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From Words to Deeds A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms

Research and Policy Conclusions

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DISCLAIMER

This paper reflects the views of the authors and not necessarily those of the partner institutions or any other contributors. All errors are those of the authors alone.

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This document presents the summary conclusions of a two-year research project on the practice and interpretation of armed non-State actors (ANSAs) with respect to ten key international humanitarian norms.¹ ANSAs are key players in most armed conflicts and directly impact civilian populations. Yet, while it is undisputed that they are bound by international humanitarian law (IHL), what ANSAs say about IHL rules and how they act upon them have remained insufficiently explored.

The research project seeks to fill this significant gap. It does so through a comparative analysis of case studies (Al Qaeda [AQ]), the *Alliance des Patriotes pour un Congo libre et souverain* [APCLS], the Islamic State group [ISg], the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* [FARC-EP], Hezbollah, the Karen National Union/Karen National Liberation Army [KNU/KNLA], the Moro Islamic Liberation Front/Bangsamoro Islamic Armed Forces [MILF/BIAF], the *Mouvement National de Libération de l’Azawad* [MNL], the Syrian Democratic Forces/Autonomous Administration of North-East Syria [SDF/AANES] and the Taliban) and examining more than 500 documents produced by ANSAs stored on the online database www.theirwords.org. The study aims to shed light on the perspective of ANSAs with respect to core humanitarian norms and on factors that influence their behaviour on the battlefield. It also suggests certain explanations as to why the commitments made by certain ANSAs are—or are not—complied with by their members. To put it differently, this research addresses to what extent ANSAs’ words actually correspond to their deeds.

The present document first examines the context of the research and explains the methodology chosen to implement the project. Subsequently, a comparative analysis evaluates and compares, for each norm, the practice and interpretation of the various ANSAs studied in the research. Finally, the conclusions of the research are drawn and policy recommendations for future action offered. As a whole, it is hoped that the results of the project will advance our understanding of the dynamics of ANSAs and help to inform the strategies and interventions of humanitarian actors and other stakeholders to promote their compliance with IHL.

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Further information on the work and its supporters is available on the companion website of the project: <https://words2deeds.org>.

¹ These norms were selected because their application raises core humanitarian, operational, or legal challenges. More specifically, the study has examined ANSAs’ perspectives on the following core norms: I) protection of civilians from attacks; II) the prohibition of sexual violence and gender discrimination; III) the prohibition of using and recruiting children in hostilities; IV) the protection of education; V) humanitarian access (and denial thereof); VI) the protection of healthcare; VII) the prohibition of forced displacement; VIII) the use of landmines and other explosive devices; IX) detention, fair trial, and the administration of justice; X) the special protection of certain objects, such as cultural property and the environment.

The research builds on three inter-related trends. First, in recent years there has been an increasing number of non-international armed conflicts (NIACs), i.e. conflicts opposing States to ANSAs or between ANSAs themselves.² In many of these contexts, not only do these non-States entities use armed violence to achieve their military and political objectives, they also establish institutions that regulate the everyday life of individuals, provide public services, and adopt laws and regulations. As noted by the UN Secretary-General in his 2022 report to the UN Security Council on the protection of civilians:

Up to 160 million people live in areas under the direct control of non-State armed groups or where control is contested. In 2020, ICRC identified around 100 armed conflicts around the world, involving 60 States and more than 100 non-State armed groups as parties. In 2021, the number of non-international armed conflicts had more than doubled since the early 2000s, from fewer than 30 to over 70.³

In these conflicts, ANSAs have a direct impact on the civilian population, especially in the territories under their control. They are also responsible for violations of certain rules of IHL and also international human rights law (IHRL).⁴ As a result—and this is the second observed trend—, the international community has called for a more sustained humanitarian engagement with these non-State actors.⁵ Given that ANSAs are indeed involved in the great majority of contemporary conflicts and that millions of civilians live under their control, not engaging with them may have detrimental consequences on both the provision of aid and the protection of civilians.

