain</td>
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<tr>
<td>Gaza (2001–2020)</td>
<td>Damage or destruction to water supply and wastewater infrastructure throughout the territory</td>
<td>Water scarcity, water quality low, lack of alternatives, safe wastewater treatment low, inadequate electricity supply, and health system low</td>
<td>Cases of diarrhoea seen to triple during hostilities in 2014</td>
<td>The decline of WASH services and spread of diarrhoea is well documented</td>
<td>Level of confidence is expected to increase. Even prior to the hostilities of 2021, Ministries and international non-governmental organizations (NGOs) have been documenting the reverberating effects of previous rounds of hostilities</td>
</tr>
</tbody>
</table>
As such, establishing a cause-and-effect relationship along the attack–water/wastewater service–infectious disease consequential chain with a high degree of certainty would oblige tests that controlled for the influence of these other variables on the outcome observed (as this would allow judgement of the extent to which the variable in question is significant).

Indeed, this article’s analysis suggests that more research can be done to factor in the specific characteristics and vulnerabilities of civilian infrastructure and services in order to mitigate civilian harm during conduct of hostilities. As just one example, the analyses required to feed into targeting procedures should seek to identify the visible infrastructural laydown of water and wastewater services.

Figure 6. Compounded figure based on the review of Yemen, Gaza and Basrah showing the trends between the baseline resilience of water and wastewater services, the risk of cross-contamination, and the associated consequences in terms of infectious disease. The combination of rehabilitation of infrastructure (which restores service delivery) and emergency preparedness planning (e.g. identification of alternative sources to be used as a backup if the primary source fails) together help to strengthen the resilience of the services. The confidence in knowledge about the degradation of the baseline resilience is high, relative to the confidence in the knowledge of the likelihood of cross-contamination and its cause of infectious disease, for the reasons explained in the text. The figure also shows that the quality of the evidence base and the foreseeability of reverberating effects can increase over time, subject to intelligence-gathering efforts.

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services. These could be mapped as part of an IPOE or prior to an attack using geospatial and systems mapping techniques, and specify a range of points of particular hazard (including single points of failure as well as upstream and midstream infrastructure) which if rendered inoperable would affect the largest part of the population in the service area. Taken as part of the IPOE, the information of critical civilian infrastructure in the area of operations would be improved through enhanced stand-off recognition (remote sensing techniques, satellite imagery) or directly from allied/local forces or from local authorities.

The effort could be complemented by improved systems-level understanding obtained by involving the relevant engineering expertise and using other open-source information which could help to identify the population served by specific ground-level objects (i.e. water treatment plants) and sub-surface objects (transmission lines under main roads, or bridges). Carried out prior to an attack, the effort can inform weapons selection (usage and restrictions), identification of restricted targets, and the development of a no-strike list. A similar effort would be expected if planning multiple attacks during a protracted armed conflict, since infrastructure condition and use changes with time. Routine ISR (intelligence, surveillance, and reconnaissance) data collection procedures would have to be prioritized and augmented when in the midst of hostilities, to accommodate for the suspected reverberating effects.

Because of the greater level of knowledge that it is possible to acquire, as well as the general awareness that existing services are very likely to be degrading due to reduced operations and maintenance, the quality of the evidence base can increase as the conflict prolongs. This is shown by the green line of Figure 6. What the local health services and humanitarian actors know about the cholera outbreaks in Yemen in 2021 is much better than what was known when they occurred in 2018, for example.

With the importance of understanding the underlying conditions/baseline resilience of any service in mind, the patterns revealed show that reverberating effects of an attack can be expected, to an extent (dashed line of Figure 6). It would not be unreasonable to expect an outbreak of infectious disease if a wastewater treatment plant were damaged, and if its proximity to drinking water sources or infrastructure meant there was a high risk of cross-contamination, for example. It follows that the extent of measures that parties to armed conflict must take to avoid or at least minimize such reverberating effects also increases as the conflict prolongs.

In short, it is possible to establish the same level of confidence in the three-element (attack–water/wastewater service–infectious disease) consequential chain as in the double-element links between them, through a suite of robust epidemiological and damage assessment studies. The effort required to obtain this level of confidence is very much easier to specify than it is to execute, however. Combatants, lawyers, policy-makers and humanitarian organizations alike will thus inevitably be obliged to answer the earlier theoretical and practical questions about uncertainty. For the topic at hand, the question will be some variant of: if robust epidemiological and damage assessment studies cannot prove an outbreak of
cholera was due primarily to the incidental damage inflicted by an attack on a wastewater treatment plant, does that mean that they are not linked?

Those seeking to quantify and reduce civilian harm during the conduct of hostilities must therefore decide how they will deal with uncertainty. The decision taken may matter little to humanitarian practitioners and those tasked to stabilize infrastructure and service delivery, considering how humanitarian work continues unabated by any equivocality.\(^\text{108}\) The answer matters considerably for those involved in the conduct of military operations and, in particular, the targeting process, on the other hand, because they are compelled by their own targeting procedures to reduce the complexity of their operating environment and ensure compliance with the laws of armed conflict/IHL.

In the absence of the preferred level and quality of information, those who seek to reduce civilian harm should follow a “precautionary approach” which assumes the causal links and chains, and which is readily adapted to standard military operational planning process and targeting procedures.

**Annex: Literature on the effects of war on WASH systems**

Table A presents an incomplete list of documentation, mostly by humanitarian water engineers charged to repair water and sanitation systems damaged by military attacks. Read collectively, the reports reveal patterns about the influence of the resilience of the service before the attack occurs (or “baseline resilience”), cross-contamination between wastewater and drinking water, and, to a lesser link, observed links with outbreak or transmission of infectious diseases.

\(^{108}\) Indeed, the assumption that improved and sustained levels of public health relies on good WASH services is the foundation for most humanitarian and development programmes, whether humanitarian, “development” or military.
Table A. Published and unpublished literature on the effects of war on WASH systems

<table>
<thead>
<tr>
<th>Location</th>
<th>Approximate year</th>
<th>Reference</th>
<th>Topics covered/summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>First tier: Documentation of direct impact</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Beirut</td>
<td>1989/1990</td>
<td>109</td>
<td>Description of infrastructure directly damaged by hostilities</td>
</tr>
<tr>
<td>Aden</td>
<td>1994</td>
<td>110</td>
<td></td>
</tr>
<tr>
<td>Baghdad</td>
<td>1991</td>
<td>111</td>
<td></td>
</tr>
<tr>
<td>Kigali and Butare</td>
<td>1994</td>
<td>112</td>
<td>Description of the relief effort, including graph of number of people served water</td>
</tr>
<tr>
<td>Sarajevo and Srebenica</td>
<td>1992–1994</td>
<td>113</td>
<td></td>
</tr>
<tr>
<td>Grozny, Chechnya</td>
<td>1995–1998</td>
<td>114</td>
<td>Description of the relief effort, including graph of number of people served water</td>
</tr>
<tr>
<td>Donbass</td>
<td>2017</td>
<td>115</td>
<td>Description of infrastructure directly damaged by hostilities, and number of people affected</td>
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<tr>
<td><strong>Second tier: Documentation of direct and indirect impact</strong></td>
<td></td>
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<tr>
<td>Mogadishu and Kismayo</td>
<td>1991/1992</td>
<td>116</td>
<td>Documentation of damage to physical and institutional components</td>
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<tr>
<td>Dilli</td>
<td>1999</td>
<td>117</td>
<td></td>
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<tr>
<td>Huambo</td>
<td>1985+</td>
<td>118</td>
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Continued

110 Aloys Widmer, in ICRC, *ibid*.
111 Riccardo Conti, in ICRC, above note 109.
112 Riccardo Conti, in ICRC, above note 109.
113 Markus Baechler, in ICRC, above note 109.
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<td>Novi Sad</td>
<td>1999</td>
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<td>Monrovia</td>
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<td>Kabul</td>
<td>1992–1994</td>
<td>121</td>
<td>Documentation of village-level water infrastructure (e.g. water reservoirs); development of analytical frame of water and armed conflict</td>
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<tr>
<td>Jenin</td>
<td>2002</td>
<td>122</td>
<td></td>
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<tr>
<td>Basrah</td>
<td>2003</td>
<td>123</td>
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<tr>
<td>Southern Lebanon</td>
<td>2006</td>
<td>124</td>
<td>Documentation of damage to physical and institutional components</td>
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<td>Gaza</td>
<td>2008–2009</td>
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<td>Documentation of damage to physical and institutional components</td>
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<td>Gaza</td>
<td>2008–2009</td>
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<td>Documentation of damage to physical and institutional components</td>
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123 P. G. Nembrini, C. Generelli, A. Al-Attar, *et al.*, above note 44.


