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Peacemaking, the Law of Armed Conflict, and Territories Effectively Controlled by Armed Non-State Actors

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The Centre for Humanitarian Dialogue (HD) is a private diplomacy organisation founded on the principles of humanity, impartiality, neutrality and independence. Its mission is to help prevent, mitigate, and resolve armed conflict through dialogue and mediation.

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Executive Summary

This paper explores emerging international and state practice towards territories under the effective control of armed non-state actors in conflict-affected states. It focuses on Syria, Yemen, Libya and Afghanistan and pays particular attention to emerging practice around peacemaking, the application of international humanitarian law and relief, and the dealing with certain counter-terror, security and public health issues that potentially threaten international peace and security.

The paper seeks to explain why state practice is changing towards these types of territories. It looks at how the search for peace, and the application or non-application of international humanitarian law (IHL) in relation to these territories, have been adversely affected by an overly rigid interpretation of the laws surrounding international armed conflicts (IACs) and non-international armed conflict (NIACs); the uneven application of counter-terror legislation and doctrines; and continuing state sensitivities over the conferring of any legal recognition, status and obligations on armed non-state actors, who either ‘effectively control’ or are said to ‘occupy’ (within the meaning of ‘occupation’ under IHL) large portions of state territory.

The paper aims to provide peacemakers, policymakers and humanitarians with an introduction to the subject and an opening set of observations about emerging state practice in order to help clarify issues and identify the possible basis of a new programme of research that might be useful to mediators, diplomats, legal professionals and humanitarian practitioners operating in this area and the field.

This is timely as the early 21st century has seen a number of protracted armed conflicts in which significant territories and populations have come under the control of armed non-state actors. The Afghan Taliban, the authorities in Eastern Libya, the Houthis in Yemen, and the Kurdish authorities in Syria, have all established a measure of effective authority over large territories and millions of people for extended periods of time. International and State actors have interacted with these entities in a number of ways. Sometimes these interactions have been clandestine, or at least unofficial, other times they have been more public, formal and licit. Iranian support for the Houthis, Turkish backing of Syrian rebel groups, and French and Russian assistance to the authorities in Eastern Libya fall into the former category. While the US-Taliban Doha Agreement and the arrangements between the US and the Kurdish authorities in Syria may be said to fall into the latter.

In many of these interactions, non-state armed actors, while not exactly recognised or dealt with as if they were states, have not been dealt with like normal armed rebel or ‘terrorist’ groups either. Increasingly, countries and international organisations are negotiating and making tacit and formal agreements with them, consequently affording these actors a certain de facto grey zone status. That status appears to lie somewhere between that of a State and other subjects recognised by the law of armed conflict, and unrecognised rebel or ‘terrorist’ groups. Some of these interactions are reminiscent of the old status of “belligerents” used in the 19th and first half of the 20th Century, which is examined later in this paper.

New types of bilateral de-escalation as well as interim measures and processes between States to regulate ongoing conflict in territories effectively controlled by such non-state actors have also been emerging, including the Astana Process set up in relation to the conflict in Syria. In these processes, States have adjusted their traditional attitudes towards armed non-state actors, albeit covertly, in order to achieve their political goals and meet some of the practical challenges on the ground posed by the 21st Century conflict environment. This has been done without expressly applying or revising the rigid IHL which is otherwise said to govern this conflict environment.

Whatever ultimate characterisation is given to these interactions, it is already clear that such practices have profound implications for international diplomacy, traditional notions of state sovereignty, and the application or non-application

of IHL and international human rights law (IHRL) to these areas. This paper considers how such practices – together with recent developments in IHL and IHRL, changing notions of sovereignty, and the increasing ‘internationalisation’ of internal conflicts – have come together to render the IAC/NIAC dichotomy less relevant in the 21st Century, at least as far as international attempts to resolve and manage such conflicts are concerned.

The paper also examines international practice towards such conflict-affected territories in Syria, Yemen, Afghanistan and Libya in relation to the COVID-19 pandemic, which the UN Secretary-General has identified as a threat to international peace and security. It contends that the public health, humanitarian and security threats posed by COVID-19 are exacerbated in such territories due to (a) host and neighbouring government sensitivities over the recognition and status of armed non-state actors; and (b) continuing reticence on the part of the international community to enforce the Geneva Conventions in such circumstances or reinterpret IHL in a manner that takes account of this new conflict environment. These sensitivities and this reticence have complicated the international community’s ability to respond to threats in a timely manner and effectively prevent, manage, resolve and transform conflict more generally.

The paper suggests that the international search for peace and security will continue to be constrained by this political and legal IHL architecture unless new approaches are adopted towards it. It suggests the answer may lie not so much in getting States to legislate away the IHL dichotomy through the adoption of a new Additional Protocol or relying on IHRL as an alternative source of law or expanding the definition of IACs to include new modalities of ‘internationalisation.’ But rather in reviving the law of belligerent occupation and applying an ‘effective control test’ towards these types of territories in order to trigger the application of IHL, whether under the law of belligerent occupation or the Conventions.

The paper offers a set of ideas about how the international community might move forward on this issue – including potential new areas for research. The research would aim to see whether any principles can be discerned and developed to guide the work of practitioners and actors who seek to promote stability through mediation and other tools of diplomacy and law more effectively. The ultimate aim of these efforts is to help produce better outcomes on the ground in these and other conflict-affected territories.

The Geneva Conventions

To understand the dilemmas peacemakers currently face in relation to IHL and territories under the control of armed non-state actors, it is important to consider how the international community got here. The development of the law of armed conflict in the 20th Century was framed by the warfare in which states were predominantly engaged at that time, which were primarily inter-state conflicts. States were consequently more concerned about regulating conduct between themselves than between States and non-state actors. These concerns – as well as notions of sovereignty based around the concept of the territorial unity of the state, and a deep reluctance to confer any diplomatic, political or legal status on hostile armed non-state actors – structured the 1948 negotiations of the Geneva Conventions. All these concerns had a fundamental impact on the development of a binary classification of conflicts into IACs and NIACs; the identification of the proper subjects of international law¹; as well as the conservative ways in which IHL treaty obligations were subsequently applied to conflicts where portions of territory were effectively controlled by armed non-state actors.

Thus, the fundamental dichotomy of modern IHL flows from Common Article 2 of the 1949 Geneva Conventions, which states:

The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties², even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Common Article does not define occupation. However, Article 42 of the 1907 Hague Regulations provides that a territory is occupied when it is actually placed under the authority of the hostile army. Most observers agree that there are no threshold requirements concerning the intensity or duration of the conflict and that Common Article 2 can be triggered by a belligerent occupation even if it is not resisted. Once triggered, a whole raft of detailed rights and obligations regarding the conditions of occupation, as well as the treatment and protection of combatants and civilians, come into effect.

Common Article 2 has been met with universal acceptance and become part of customary law. However, most of the rights and obligations set out in it were not extended by the high contracting parties to internal wars and conflicts. This was due to a reluctance on their part to confer a similar status to rebels or to give them incentives about equivalent treatment or to limit the sovereign right of a state to maintain law and order across its entire territory. Accordingly, the high contracting parties agreed to reduce the number of rights and obligations applicable to an internal conflict to a bare minimum in Common Article 3, which states:

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall

1 Which did not include non-state actors.

2 A State Signatory to the Geneva Conventions.

in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b. taking of hostages;
- c. outrages upon personal dignity, in particular humiliating and degrading treatment;
- d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.³

However, in 1977 an exception was made when the norms pertaining to IACs were extended to internal wars in Additional Protocol 1 where “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”. See also Second Additional Protocol to the Geneva Conventions (known as Protocol II).³

The Geneva Conventions and its Additional Protocols form the foundational basis of international humanitarian law outlining conflict-related rights and obligations. While they primarily pertain to international conflicts between States, Common Article 3 and Protocol II have implications for non-international armed conflicts.⁴ Common Article 3 establishes fundamental rules for all parties to a conflict, requiring them to treat all non-combatants humanely, with no exceptions. It explicitly prohibits murder, mutilation, torture and other forms of cruel, humiliating and degrading treatment, as well as the taking of hostages and extrajudicial executions. Article 6 of Protocol II supplements and develops these provisions, mandating the prosecution and punishment of serious criminal offences related to conflict. Amnesty is permitted under humanitarian law (Protocol II (art. 6 (5)) with a view to facilitating peaceful transition and reconciliation, although States are prohibited from absolving themselves or others from liability for war crimes and other grave breaches of international human rights and humanitarian law.⁵

It follows that if IHL is to apply under the Geneva Conventions to territories held by armed non-state actors then a conflict must be classified as falling under one of these two types of conflict. Such legal architecture has obvious consequences for peacemakers and peacemaking.

Where a conflict has been recognised as coming within the Conventions by a contracting State or host government, an overt legal framework exists in which the peacemaker can work. Such a legal framework can help in securing countrywide humanitarian access and the relief of the civilian population. It can also assist the resolution of certain security and counter-terror issues and other matters that touch upon peacemaking, including the maintenance of existing order and public safety; combatting, detaining, processing and prosecuting alleged terrorists, such as Islamic State (IS) suspects; defining the status of other participants and dependents caught up in the conflict, including whether they are considered combatants; and rolling out transitional justice and reconciliation measures.

Where a conflict has not been recognised or classified as either an IAC or NIAC, the peacemaking landscape is much more complicated and fractured, requiring peacemakers to work around many different and competing claims relating to recognition, status, sovereignty, lawful governance, as well as the proper application of customary international law.

3 The 1977 Second Additional Protocol imposed two more requirements on its high contracting parties, namely that government armed forces are involved and that insurgents must be in control of a discernible part of the state’s territory.

4 For a definition of non-international conflict, see Protocol II, art. 1 (1); Rome Statute, art. 8 (2) (f).

5 See Geneva Convention IV, arts. 146-48; Geneva Conventions I-IV, common art. 3; Protocol II, art. 6; Rome Statute, art. 8 (2) (e). See also principle 24 of the updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1).

Recent Developments in International Humanitarian Law

Since 1977, international law has sought to bring the two humanitarian regimes for IACs and NIACs closer to one another, particularly in relation to conventions governing the use of types of weapons. There has also been a discernible effort on the part of international courts to ameliorate the effect of the strict dichotomy imposed by the Geneva Conventions. For example, “elementary considerations of humanity” (including those protected in Common Article 3) are now considered by the International Court of Justice (ICJ) to be part of universally binding customary law⁶, and are said to apply to both NIACs and IACs.⁷ These include the principle of “distinction” between combatants and civilians, including the prohibition of indiscriminate attacks; the requirement of “proportionality”, including the principle of military “necessity”; and a “prohibition” on employing means of armed conflict that cause “unnecessary suffering”.

As long ago as October 1995, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic*⁸ case remarked on the growing irrelevance of the legal distinction between IACs and NIACs as a consequence of the changing nature and conduct of modern armed conflict. The judgment stated that there were compelling humanitarian grounds for dispensing with the distinction as modern armed conflicts were no longer predominantly inter-state in nature. More recently, the US Supreme Court in *Hamdan v Rumsfeld*⁹ affirmed the applicability of Common Article 3 in all armed conflicts, and to all persons, provided the conflict takes place in the territory of a party to the Geneva Conventions. See also the military manuals of some States¹⁰ and the ICRC study that concludes that 90% of customary rules of IHL apply to both types of conflict. The primacy of the principle of distinction has been also restated in a number of UN General Assembly and Security Council resolutions without necessarily also distinguishing between IAC and NIAC conflicts and therefore what ‘type’ of IHL was applicable in the relevant situation.

