

# The legal protection of persons living under the control of non-State armed groups

**Tilman Rodenhäuser\***

Tilman Rodenhäuser is a Legal Adviser at the International Committee of the Red Cross.

## 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.<sup>1</sup> 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”.<sup>2</sup> 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.<sup>3</sup> Moreover, they destroyed several mausoleums in Timbuktu, which the new “government” considered to be against its interpretation of Islam.<sup>4</sup>

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.<sup>5</sup> In many cases, and for a variety of reasons, NSAGs perform some form of governance in these territories.<sup>6</sup> 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.
- 2 ICC, *Prosecutor v. Ahmad al Faqi al Mahdi*, Case No. ICC-01/12-01/15, Judgment, 27 September 2016, para. 31.
- 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.
- 5 For additional examples, see Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018 pp. 3, 185–187 for *de facto* control over territory, 164–169; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Studies in International Law, Hart Publishing, Oxford, 2016, pp. 2–7.
- 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.<sup>7</sup> 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”.<sup>8</sup> 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’”.<sup>9</sup>

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”.<sup>10</sup> 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.<sup>11</sup> 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

7 See Internal Security Forces (Assayesh) in Northeast Syria, “Self-Administration COVID-19 Response”, found on Geneva Call’s COVID-19 Armed Non-State Actors’ Response Monitor, available at: [www.genevacall.org/covid-19-armed-non-state-actors-response-monitor/](http://www.genevacall.org/covid-19-armed-non-state-actors-response-monitor/) (all internet references were accessed in July 2021).

8 Human Rights Watch, “Colombia: Armed Groups’ Brutal Covid-19 Measures”, 15 July 2020, available at: [www.hrw.org/news/2020/07/15/colombia-armed-groups-brutal-covid-19-measures](http://www.hrw.org/news/2020/07/15/colombia-armed-groups-brutal-covid-19-measures).

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-enough#Colomb](http://www.icrc.org/en/document/as-if-war-was-not-enough#Colomb).

10 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, p. 52, available at: [www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts](http://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts).

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”,<sup>12</sup> “highly controversial”<sup>13</sup> and “contested as a matter of international law”.<sup>14</sup>

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.<sup>15</sup> Among these armed groups, in 2020 more than 100 could be legally classified as parties to a NIAC by the ICRC.<sup>16</sup> In this article, such non-State parties to armed conflicts are referred to as NSAGs.<sup>17</sup> Importantly, while they must share certain features to be considered sufficiently organized to be party to a NIAC,<sup>18</sup> 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.<sup>19</sup> This includes a spectrum of groups, ranging from those that exercise somewhat fluent control

12 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 517.

13 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 530; Marco Sassòli, “L’administration d’un territoire par un groupe armé, peut-elle être régie par le droit?”, in Michel Hottelier, Maya Hertig Randall and Alexandre Flückiger (eds), *Études en l’honneur du Professeur Thierry Tanquerel*, Schulthess, Geneva, 2019, p. 271.

14 Human Rights Council, *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, UN Doc. A/HRC/17/44, 12 January 2012, para. 62.

15 See ICRC, *The Roots of Restraint in War*, Geneva, 2018, p. 13.

16 See Jelena Pejic, Irénée Herbert and Tilman Rodenhäuser, “ICRC Engagement with Non-State Armed Groups: Why and How”, *Humanitarian Law and Policy Blog*, 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/03/04/icrc-engagement-non-state-armed-groups/>.

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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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”.<sup>23</sup> 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”.<sup>24</sup>

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

20 ICC, *Al Mahdi*, above note 2, para. 31.

21 For in-depth legal analysis on when a situation reaches the threshold of a NIAC, see ICRC, *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), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 404–414.

22 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”, *Journal of Conflict and Security Law*, Vol. 20, No. 1, 2015.

23 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.

24 ICRC, above note 10, p. 53.

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.<sup>25</sup>

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”.<sup>26</sup> 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.<sup>27</sup>

Other experts, however, have questioned whether IHL would apply to “governance” acts conducted by an NSAG in territory under its control.<sup>28</sup> 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.<sup>29</sup>

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.

26 Dieter Fleck, “The Law of Non-International Armed Conflict”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 605.

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.