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<td>Kabul</td>
<td>2001</td>
<td>127</td>
<td>Condition of public and private water and wastewater services, pre- and post-war; impact of armed conflict on water infrastructure, water authority, buildings; assessment of humanitarian interventions (especially regarding partnerships) by different actors</td>
</tr>
<tr>
<td></td>
<td>1985–2003</td>
<td>128</td>
<td>Impact of protracted conflict on civilian population and municipal authorities; reconstruction efforts by several NGOs</td>
</tr>
<tr>
<td>Jaffna</td>
<td>1990–2006</td>
<td>129</td>
<td>Condition of public and private water and wastewater services, pre- and post-war; impact of armed conflict on water infrastructure, water authority, buildings; assessment of humanitarian interventions (especially regarding partnerships) by different actors</td>
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<tr>
<td>Monrovia</td>
<td>1992–2003</td>
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<td>Béni</td>
<td>1994–2003</td>
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<td>Port-au-Prince</td>
<td>1986–2004</td>
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<td>Port-de-Paix</td>
<td>1986–2004</td>
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<td>Grozny</td>
<td>1994–2005</td>
<td>134</td>
<td></td>
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130 J.-F. Pinera and R. Reed, above note 127.
131 J.-F. Pinera, above note 129.
133 Ibid.
134 Ibid.
<table>
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<th>Location</th>
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<th>Reference</th>
<th>Topics covered/summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Huambo, Angola</td>
<td>1998</td>
<td>135</td>
<td>Collaboration between a “development” NGO and ICRC on an emergency rehabilitation water project</td>
</tr>
<tr>
<td></td>
<td>1961–1990s</td>
<td>136</td>
<td>Impact of protracted conflict on civilian population and municipal authorities; reconstruction efforts by several NGOs</td>
</tr>
<tr>
<td>Dushanbe and Kulyab, Tajikistan</td>
<td>1992–1996</td>
<td>137</td>
<td>Explanation of cross-contamination of sewage and drinking water; effects of economic decay on water systems</td>
</tr>
<tr>
<td>Mogadishu, Somalia</td>
<td>1980s+</td>
<td>138</td>
<td>Measuring of groundwater quality (e.g. salinity) to trace impact of informal water provision and well-drilling</td>
</tr>
<tr>
<td>Gaza</td>
<td>2008–2009</td>
<td>139</td>
<td>“The Goldstone Report”. Forensic analysis complemented by health records and testimonies of victims; documentation of damages to a well field and Gaza City wastewater treatment plant</td>
</tr>
<tr>
<td>Gaza</td>
<td>2008–2009</td>
<td>140</td>
<td>“Forensic architecture” approach to interpreting damaged infrastructure</td>
</tr>
</tbody>
</table>

135 Mary Daly and Christoph Langenkamp, in ICRC, above note 109.
136 Jean-Paul de Passos, “Huambo, une capitale provinciale au cœur de la guerre civile”, in F. Grünewald and E. Levron, above note 128.
**Table A. Continued**

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<tr>
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143 E. Weinthal and J. Sowers, above note 80.

In December 2019, the 33rd International Conference of the Red Cross and Red Crescent (International Conference) adopted Resolution 1 (33IC/19/R1), entitled “Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law” (Bringing IHL Home Resolution).¹

The resolution is based on the widely shared recognition that better respect for international humanitarian law (IHL) is needed to protect victims of armed conflict, and that implementing IHL at the domestic level is an essential step towards achieving this goal. The resolution therefore sets a general direction for the members of the International Conference² to follow and provides them with guidance in the form of key measures for strengthening the national implementation of IHL.

In parallel to the Bringing IHL Home Resolution and within the framework of the International Conference, States and National Red Cross and Red Crescent Societies (National Societies) also adopted a number of pledges touching upon a variety of IHL-related issues, including the strengthening of national committees and similar entities on IHL, the adoption of plans of action on national implementation of IHL, the establishment of educational and training programmes on IHL, and the ratification of key IHL instruments.

In order to give effect to both the resolution and the pledges, the International Committee of the Red Cross (ICRC) took the initiative of producing Bringing IHL Home: Guidelines on the National Implementation of
International Humanitarian Law (Bringing IHL Home Guidelines), published in May 2021. The Bringing IHL Home Guidelines compile the ICRC’s recommendations, addressed to States and National Societies, on implementing the commitments they have undertaken in the framework of the 33rd International Conference with respect to the domestic implementation of IHL. The Guidelines focus on, and unpack, the process behind the implementation of IHL at the domestic level, answering the question: what is needed to better implement IHL?

How can the Bringing IHL Home Guidelines be used?

The Guidelines contain a series of checklists on key areas of national IHL implementation: treaty participation; domestic legislation; practical implementation measures; criminal repression and suppression of violations of IHL; integration of IHL into military doctrine, education, training and sanction systems; and dissemination. These checklists are meant to serve as a roadmap to help States and National Societies to:

- **Assess**: Users of the Guidelines can use the concrete and practical checklists to analyze whether their national legal system is in harmony with the existing IHL treaty and customary rules that are binding upon the State, as well as with the IHL-related commitments made at the 33rd International Conference.
- **Identify**: On the basis of such assessments, users can then determine whether some areas need further action to ensure that IHL is fully implemented, and can use the same checklists to select concrete actions that are appropriate in response.
- **Plan**: After having listed possible measures available to the State and provided in the Guidelines, users will be able to prioritize such measures, for instance by creating annual plans of action on the domestic implementation of IHL.
- **Monitor and measure**: The Guidelines can also serve to monitor the impact of the commitments made during the 33rd International Conference, including the Bringing IHL Home Resolution and potential pledges signed by the State, by tracking all the actions made in relation to them.
- **Exchange**: The Guidelines can be used to foster inter-ministerial and inter-institutional discussions and collaboration on IHL-related issues, including on the adoption of strategies and initiatives in this area. Beyond the national level, the Guidelines can also serve to generate exchange among stakeholders.

2 The members of the International Conference include all States party to the Geneva Conventions and all components of the International Red Cross and Red Crescent Movement: the International Committee of the Red Cross (ICRC), the National Red Cross and Red Crescent Societies (National Societies), and the International Federation of Red Cross and Red Crescent Societies.
from different States and regions on good practices related to the domestic implementation of IHL.

The checklists provided in the Guidelines are drafted as recommendations. They are therefore not binding and are not meant to interpret the Bringing IHL Home Resolution or any existing international instrument.