However, the distinction between IACs and NIACs continues to exist despite calls for its elimination. This is not least because there are frameworks of law in the Geneva Conventions governing IACs that are not easily transposable to NIACs – particularly in relation to the concepts of “combatant status” and “belligerent occupation”. Thus, of the 161 customary rules of IHL identified in an ICRC study¹¹, 142 rules are uniformly applicable in all armed conflict, but critically those that are not all relate to occupation, belligerent reprisals, the question of combatants and POWs, and guaranteed access for the ICRC and the humanitarian community. This is because all of these matters touch upon the sovereign rights of states and what is perceived to be the status and legitimacy of armed non-state actors and opponents.

As a consequence, host governments in conflicts featuring armed non-state actors holding substantial territory have often appeared either unwilling or unable to apply the IHL framework laid down by the Geneva Conventions. Such governments prefer, instead, to hide behind the non-resolution of the dichotomy in order to avoid the full application of IHL to territories controlled by these actors, including the provision of humanitarian relief and support for the maintenance of order in these territories by neighbouring states. See, for example, the Government of Syria’s attitude towards the relief of north-west Syria by Turkey. This state practice of resisting the classification of conflicts and the consequent imposition of IHL has consistently constrained or affected wider international action in relation to peacemaking and

6 *Nuclear Weapons Advisory Opinion* (n8), p.79.

7 International Criminal Tribunal for the former Yugoslavia, *Tadic* Decision on Jurisdiction (n107), p.102.

8 *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

9 *Hamdan v Rumsfeld*, Secretary of Defense, et al, Vol 548, U.S. Supreme Court, p.723 (2006).

10 Including the UK and USA.

11 Jean-Marie Henckaerts and Louise Doswald-Beck et. al. *Customary International Humanitarian Law*, Vol. I (2009) Cambridge University Press.

efforts to protect civilian populations and combatants in states where portions of territory are controlled by armed non-state actors.¹²

Both the Syrian and Yemeni Governments have consequently shown a deep reluctance to engage in any process that might lead to their conflict being recognised as an IAC. They have avoided trying to formally classify the conflict in order to ensure that non-state actors are not ‘immunised’ or fully protected or legitimised by IHL. Consequently, where combatant status is denied to a non-state participant, the individual is no longer protected by the international law of armed conflict regarding the treatment of POWs, and instead becomes subject to domestic law and potentially liable to criminal prosecution, being only entitled to be treated humanely if they are captured. That is why the Syrian Government has been at pains to classify all armed non-state actors as ‘terrorists’ in nature, despite co-participating in peace talks with them in Geneva and Astana.¹³

On a wider level, neighbouring governments have often used the IHL dichotomy as a blocking device to ensure that governance systems in territories run by hostile armed non-state actors cannot fully access, or take advantage of, the international support that IHL might ordinarily offer them. See for example, Saudi efforts to close off Sanaa Airport in Yemen to UN humanitarian flights, and the Turkish Government’s efforts to restrict humanitarian access to Kurdish-controlled north-east Syria. It is likely such humanitarian assistance would be more forthcoming if such conflicts were either officially classified as an IAC or held subject to the full terms of IHL customary law, whether under an NIAC or ‘belligerent occupation’ designation. As the legal scholar, Professor Andrew Clapham, notes while quoting Sandesh Sivakumaran:

‘There are multiple examples of governments dismissing the promulgation of laws (by armed non-state actors) . . . as illegitimate and rebellious.¹⁴ Attempts to engage with these groups or even offer technical assistance have been met with warnings and even threats of prosecution by certain governments.¹⁵ Such action can have a chilling effect on academics seeking out new ways of thinking about the laws of war in order to offer better protection to the victims of war.’¹⁶

What is clear is the failure to fully apply the Geneva Convention framework not only has an impact on armed non-state actors but also those civilian populations who live under their control. This should be of concern to all peacemakers. It follows from the above analysis the real issue is not so much to do with the further codification and confluence of IHL standards but with their practical application and enforcement in conflicts where large portions of territory are effectively controlled by armed non-state actors. The inability to resolve the IAC-NIAC dichotomy through an appropriate trigger mechanism hampers international humanitarian relief and peace-making in these conflict areas. What is needed is the development of a new conceptual framework that takes account of 21st Century conflict dynamics and provides for the practical activation of IHL, including its customary norms, in conflicts where areas are controlled by armed non-state actors.

12 See, for example, state practice in relation to the four cases examined later in this paper.

13 It is interesting to note that on 15 July 2012, the ICRC spokesperson, Hicham Hassan, declared the Syrian conflict a civil war. He stated: “We are now talking about a non-international armed conflict in the country. Hostilities have spread to other areas of the county. . . . International humanitarian law applies to all areas where hostilities are taking place.” The UK Foreign Office immediately issued a statement that this would have “serious legal and policy ramifications”. It is not clear whether the ICRC intended to be so explicit since it rarely classifies an armed conflict by means of its press releases. For the ICRC to be able to do its work, access to the affected places is vital. It needs to be seen as a neutral organisation by the parties on the ground. As governments are often reluctant to accept that the level of unrest and violence within its borders has risen to the level of a non-international armed conflict, making public statements about the legal status of the situation is often not seen as helpful to ICRC’s humanitarian mission.

14 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, 549, 577-58 (2012).

15 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, 558 (2012).

16 Clapham, A. (2017), *Detention by Armed Groups under International Law*, International Law Studies, U.S. Naval War College, Vol. 93.

The Internationalisation of Internal Armed Conflicts and a Call for Change

It would appear that the tendency to avoid formally classifying conflict occurs even where the conflict in which the State is engaged has evidently morphed from an internal conflict into an international one. This could be said of the four cases in Syria, Yemen, Afghanistan and Libya examined later in this paper. All started out as a civil or internal war between an opposition group and a host government, but then morphed into an ‘internationalised’ armed conflict. In each case, this occurred as a result of the external intervention of a multitude of regional and geopolitical players, as well as international non-state actors, in a way not envisaged by the framers of the Geneva Conventions. It is these types of conflict that have increasingly come to dominate the 21st Century conflict environment. As legal scholar, Kubo Macak, perceptively notes:

‘... in a world defined by the twin forces of globalisation and fragmentation, virtually no armed conflict remains confined to the territory of one state, free from foreign involvement.’¹⁷

Even civil wars that might be said to be set within a larger internationalised conflict but which remain distinct (such as the Kurdish aspect of the Syrian conflict), rarely feature or involve armed rebel groups which operate solely within a nationalised or autonomous setting. As a consequence, they don’t conform with the classification of internal armed conflict conceived by 20th Century policymakers and humanitarians. This is to say nothing of how the so-called ‘war on terror’ impacts on these conflicts. This morphing of armed conflict from a civil war into a more multi-dimensional conflict – in which both civil and international dimensions are present – plainly raises new questions for policymakers and humanitarians about which treaty obligations and legal rules to apply and how to structure peace negotiations.

As a consequence of these changing dynamics, some legal scholars have called for a new Additional Protocol to be enacted. However, in reality, there is little prospect of States negotiating a new multilateral treaty to overtly define a new class of international conflicts, as they did in AP1 in 1977. Other scholars have argued in favour of enhancing compliance in relation to IHL as it stands. The question is how? One way to potentially resolve the situation is to adjust restrictive interpretations of what constitutes an IAC through case law and by noting emerging state practice so as to take account of these new types of ‘internationalised’ conflicts. To this end, the legal scholar Macak has identified four distinct modalities of ‘internationalisation’ by which an NIAC can mutate into an IAC:

- (1) Where a third state or an international organisation intervenes in a NIAC, as occurred in the case of Libya when the Transitional National Council received assistance from NATO;
- (2) Where a NIAC is internationalised if the host State disintegrates within the duration of the conflict (e.g. ex-Yugoslavia);
- (3) Where a NIAC is waged in furtherance of the self-determination of a people (AP1);
- (4) Where the law of IAC is activated by the actions of host or third party towards an armed non-state actor in an internal conflict (i.e. through the customary doctrine of recognition of belligerency; a unilateral decision of the host state; conclusion of a special agreement under Common Article 3)

However, such reclassification does not deal with the role of neighbouring ‘gatekeeper’ countries. In practice, international policymakers and peacemakers will still not know what type of action and assistance might be permissible,

¹⁷ Kubo Macak, *Internationalized Armed Conflict in International Law*, in the Oxford Monographs in International Humanitarian and Criminal Law Series, Oxford University Press (2018).

if host governments continue to fail to classify the type of conflict in which they are engaged. Even where a conflict has clearly become 'internationalised' under one of the modalities identified above, there still is a discernible tendency to hide in the 'grey zone' left by the Geneva Conventions. Thus, even if there is a readjustment in the definition of an IAC, it will still be open to host governments to either erroneously, or simply fail to, classify a conflict in order to avoid conferring any political or legal status, recognition or legitimacy on hostile armed non-state actors or their governance arrangements. And this may be done not so much as a matter of law but of politics.

This paper puts forward the view that the growing disinclination to properly and expressly regulate conflict constitutes a threat to international peace and security, particularly as multi-dimensional conflicts become more prevalent in the 21st Century. The way in which armed conflict is characterised and classified has profound implications for how it is regulated, ameliorated and ultimately resolved. The same is true of the failure to characterise it at all. The change in conflict dynamics cited earlier has implications for the future applicability of IHL to these conflict areas and also for the search for peace and security more generally.

The IS detainees in Syrian Democratic Forces-controlled territory in north-east Syria are a case in point. Over the last two years, Kurdish authorities have repeatedly asked for international mutual legal assistance in relation to the legal processing of such detainees. These calls have largely received no response, as Western policymakers grapple with the IHL concerns which such requests raise in relation to their occupying status. Some of those concerns were captured at the 32nd International Conference of the Red Cross in 2015-6, where the ICRC reported that "States see a risk that regulation would imply the lawfulness of armed groups' detention activities or accord them a legal status under international law."¹⁸

Whether, and to what extent, third States recognise the detentions and convictions of IS suspects by courts operated by de facto authorities in north-east Syria will, in practice, depend on many factors, including how rule of law compliant they are and the pragmatic reasons for recognising those convictions. Politics and policy will, no doubt, play a huge role. But what is already clear is that if these IHL issues are not confronted and addressed soon, including the potential legal basis for detention, then it is likely that IS suspects will escape or be released as a consequence of this lack of clarity. The lack of an agreed IHL framework, therefore, constitutes a very real threat to humanitarian and peacemaking action and security.

Thus, while the last two decades has seen some convergence between the IHL regimes for both IACs and NIACs, the distinction introduced by the Geneva Conventions continues to adversely frame State responses towards conflicts in unanticipated ways. Policymakers need to recognise and adapt to changing conflict dynamics if the Geneva Conventions and/or the wider IHL customary framework are to have any real relevance to these types of conflicts in the future.