28 See, for instance, Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict*, Oxford University Press, Oxford, 2014, p. 241; William Schabas, “Al Mahdi Has Been Convicted of a Crime He Did Not Commit”, *Case Western Reserve Journal of International Law*, Vol. 49, No. 1–2, 2017, pp. 97–98; Katharine Fortin, “The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control”, *Netherlands International Law Review*, Vol. 63, No. 2, 2016, pp. 172, 178; M. Sassòli, above note 13, p. 270.

29 See, for instance, Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017, pp. 47–51. As Heffes points out, proponents of human rights obligations of NSAGs have argued that there are two “protection gaps” which call for such obligations. First, there is arguably a “lack of IHL rules regulating certain issues of daily life” (this will be examined further in the section below entitled “IHL Provides Important – but Limited – Rules”); and second, “issues taking place in the everyday life of individuals with no nexus to the armed conflict fall outside the scope of IHL”. See Ezequiel Heffes, “International Human Rights Law and Non-State Armed Groups: The (De) Construction of an International Legal Discourse”, in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives*, Edward Elgar, forthcoming.

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.<sup>30</sup> 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.<sup>31</sup> 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”.<sup>32</sup> Reportedly, they progressively acquired “the trappings of pseudo-state institutions, including a police, courts and detention centres” until the conflict ended in 2009.<sup>33</sup> 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’”.<sup>34</sup> 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?

### *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*.

31 See ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, available at: [www.icrc.org/en/document/protracted-conflict-and-humanitarian-action](http://www.icrc.org/en/document/protracted-conflict-and-humanitarian-action)

32 Office of the UN High Commissioner for Human Rights (UN Human Rights), *Report of the OHCHR Investigation on Sri Lanka (OISL)*, UN Doc. A/HRC/30/CRP.2, 16 September 2015, para. 151.

33 *Ibid.*

34 UN Human Rights, *Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine, April 2014–April 2020*, 27 August 2020, para. 25.

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*.<sup>35</sup>

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.<sup>36</sup>

As a result, IHL treaty law and the jurisprudence of international tribunals make it clear that common Article 3, APII 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.<sup>37</sup> 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”.<sup>38</sup>

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.

35 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić AKA “Dule”*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 69–70 (emphasis added). This view is supported by the International Criminal Tribunal for Rwanda (ICTR), in ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Judgment (Trial Chamber), 1998, para. 636. This view has also been endorsed by the ICC; see ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute: Public with Annexes I, II, and A to F (Trial Chamber III), 21 March 2016, para. 128; ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (Pre-Trial Chamber II), 7 March 2014, paras 1172–1173.

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.

38 ICTY, *Tadić*, above note 35, para. 70. Two elements are commonly examined in this context: “The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organisation*.” ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, March 2008, p. 5. For an in-depth discussion on the threshold of application of IHL of NIAC, see ICRC Commentary on GC I, above note 12, paras 414–444; L. Moir, above note 21, pp. 404–414.

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”.<sup>39</sup> 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”.<sup>40</sup> 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”,<sup>41</sup> potentially introducing “a measure of formalism in a determination that should, first and foremost, be driven by facts on the ground”.<sup>42</sup>

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”.<sup>43</sup> 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”.<sup>44</sup>

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.

40 ICC, *Bemba*, above note 35, para. 141.

41 Rogier Bartels, “From Jus In Bello to Jus Post Bellum: When Do Non-International Armed Conflicts End?”, in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds), *Jus post bellum: Mapping the Normative Foundations*, Oxford University Press, New York, 2014, p. 301.

42 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2015, p. 10, available at: [www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf](http://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf).

43 ICTY, *Tadić*, above note 35, paras 69–70.

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.<sup>45</sup> 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”.<sup>46</sup> 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.<sup>47</sup>

### 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”.<sup>48</sup> 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.

46 Marko Milanovic, “The End of Application of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, p. 181.

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”.<sup>49</sup> 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”,<sup>50</sup> 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”.<sup>51</sup> 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”.<sup>52</sup> 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.<sup>53</sup> Yet surprisingly, no international treaty rule defines this nexus requirement.<sup>54</sup> 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.<sup>55</sup> 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.

52 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. 8, Geneva, 1974–77, p. 205 (emphasis added).