**Who will find the Guidelines useful?**

The Bringing IHL Home Guidelines translate the commitments undertaken at the 33rd International Conference into practical and actionable measures. They are therefore addressed to practitioners, in particular those tasked with applying IHL. This includes categories of national stakeholders that are expressly mentioned in the Bringing IHL Home Resolution: national committees and similar entities on IHL, military personnel (including legal advisers to armed forces), civil servants, parliamentarians, prosecutors and judges, National Societies, academia, youth and the general public.

In parallel, the ICRC itself intends to use the Bringing IHL Home Resolution to monitor the implementation—and hence the impact—of the resolution and of the IHL-related pledges. ICRC legal advisers across the globe will be able to use the Guidelines in their dialogue with States and National Societies, to assist them in their efforts to implement IHL at the domestic level, in line with the mandate given to the ICRC’s Advisory Service on International Humanitarian Law.

**What are the key features of the Guidelines?**

**Ready-to-use checklists**

The checklists contained in the Bringing IHL Home Guidelines are based on the idea that national implementation of IHL is a continuous process and that additional steps are always possible, regardless of the current state of implementation. In the spirit of the Bringing IHL Home Resolution, the checklists therefore function as a sort of menu allowing users to select areas which are most relevant to them.

The checklists are formulated as questions, and each of these can be ticked off when the recommended measure has been implemented. Each question is accompanied by a description of what would be required to give effect to the measure, and how to do it.

**Real-life examples**

Each section includes examples of measures taken in different countries. This is already one way to implement paragraph 13 of the Bringing IHL Home
Resolution, which “invites States to share examples of and exchange good practices of national implementation measures taken in accordance with IHL obligations as well as other measures that may go beyond States’ IHL obligations”. These examples are indeed provided with the hope of inspiring others and of demonstrating that, everywhere in the world, measures are being adopted to better implement IHL.

Protection of persons facing particular risks

The Guidelines have been drafted while keeping in mind the specific risks that some groups face during armed conflict, such as children, persons with disabilities and victims of sexual violence. The recommendations provided in each section take into account the needs of these persons, and an entire checklist further develops the measures necessary to ensure that those who come into contact with these groups are adequately prepared.

Targeted bibliography

At the end of the Guidelines, a bibliography presents additional materials that can support the domestic implementation of IHL. This bibliography is sorted by the intended audience of readers, in order to allow those who play a role in implementing IHL to delve deeper into possible measures that they can take themselves.

What is next?

The ICRC hopes that the Bringing IHL Home Guidelines will be widely used by all those who play a role in the domestic implementation of IHL, and will be the object of further discussion and exchange during regional or universal meetings—for instance, those bringing together national committees and similar entities on IHL. For any questions or suggestions, the ICRC’s Advisory Service on International Humanitarian Law remains available and can be contacted at gva_advisoryservice@icrc.org.
Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce The Human Cost of War

Abstract

The publication Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War, launched on 14 April 2021, presents a framework developed by the International Committee of the Red Cross to encourage decision makers to take a holistic view of support relationships and their humanitarian impact. The point of this publication is to generate a comprehensive understanding of the stakes involved in support relationships and guide the decision-making process.

Armed conflicts feature an ever-growing number of actors organized in overlapping webs of alliances, proxy dynamics and other types of support relationships. And when armed actors fight alongside each other in loose coalitions such as these without adequate planning, coordination and ownership, this can lead to a diffusion of responsibility that heightens the risks to civilians and others not fighting. Yet support relationships also have the potential, exercised or not, to positively influence the protection of civilians and others not fighting in armed conflict.

The International Committee of the Red Cross (ICRC) defines a support relationship as one in which the support increases the capacity of a party to conduct armed conflict. This definition covers a range of forms of support (see Figure 1).
The growing prevalence of support relationships in armed conflicts led the ICRC to launch the Support Relationships in Armed Conflict Initiative in 2019. The aim of this pragmatic policy initiative is to gather and analyse the support-related practices of States and non-State actors. The ICRC believes that, by leveraging those actors’ potential to positively influence parties to armed conflict, it is possible to enhance the protection of civilians and others not fighting and promote respect for international humanitarian law (IHL). One of the key deliverables of this initiative was the publication Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War.

**Practical steps to manage support relationships responsibly**

To help decision makers, Allies, Partners and Proxies sets out a range of practical measures and guiding questions across ten broad areas and grouped into three phases, as shown in Figure 2. Decision makers are encouraged to use these questions to factor civilians and other protected people into their strategic and operational decisions at each stage of the support relationship.

Throughout support relationships, the ICRC asks supporting actors to:

- integrate an analysis of the risks and consequences for civilians and others not fighting into how they manage their support relationships.

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assess practical measures they can take in each area of support from a legal, policy and operational perspective and at all levels of decision-making. In contextualizing their approach, supporting actors should factor in the type of conflict, their partners, any inconsistencies between their partners, their partners’ activities, the support provided, as well as any specific protection concerns.

- adopt practical measures to promote compliance with IHL and the protection of civilians and others not fighting and otherwise reduce negative humanitarian consequences.
- take meaningful action to address allegations of IHL violations or other problematic behaviour in a support relationship.

On the basis of this framework and these guiding questions, the ICRC intends to engage bilaterally and confidentially with a range of actors involved in such support relationships in order to improve the protection of civilians and others not fighting, further refine its own understanding of practices, and continue to analyse the experience of supporting and supported actors. Ultimately, the ICRC aims to make this knowledge available to the wider international community.
International Committee of the Red Cross position on autonomous weapon systems: ICRC position and background paper

This position paper is available in the six United Nations languages at: https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems.

International Committee of the Red Cross position on autonomous weapon systems

The International Committee of the Red Cross’s concerns about autonomous weapon systems

Autonomous weapon systems select and apply force to targets without human intervention. After initial activation or launch by a person, an autonomous weapon system self-initiates or triggers a strike in response to information from the environment received through sensors and on the basis of a generalized “target profile”. This means that the user does not choose, or even know, the specific target(s) and the precise timing and/or location of the resulting application(s) of force.
The use of autonomous weapon systems entails risks due to the difficulties in anticipating and limiting their effects. This loss of human control and judgement in the use of force and weapons raises serious concerns from humanitarian, legal and ethical perspectives.

The process by which autonomous weapon systems function:

- **Brings risks of harm for those affected by armed conflict, both civilians and combatants**, as well as dangers of conflict escalation;
- **Raises challenges for compliance with international law**, including international humanitarian law, notably, the rules on the conduct of hostilities for the protection of civilians;
- **Raises fundamental ethical concerns for humanity**, in effect substituting human decisions about life and death with sensor, software and machine processes.

**The International Committee of the Red Cross’s recommendations to States for the regulation of autonomous weapon systems**

The International Committee of the Red Cross (ICRC) has, since 2015, urged States to establish internationally agreed limits on autonomous weapon systems to ensure civilian protection, compliance with international humanitarian law, and ethical acceptability.

With a view to supporting current efforts to establish international limits on autonomous weapon systems that address the risks they raise, the **ICRC recommends that States adopt new legally binding rules**. In particular:

1. **Unpredictable autonomous weapon systems should be expressly ruled out**, notably because of their indiscriminate effects. This would best be achieved with a prohibition on autonomous weapon systems that are designed or used in a manner such that their effects cannot be sufficiently understood, predicted and explained.

2. In light of ethical considerations to safeguard humanity, and to uphold international humanitarian law rules for the protection of civilians and combatants hors de combat, **use of autonomous weapon systems to target human beings should be ruled out**. This would best be achieved through a prohibition on autonomous weapon systems that are designed or used to apply force against persons.