The issue of how the humanitarian obligations that currently regulate IACs might practically and effectively be transposed and imposed on warring parties involved in NIACs remains totally unsettled. This lack of clarity not only affects the way those engaged in the conflict are treated, it also affects the civil populations who live under them who are unable to fully assert rights to protection and relief. This leads to the degrading of normative standards, despite the shift in the Geneva Conventions away from the defence of state political interests towards the protection of the individual. In short, where a right has been established there should be an accompanying effective remedy.

A gap has opened up in the heart of the system of international humanitarian protection and relief. Civilian populations caught up in conflicts involving non-state actors have lost out as a result of new conflict dynamics that were not envisaged by the Geneva Conventions. This will not be resolved by simply redefining what an IAC is. At the centre of this humanitarian dilemma lies the lack of a transparent, legal framework and trigger mechanism by which to determine how IHL applies to these territories.

18 ICRC. (2015). *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report* 32.

International Human Rights and International Criminal Law

One potential way around this gap, suggested by certain legal scholars, is for the international community to rely on related areas of international human rights law (IHRL) and international criminal law (ICL). They note that both these areas of law continue to operate in times of armed conflict and are designed to provide additional protection to victims even if, as Macak observes, “the exact relationship between IHL and international human rights law remains the subject of ongoing debate.”¹⁹ Certainly, international criminal law has helped to enforce IHL by criminalising serious violations and identifying relevant rules to apply.

IHRL and ICL impose obligations on States emerging from situations of conflict. These obligations, which lie at the core of transitional justice processes, include a duty to: (a) investigate, prosecute and punish those accused of serious rights violations; (b) reveal to victims and society at large all known facts and circumstances of past abuses; (c) provide victims with restitution, compensation and rehabilitation; and (d) ensure repetition of such violations is prevented. Numerous human rights treaties underpin these obligations, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Racial Discrimination.²⁰

Other international instruments and mechanisms – such as the updated set of principles for the protection and promotion of human rights through action to combat impunity, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the OHCHR’s reports and statements, as well as the treaty bodies and the special procedures of the Human Rights Council – provide clarification and guidance on operationalizing these requirements, in addition to a growing body of international and regional jurisprudence.²¹

In accordance with customary international law and practice, and in addition to obligations deriving from humanitarian law, States are responsible for the violations committed by private actors should they fail to exercise due diligence. International humanitarian law and human rights instruments are therefore based on the assumption that States have the ability to support the rights that they enshrine. For example, according to article 2 of the International Covenant on Civil and Political Rights, State parties are to take the necessary steps “to adopt such laws or other measures as may be necessary to give effect” to the rights recognized in the Covenant. According to article 2 (3), State parties must undertake actions to ensure “effective remedies”, including “the possibilities of judicial remedy” with respect to the rights recognized. Article 9 (3) recognises a right, as part of the right to liberty and security of the person, to a meaningful criminal justice system with the prompt exercise of judicial power within a reasonable amount of time. Elsewhere the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment repeatedly focuses on the necessity for “effective legislative, administrative, judicial or other measures” relating to the prompt investigation, punishment and prevention of torture, and restitution for past violations.

19 Kubo Macak, *Internationalized Armed Conflict in International Law*, in the Oxford Monographs in International Humanitarian and Criminal Law Series, pg.8, Oxford University Press (2018).

20 See also UN Human Rights Council documents: A/HRC/21/46, paragraphs. 13 and 14; A/HRC/24/42, paragraphs. 18-20; A/HRC/27/56, paragraphs. 27-32; and A/HRC/30/42, paragraphs. 15-19.

21 On the duty to investigate and prosecute, see, for example, Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, 29 July 1988; and European Court of Human Rights, *Aksoy v. Turkey*, 18 December 1996. On the right to truth, see Human Rights Committee, *María del Carmen Almeida de Quinteros et al. v Uruguay*, 15 October 1982; and European Court of Human Rights, *Cyprus v. Turkey*, 10 May 2001.

Some scholars, therefore, suggest the legal basis for bridging the gap in the laws applicable to IACs and NIACs lies not in IHL but in IHRL. They argue that gaps relating to NIACs could be filled by recourse to IHRL, which has the advantage of applying even in situations where the exact nature of the conflict is in dispute.²² As the ICJ in the *Nuclear Weapons Advisory Opinion*²³ observed:

“the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant.”

The applicability of IHRL is therefore not displaced by the onset of armed conflict.²⁴ That is why the UN General Assembly has issued a number of resolutions calling on States to respect human rights in armed conflict, starting with Resolution 2444 (XXIII) on Respect for Human Rights in Armed Conflict²⁵. The UN Secretary-General has also urged both States and non-state actors to do the same in relation to non-derogable rights in the International Covenant on Civil and Political Rights.²⁶ See also, UN instruments and documents relating to the treatment of people held in any kind of detention, not just those detained in an armed conflict.²⁷

In the view of scholars like Schindler, this is suggestive of what he calls a ‘progressive assimilation’ of the dual laws of armed conflicts into one body of law.²⁸ Other scholars claim that there has been such an accumulation of treaty and customary law in relation to IHRL that it can now comprehensively regulate armed conflict, whether or not host governments specifically classify it as an IAC or NIAC. But, while it is plain that States are bound by the array of IHRL obligations listed above, the question of whether non-state actors can be the bearer of such obligations is far less clear.

Certain scholars, like Professor Andrew Clapham, argue that such human rights obligations do fall upon non-state actors, despite them not being seen as proper subjects of international law for the purposes of enforcing IHL. He points to the declaration of four UN Special Rapporteurs who determined that, while Hezbollah was not a party to the Universal Declaration of Human Rights, it remains subject to the demand of the international community as articulated by it and should respect it when: “it exercises significant control over territory and population and has an identifiable political structure”.²⁹ Such scholars also point to many of the UN Security Council Resolutions issued in relation to the conflicts in Syria, Yemen, Libya and Afghanistan. All seemingly call on all parties to these conflicts, including non-international parties, to respect IHL and IHRL and to take measures accordingly.

For example, in the case of Syria, Resolution 2165 (2014), strongly condemns “the continuing widespread violations of human rights and international humanitarian law by the Syrian authorities, as well as the human rights abuses and violations of international humanitarian law by armed groups”. It reiterates that: “all parties to the conflict, in particular the Syrian authorities, must comply with their obligations under international humanitarian law and international human rights law and must fully and immediately implement the provisions of its resolution 2139 (2014) and its Presidential Statement of 2 October 2013 (S/PRST/2013/15).”

See also the work of the Independent International Commission of Inquiry on the Syrian Arab Republic, established on 22 August 2011 by the Human Rights Council with a mandate to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.³⁰ It was tasked “with establishing the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those

22 See Crawford, E. (2010). *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*. Oxford University Press.

23 See paragraph 5.

24 See *Advisory Opinion on the Wall*, ICJ Reports (9 July 2004,) paragraphs 102-6.

25 UN General Assembly Official Records, 23rd Session. 23 UNGAOR, Supp (no 18), UN Doc A/7433 (1968), 18 December 1968.

26 See UN Security Council Report S/1999/957.

27 Such documents include Standard Minimum Rules for the Treatment of Prisoners; Basic Principles for the Treatment of Prisoners; Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty; Code of Conduct for Law Enforcement Officials; UN Standard Minimum Rules for Non-Custodial Measures; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Basic Principles on the Independence of the Judiciary; Basic Principles on the Role of Lawyers.

28 See Schindler, D. ‘International Humanitarian Law: Its Remarkable Development’ (2012) in Schmitt, M. *The Development and Principles of International Humanitarian Law*. London, Routledge. p.177.

29 See Clapham, A (2006), *Human Rights Obligations of Non-State Actors*. Oxford, Oxford University Press. pp.278-85.

30 See Resolution S-17/1 adopted at the 17th Special Session of the Human Rights Council.

responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”.³¹ Since then it has repeatedly made mention in press releases and investigations of the failure of armed non-state actors to uphold human rights, implying that they are bound by IHRL.³²

In its report of 22 February 2012, the International Commission states that “Anti-Government groups have also committed abuses, although not comparable in scale and organization to those carried out by the State”, while referring to human rights violations. In Paragraph 106, it states that: “the Commission notes that, at a minimum, human rights obligations constituting peremptory international law (*jus cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *jus cogens* – for instance, torture or enforced disappearances – can never be justified.” In Paragraph 113, it documents instances of gross human rights abuses committed by members of various Free Syrian Army (FSA) groups. In Paragraph 120, it highlights the fact that FSA members, including local commanders that have command responsibility, may incur criminal responsibility under international law. In Paragraph 113, it recommends that “armed groups, in particular, the FSA and its local groups should: (a) Adopt and publicly announce rules of conduct that are in accordance with IHRL and other applicable international standards, including those reflected in the Declaration of Minimum Humanitarian Standards.”

Subsequent reports, including in August 2019, outline violations of human rights and humanitarian law by armed groups.³³ In reporting that the U.S. has conducted operations with the Syrian Democratic Forces (SDF) that destroyed towns and villages, the Commission confirms that states using non-state actors as agents must still adhere to the laws of armed conflict. See also the letter from UN Secretary-General Antonio Guterres to Jose Singer Weisinger (UNSC President), in which he states:

‘The impact of the hostilities on civilian and humanitarian sites in north-west Syria is a clear reminder of the importance for all parties to the conflict to observe and ensure respect for international humanitarian law, in particular: the obligations at all times to distinguish between civilians and combatants and between civilian objects and military objectives and to direct attacks only against combatants and military objectives; the obligation to take all feasible precautions in conducting an attack to avoid, and in any event to minimize, incidental harm to civilians and civilian objects; the obligation not to conduct attacks that may be expected to cause incidental harm to civilians and civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated; and the prohibition of indiscriminate attacks, including the indiscriminate use of high explosive weaponry in populated areas. According to numerous reports, the parties have failed to do this.’

In the case of Yemen, UN Security Council Resolution 2140 (2014) calls on all parties to comply with their obligations under international law, including applicable international humanitarian law and human rights law.³⁴ While the Statement from UN Secretary-General Guterres in 2018 “reminds all parties to the conflict that they must uphold international humanitarian law, including taking steps to protect civilians.”³⁵ See also the UN Human Rights Council in Resolution 36/31 of 29 September 2017 which calls on “all parties to the armed conflict to respect their obligations and commitments under applicable international human rights law and international humanitarian law.”

As regards Libya, see the Communique of the Berlin Conference on Libya, organised by the Federal Government of Germany, issued on 19 January 2020, in which a number of States urged:

“all parties in Libya to fully respect international humanitarian law and human rights law, to protect civilians and civilian infrastructure, including airports, to allow access for medical, human rights monitors, humanitarian

31 See <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCol.aspx>.

32 See, for example, the Commission of Inquiry Finding of August 2012, which stated that opposition groups are bound by human rights obligations and that the Free Syrian Army’s activities met the threshold of non-international armed conflict so that IHL becomes applicable to hostilities between government and armed groups.

33 See UN Peace and Security (2020) *Syria: Warring parties failed to abide by international law over hospital attacks*. Accessed at <https://news.un.org/en/story/2020/04/1061192>.