53 See ICRC Commentary on GC I, above note 12, para. 460; Gloria Gaggioli, “Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014, p. 514. The notion of “nexus” is discussed further in this section.

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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> 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

56 See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. 15, CDDH/III/SR.43, Geneva, 1974–77, p. 35 (US); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Vol. 15, CDDH/III/SR.44, Geneva, 1974–77, p. 49 (Canada). This interpretation is said to respect “the jurisdiction of the Parties to the conflicts for matters of their internal competence”. 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*, Martinus Nijhoff, Leiden, 2013, p. 517. See also Theodor Meron, “On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument”, *American Journal of International Law*, Vol. 77, No. 3, 2017, pp. 596–597.

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.<sup>60</sup> 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”.<sup>61</sup>

This broad conclusion has been challenged by reference to an arguably narrower scope of application found in some IHL rules.<sup>62</sup> 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”<sup>63</sup>). 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”,<sup>64</sup> this can also be taken to mean that the judicial guarantees as found in common Article 3 and in customary IHL only

60 Elvina Pothelet, “Life in Rebel Territory: Is Everything War?”, *Armed Groups and International Law*, 20 May 2020, available at: <https://armedgroups-internationallaw.org/2020/05/20/life-in-rebel-territory-is-everything-war/>. This argument is further developed in Elvina Pothelet, *Searching for the Nexus: A Proposal to Refine the Scope of Applicability of International Humanitarian Law and War Crimes Law*, 2021 (on file with the author).

61 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Vol. 8, CDDH/I/SR.22, Geneva, 1974–77, p. 201. In the view of Cassese, “a teleological interpretation of IHL and ICL may lead to the proper classification of the offence” (emphasis in original). Accordingly, he finds that “the aim of the whole corpus of rules of IHL is to safeguard as much as possible the life and limb of persons caught in the maelstrom of armed violence. ICL supports and enforces this aim, by providing for the prosecution and punishment of all those who, by their conduct, run counter to that aim and imperil persons involved in armed conflict”. Antonio Cassese *et al.*, “War Crimes”, in Antonio Cassese and Paola Gaeta (eds), *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, fn. 33.

62 See K. Fortin, above note 28, p. 178.

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.<sup>65</sup> 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”.<sup>66</sup>

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.<sup>67</sup>

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”.<sup>68</sup> 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”.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup>

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.<sup>72</sup>

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

70 ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1, Judgment (Appeals Chamber), 12 June 2002, para. 58; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment (Trial Chamber), 21 March 2016, para. 142; ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3436-tENG, Judgement (Trial Chamber), 7 March 2014, para. 1176. Note that these elements have been criticized for being overly broad and may permit different conclusions in similar situations. See Harmen van der Wilt, "War Crimes and the Requirement of a Nexus with an Armed Conflict", *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012.

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

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,<sup>73</sup> it is a relevant consideration for determining a link between an act and the conflict.<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup> 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

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.

75 For a similar conclusion with regard to the conduct of NSAGs in Timbuktu in 2012, see ICC, *Prosecutor v. Ahmad al Faqi al Mahdi*, Case No. ICC-01/12-01/15-66-Conf, version publique expurgée du “Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d'accusation dans l'affaire contre Ahmad al Faqi al Mahdi”, 17 December 2015, paras 258–261.

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”.

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”.<sup>77</sup> 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.<sup>78</sup> 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”.<sup>79</sup> Indeed, according to the IHL principle of equality of belligerents, “parties to an armed conflict have the same rights and obligations under IHL”.<sup>80</sup> 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”,<sup>81</sup> there are also examples of NSAGs developing various forms of (civilian) governance structures.<sup>82</sup> 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.<sup>83</sup> 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.

81 Zachariah Mampilly and Megan A. Stewart, “A Typology of Rebel Political Institutional Arrangements”, *Journal of Conflict Resolution*, Vol. 65, No. 1, 2020, p. 8.