3. In order to protect civilians and civilian objects, uphold the rules of international humanitarian law and safeguard humanity, **the design and use of autonomous weapon systems that would not be prohibited should be regulated**, including through a combination of:
   - **Limits on the types of target**, such as constraining them to objects that are military objectives by nature;
   - **Limits on the duration, geographical scope and scale of use**, including to enable human judgement and control in relation to a specific attack;
ICRC position on autonomous weapon systems

- **limits on situations of use**, such as constraining them to situations where civilians or civilian objects are not present;
- **requirements for human–machine interaction**, notably to ensure effective human supervision, and timely intervention and deactivation.

The ICRC supports initiatives by States aimed at establishing international limits on autonomous weapon systems that aim at effectively addressing concerns raised by these weapons, such as efforts pursued in the Convention on Certain Conventional Weapons to agree on aspects of a normative and operational framework. Considering the speed of development in autonomous weapon systems’ technology and use, it is critical that internationally agreed limits be established in a timely manner. Beyond new legal rules, these limits may also include common policy standards and good practice guidance, which can be complementary and mutually reinforcing. To this end, and within the scope of its mandate and expertise, the ICRC stands ready to work in collaboration with relevant stakeholders at international and national levels, including representatives of governments, armed forces, the scientific and technical community, and industry.

ِGeneva, 12 May 2021

**Background paper**

1. International discussions on autonomous weapon systems

International discussions on the humanitarian, legal and ethical concerns raised by autonomous weapon systems (AWS) have spanned the past decade. These include the work of High Contracting Parties to the Convention on Certain Conventional Weapons (CCW), which have discussed AWS since 2014, in a formal Group of Governmental Experts (GGE) on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems since 2016.

In 2019, the High Contracting Parties to the CCW agreed to work towards consensus recommendations on “aspects of the normative and operational framework” on AWS while adopting eleven Guiding Principles reflecting agreement to date. During 2020 many States elaborated on their understanding of these principles in national commentaries submitted to the GGE and during deliberations at the GGE’s September 2020 meeting. This demonstrated increasing convergence of views among States, as noted by consecutive GGE chairpersons during, and following, the 2020 meeting. The GGE is due to hold

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2 UN, Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems: Commonalities in National Commentaries on Guiding Principles, CCW/GGE.1/2020/WP.1, 26 October 2020; UN, Group of Governmental Experts on Emerging Technologies in the Area of Lethal
further sessions in 2021 in advance of the Sixth Review Conference of the CCW—a key moment in States Parties’ response to concerns raised by AWS.

The International Committee of the Red Cross (ICRC) first publicly drew attention to its concerns about AWS in 2011. **Since 2015, the ICRC has been calling on States to urgently establish internationally agreed limits on AWS** to respond to the rapid developments toward expanding the use of AWS, and the humanitarian, legal and ethical concerns they raise. The ICRC has subsequently made proposals to States on the general types of limit on AWS needed—in particular in terms of predictability, types of target, duration and scope of use, situations of use, and human supervision—most recently in the ICRC’s commentary on the CCW GGE’s Guiding Principles. Thus far, the ICRC has left open the question of whether these limits should take the form of new legally binding rules, policy standards or shared practices.

The ICRC’s position and its recommendations to States are based on its analyses of associated humanitarian, legal, ethical, technical and military implications of AWS, and insights published in a series of reports, such as the June 2020 report *Limits on Autonomy in Weapon Systems: Identifying Practical Elements of Human Control*, jointly published with the Stockholm International Peace Research Institute (SIPRI), and regular engagement with States and experts at the CCW and bilaterally.

On that basis, the ICRC can now **provide more detailed recommendations on what specific limits on AWS are needed** to ensure civilian protection, compliance with international humanitarian law (IHL) and ethical acceptability. Furthermore, the **ICRC is convinced that these limits should take the form of new legally binding rules that specifically regulate AWS.** These rules should clarify how existing rules of international law, including IHL, constrain the design and use of AWS, and supplement the legal framework where needed, including to address wider humanitarian risks and fundamental ethical concerns raised by AWS.

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The negotiation of new legally binding rules on AWS and other efforts to develop aspects of an operational and normative framework under consideration in the CCW GGE\textsuperscript{5} can be complementary and mutually reinforcing. Such efforts may include initiatives aimed at effectively addressing concerns raised by AWS by way of international commitments agreed among States in a political declaration, the elaboration of international technical standards on testing, validation or verification, as well as national moratoria on the development or procurement of AWS, and measures to support domestic implementation of internationally agreed limits, including in military doctrine and other guidance.

2. Current and emerging autonomous weapon systems

The ICRC understands AWS to be weapons that select and apply force to targets without human intervention. After initial activation or launch by a person, an AWS self-initiates or triggers a strike in response to information from the environment received through sensors and on the basis of a generalized “target profile” (technical indicators function as a generalized proxy for a target).

In simple terms, AWS are weapons that fire themselves when triggered by an object or person, at a time and place that is not specifically known, nor chosen, by the user. Indeed, the distinction between a non-AWS and an AWS can be understood by asking whether a person chooses the specific target(s) to strike or not.\textsuperscript{6} This process of applying force is a feature that could be implemented with a wide variety of weapon systems, platforms and munitions, especially unmanned systems that are presently remote-controlled.

Some AWS are already in use for specific tasks in narrowly defined circumstances, for example: air defence systems used on board warships or at military bases to strike incoming missiles, rockets or mortars; “active protection” weapons used on tanks to strike similar types of incoming munitions; loitering weapons with autonomous modes used against radars and possibly vehicles; and certain missiles and sensor-fused munitions used for example against warships and tanks. Mines have also been described as crude AWS.\textsuperscript{7} According to proponents, AWS offer several potential military benefits over directly controlled and remote-controlled weapon systems, including:


- **Increased speed in targeting**: accelerating the process of detecting, tracking and applying force to targets. This provides a military advantage but risks loss of control over the use of force, and escalation.

- **Automated area denial**: AWS can deny adversaries access to or passage through areas without requiring the presence of soldiers or constant monitoring. This is a similar military rationale to laying minefields.

- **Continuing an attack when communications are denied**: Remote-controlled armed drones (air/land/sea) rely on communication links for the operator to trigger a strike but are vulnerable to communications being jammed, cut or hacked. AWS could operate without communications.

- **Operating in greater numbers, including swarms**: Since AWS remove operator involvement in individual strikes, they facilitate greater numbers of unmanned armed systems being deployed with fewer human resources than required for remote-controlled systems.

Some proponents also claim they are pursuing AWS to enable greater precision and/or accuracy in targeting compared to using directly controlled or remote-controlled weapons (non-AWS). AWS actually weaken precision and accuracy because of the shift to a more generalized decision-making in targeting, with less knowledge about the eventual target(s), and the precise timing and/or location of the resulting application(s) of force. Constraining AWS, however, does not prevent militaries from using new technologies to ensure greater precision and accuracy in targeting.

Another common argument put forward by proponents is that the use of AWS will be “better than humans” for compliance with IHL. However, to evaluate the risks posed by AWS, we need not compare humans and AWS. Rather, we need to compare (a) the consequences of humans using non-AWS against targets they choose with (b) the consequences of humans using AWS against targets they do not choose specifically. Whatever challenges human decision makers face today in anticipating and constraining the effects of their attacks in accordance with IHL, these are exacerbated, not reduced, by AWS due to the process by which AWS function.