34 See also UN Security Council Resolution 2216 (2015) in respect of Syria which also addresses sanctions and in paragraph 8: “Calls on all parties to comply with their obligations under international law, including applicable international humanitarian law and human rights law.”

35 See <https://news.un.org/en/story/2018/05/1009282>.

personnel and assistance and to take action in order to protect the civilian population, including internally displaced people, migrants, refugees, asylum seekers and prisoners, also through engagement with UN entities.”

However, what many of these resolutions and statements do not do, is identify the exact source and provenance of IHL obligations or point to how they may be practically invoked.

Thus, while these and other examples of emerging international practice outlined later, undoubtedly support Clapham's basic argument that non-state actors are bound by IHRL, other State acts and omissions suggest it is not entirely settled law. The key question is not just whether but how these IHRL obligations can be applied to non-state actors in a way that provides real protection to the civilian population. And, if they can, whether there are any coterminous positive obligations that fall on host and neighbouring governments to actively co-operate with such non-state actors to protect civilians. Certainly, there is nothing in any IHRL instrument that ensures automatic access for the ICRC to such territories. Again, the issue is not whether IHRL has relevance to conflict-affected areas controlled by non-state actors, but how it can be practically applied and enforced by and against all parties to conflicts, including those non-state actors.

As Christopher Greenwood notes “the enforcement machinery created by human rights treaties can normally be invoked only in proceedings against a state.”³⁶ Moreover, while the ICJ³⁷ or European Court of Human Rights (‘ECtHR’)³⁸ could constitute a forum, their legal processes are protracted and too state-directed. Their mechanisms for emergency interim relief are also undeveloped and lack enforcement mechanisms on the ground. So how does the international community go about ensuring human rights are respected in conflict territories where the State no longer has authority on the ground, but the occupying non-state entity's governance system has not been recognised or classified under the law of armed conflict and the Geneva Conventions?

While the normative frameworks of IHRL and ICL have grown, their practical application to conflict-affected areas where portions of territories are effectively controlled by non-state actors remains problematic. They do not constitute a solution to the international community's IHL problem on their own. For IHRL to function properly in such territories, there needs to be a governance structure that guarantees safety and respect for the rule of law. Humanitarians, human rights advocates and peacemakers will continue to face this IHL dilemma, and it will continue to engender impunity in such territories, unless new IHL approaches are developed. What is needed is the development of an effective trigger mechanism for the practical activation and application of IHL legal frameworks and standards. Enduring concerns over the recognition and status of non-state actors, which were not addressed during the negotiation of the Geneva Conventions, continue to be an obstacle to the development of such a mechanism.

Such findings are consistent with the observations of the UN Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence made in a 2017 Report to the United Nations. They focus on the development of appropriate and nuanced transitional justice measures in conflict-affected states, including those where armed non-state actors control territory. In the 2017 report, he states that:

‘the increasingly complex nature of modern armed conflict presents challenges for the application of humanitarian law, in addition to uneven development between provisions governing international and non-international conflicts. Other challenges arise from the recent trend to conflate acts of terrorism and those of warfare by non-State groups. Indeed, the general question of the obligations and rights of armed non-State actors is far from settled.’

The Special Rapporteur goes on:

‘References to institutions and institutional processes for the provision of rights in international law imply recognition that, in the absence of effective State institutions, the ability of the State to ensure that rights under international law are protected would be severely compromised. Neither development nor human rights regimes have focused sufficient attention on how post-conflict societies should be assisted by international organizations,

36 Greenwood, C. (2020) “The Application of Humanitarian Law”. *Handbook of Humanitarian Law in Armed Conflicts* p76 (D. Fleck, Ed.). Oxford University Press Online.

37 See the recent case brought by The Gambia against Myanmar on behalf of the Royhinga.

38 See the European Court of Human Rights case of *Issa v Turkey*.

other States or civil society groups to effectively bridge institutional gaps that may hinder the realization of rights afforded under international law.

The conclusion to be drawn from these observations is not that the legal framework should be modified in order to weaken the universality of certain rights and obligations. This would imply that justice is a luxury that only the affluent (or at least well institutionalized) countries can afford. Mere reiteration of an existing legal obligation, without considering how, under particular circumstances, the obligation could ever be satisfied, will not, however, undo very real constraints. The solution involves rather the adoption of a problem-solving attitude and considering what kind of processes can be established to secure in the short-term maximum satisfaction for victims, and, eventually, the full realization of those rights.'

The Special Rapporteur told the UN that his 2017 report was animated by concerns about "a scandalous gap in redress for violations of rights in post-conflict cases." He referred to transitional justice in weakly-institutionalised post-conflict settings featuring "a plethora of armed non-state actors and different agents'" where "significant legal vacuums exist" but made clear that "obligations in situations of conflict are no less serious than those pertaining to human rights in other contexts, and the rights that are violated in conflict deserve to be redressed."

The Law of Belligerent Occupation

One potential way forward would be to explore whether the old law of belligerent occupation could be revived, reworked and applied to these modern ‘internationalised’ armed conflicts. Much will depend on whether the law of belligerent occupation can be said to apply to territory effectively controlled by armed non-state actors, particularly within the context of an NIAC. Traditional notions of state sovereignty hold that the State exercises a monopoly of force and an absolute authority over all domestic dealings. However, during the 19th Century a new doctrine of belligerency emerged to cover situations where an insurgent non-state entity began to operate as a quasi-State. This reflected situations where their level of institutional organisation and territorial control was such that the conflict became de facto between two independent entities – two States in effect. This doctrine of recognition of belligerency gave States the option to bring the full laws of armed conflict into effect once the internal strife had reached a sufficient duration and intensity. In this way, non-state belligerents were able to call on the full protection of the laws of armed conflict but were also obliged to respect and apply those same laws. The doctrine that developed during the 19th Century also made a distinction between rebellion, insurgency and belligerency, in a way that may fit with the new conflict dynamics of the 21st Century.

According to the mid-19th Century German lawyer, August Wilhelm Heffter, such belligerent occupation constitutes an interim phase in which sovereignty is suspended rather than transferred and existing laws and institutions are conserved, pending a final resolution to the conflict. Twenty years later, in 1863, the United States adopted the Lieber Code, which set out the legal norms that apply in times of war, including for the first time in relation to the occupation of territory controlled by rebel forces. Under the Code, its application was not triggered by declaration or any other formal requirements but by sufficient presence in the occupied territory. The Code was later and separately taken up by the 1874 Brussels Declaration, which held not simply that local law should continue during any interim phase but that there is a duty on the occupying actor to restore and maintain public order and safety.³⁹ This formula regarding the law of occupation was later adopted by the Hague Regulations, although it only applies to “contracting powers”.

As this paper makes clear, the doctrine of belligerent occupation was not adopted by the Diplomatic Conference which drafted the Geneva Conventions in 1949. Delegates did not do so partly to deny non-state actors equal status, partly because holding such actors to the same level of obligation would require asking them to behave in a manner akin to a properly-constituted state, and partly because, as one delegate put it, “internal terrorism [can] not be made legitimate merely by calling it an international conflict.”⁴⁰ However, the Convention did shift the priority away from the protection of the political interests of the ousted state towards the protection of the occupied population through the articulation of a set of rights and obligations applicable during occupation. This normative shift is extremely important. This paper has outlined the manner in which international and state practice has developed since 1948, including how the law of occupation has been expressly applied to non-state actors (in the form of so-called liberation movements) in AP1. Elsewhere, the law of belligerent occupation has been acknowledged as applicable by Israel with respect to the Occupied Palestinian Territories and by the US and UK with respect to Iraq after 2003.

Yet, despite these developments and state acknowledgements, some commentators continue to argue that the law and practice in relation to belligerency is no longer relevant and has been replaced by modern IHL. Other scholars maintain that belligerent occupation is a concept so firmly rooted in the law of IACs that it is a prime example of a concept which cannot be applied to NIACs. They contend that non-state actors do not have the sovereign capacity

39 Brussels Declaration Concerning the Laws and Customs of War (27 August 1874) Arts 2-3.

40 Council of Europe Steering Committee for Human Rights (CDDH) 1/SR.2, paragraph 52.

to bear the rights and obligations associated with the law of occupation as they lack the resources and institutional capacity to comply with the law, and only States are International Legal Persons.

This paper disagrees and advances the proposition that the law of belligerent occupation should be seen as in principle applicable to situations of ‘internationalised’ armed conflict, with the actual extent of applicability depending on the circumstances of a particular conflict. Certainly, Oppenheim maintains that an armed group recognised as a belligerent can acquire limited international legal personality. As Macak observes, both international bodies like the UN and non-state actors are capable of acquiring limited legal personality, as exemplified by AP1. He also points to the ICJ’s advisory opinion on *Reparation for Injuries*⁴¹, which held that such capacity should, in any case, be determined by the needs of the community, observing:

“The growing regulation of conduct during such conflicts and the legal protection of interests and rights implicated by these conflicts attest to the fact that the needs of the international community have evolved and now require for non-state armed groups to be capable of holding rights and duties. Due to this development, the attribution of international legal personality to non-state actors has likewise become indispensable.”

Thus, customary IHL can apply to and bind armed groups, just as AP1 does in relation to national liberation movements. Further, the applicability of the law of occupation to non-state actors, and the territories they effectively control, does not involve the conferring and transferring of sovereign power at all. The law of belligerent occupation is, in a sense, sovereign neutral. It does not affect the sovereignty or legal status of the territory that is being occupied as the occupation of, and title to, such territory are distinct matters. This, then, deals with the sovereignty issue and fears about the legitimisation of hostile actors.

As regards the claim that armed non-state actors are either unwilling to comply, or incapable of complying, with such a law, there is ample evidence that many have both the resources and institutional capacity to organise themselves to do so, if they so desire. Some duties under the law of belligerent occupation, such as obligations to refrain from certain actions, are easier to comply with than others and a number of non-state actors have bound themselves to IHL and IHRL by voluntary declaration.⁴²

It is also noteworthy that many non-state actors like the Houthis, Kurds, Taliban and Libyan National Transitional Council (NTC) have passed legislation to maintain public order and safety. For example, the NTC started enacting laws before it consolidated its territory in Libya in 2011, which were then adopted by the General National Congress in July 2012. Many of these actors have also imposed taxes to pay for occupation. More recently, Kurdish, Taliban, Houthi and other Yemeni non-state actor authorities like the STC, have issued public health alerts in an attempt to be seen to be responding to the COVID 19 pandemic,⁴³ and their duties as occupiers, which in the case of the Taliban was welcomed by the US Government.⁴⁴

It is clear from this analysis that the law of belligerent occupation did not stop being relevant with the passing of the Geneva Conventions. Nor is it the case that non-state actors can’t be the bearers of IHL or IHRL obligations or possess enough resources to abide by them. It is possible for such groups to acquire limited legal personality for the purposes of carrying out obligations arising under the law of belligerent occupation. Further research could therefore explore whether the law of belligerent occupation could, and should, be made applicable to territories effectively controlled by non-state actors in line with recent changes in conflict dynamics. At the very least, it could act as a new conceptual framework for dealing with such new multi-dimensional conflicts, whether under the Conventions or separately. The review of recent state practice in the four cases that follow suggests that it is already being used in this way by certain States involved in the management of multi-dimensional conflicts, albeit covertly.