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.<sup>84</sup> This conclusion is without prejudice to whether human rights law may, in practice, also be referred to.<sup>85</sup>

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.<sup>86</sup>

## **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”.<sup>87</sup> 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,<sup>88</sup> and IHL addresses several conflict-related humanitarian concerns that are likely to occur in territory held by armed groups.<sup>89</sup>

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.<sup>90</sup>

### *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.<sup>91</sup> 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.<sup>92</sup> Other areas in which IHL provides particular conflict-specific obligations for

87 Jaw Tu Hkawng, Emily Fishbein and Yuichi Nitta, “Myanmar’s Ethnic Conflicts Obstruct COVID-19 Aid to Minorities”, *Nikkei Asia*, 3 May 2020, available at: <https://asia.nikkei.com/Spotlight/Coronavirus/Myanmar-s-ethnic-conflicts-obstruct-COVID-19-aid-to-minorities>.

88 See 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 40, 52, 87–99, 103–104, 136, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

89 See *ibid.*, Rules 53–56, 99–102, 109–111, 118–129, 131–133.

90 For an excellent analysis of this point, see K. Fortin, above note 28, p. 169.

91 See, for example, ICRC Customary Law Study, above note 88, Rules 87–95, 98–103.

92 For IHL, see *ibid.*, Rules 38–40. For IHRL, see International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Art. 27; International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (entered into force 3 January 1976) (ICESCR), Art. 15.

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.<sup>93</sup>

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).<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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.<sup>97</sup>

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,<sup>98</sup> 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

93 For IHL rules on these issues, see ICRC Customary Law Study, above note 88, Rules 109–111, 95, 105. On education, see AP II, Art. 4(3)(a).

94 See ICCPR, Arts 16, 18, 19, 21–27; ICESCR, Arts 8–10, 15.

95 See ICCPR, Art. 2(3). With regard to reparations sought by individuals for IHL violations, see ICRC Customary Law Study, above note 88, Rule 150, discussion on “Reparation Sought Directly by Individuals”.

96 A rule that does require positive steps is, for example, the obligation of all parties to armed conflicts to collect and care for the wounded and sick. See common Article 3; ICRC Customary Law Study, above note 88, Rule 109.

97 See ICCPR, Art. 2.

98 See, for instance, Special Court of Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.

non-State armed groups' potential human rights obligations, and the relationship between these potential obligations and those of the territorial State".<sup>99</sup> 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.<sup>100</sup> 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".<sup>101</sup> 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.<sup>102</sup>

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

99 ICRC, above note 10, p. 54.

100 For a comprehensive analysis of relevant resolutions of the UN Security Council and UN General Assembly, see Jessica Burniske, Naz K. Modirzadeh and Dustin A. Lewis, *Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the UN Security Council and UN General Assembly*, Harvard School of Law Program on International Law and Armed Conflict, 2017, Annex II. For an overview and analysis of UN Human Rights Council practice, see Annysa Bellal, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, Academy In-Brief No. 7, Geneva Academy of International Humanitarian Law and Human Rights, 2016, Annex.

101 J. Burniske, N. K. Modirzadeh and D. A. Lewis, above note 100, p. 27.

102 A. Bellal, above note 100, p. 32.

103 For discussions of many such examples, see, for instance, Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", *International Committee of the Red Cross*, Vol. 88, No. 863, 2006. For more recent and comprehensive analyses of the issue, see D. Murray, above note 5; K. Fortin, above note 29; T. Rodenhäuser, above note 5; Jean-Marie Henckaerts and Cornelius Wiesener, "Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice", in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, Asser Press, The Hague, 2020. In 2021, a group of UN human rights experts stated jointly that "at a minimum, armed non-State actors exercising either government-like functions or *de facto* control over territory and population must respect and protect the human rights of individuals and groups". "Joint Statement by Independent United Nations Human Rights Experts on Human Rights Responsibilities of Armed non-State Actors", Geneva, 25 February 2021, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E).

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. Rodenhäuser, above note 5, pp. 169–177.

105 Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 16 August 2012, Annex II, para. 10; Human Rights Council, above note 14, para. 62; UN Human Rights, above note 34, para. 31. Indeed, only two human rights treaties address armed groups: the Optional Protocol to the Convention on the Rights of the Child on the Involvement of

rely on the idea that human rights obligations devolve with territory and bind NSAGs even if they only control part of a State's territory.<sup>106</sup> 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.<sup>107</sup> Outside UN organs, the present author is not aware of sufficient practice or *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.<sup>108</sup>

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.<sup>109</sup> In addition, there seems

Children in Armed Conflict, 25 May 2000; and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 23 October 2009.