Existing military practice in the use of AWS is characterized by strict limits that can help avoid risks for civilians and “friendly forces” and facilitate compliance with IHL, and that are likely influenced by ethical considerations. These include limits on:

- **Targets**: AWS are generally used to target military objects such as projectiles, aircraft, naval vessels, military radars, tanks or other military vehicles. To the ICRC’s knowledge, there are no anti-personnel AWS in use (except anti-personnel landmines whose use is prohibited by the Anti-Personnel Mine Ban Convention and regulated by the CCW Amended Protocol II).

- **Duration and geographical scope of use**: The majority of AWS are in autonomous mode for short periods only, and many are not mobile but rather fixed in place.

- **Situations of use**: The majority of AWS are used only in situations where civilians and civilian objects are not present, or measures are taken (e.g.
barriers, warning signs, exclusion zones) to exclude the presence of civilians in the area where the AWS operates.

- **Human–machine interaction:** Almost all AWS are supervised in real time by a human operator that can intervene to authorize, override, veto or deactivate the weapon as needed.

However, the expanding infrastructure of weapon systems that could become future AWS is vast, ranging from hand-held armed quadcopters with facial recognition to autonomous combat aircraft, from “sentry guns” to autonomous tanks, and from armed speedboats to autonomous ship-hunting underwater drones. It includes networks of connected systems, where software for target identification and selection may trigger separate weapons, and autonomous cyber weapons.

Many remote-controlled systems can already **identify, track or select** targets autonomously and it is only a small investment—a software upgrade or even just a change of doctrine—for these systems to **apply force** autonomously. This could also occur due to a malfunction or deliberate hacking of the weapon. For example, remote-controlled “sentry guns” deployed at certain borders and military bases are used to autonomously **select** human targets. To the ICRC’s knowledge, users must still specifically authorize the application of force by remote control, although commercial developers have already offered AWS versions.

Current trends in military interest and investments indicate that, without internationally agreed limits, future AWS may be:

- increasingly reliant on artificial intelligence and machine learning software, raising concerns about unpredictability by design
- used to target people and a greater variety of objects
- increasingly mobile and used over wider areas for longer periods, carrying out multiple strikes
- used in cities and towns where civilians would be most at risk
- used without effective human supervision, timely intervention or deactivation.

These trends are not limited to well-resourced States but are a feature of current rapid military technology and doctrinal developments, and proliferation among States and non-State armed groups. All these trends dramatically exacerbate the humanitarian, legal and ethical concerns outlined in the next section. They highlight the urgency of reaching international agreement on new legally binding rules on AWS as well as other aspects of a normative and operational framework on AWS under consideration in the CCW GGE.

### 3. Limits needed on autonomous weapon systems

The process by which AWS function leads to a loss of human control and judgement over the use of force and weapons, raising serious concerns from humanitarian, legal and ethical perspectives. Generally, the use of AWS introduces a significant increase
in risk to those affected by armed conflict, by undermining civilian protection, challenging the rule of law and raising concerns under the principles of humanity.

AWS, as a means of warfare, must be capable of being used and must be used in accordance with IHL. The requirements under the IHL rules on the conduct of hostilities must be fulfilled by the users of an AWS, not by the weapon itself. It is parties to armed conflict – ultimately, human beings – who are responsible for applying IHL and who can be held accountable for violations. However, the process by which AWS function poses a challenge for compliance with these IHL rules.

3.1 Addressing concerns about unpredictability in autonomous weapon systems

Humanitarian concerns

A degree of unpredictability is inherent in the effects of using all AWS due to the fact that the user does not choose, or know, the specific target(s), and the precise timing and/or location of the resulting application(s) of force. This brings risks of harm for those affected by armed conflict, serious challenges in applying IHL, and dangers of conflict escalation.

The trends identified in section 2 (specifically, the use of AWS against a wider range of targets; over longer durations and wider areas; in more dynamic, congested and complex environments; and with reduced human involvement) will increase the unpredictability of AWS effects, and therefore the risks for civilians.

In addition, the development of AWS controlled by artificial intelligence, and especially machine learning software, introduces an additional dimension of unpredictability at the design level. Machine learning techniques make it extremely difficult for humans to understand and, therefore, to predict and explain the process by which an AWS functions (the “black-box” challenge), irrespective of its environment of use.

International humanitarian law concerns

Unpredictability in AWS poses a fundamental challenge to IHL. Customary IHL prohibits weapons that are by nature indiscriminate, that is, weapons that in their normal or expected circumstances of use, which cannot be directed at a specific military objective or whose effects cannot be limited as required by IHL.

Certain AWS would be inherently indiscriminate and, thus, prohibited under existing IHL. These would include, notably, AWS whose effects, in their

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normal or expected circumstances of use, could not be sufficiently understood, predicted and explained. For instance, if humans responsible for the use of an AWS could not reasonably anticipate what would trigger an AWS strike, they could not control and limit its effects as required by IHL, nor could they explain why a particular person or object was struck in a manner that would allow holding perpetrators of IHL violations to account.

Specifically, if an AWS functioning is opaque, then humans responsible for the application of IHL rules—both persons entrusted with the legal review of an AWS and persons responsible for compliance with IHL during its use—could not reasonably determine its lawfulness under IHL. The functioning could be opaque notably due to reliance on artificial intelligence and machine learning techniques, or because it changes during use in a way that affects the use of force (e.g. machine learning enables changes to targeting parameters over time).

**ICRC recommendation: Ruling out unpredictable autonomous weapon systems**

In light of this analysis, unpredictable AWS should be expressly ruled out, notably because of their indiscriminate effects: the user cannot know whether they will target civilians or combatants, civilian or military objects or whether their effects will be limited as required by IHL. This could best be achieved with a prohibition on AWS that are designed or used in a manner such that their effects cannot be sufficiently understood, predicted and explained.

This prohibition would build on the recognition by States of the need for sufficient predictability in the use of AWS for compliance with IHL and for practical military operational reasons. Such a prohibition would find support in the general agreement that inherently indiscriminate weapons are prohibited under existing IHL. A treaty-based prohibition on unpredictable AWS would also help clarify which AWS would be deemed indiscriminate.

### 3.2 Addressing concerns raised by the use of autonomous weapon systems against persons

Particular ethical concerns and legal challenges also arise with AWS that are designed or used to target persons, as highlighted previously by the ICRC\(^\text{11}\) and others.

**Ethical concerns**

The process by which AWS function raises fundamental ethical concerns for humanity, in effect substituting human decisions about life and death with sensor, software and machine processes. In sum, most agree that an algorithm—a machine process—should not determine who lives or dies, even though it is not always explicit whether this concern should rule out: all AWS, AWS that endanger humans, or only AWS that target humans directly.

These concerns have been raised by many States, the United Nations Secretary-General, civil society and leading figures in the technology industry and scientific community.

These concerns centre on the interrelated loss of human agency, moral responsibility and human dignity in life-and-death decisions. Humans have moral agency and responsibilities that guide their decisions and actions, whereas inanimate objects (e.g. weapons, machines and software) do not. This remains the case regardless of the “sophistication” of an AWS.

Preserving human agency requires effective human deliberation. Without this it can be said that there has not been morally responsible decision-making, nor recognition of the human dignity of those targeted or affected. Removing human agency is a dehumanizing process that undermines a shared sense of humanity. In decisions about life and death, it also removes the possibility for restraint, a human quality that means people may decide not to use force even if it would be lawful.

In the view of the ICRC, these ethical concerns apply to AWS that endanger human beings and they are most acute with AWS designed or used to target persons directly (as opposed to AWS that target unmanned military objects such as missiles). The latter would facilitate death and injury based on a generalized target profile, where human life is reduced to sensor data and machine processing. It would effectively amount to “death by algorithm” – the final frontier in the automation of killing.