41 ICJ Advisory Opinion. (1949) *Reparations for Injuries Suffered in the Service of the United Nations*.

42 See for example the Taliban Statement of the Islamic Emirate of Afghanistan on the Problem of Landmines, 6 October 1998; the Libyan National Transitional Council Statement of 30 March 2011 in which it committed to observing IHL and IHRL obligations; as well as other declarations by armed non-state actors in relation to landmines and children’s rights lodged with Geneva Call.

43 See, for example, 29/04/2020, STC website, statement on COVID-19 restrictions in Aden <https://stcaden.com/news/11822>. 06/04/2020, Aljazeera, Taliban launches campaign to help Afghanistan fight coronavirus. <https://www.aljazeera.com/news/2020/04/taliban-launches-campaign-afghanistan-fight-coronavirus-200406055113086.html>

44 10/04/2020, US State Department Tweet: “We join the Afghan Ministry of Public Health in welcoming the Taliban’s efforts to raise awareness against #COVID19 and their offer of safe passage to health workers & international organizations working to prevent the spread of the virus” https://twitter.com/State_SCA/status/1248731243287662593

Belligerency and the Four Cases

A number of outside States involved in four conflicts have developed bilateral violence reduction mechanisms that bypass the legal application of the Conventions but appear entirely consistent with, and might even be said to be predicated on, the concept of belligerent occupation. These mechanisms are clearly focused on protecting the political interests of these States rather than upholding IHL per se. However, they all deal with the threat to public safety and regional security posed by the lack of sovereign authority and regulation over territory held by non-state actors. As such, they offer important examples of emerging state practice in this area.

Syria

The situation in Syria is one example. In Security Council Resolution 2254, the United Nations called on the parties to respect IHL and IHRL obligations and agree to a ceasefire. The lack of an effective mechanism by which to trigger these and other security obligations in these territories led directly to the development of state-led mechanisms to do so. They included the formation of two task forces by the International Syria Support Group (ISSG) in 2016. When the task forces failed, the Astana Process was established by Russia, Turkey and Iran from 2017-20. Both initiatives are instructive.

In January 2016, the first round of Intra-Syrian peace talks facilitated by the UN failed to address humanitarian concerns or agree any IHL confidence-building measures in relation to a ceasefire. As a consequence, the Special Envoy to Syria stopped the talks, deciding that progress needed to be made on these two issues before talks could resume. He referred the two issues to the ISSG, which had helped shape UNSC Resolution 2254 under the joint chairmanship of Russia and the USA. This led to the creation of two ISSG state-based ceasefire and humanitarian task forces in February 2016. Through the mechanism of these two ISSG task forces, Russia and the US secured a nationwide ceasefire and gained agreement for increased humanitarian access from both the Government of Syria and armed non-state actors (with the help of each sides' international supporters) particularly in relation to territories under the control of armed non-state actors. The UN talks resumed, and three more rounds took place, before the ceasefire broke down four months later.

From June 2016 to December 2017, intense fighting saw the fall of opposition-held Aleppo and a series of serious breaches of IHL customary norms in territories held by non-state actors. Russia, Turkey and Iran stepped into this IHL vacuum to develop the so-called Astana Process. The three Guarantors of the Astana Process invited both the Government of Syria and leaders of armed non-state actors to Astana, where they got them to agree in parallel negotiations, however reluctantly, to the creation of a number of de-escalation zones, which corresponded precisely to the territories held by these non-state actors.

On 4 May 2017, the Astana Guarantors were able to issue a Memorandum on the creation of de-escalation areas in the Syrian Arab Republic, "with the aim to put a prompt end to violence, improve the humanitarian situation and create favourable conditions to advance political settlement of the conflict in the Syrian Arab Republic." The Memorandum made clear that the creation of the de-escalation areas and security zones "is a temporary measure". It provided that:

'Within the lines of the de-escalation areas:

- hostilities between the conflicting parties (the government of the Syrian Arab Republic and the armed opposition groups that have joined and will join the ceasefire regime) with the use of any kinds of weapons, including aerial assets, shall be ceased;

- rapid, safe and unhindered humanitarian access shall be provided;
- conditions to deliver medical aid to the local population and to meet basic needs of civilians shall be created;
- measures to restore basic infrastructure facilities, starting with water supply and electricity distribution networks, shall be taken;
- conditions for the safe and voluntary return of refugees and internally displaced persons shall be created.

Along the lines of the de-escalation areas, security zones shall be established in order to prevent incidents and military confrontations between the conflicting parties.’

These zones were then subjected to a number of interim “reduction of violence” measures. Committees relating to humanitarian access and detainees, in which officials from the UN Office of the Special Envoy participated, were also created. Later declarations issued by the Guarantors of the Astana Process “underscored their joint determination to speed up their efforts to ensure calm on the ground and protect civilians in the de-escalation areas as well as to facilitate rapid, safe and unhindered humanitarian access to these areas.” Again, they emphasised that “the creation of de-escalation areas was temporary as provided for by the Memorandum of 4 May 2017.”⁴⁵ On 7 September 2018, the three Guarantors “expressed their satisfaction with the achievements of the Astana format since January 2017, in particular, the progress made in reducing violence across the Syrian Arab Republic and contributing to peace, security and stability in the country.”

In practical (but not official) terms, the Astana Process recognised the interim belligerent occupation of these territories by non-state actors. The Guarantor statements consistently called for compliance with UNSCR 2254, including obligations relating to maintaining order and combating certain UN-designated terror organisations, while allowing the Government of Syria to continue to describe these armed non-state actors as ‘terrorists.’⁴⁶ The logic behind the Astana de-escalation mechanism was, therefore, that armed non-state actors were not only capable of abiding by obligations but had a duty to do so. Indeed, in January 2018, the Astana Process convened a Conference involving Government and opposition figures as well as armed non-state representatives which endorsed the 12 Intra-Syrian Essential Governing Principles developed through the UN process, as the basis of a possible settlement.

A similar process occurred in north-east Syria in relation to the Kurds. The US marked out a similar zone and supported the Kurdish authorities in combating UN-designated terror groups like Islamic State (‘IS’). They also provided support in relation to maintaining public order, protecting public utilities and discharging humanitarian relief. In addition, the SDF have been detaining IS suspects with a view to establishing their combatancy status and subsequent rights to release, extradition or prosecution. US and UK military advisors on the ground have helped the Kurdish authorities to establish detention facilities for their detention and processing.

The dire circumstances on the ground in these territories has already resulted in the tentative development of new state-based approaches towards them. This includes the attempt to develop a new legal basis to detain those ‘that pose an imperative security risk’ in the context of an NIAC, which by extension could apply to the right of armed non-state actors to intern their own captives.⁴⁷ In the English case of *Serdar Mohammed v Ministry of Defence*, the UK Government argued that the reasoning in the ECtHR case of *Hassan v UK* (which read into Article 5 an implied ground for detention so as to enable the safeguards of the Convention to apply to the ‘taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Convention’) should apply to detention in NIACs, due to either the authority of the relevant resolutions of the Security Council or the authority granted under IHL. The Supreme Court accepted it could apply where a State had been authorised by the Security Council to detain in a NIAC ‘in circumstances where this was necessary for imperative reasons of security.’ However, it could not agree whether treaty based IHL or customary IHL provided such authority.⁴⁸ Lord Sumption suggested that the ‘lack of international

45 See, for example, Statement issued on 4 April 2018. http://www.mfa.gov.tr/iran-islam-cumhuriyeti_-rusya-federasyonu-ve-turkiye-cumhuriyeti-devlet-baskanlari_nin-ortak-aciklamasi_en.en.mfa

46 It is worth noting that Syria does not use the same approach towards the granting of amnesties following an internal conflict. This follows a wider trend among States of granting such amnesties, which suggests a willingness on their part to consider solutions other than criminal prosecutions when dealing with armed non-state actors. According to the International Centre for Transitional Justice, as of 2008, 37 States have implemented or examined the possibilities of establishing truth and reconciliation commissions in the aftermath of internal conflicts, in an attempt to promote social reconciliation.

47 Sean Aughey & Aurel Sari, *Targeting and Detention in NIAC: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 *International Law Studies* 60,87-97 (2015).

48 *Mohammed* [2017] UKSC2 (Lord Sumption SCJ0).

consensus really reflects differences among states about the appropriate limits of the right of detention, the conditions of its exercise and the extent to which special provision should be made for non-state actors.⁴⁹ However, since the duties set out in Common Article 3 apply to ‘each Party of the conflict,’ it is at least arguable that they apply to armed non-state actors as well.⁵⁰ The recourse to the courts merely emphasised the need for the development of new approaches towards this problem.

Afghanistan

In February 2020, the US sat down with Taliban negotiators to agree a four-point security plan to end the conflict between them. This was done without the express support, or presence, of the Government of Afghanistan. The agreement stated that the “obligations of the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban in this agreement apply in areas under their control until the formation of the new post-settlement Afghan Islamic government as determined by the intra-Afghan dialogue and negotiations.” The plan agreed included a number of counter-terror obligations relating to the combating of Islamic State and other terror groups. The Taliban were obliged to implement these obligations in exchange for troop withdrawals by the US.

As in the Syrian case, the logic behind these agreements, made in the absence of any other viable forum for dealing with either IHL or security obligations, is that both the Kurdish and Taliban authorities were capable of abiding by such obligations. These agreements, in effect, amounted to a de facto or tacit recognition of belligerent occupation by these actors, who now had a duty to maintain public safety and security.

Yemen

In 2019, after years of protracted fighting and humanitarian abuses in Yemen, both the Saudi Government and the United Arab Emirates entered into direct negotiations with both the Houthis in the north and the Southern Transitional Council (STC)⁵¹ in the south. This was done as part of a wider United Nations effort to secure an overall political settlement. The direct negotiations aimed to secure ceasefires and other security measures, as well as the release of detainees and the provision of humanitarian relief. These States, although not willing to explicitly recognise the existence of a belligerent occupation by either the Houthis or STC (no doubt in deference to the so-called legitimate Government of Yemen) again effectively did so, albeit covertly through their actions.

Such practice was in line with other international pronouncements made at the same time about the nature of the occupation exercised by these non-state actors in Yemen. The 2019 Report of the Group of Eminent International and Regional Experts submitted to the United Nations High Commissioner for Human Rights offers an example. It outlined human rights violations since September 2014 and suggested that: “the situation in Yemen qualifies as a non-international armed conflict between the armed forces of the Government of Yemen and the Houthis, to which article 3 common to the Four Geneva Conventions and Additional Protocol II apply, as does customary law.” More interestingly, it also observed that “human rights obligations of non-State armed groups and member States of the coalition may arise insofar as they exercise control over certain areas or facilities.” As part of its Conclusions, it found that:

‘The Group of Experts has reasonable grounds to believe that the de facto authorities are responsible for human rights violations in the areas over which they exercise effective control, including arbitrary deprivation of the right to life, arbitrary detention, enforced disappearances, sexual violence, torture, ill-treatment and child recruitment, and violations of fundamental freedoms, and economic, social and cultural rights.’⁵²

49 *Id* [16] (Lord Sumption SCJ)

50 See also Andrew Clapham, who argues that ‘even if armed groups may not necessarily be entitled or empowered under international law to detain or try anyone, once they do engage in these activities it seems incontrovertible that such groups have explicit and detailed obligations under international law.’ Detention by Armed Groups under International Law, *International Law Studies*, U.S. Naval War College, Vol. 93, (2017).