106 See "Joint Statement", above note 103. For detailed discussions on the idea that human rights obligations devolve with territory, see T. Rodenhäuser, above note 5, pp. 173–176; K. Fortin, above note 29, pp. 275–276; D. Murray, above note 5, pp. 134–138.

107 In 2018 the International Law Commission concluded that the practice of non-State actors, including NSAGs, "is not practice that contributes to the formation, or expression, of rules of customary international law". International Law Commission, "Draft Conclusions on Identification of Customary International Law, with Commentaries", 2018, Conclusion 4, para. 3, para. 8 of the commentary to that conclusion. The question of whether the practice of NSAGs is relevant for the identification of customary international law has been subject to debate. See Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 21–22; Jonathan Somer, "Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict", *International Review of the Red Cross*, Vol. 89, No. 867, 2007, pp. 661–662; Annyssa Bellal and Ezequiel Heffes, "'Yes, I Do': Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent", *Human Rights & International Legal Discourse*, Vol. 12, No. 1, 2018, pp. 125–126.

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", *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.

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 (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups". Human Rights Council, *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”<sup>110</sup> if an NSAG exercises “*de facto* control”<sup>111</sup> over an area or “de facto control over territory akin to that of a Governmental authority”.<sup>112</sup> 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.<sup>113</sup>

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”.<sup>114</sup> 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”.<sup>115</sup> 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”.<sup>116</sup> 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”.<sup>117</sup>

110 Philip Alston, *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, UN Doc. E/CN.4/2006/53/Add.5, UN Commission on Human Rights, 27 March 2006, para. 25.

111 UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 16 August 2012, Annex II, para. 10.

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”.

114 Free Syrian Army, Declaration, 2016, available at: <https://tinyurl.com/58r9kxj4>.

115 Justice and Equality Movement, “Statement by the Opposition Movements”, 2008, available at: <https://tinyurl.com/my8c4rnc>.

116 Justice and Equality Movement, “Establishment of a JEM Committee for Human Rights”, 2010, available at: <https://tinyurl.com/2kyndfbm>.

117 Sudan Peoples’ Liberation Movement, Office of the Chairperson, Res. (6)-2013, 10 October 2013, available at: <https://tinyurl.com/498rfaks>.

## 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".<sup>118</sup> 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.<sup>119</sup> 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?<sup>120</sup> 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

118 T. Rodenhäuser, above note 5, p. 116.

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.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup>

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”.<sup>124</sup> 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”.<sup>125</sup> 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.

125 Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Mali*, UN Doc. A/HRC/22/33, 7 January 2012.

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.<sup>126</sup> 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.<sup>127</sup>

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, *Velasquez Rodriguez 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 legitimize 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.<sup>128</sup> 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.”<sup>129</sup>

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”.<sup>130</sup> 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”.<sup>131</sup> 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.<sup>132</sup>

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

see G. Giacca, above note 28, pp. 248–249. For the opposing view, see Frédéric Mégret, “Detention by Non-State Armed Groups in NIACs”, in E. Heffes, M. D. Kotlik and M. J. Ventura (eds), above note 103, p. 186; J.-M. Henckaerts and C. Wiesener, above note 103, p. 207.

128 Human Rights Council, *Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriyah*, UN Doc. A/HRC/17/44, 1 June 2011, para. 218.

129 UN Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, 2011, p. 21. For an excellent analysis of the ability of armed groups to respect, protect and fulfil human rights, see D. Murray, above note 5, pp. 181–192.

130 G. Giacca, above note 28, p. 267.

131 Human Rights Council, above note 14, para. 62.

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”.<sup>133</sup> Would the NSAG have to put into place “effective criminal law provisions ... backed up by law enforcement machinery” to enforce them?<sup>134</sup> 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”.<sup>135</sup> 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.<sup>136</sup> 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.

134 European Court of Human Rights, *Osman v. United Kingdom*, Appl. No. 87/1997/871/1083, Judgment, 28 October 1998, para. 115.

135 See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990.

136 See T. Rodenhäuser, above note 5, pp. 161–164; G. Giacca, above note 28, p. 269; J.-M. Henckaerts and C. Wiesener, above note 103, p. 214; D. Murray, above note 5, pp. 172–202.

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.