International humanitarian law concerns

From a legal perspective, AWS pose a real risk of harm to persons protected under IHL. In particular, the use of AWS to target human beings entails a

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16 V. Boulanin, N. Davison, N. Goussac and M. Peldán Carlsson, Limits on Autonomy in Weapon Systems: Identifying Practical Elements of Human Control, ICRC & SIPRI, June 2020, p. 14: “Fundamental ethical concerns do appear to be heightened in situations where AWS are used to target humans, and in situations where there are incidental risks for civilians (though such concerns could also be raised in relation to inhabited military targets, such as military aircraft, vehicles and buildings).”; ICRC, Ethics and Autonomous Weapon Systems: An Ethical Basis for Human Control?, 3 April 2018, p. 22: “The combined and interconnected ethical concerns about loss of human agency in decisions to use force, diffusion of moral responsibility and loss of human dignity could have the most far-reaching consequences, perhaps precluding the development and use of anti-personnel autonomous weapon systems, and even limiting the applications of anti-materiel systems, depending on the risks that destroying materiel targets present for human life.”
significant risk that protected civilians and combatants hors de combat may trigger an AWS strike.

Effectively protecting combatants/fighters who are placed hors de combat and civilians who are not, or no longer, taking a direct part in hostilities calls for difficult and highly contextual, conduct-, intent- and causality-related legal assessments by humans in the context of a specific attack. Two interrelated challenges make it difficult to envisage how anti-personnel AWS could be used lawfully under IHL. First, the ways in which a civilian might take part in hostilities are extremely diverse, as are the ways in which a combatant, or a civilian taking part in hostilities, may surrender or react to being wounded; a determination of whether a person is protected against attack, or is a lawful target, is therefore highly contextual and does not lend itself to being standardized in a target profile. Second, these legal characterizations can change quickly, meaning that an assumption about the targetability of persons within an AWS area of operation made by a commander upon launching an attack are subject to change before the AWS strikes. The legal protection of persons from attack varies more easily depending on the circumstances compared to objects that are military objectives by nature (see section 3.3 below).

In today’s combat situations, increasingly involving fighting in the midst of urban areas – dynamic and congested places – compliance with the principle of distinction and rules protecting combatants hors de combat already presents formidable challenges. The introduction of AWS to target persons can only increase these challenges. In the view of the ICRC, it is difficult to envisage realistic combat situations where AWS use against persons would not pose a significant risk of IHL violations.

ICRC recommendation: Ruling out anti-personnel autonomous weapon systems

In light of ethical considerations to safeguard humanity, and to uphold IHL rules for the protection of civilians and combatants hors de combat, use of AWS to target human beings should be ruled out. This would best be achieved through a prohibition on AWS that are designed or used to apply force against persons.

Such a prohibition is grounded in present practice, where AWS are not yet used to target humans directly. It also finds support in concerns expressed by many States, scientists, philosophers, human rights specialists, civil society, and the public at large, that humans must not delegate life-and-death decisions to machines.

The prohibition of anti-personnel landmines in the Anti-Personnel Mine Ban Convention provides a precedent for excluding AWS that are triggered by persons. The recommended prohibition of anti-personnel AWS will draw an important normative line.

3.3 Addressing concerns raised by other autonomous weapon systems

The use of any AWS must comply with IHL rules aimed at protecting civilians and civilian objects during the conduct of hostilities, notably, the principle of distinction,
the prohibitions of indiscriminate and disproportionate attacks and the obligation to take all feasible precautions in attack. Use of AWS raises humanitarian, legal and ethical concerns even in situations other than those discussed above and for which the ICRC recommends a prohibition.

**Humanitarian, legal and ethical concerns**

AWS use carries a risk that determinations made by the AWS user upon launching an attack are invalidated by a change of circumstances, including determinations about whether the objects the AWS will strike are military objectives and about the proportionality of attack. This risk is heightened, *inter alia*, when targeting objects whose legal characterization as military objectives is subject to rapid change, by a longer duration of an AWS attack, a larger area over which the AWS operates, a higher number of strikes it can conduct, and a more dynamic, congested or complex operating environment. Whereas existing AWS are generally designed and employed in a manner that tries to minimize these risks and facilitate compliance with IHL, the **trends of AWS development identified in section 2 all point in the direction of increased risk** in these respects.

These trends also increase the risk that AWS users would not be in a position to recognize changed circumstances that warrant the suspension of an attack, and that they would be unable to intervene in time to prevent adverse humanitarian consequences and violations of IHL.

Viewed against the backdrop of the evolution of contemporary armed conflict, including the increase of warfare in urban settings, **unfettered AWS design and use bring significant humanitarian risk and risk of violations of IHL.**

**Types of measure used to attenuate risks in present practice**

**Mutually reinforcing humanitarian, legal, ethical and military operational rationales strictly limit AWS design and use in present practice** and provide examples of the types of limit on AWS needed to allow the exercise of sufficient human control and judgement over the use of force, and to attenuate the risks highlighted above. **This is done through a combination of technical and doctrinal limits:**

- **Targets pursued with AWS are generally limited to objects whose legal qualification as a military objective is relatively stable, namely military objectives by nature**, such as projectiles, military radar, or military naval vessels. The legal determination of whether other objects are military objectives (e.g. buildings or vehicles can become military objectives if used for military action by the adversary\(^\text{17}\)) is typically highly dependent on the circumstances, and can therefore differ between physically similar objects in the AWS area of operation (e.g. identical vehicles being used by civilians and

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by military) and vary quickly between the launch of an attack and an AWS strike (e.g. the adversary having stopped using, at the time of the AWS strike, a civilian vehicle they had been using for military action at the time of the AWS launch).

- **The use of AWS is generally limited in space, time and scale of force.** Limits pertain to the area within which an AWS may apply force, the duration of operation, and the scale or number of strikes it may conduct. These limits aim to enable AWS users to have the necessary situational awareness to anticipate the effects of an attack and be reasonably certain upon launching the attack that it will comply with IHL. These limits also reduce the risk that circumstances may change during an attack and facilitate supervision during the operation of the AWS.

- **AWS are generally used in places where civilians and civilian objects are not present.** The higher the number of civilians and civilian objects within the area where an AWS can apply force, the higher the risk of harm to civilians. First, civilian objects such as cars or buses might trigger an AWS whose target profile is meant to capture military jeeps or personnel carriers. Second, civilians and civilian objects may also be harmed incidentally if they are in or near a military objective (such as a military jeep or personnel carrier).

  These risks can be more easily managed in a situation where civilians and civilian objects are not present, e.g. on the high seas far from shipping lanes or fishing areas, or an area from where they can effectively and legitimately be excluded (e.g. through fencing off a military compound or an air exclusion zone). By contrast, use of an AWS in a dynamic, congested or complex civilian environment, such as a city or town, can put civilians at a significant risk of harm. In such environments, concern about compliance with IHL rules for the protection of civilians is heightened. So are ethical concerns about loss of human life as a result of machine processes or calculations in the use of AWS that accidentally or incidentally endanger persons even if they are not directly targeted.

- **AWS are generally used under constant human supervision and with the option of deactivation.** Measures taken in the design and use of AWS (including the limits discussed above on targets, time and space, scale of force and situations of use) serve to enable real-time situational awareness and to safeguard a practical possibility for AWS users to intervene and deactivate an AWS if need be.