51 “STC engages in important talks with Saudi Arabia” (May 2020), <http://en.adenpress.news/news/23172>

52 Also see a similar statement from Group of Eminent Experts panel member Charles Garraway in 2018 where he described the Houthis as “de facto authorities” and added that the UN panel also has “reasonable grounds to believe, that the de facto authorities are responsible, in the areas over which they exercise effective control, for human rights violations.” UN Human Rights (2018) “All sides in Yemen conflict could be guilty of war crimes, UN experts find” <https://news.un.org/en/story/2018/08/1017892>

Libya

Despite many UN Resolutions and statements in favour of the UN-recognised Government in Libya, a succession of States (including France, Egypt and the UAE) have agreed semi-covert deals with General Haftar and his non-state allies who effectively control territories in the east of the country. A 2016 report issued by the OHCHR on Libya, which felt obliged to call on these armed non-state actors to comply with IHL and IHRL obligations concerning the protection of the civilian population, explained this as follows:

‘The present report adopts the approach that non-state actors who exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.’⁵³

A similar approach was adopted by UNSMIL and OHCHR in a report on arbitrary and unlawful detention in Libya in April 2018. It reiterates that “all parties to the conflict are also bound by international humanitarian law. Non-State actors who exercise government-like functions and control over territory are also obliged to respect human rights norms.” It also states:

“Non-State actors who exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of individuals under their control.’

The report adds:

‘Non-State armed groups that are party to an armed conflict are also bound by international humanitarian law. Furthermore, relevant rules of customary international humanitarian law apply to non-State armed groups that are party to an armed conflict.’⁵⁴

The implication is these non-state actors have obligations under both IHL and IHRL due to their effective control over these territories.

What does the modern practice of belligerent occupation mean for peacemakers?

The only rational explanation for all this international and state practice is that these armed non-state actors have been deemed to have acquired sufficient presence, authority and institutional control over their territories to require them to comply with certain humanitarian and security obligations. All of this is consistent with the concept of belligerent occupation.

What is particularly significant about the Astana and US-Taliban de-escalation plans is that they are interim plans. They are not fully-fledged peace processes that involve negotiations between the conflict parties and the host governments. They are not about agreeing the actual terms of a long-term political settlement. Instead, these are interim mechanisms that mimic frameworks for engaging the law of armed conflict and combating terrorism, without activating the existing ones. That is why the negotiations mainly involve armed actors rather than political or civil society representatives.

Added to this, these interim agreements were only negotiated with armed non-state actors because of their enduring presence on the territory and the inability of the host government to impose its sovereignty on that territory. Where outside states have intervened (despite complaints from host governments, including about the need to maintain the integrity of the state), this has been done precisely because the conditions of belligerent occupation had effectively been met.⁵⁵

53 Human Rights Council (2016) *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*. https://www.ohchr.org/Documents/Countries/LY/A_HRC_31_CRP_3.pdf p10

54 Office of the United Nations High Commissioner for Human Rights in Cooperation with the United Nations Support Mission in Libya (2018) *Abuse Behind Bars: Arbitrary and unlawful detention in Libya*. https://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf p14

55 See also state practice more generally towards Taiwan; the ‘frozen conflicts’ of the ex-Soviet periphery; the Turkish Republic of North Cyprus; Kachin, Wa and other entities in Myanmar; as well as the Donetsk and Luhansk People’s Republics and the “Minsk I” and “Minsk II” agreements.

The real issue for peacemakers, is not whether these non-state actors are capable of being considered limited subjects of international law for the purposes of enforcing IHL standards, but how such IHL obligations can be triggered. More specifically, how they can be triggered through the proper functioning of the law of armed conflict instead of through uneven bilateral state mechanisms. Especially since state mechanisms are not transparent and too often focus on the security concerns and political interests of States instead of the protection of the rights of civilians.

At present, there are only a few ways peacemakers can try to activate the formal application of the law of armed conflict. They can urge host States to classify the conflict or make a declaration (including of belligerency), or enter into some form of special agreement with a non-state actor under Common Article 3; they can encourage victims to engage in human rights litigation (which can be protracted) to highlight the issue; and/or they can call on all conflict parties to respect UN resolutions which also reference obligations to observe IHL and IHRL. As the four cases have shown, in practice each of these courses of action are fraught with difficulties.

The Effective Control Test

What is needed then is a conflict qualification or trigger mechanism by which the conflict parties (or the international community if necessary) can formally invoke the proper application of IHL to territories controlled by armed non-state actors. For IHL to apply under the Geneva Convention, a conflict must qualify as either an IAC or NIAC. In the case of a classic IAC, the interpretative trigger is relatively easy to identify as it consists of an armed attack or occupation by one state on another. The formal trigger for an NIAC is either Common Article 3 and/or Article 1(1) of the Additional Protocol. However, in an ‘internationalised’ NIAC conflict, the assessment is much more complex. That is because such conflicts often start with protest, escalate into political violence and lead to an insurgency by non-state actors which might eventually amount to a belligerent occupation of territory. This leads to a need to determine whether such an evolutionary process has (a) taken on the status of a belligerency (whether under an official NIAC designation or not); or (b) become so ‘internationalised’ it now qualifies as an IAC (in the same way Macak suggests NIACs can evolve). One way to do this would be to adopt and apply the effective control test.⁵⁶

Such a test could be used to trigger the enforcement of a minimum set of IHL norms in cases of belligerent occupation, whether or not the conflict is classified under the Geneva Conventions. The set of norms could be confined to those protecting the civilian population, maintaining public security, and treating participants humanely, pending resolution of their combatant status (which could be resolved later under the Geneva Conventions or some wider peacemaking process). Deferring some of the more controversial obligations concerning combatancy status could make this approach less politically sensitive while allowing for the proper application of IHL.

This offers a different way to deal with the gap in IHL which doesn’t involve getting States to sign a new Additional Protocol, or rely on IHRL as an alternative source of law, or demand the recognition of combatant status that may come with expanding the definition of IACs to include Macak’s four modalities of ‘internationalisation’⁵⁷. This would mean devising and applying a dynamic trigger test for territories controlled by non-state actors which:

- (a) Recognises the principle of universality in relation to a new minimum set of IHL standards concerning the protection of the civilian population⁵⁸;
- (b) Deploys an effective, time-sensitive conflict qualification trigger mechanism, based upon the effective control test, by which minimum standards can be formally triggered and enforced by all conflict parties without, that is, the conferring of diplomatic or political recognition or any other legal status upon armed non-state actors by virtue of their mere enforcement.

This paper consequently argues that the law of belligerent occupation and the effective control test could offer a potential way through the current IHL impasse. It could be even deployed by a host State when deciding whether or not to classify a conflict as an IAC or NIAC, or whether to enter into a special agreement with an armed non-state actor under Common Article 3. As Emily Crawford observes:

‘It should be noted that the possibility of non-State implementation and compliance of the Conventions in their entirety was provided for in the Conventions. The inclusion of the ‘special agreements’ mechanism in Common

56 Much of the distinction between the law of belligerent occupation and the test for Common Article 3 has fallen away given the recent application and activation of customary international law to all conflicts.

57 Such an expansion may bring with it a range of diplomatic difficulties in relation to recognition of combatant status.

58 Including those contained in Common Article 3 but not necessarily those relating to combatancy.

Article 3 suggests that rebels and insurgents are capable of fulfilling all the obligations and duties contained in the Convention as a whole, if such a 'special agreement' is adopted between parties to the conflict.⁵⁹

Such an approach would plainly require the identification and development of new '*meta rules*' for the determining and triggering of IHL in such situations but as Eyal Benvenisti once put it: 'once control is established, occupation begins.'

But what does the term 'effective control' mean in such circumstances? One possible answer could be: a degree of consolidation of power and stabilisation for a material period of time in which the relevant conflict actor substitutes its authority for that of the host Government's in a manner that would allow for the law of belligerent occupation to become operative and enforceable on an interim basis, without the conferring of any status that might affect the sovereign rights of the host State.

Such an answer would be consistent with the ICTY judgment in the *Prlic* case in late 2017 which held: "the test for occupation is actual authority over the territory and population and not the motivation behind such an occupation."⁶⁰ There is also other case law which makes clear that where a non-state actor group has effective control over territory to affect the day-to-day running of the government, the interim 'jurisdictional basis' (if that is what you call it) for them running the courts and complying with IHL and IHRL, is their effective control. That is, acting as a *de facto* government, meeting the needs of the population and applying existing criminal law within the existing judicial system.

If the non-state actor takes over the running of the existing courts it should apply the applicable law of that territory and generally only amend it as necessary in the public interest (save for some specific exceptions), since this is what customary international law, the Hague Regulations and Geneva Conventions require of States occupying territory. However, if the non-state actor group declares independence (with or without the support of a third State), it will probably create a new constitution and seek legitimacy by ensuring it meets its obligations to the local population, including their human rights. In this case, the law of treaty succession may also be relevant. See, for example, the Turkish Cypriots declaration in the case of the Turkish Republic of Northern Cyprus (TRNC').

Whether, and to what extent, the laws made by armed non-state actors and their courts are recognised by other States is probably ultimately a political matter. There have, for example, been some English divorce cases which recognise acts of State by unrecognised *de facto* governments (see *Emin v Yeldag*). The European Court of Human Rights has also accepted that a TRNC court can remedy property rights claims (see *Xenides-Arestis v Turkey*).

States may, of course, refuse to recognise the non-state actor and their territory as a State, no matter how much effective control the actor exercises or how compliant it is with the law. However, the point is the 'effective control test' and the law of belligerent occupation could still be used to support the enforcement of the humanitarian rights of the civilian population.

Several cases at the European Court of Human Rights (ECtHR) have also explored when a State might be liable for violations committed by its forces in a neighbouring State or by a non-State proxy administration set up to control and occupy territory in a neighbouring state.⁶¹ In these cases, the test used is whether the State effectively controls either its agents operating in that territory or the alleged proxy administration set up to govern it. These cases also identify a number of sub-tests which could be of potential use when deciding whether an armed non-state actor exercises sufficient authority over the territory to trigger the application of IHL and its customary norms.

In 2019, a UK Supreme Court Judgment found that Article 1 of the UN Convention Against Torture applies to those acting on behalf of non-State armed groups when those groups exercise the authority normally exercised by governments over their civilian populations. It didn't accept that article 1 must be confined to government officials and applied a version of the effective control test instead, stating:

'A person acting in an official capacity' in section 134(1) of the Criminal Justice Act 1988 includes a person who acts or purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict.'

59 Crawford, E: *The treatment of Combatants and Insurgents under the Law of Armed Conflict*, Pg. 166, Oxford University Press.