There is a risk that the trends identified in section 2, especially increasing speed, scale, and reliance on artificial intelligence and machine learning to control the selection and application of force to targets, will reduce human operators’ capacity to make sense of information received, meaningfully deliberate on their choices and take timely action in line with humanitarian, legal and ethical principles. This, in turn, would reduce the prospect of holding AWS operators to account for harm done and violations of IHL.
ICRC recommendation: Regulation of other autonomous weapon systems

In light of this analysis, **the design and use of AWS that would not be prohibited should be regulated** to avoid harm to civilians and civilian objects, uphold the rules of IHL and safeguard humanity, including through a combination of legally binding:

- **limits on the types of target**, such as constraining them to objects that are military objectives by nature
- **limits on the duration, geographical scope and scale of use**, including to enable human judgement and control in relation to a specific attack
- **limits on situations of use**, such as constraining them to situations where civilians or civilian objects are not present
- **requirements for human–machine interaction**, notably to ensure effective human supervision, and timely intervention and deactivation.

4. Conclusions and summary of the ICRC’s recommendations to states

In the view of the ICRC, new legally binding rules are urgently needed to address the humanitarian, legal and ethical concerns raised by AWS that have been highlighted by many States, civil society and the ICRC.

With a view to supporting current efforts to establish international limits on AWS that address the risks they raise, the **ICRC recommends that States adopt new legally binding rules**. In particular:

1. **Unpredictable AWS should be expressly ruled out**, notably because of their indiscriminate effects. This would best be achieved with a prohibition on AWS that are designed or used in a manner such that their effects cannot be sufficiently understood, predicted and explained.

2. In light of ethical considerations to safeguard humanity, and to uphold IHL rules for the protection of civilians and combatants *hors de combat*, **use of AWS to target human beings should be ruled out**. This would best be achieved through a prohibition on AWS that are designed or used to apply force against persons.

3. In order to protect civilians and civilian objects, uphold the rules of IHL and safeguard humanity, **the design and use of AWS that would not be prohibited should be regulated**, including through a combination of:
   - **limits on the types of target**, such as constraining them to objects that are military objectives by nature
   - **limits on the duration, geographical scope and scale of use**, including to enable human judgement and control in relation to a specific attack
   - **limits on situations of use**, such as constraining them to situations where civilians or civilian objects are not present
   - **requirements for human–machine interaction**, notably to ensure effective human supervision, and timely intervention and deactivation.
Consistent with the ICRC’s long-standing role to prepare the development of IHL, including specific prohibitions and restrictions on weapons, these recommendations aim to uphold humanitarian principles and strengthen IHL in response to challenges raised by the application of science and technology developments to AWS as means and methods of warfare.

In the view of the ICRC, existing IHL rules do not hold all the answers to the humanitarian, legal and ethical questions raised by AWS. New rules are needed to clarify and specify how IHL applies to AWS, as well as to address wider humanitarian risks and fundamental ethical concerns. New legally binding rules would offer the benefits of legal certainty and stability. The ICRC is concerned that without such rules, further developments in the design and use of AWS may give rise to practices that erode the protections presently afforded to the victims of war under IHL and the principles of humanity.

The ICRC offers its recommendation to all States with a view to supporting both national policy development and current international efforts to address the risks posed by AWS, including the work of the CCW GGE to agree aspects of the normative and operational framework on AWS.

The ICRC is encouraged that many States recognize the need for international limits on AWS, with many having already called for new legally binding rules, and others more generally for internationally agreed limits along similar lines to those proposed by the ICRC. The ICRC also acknowledges that diverse views remain on where, and in what form, limits on AWS should be drawn, and that some States consider that national measures are sufficient to address AWS.

Against this backdrop, the ICRC intends with these recommendations to contribute to building shared understandings and fostering progress towards the establishment of effective internationally agreed limits on AWS. The ICRC is looking forward to further discussion with States on these recommendations, including to elaborate what exactly would fall under the purview of the proposed prohibitions and regulations.

Within the scope of its mandate and expertise, the ICRC will continue to engage with all interested stakeholders and to support initiatives that aim to contribute to limits on AWS that effectively and in a timely manner address the concerns it has raised, including efforts within the framework of the CCW to agree on aspects of the normative and operational framework, such as a political declaration, common policy standards or good practice guidance. To this end, the ICRC stands ready to work in collaboration with relevant stakeholders at international and national levels, including representatives of governments, armed forces, the scientific and technical community, and industry.

The potential human cost of the use of weapons in outer space and the protection afforded by international humanitarian law

Position paper submitted by the International Committee of the Red Cross to the Secretary-General of the United Nations on the issues outlined in General Assembly Resolution 75/36, 8 April 2021

I. Introduction

1. The use of weapons in outer space – be it through kinetic or non-kinetic means, using space- and/or ground-based weapon systems – could have significant impacts
on civilians on earth. This is because technology enabled by space systems permeates most aspects of civilian life, making the potential consequences of attacks on space systems a matter of humanitarian concern.

2. This matter is of direct relevance to the issues outlined in Resolution 75/36 “Reducing space threats through norms, rules and principles of responsible behaviours” adopted by the United Nations (UN) General Assembly on 7 December 2020 (hereinafter “the Resolution”). The Resolution notably:

- “[e]ncourages Member States to study existing and potential threats and security risks to space systems, including those arising from actions, activities or systems in outer space or on Earth, characterize actions and activities that could be considered responsible, irresponsible or threatening and their potential impact on international security, and share their ideas on the further development and implementation of norms, rules and principles of responsible behaviours and on the reduction of the risks of misunderstanding and miscalculations with respect to outer space;”

- “[r]equests the Secretary-General … to seek the views of Member States on the issues … and to submit a substantive report, with an annex containing these views, to the General Assembly … for further discussion by Member States”.

3. In line with its humanitarian mission and mandate, the International Committee of the Red Cross (ICRC) submits this position paper to the Secretary-General to contribute its expertise to the discussion. The paper lays out the potential human cost of the use of weapons in outer space (section II) and the existing limits to such use under international law (section III). It concludes with recommendations that States and the Secretary-General’s report are invited to consider in this regard (section IV).

II. Potential human cost of the use of weapons in outer space

4. The human cost of using weapons in outer space that could disrupt, damage, destroy or disable civilian or dual-use space objects is likely to be significant. For example:

- Critical civilian infrastructure needed for health care, transportation, communications, energy and trade is increasingly dependent on space systems. These space systems are often “dual use”, i.e. they perform both military and civilian functions. For instance, global navigation satellite systems (e.g. GPS, Beidou, Galileo and GLONASS) play an essential role in civilian transport systems, such as air traffic controls and maritime shipping.

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1 UN General Assembly, UN Doc. A/RES/75/36, 7 December 2020, para. 5.
2 Ibid, para. 6.
3 It is acknowledged that military operations against ground-based components of such space systems would also have humanitarian consequences and raise issues under international humanitarian law (IHL). However, they are not discussed in this paper.
They are also crucial for precise time synchronization of critical civilian infrastructure, such as global communication networks, banking systems, financial markets and power grids. These systems may also be used by the military, which could make them military objectives in specific circumstances. Disabling or damaging such satellites, through kinetic or non-kinetic means, could have wide-reaching consequences for civilians on earth.

- Space objects, particularly weather, communication, navigation, and earth observation/imaging satellites, contribute to every phase of humanitarian work, from needs assessment to emergency relief delivery, from early recovery to disaster and conflict risk reduction. Communication satellites enable first responders, medical personnel and humanitarian workers to communicate in times of natural disaster or armed conflict, when mobile phone networks and internet services may be dysfunctional. Weather satellites provide time-sensitive information to prevent or mitigate the impacts of severe weather events such as hurricanes. Navigation satellites can support logistics and provide low-cost and accurate real-time location tracking for personnel and large equipment necessary for the delivery of humanitarian assistance. And, earth observation satellites offer unique information and imagery for emergency mapping, risk assessment, and planning and implementation of humanitarian operations. Accordingly, disruption of satellite services would hinder the delivery of humanitarian and emergency relief.