60 ICTY, *Prlic* Appeal Judgment (n14) Vol 1, p.310.

61 See *Issa and ors v Turkey*, ECtHR (2004); *Ocalan v. Turkey*, ECtHR (2003); *Al-Skeini and others v. UK*, ECtHR (2011); *Chiragov and Others v. Armenia*, ECtHR (2015) and the Council of Europe Factsheet on extra-territorial of State Parties, July 2018.

This is also consistent with the ICJ ruling in the Bosnian Genocide judgment which outlines that States are responsible if the acts of the “State’s organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.”⁶² This meant that non-state actors were also held responsible where the acts were carried out “by persons or entities which are not formally recognised as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State.”⁶³

If this was applied in the cases of Turkish-backed rebels in Syria or Iranian-backed Houthi authorities in Yemen, it could be argued that those conflicts had mutated into internationalised IACs, with conflict being effectively between two states. However, these two cases are far more complex, since the non-state-actors control only part of the home state’s territory and also aren’t fully under the effective control of the outside state. Despite this, as long as these non-state actors maintain some operational autonomy, they could be considered an occupying power under the law of belligerent occupation. This would still trigger the application of IHL whether the conflict is re-classified as an IAC or not. Either way, the development of a reworked test could help clarify a number of issues which have stopped the practical application of IHL in these types of conflicts.

However, there is still the issue of what to do if a host state refuses to use, or is incapable of using, such a test to classify the conflict for the purposes of IHL and relieving the humanitarian situation. This paper suggest that the time has surely come for the international community to consider whether, in this case, it should apply the effective control test and the law of belligerent occupation itself in order to protect the civilian population in such territories. This could be done through UNSC Resolutions and/or processes established under the *Responsibility to Protect* doctrine.

62 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v Serbia & Montenegro*) ICJ Judgment, (2007), ICJ Report 43, paragraph 401.

63 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v Serbia & Montenegro*) ICJ Judgment, (2007), ICJ Report 43, paragraph 406.

The Responsibility to Protect

Identifying a belligerent occupation and then imposing IHL obligations plainly touches on the sensitive issue of sovereignty. The international community's right to intervene in the internal affairs of a State has dominated debates within the UN Security Council over the last twenty years, most notoriously in relation to Iraq. Much of the controversy has revolved around the Responsibility to Protect ('R2P') doctrine, which has been quietly becoming an international norm since the end of the Cold War.

R2P re-thinks sovereignty based on the idea that individual subjects have rights whereas states have responsibilities. The most important of these is the responsibility to protect subjects from mass atrocities. Where a state is unable or unwilling to do this, the responsibility passes to the international community – since the promotion and protection of human rights is also a legitimate concern of that community.

It is clear, however, that this re-thinking of sovereignty and the role of the international community sits uncomfortably with the rules that have traditionally governed relations between states. Ever since the Peace of Westphalia put an end to the Thirty Years War in Europe in 1648, non-interference in the internal affairs of states has been the golden rule of international diplomacy. Indeed, Article 2(7) of the UN Charter assumes that there is no right to “intervene in matters which are essentially within the domestic jurisdiction of any state”.

However, the UN was also established to avoid the violence of the first half of the 20th Century and the UN Security Council was given the task of ensuring peace and security among nations. States, therefore, accept limits on their right to use force in order to benefit from collective action. Article 2(4) of the Charter states: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” This makes clear there is a limit to the idea of sovereignty established in 1648.

Other limits include the Charter's recognition of the right of self-determination for all peoples of the world as well as the inviolability of the dignity of the individual. The 1948 Universal Declaration of Human Rights recognises that all people are endowed with the same basic rights. This Declaration has led to many other international treaties, including one making genocide a crime with universal jurisdiction, and another creating the International Criminal Court to hold state leaders accountable for human rights abuses. However, it was the end of the Cold War before R2P and new ideas of international security began to take hold.

This is because, like the Geneva Conventions, the UN system was originally designed to stop interstate rather than internal armed conflicts. However, in the second half of the 20th Century the world was ravaged by genocide, internal armed conflict, terrorism and pandemics, all of which transcend state boundaries. As the UN Secretary-General Kofi Annan observed – in an increasingly globalised world – threats to security have become “problems without passports”. As a result, new concepts of human security became the focus of the foreign policy of a number of liberal states such as Canada and Norway.

These states managed to expand the definition of a “threat to international peace and security” in Chapter VII of the UN Charter to include humanitarian concerns. It was partly on this basis that the Security Council authorised UN interventions in Somalia, Liberia, Rwanda, Haiti, Sierra Leone and Kosovo during the 1990s. However, many other states remained deeply suspicious of this extension of powers, seeing them as, at best, inadvertently encouraging armed uprising and, at worst, a cover for Western imperialism. They argued that there was no right to intervene in international law and it is politically impossible to intervene fairly given the biased international system. For them, the 1990s interventions lacked consistency and coherence, and did not justify infringing sovereignty.

In the end, Kofi Annan decided to confront the tension between traditional concepts of sovereignty and the increasing need to protect civilians. In his Millennium Report, he asked:

'If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?'

The answer came in a 2001 Report on R2P written by the International Commission on Intervention and State Sovereignty (ICISS). It claimed that R2P was a comprehensive approach to humanitarian crises. It defined intervention as a continuum from sanctions to military intervention, including both a "*responsibility to prevent*" and a "*responsibility to rebuild*". The Report identifies six principles that need to be satisfied before a military intervention can be justified.⁶⁴ The Report is based on a redefinition of sovereignty, in which a state only acquires full sovereign powers provided it discharges its primary responsibility to protect its citizens.

Opponents of the norm argue that the illegal use of force in Iraq in 2003, and the early attempt by Bush and Blair to justify the intervention as serving humanitarian purposes, is an example of the potential danger and misuse of R2P. Other observers say the invasion of Iraq did not represent a proper R2P case and should not be used as an example of a response under its framework.

R2P was finally approved at a world summit in 2005 after the UN unanimously accepted the findings of the 2001 Report. The Summit limited R2P to cases of genocide, war crimes, ethnic cleansing and crimes against humanity, but agreed that the international community "should assist states in exercising this responsibility and in building their protection capacities". It also confirmed that the international community is prepared to take collective action "when a state manifestly fails in protecting its populations from these four mass atrocities" and particularly when it commits such atrocities against its own population. The authority to intervene was, however, only to be granted by the Security Council.

These new conceptions of security actually reflect the ways IHL and IHRL has developed (as outlined earlier) and offer ways it can be applied. Some humanitarian practitioners believe they should be applied to protect civilian populations in States where portions of territory are controlled by armed non-state actors. The R2P report rightly emphasises the rights of civilians to be protected and how the international community should intervene to assist states "in exercising this responsibility and in building their protection capacities", especially when they become incapable of doing so. Where this is the case and there is a threat to international peace and security, aspects of the R2P doctrine could, therefore, be used to provide part of the moral basis of the right of the international community to intervene and apply the effective control test and the law of belligerent occupation to portions of territory controlled by armed non-state actors.

64 1. Just cause – To warrant military intervention there must be an extraordinary level of human suffering, evidenced by either a large scale loss of life actual or anticipated, with genocidal intent or not, or by large-scale ethnic cleansing actual or anticipated, whether carried out by killing, forced expulsion, acts of terror, or rape; 2. Right intention – The primary purpose must be to prevent or stop human suffering; 3. Proportional means – The intervention should be the minimum necessary to prevent or stop human suffering; 4. Last resort – Military intervention can only be employed if all non-military options have been considered; 5. Reasonable prospects – Military intervention should not go forward unless there is a reasonable likelihood of success; 6. Right authority – Security Council authorisation should be sought prior to military intervention.

The COVID-19 Pandemic

The issues raised in this paper have become even more critical in the light of the COVID-19 pandemic. This has highlighted the critical need for co-operation across battle lines on public health issues. By late April 2020, it was becoming clear to many observers that what was needed was a full spectrum, multi-dimensional and layered approach towards the pandemic and the resolution of conflict more generally. As Fadi El-Jardali, Professor of Health Policy and Systems at the American University of Beirut, observed in a think piece put out by Chatham House and the Arab Reform Initiative:

‘It is becoming increasingly clear that an effective pandemic response requires a whole-of-government, whole-of-society approach (Kim, 2015; Shwartz and Yen, 2017; WHO, 2020). This calls for a collaborative response that draws on the capacities and resources of multi-sectoral, state and non-state actors, comprised of private, for-profit and not-for-profit organizations including civil society organizations (WHO, 2020).’⁶⁵

On 17th April, Roland Kobia, the EU special envoy for Afghanistan, tweeted that containing COVID-19: “. . . requires full cooperation between humans, even enemies. Together, not against each other. The enemy has changed; it is now called coronavirus. Need to adapt to this new reality.”⁶⁶

Yet the failure to tackle how the law of armed conflict applies to territory controlled by armed non-state actors has led the international community to speak in code when it comes to humanitarian and security assistance in such areas. For example, in March the OHCHR issued a press release about Yemen which highlighted a call by a Group of Eminent International and Regional Experts to “all parties to the conflict to immediately release all detainees . . . in order to prevent and mitigate the risks of COVID-19 contagion in the whole of Yemen, in line with their obligations under International Law.” However, it did not set out what which IHL obligations it was referring to or who was legally responsible for meeting them.

The potential for disaster led Afrah Nasser, Yemen Researcher for the MENA Division of Human Rights Watch, to observe in a dispatch⁶⁷ that “COVID-19 could be a greater scourge than anything Yemeni civilians have experienced.” She added: “for Yemen to have a chance against the disease, parties to the conflict need to take immediate measures to protect civilians in areas under their control, abide by the laws of war, and ensure the unimpeded passage of humanitarian assistance.” Two days later, UN aid chief, Mark Lowcock, similarly hinted that all the conflict parties in Yemen were bound by the laws of war but also didn’t address how the legal framework applied to armed non-state actors who effectively controlled territory. In both cases, this was no doubt for fear of inflaming the sentiments of states intent on denying these entities any type of status.

OCHA took a similar approach towards the position of non-state actors in Libya, despite its *COVID-19 Situation Report No. 3* which reported “particular challenges in moving assistance between GNA-controlled and LNA-controlled areas.”⁶⁸

65 El-Jardali, F (2020) *After the Pandemic: Reimagining the Role of State and Non-State Actors in (Re)building National Health Systems in the Arab World*. <https://www.arab-reform.net/publication/after-the-pandemic-reimagining-the-role-of-state-and-non-state-actors-in-rebuilding-national-health-systems-in-the-arab-world/>

66 Tolo News. (2020, April 17). Govt Extends Kabul Lockdown as Fears Grow. Tolo News, available at <https://tolonews.com/afghanistan/govt-extends-kabul-lockdown-fears-grow>

67 Nasser, A. (2020, April 14). *COVID-19 in Yemen – A Perfect Storm: War-torn Country’s Shattered Health Care System Is No Match for Pandemic*. Human Rights Watch, available at <https://www.hrw.org/news/2020/04/14/covid-19-yemen-perfect-storm>

68 UNOCHA. (2020, April 27). *Libya – COVID-19 Situation Report No.3*, available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/covid-19_situation_report_no.3_libya_27apr2020.pdf. GNA – Government of National Accord. LNA – Libyan National Army.

These included 851 access constraints, of which 164 were related to COVID-19 and prevention measures imposed by the authorities (particularly curfews and prohibited movement between areas). OCHA prefaced its Humanitarian Plan for April-June 2020⁶⁹ with the standard disclaimer:

'The designations employed and the presentation of material in the report do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.'

As a consequence of this coded language, IHL obligations are noted but not practically enforced. Similarly, no legal basis is provided for them for fear of inflaming the political situation further. Thus, the public health, humanitarian and security threats posed by COVID-19 continue to be exacerbated in some territories due to (a) host and neighbouring government sensitivities over the recognition and status of armed non-state actors; and (b) continuing reticence on the part of the international community to fully enforce the Geneva Conventions in such circumstances or reinterpret IHL in a manner that takes account of this new conflict environment. These sensitivities and this reticence have complicated the international community's ability to respond to threats in a timely manner and effectively prevent, manage, resolve and transform conflict more generally.

It is notable that, in the first stages of the virus in March 2020, the WHO sent COVID-19 testing kits for use in Idlib not to Idlib but to Turkey because *it* only recognises state parties. Worried, no doubt, about claims of an interference with the unity and territorial integrity of Syrian sovereignty, it understandably chose to avoid the issue of direct international assistance to non-state actors altogether. How that decision fitted in with the Security Council's recognition of the need for "unity and solidarity" with "all those affected" is less clear.⁷⁰ It certainly raises the issue of how the international community should respond to conflict-affected areas in which territory is effectively controlled by those who are neither recognised by host governments nor classified as being involved in a recognised conflict under the Geneva Conventions.

This brief exploration of the international community's responses to the virus in Afghanistan, Yemen, Libya and Syria during the first two months of the crisis confirms that some of the most acute public health and security threats facing conflict-affected states are in portions of territory which are effectively controlled by non-state armed actors. A failure to mitigate the spread of the virus in these areas might easily turn into a much wider threat to international peace and security, because these public health and security threats can act as a force multiplier of sickness, further violence and greater security disorder.

The problem is not that there are no humanitarian resources getting through to these areas but that it is uneven and constrained by the lack of a clear applicable IHL framework, which humanitarians, peacemakers and security experts can work within. As Foreign Policy rightly observed in May⁷¹, violence limits access to health care, strains supply chains, and spurs health professionals to flee for safer areas. Entire communities can be cut off from health services, and the disruption can be so severe that local health systems collapse. It went on:

'The U.N. Secretary-General António Guterres has rightly urged global unity in mobilizing "every ounce of energy" to defeat the pandemic. This must include more robust efforts to talk to armed actors about their obligations to stop the spread of the virus. The world needs to do this regardless of whether these groups are terrorists or criminals or whether doing so might legitimate them in the short term. This dialogue may lead to humanitarian pauses in fighting, but it might also mean negotiating safe passage guarantees for health workers, encouraging coordination with government health care entities, or merely talking to armed groups about appropriate health messaging. If they control territory and aspire to some form of legitimacy, they have an essential role to play in lessening the pandemic's toll—one for which they must also be held to account.'

69 See Report: United Nations Office for the Coordination of Humanitarian Affairs. (2020) '*The Humanitarian Response Plan Prioritization Direct and Indirect Contribution to COVID-19 Response for April-June 2020*'. <https://www.humanitarianresponse.info/en/operations/libya/document/libya-i-humanitarian-response-plan-prioritization-direct-and-indirect>

70 On 9 April 2020, the UN Secretary-General warned the UN Security Council that the coronavirus pandemic was threatening international peace and security, potentially leading to an increase in social unrest and violence that would greatly undermine the world's ability to fight the disease. In response, the Security Council issued its first statement since the outbreak began. It expressed support: "for all efforts of the Secretary-General concerning the potential impact of the COVID-19 pandemic to conflict-affected countries and recalled the need for unity and solidarity with all those affected.'

71 Jackson, A. (2020, May 6). For the Taliban, The Pandemic is a Ladder. *Foreign Policy*.

A *New York Times* article offered an example when it recently reported that Taliban officials had summoned health workers and journalists to a meeting in eastern Afghanistan, where a medical worker in a full protective suit displayed a thermometer gun. On closer inspection, however, the device turned out to be a prop taped together from scraps of plastic and wood. The UN Secretary-General was, therefore, surely correct when he observed, during a debate on armed conflict in the Security Council on 27th May:

‘Where armed conflict continues, COVID-19 makes the protection of civilians more challenging than ever – and our support more important than ever. It is only through respect for human rights and international humanitarian and refugee law that we can protect civilians, including health and humanitarian workers and infrastructure, and relieve pressure on health systems. But the prospects are bleak. My latest report on the Protection of Civilians in Armed Conflict shows little progress on the protection of civilians, and on compliance with international law, in 2019 . . . Throughout the year, humanitarian access was hampered by violence, insecurity, and bureaucratic impediments – often in violation of international humanitarian law . . .

Last year marked 20 years since the Security Council added the protection of civilians to the agenda, and the 70th anniversary of the Geneva Conventions. The year brought several important initiatives and commitments, including the Call to Action to bolster respect for international humanitarian law endorsed by 40 States. Such pledges are an important first step. However, compliance and accountability are essential, and lacking. I repeat my call to States to develop national frameworks to strengthen the protection of civilians in armed conflict. I urge all to move beyond rhetoric and close the accountability gap through national legislation and coordinated international action . . .

The pandemic is amplifying and exploiting the fragilities of our world. Conflict is one of the greatest causes of that fragility. Protecting civilians requires us to do much more to ensure compliance with international law and accountability for violations. We must also do more to prevent, reduce and resolve conflicts. Sustainable political solutions remain the only way to ensure that civilians are kept safe from harm.’

In all of these conflict-affected states the threat of further violence or social unrest, and of a corresponding breakdown in public health services, remains acute. At the same time, the ability of the international community to support countrywide humanitarian relief in such states is constrained by a dysfunctional IHL framework. Issues to do with the recognition of non-state armed actors, their legitimacy and claims to lawful governance, remain highly contested by host governments. The UN Security Council has made no attempt to deal with these issues, even on an interim or emergency basis. Yet such issues and claims will continue to exacerbate the security situation as well as complicate the international community’s public health and security response towards these areas and the civilian populations who live in them.

As the world enters a new COVID-19 pandemic era, the international community, as the IMF recently observed, must do “what it takes,” if it is to control the virus. These non-state-controlled territories could become virus trouble spots, including for the second wave of geopolitical effects of the virus that is likely to hit the world and its fragile governance structures sooner rather later.⁷² New approaches that address the dysfunctionality of the IHL framework need to be developed as a matter of urgency in order to deal with both the emerging conflict dynamics of the 21st Century and the rise of this new threat. As the UN-Secretary General observed at the outset of this crisis, nothing illustrates “the folly of war”, including its non-regulation, more than “the fury of the virus.”

72 McTague, T (2020) *The Pandemic’s Geopolitical Aftershocks are Coming*. <https://www.theatlantic.com/international/archive/2020/05/coronavirus-pandemic-second-wave-geopolitics-instability/611668/>

Next Steps

This paper suggests that the law of belligerency, together with the concept of effective control, could act as a useful framework for an HD Study Group enquiry into how to deal with gaps in the application of IHL to territories under the control of armed non-state groups. It has considered both emerging state practice and the changing dynamics of 21st Century conflict environment. A more detailed investigation into how this gap could be addressed in the future, including in relation to the four cases in this paper, could result in significant insights for the international community and the UN agencies which have to deal with such territories.

States need to be reminded that under Common Article 1 of the Geneva Conventions they “undertake to respect and to ensure respect for the present Convention in all circumstances.” A 2016 ICRC Commentary suggests there may also be ‘positive’ and “due diligence” obligations on States to prevent violations of Common Article 3 by non-state actors, including “in the case of a partner in a joint operation.” States, for example, remain bound under IHRL to protect people from the infringement of certain rights by armed state actors during conflict, such as in relation to the right to life. These requirements and obligations need to be explored further if the international community is to develop a more protective and responsive approach to IHL that meets the need of the 21st Century. While it is clear this could be difficult and result in some political controversy, the emergence of increasingly globalised threats – such as the COVID-19 pandemic – means the cautious approach of the international community towards this issue is unsustainable, even in the medium term.

What this paper demonstrates is that this whole area is complicated by: (a) States’ unwillingness to recognise the lawfulness of acts of non-State actors in wars; (b) the huge amount of literature generated by attempts to analyse the law in the absence of clear State practice and/or drive it forward (often with a particular agenda); and (c) the fact that each situation is fact-dependent and which international law is relevant is naturally affected by context.

The relevant areas of law to consider in any further research would include the law of recognition of States and governments; the law of succession; the law of armed conflict; international human rights law; international criminal law; transitional justice norms; as well the law of belligerent occupation from the 19th onwards. It would also have to consider new doctrines of sovereignty and of human security, including R2P, and how they might be said to apply to conflict-afflicted states. The research could start with a dialogue with officials from the UN Special Envoy offices in relation to state practice towards the four cases examined in this paper. Beyond exploring state and non-state practice in relation to these four conflicts, the research could also explore other conflict situations which have involved the concept of effective control such as Taiwan; the ‘frozen conflicts’ of the ex-Soviet periphery; the Turkish Republic of North Cyprus; Kachin, Wa and other entities in Myanmar, as well as the Donetsk and Luhansk People’s Republics and the “Minsk I” and “Minsk II” agreements.

Such research is likely to be welcomed, at least by the humanitarian and peacemaking community and more forward-thinking elements of the international community. After all, the ICRC has long worked for a more unified application of the law of armed conflict when it comes to interpreting IHL.

If the international community is willing to accept that national liberation and guerrilla fighters deserve full Geneva Convention protections, even if they are taking part in internal wars, why not explore whether such protection should be extended to civilians caught up in conflicts with both internal and international dimensions, which threaten international peace and security, and where non-state actors are in effect in belligerent occupation? As the ICTY observed in the *Tadic* case:

‘Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when

two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforesaid dichotomy should gradually lose weight.⁷³

As the great international lawyer, Hersch Lauterpacht, observed even before the adoption of the Geneva Conventions:

'A clearly ascertained state of hostilities on a sufficient large scale, willed as war at least by one of the parties, creates *suo vigne* a condition in which the rules of warfare become operative . . . once a situation has been created which, but for the constitutional law of the state concerned, is indistinguishable from war, practice suggests international law ought to step in in order to fulfil the same function which it performs in wars between sovereign states, namely to humanize and regularise the conduct of hostilities as between parties.'⁷⁴

Perhaps, the Swiss Scholar, Emmerich de Vattel, was right when he observed over 250 years ago that if an internal conflict acquired certain characteristics concerning the strength of rebels and the intensity of fighting then it should be treated in the same way as an international conflict. He maintained a civil war where rebels wielded sufficient strength to effectively oppose the sovereign is equivalent to a war between two states under international law.⁷⁵ In short, the time has surely come to re-examine some of these important and enduring insights within the context of the changing conflict dynamics of the 21st Century.

73 *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 97.

74 Lauterpacht, H. (1947) *Recognition in International Law*. Cambridge, Cambridge University Press. p.246.

75 De Vattel, E. (1797) *The Law of Nations, Book III : Of War*, Chapter 13, pp.292-95.



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