- Lastly, space debris is already a growing concern. Physically damaging or destroying space objects could generate a huge amount of such debris, which may continue to travel in the orbits in which it is produced for decades or more. Given the speed at which it travels, it could damage or destroy in an unpredictable manner other space objects that support safety-critical civilian activities and essential civilian services on earth. Such risks are growing owing to the increased congestion in orbit, partly as a result of the increased launch of new satellites, including commercial satellites, in recent years. The use of weapons in space could multiply such risks exponentially.

5. The exact scope of the consequences of using weapons to disrupt, damage, destroy or disable space objects is uncertain and merits further analysis. In any case, if activities and services that are critical for civilians’ safety or essential to their survival rely on space objects, the use of weapons affecting these objects entails a risk of significant human cost on earth.

III. Existing limits under international law on the use of weapons and other military activities in outer space

6. Military use of space and space objects has been an integral part of contemporary warfare for several decades. For example, armed forces rely on satellite navigation systems to enable precision navigation and targeting; on satellites to enable global communications, including for command and control; and on space-based
monitoring systems that allow advance warnings of missile attacks, surveillance and reconnaissance.

7. As the role of space systems in military operations during armed conflict increases, the likelihood of these systems being targeted, whether it be their ground or space components or the link between them, also increases, with the potentially significant consequences for civilians described above. Possible threats to space systems include electronic warfare, cyber attacks, directed energy attacks and orbital-based and ground-based anti-satellite weapons.

8. Whatever military activities take place in outer space, they are constrained by existing international law, as the Resolution notably recalls. Relevant international law includes:

- The Outer Space Treaty, which recognizes the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes. Its Article IV prohibits the placement in orbit of objects carrying nuclear weapons or other weapons of mass destruction, the instalment of such weapons on celestial bodies and the stationing of such weapons in outer space in any other manner. The treaty also forbids the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies, and requires that the moon and other celestial bodies be used exclusively for peaceful purposes.

- The UN Charter, which governs the lawfulness of the resort to force between States and prohibits the threat or use of force, except as authorized by the UN Security Council under Chapter VII and in self-defence under Article 51. The UN Charter also mandates Member States to settle their international disputes by peaceful means.

- International humanitarian law (IHL), also known as the law of armed conflict or *jus in bello*, which, *inter alia*, establishes rules on the conduct of hostilities with the aim of limiting, for humanitarian reasons, the effects of armed conflict. It includes, in particular, the principle of distinction, the prohibition of indiscriminate and disproportionate attacks, and the obligation to take all feasible precautions to avoid, or at least to minimize, incidental civilian harm. In the ICRC’s view, these rules apply not only to kinetic operations.

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4 UN General Assembly, UN Doc. A/RES/75/36, 7 December 2020, preamble and para. 1.
5 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (1967), adopted by UN General Assembly Resolution 2222 (XXI), 19 December 1966.
6 The applicability of IHL in outer space is confirmed by Article III of the Outer Space Treaty, which requires States to “carry on activities in the exploration and use of outer space … in accordance with international law”. International law includes IHL. See also International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 86.
7 IHL rules on the conduct of hostilities are found primarily in the 1977 Protocols additional to the Geneva Conventions of 1949, as well as in customary law. The latter rules govern the choice of means and methods of warfare, however and wherever used; see Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, ICRC/Cambridge University Press, 2005, in particular Rules 1 to 24: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul. For the purposes of applying these rules, an “attack” is defined by IHL as an act of violence against the adversary, whether in offence or in
against space objects, but also to non-kinetic operations that would disable space objects without necessarily damaging them physically. When assessing the lawfulness of such attacks, all foreseeable direct and indirect incidental harm or damage to civilian objects must be considered, including when targeting a dual-use space object. The risk of creating debris and its indirect effects, as discussed in section II of this paper, should also be considered when applying these rules.\(^8\) IHL also prohibits weapons that are of a nature to cause superfluous injury or unnecessary suffering and that are indiscriminate by nature, as well as a number of specific types of weapon.

9. It is important to emphasize that IHL applies to any military operations conducted in the context of an armed conflict, including those occurring in outer space, regardless of whether the resort to force that triggered the armed conflict is lawful under the UN Charter (\textit{jus ad bellum}). IHL does not legitimize the use of force in outer space nor its militarization or weaponization. Despite the long-term desire of the international community to free outer space “from an arms race and conflict”, as is reiterated in the Resolution,\(^9\) in the event of armed conflict the sole aim of IHL is to preserve a measure of humanity, notably to protect civilians.

10. The International Court of Justice has recalled that the established principles and rules of IHL applicable in armed conflict apply “to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future”.\(^10\) In this respect, States party to the 1977 Additional Protocol I are required to review the legality of any new space weapon, means or method of warfare that they decide to develop or acquire—be it kinetic or not, space based or ground based—to ensure that its employment complies with IHL and other relevant rules of international law, including the Outer Space Treaty.\(^11\) All States have an interest in doing so to ensure that their armed forces are capable of conducting hostilities in accordance with their international obligations.\(^12\)

\textbf{IV. Conclusions and recommendations}

11. While space objects have been employed for military purposes since the dawn of the space era, the weaponization of outer space would increase the likelihood of hostilities in outer space, with potentially significant impacts for civilians on
earth. In this respect, the ICRC recommends that future national and multinational discussions and processes acknowledge:

- the potentially significant human cost for civilians on earth of the use of weapons in outer space
- the protection afforded by the IHL rules that restrict belligerents’ choice of means and methods of warfare, including in outer space, on the understanding that acknowledging the applicability of IHL neither legitimizes the weaponization of or hostilities in outer space, nor in any way encourages or justifies the use of force in outer space.

12. In particular, it would be beneficial for States to consider including in the study of “existing and potential threats and security risks to space systems”\textsuperscript{13} the potential humanitarian consequences of the weaponization of and use of weapons in outer space on civilian populations on earth. It is notably critical to consider in this respect the harmful impacts of directly or incidentally disrupting, damaging, destroying or disabling satellites that support safety-critical civilian activities and essential civilian services on earth.

13. For the protection of the civilian population and civilian infrastructure, the ICRC believes that any “common understanding of how best to act to reduce threats to space systems”\textsuperscript{14} among States should include recognizing that military operations in outer space do not occur in a legal vacuum but are constrained by existing law, notably the Outer Space Treaty, the UN Charter and IHL, including prohibitions and limitations on the use of certain weapons, means and methods of warfare.

14. As with the development of any new means or methods of warfare, the weaponization of outer space is not inevitable but a choice. States may decide to set limits in this regard for a range of reasons, including humanitarian ones. Nothing prevents States from agreeing on additional rules to prohibit or limit specific military activities or weapons in outer space, as they did in the Outer Space Treaty, in light of the risks of significant civilian harm. This includes the further development of “norms, rules and principles of responsible behaviours” to reduce space threats, as referred to in the Resolution.\textsuperscript{15} If new norms, rules and principles of responsible behaviours are developed, they must be consistent with and should build on and strengthen the existing legal framework.

15. The ICRC is grateful for the opportunity to share its views through this position paper. It also stands ready to lend its expertise to any future discussion on this matter, as States deem appropriate.

\textsuperscript{13} UN General Assembly, UN Doc. A/RES/75/36, 7 December 2020, para. 5.
\textsuperscript{14} \textit{Ibid.} para. 3.
\textsuperscript{15} \textit{Ibid.} para. 5.
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Non-State armed groups

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