Lastly, although it is undisputed that ANSAs are bound by IHL, how they view, understand, interpret, or implement their international obligations has remained underexplored.⁶

² The umbrella terms ‘armed non-State actors’, also sometimes referred to as ‘armed groups’, ‘insurgents’, ‘rebels’, ‘freedom fighters’, or even ‘terrorists’ are not defined in international treaties or international customary law. While they potentially depict the same, or at least a similar reality—a group of individuals using armed force to achieve certain goals—they convey markedly different perceptions of what they may in fact represent. In that sense, these are subjective terms, which may, depending on the context, mean, in Andrew Clapham’s words, ‘different things to different people’. A. Clapham, ‘Non-State Actors (in Postconflict Peace-building)’, in V. Chetail (ed.), *Postconflict Peace-building: A Lexicon*, Oxford University Press, Oxford, 2009, 200–212, at p. 200. For the purpose of this study, we have defined ANSAs as any organized armed entity which is distinct and not operating under State control. This includes various types of entities, notably ‘de facto’ authorities, armed opposition movements, paramilitary groups and self-defence militia. National liberation movements and armed gangs can also be considered as ANSAs, but they have been excluded from the scope of this research. For additional information, see the methodology section of this document.

³ UN Security Council, ‘Protection of civilians in armed conflict, Report of the Secretary-General’, S/2022/381, May 10th, 2022, available at https://www.securitycouncilreport.org/atf/ct/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2022_381.pdf, para. 64 (last accessed 25 September 2022).

⁴ This study considers that certain rules of IHRL are binding upon ANSAs, such as the prohibition of using and recruiting children below 18 years in hostilities, as enshrined in the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, or rules related to the prohibition of gender discrimination. See the Annex of this document for additional information on the legal framework examined in this project.

⁵ UN Security Council, ‘Protection of civilians in armed conflict, Report of the Secretary-General’, S/2019/373, May 7th, 2019, available at https://www.securitycouncilreport.org/atf/ct/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2019_373.pdf, para. 66 (last accessed 25 September 2022).

⁶ Several authors have referred to this knowledge gap. See, among others: M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019; H. Jo, *Compliant Rebels. Rebel Groups and International Law in World Politics*, Cambridge University Press, Cambridge, 2015; M. Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law’, 1 *Journal of International Humanitarian Legal Studies* (2010); E. Heffes and M. Kotlik, ‘Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime’, 96 *International Review of the Red Cross* 895/896 (2014) and D. Petrasek, *Ends & means: human rights approaches to armed groups*, International Council on Human Rights Policy, 2000.

10 While a number of studies have analysed States' practice, notably in the context of the creation of customary IHL rules,⁷ ANSAs' perspectives have generally been excluded from consideration. As of 2022, no comprehensive analysis has been conducted at the international level. This State-centric approach to IHL, and thus to ANSAs' international obligations, may explain, at least in part, the lack of ownership of, and compliance with, international law by these non-State actors.

Scholars have thus hypothesised that creating this sense of ownership among ANSAs could result in more respectful IHL scenarios,⁸ and that it is more likely that these groups might feel bound by the norms they have agreed to, rather than by those imposed by States.⁹ Evidently, it is difficult to imagine that ANSAs will respect legal regimes drafted by the very same actor they seek to overthrow.¹⁰ This seems obvious when an ANSA is fighting against the territorial State, but it also holds true when they are fighting against each other, to the extent that the recourse to violence by the groups is usually contrary to the State's domestic law. It is clear that if humanitarian norms were to be imposed on ANSAs only by virtue of a State's acceptance—thus entailing a 'top-down' approach—the legitimacy of such norms from the standpoint of these non-State actors could be affected.¹¹

There is an increasing sense that ANSAs' compliance with humanitarian norms is likely to improve if they are more actively consulted about the creation and implementation of the rules with which they are expected to comply.

Examining the vertical relationship between IHL and ANSAs as addressees of norms, albeit important, only scratches at the surface of the reality of contemporary armed conflict. This is because it would exclude those dynamics and interactions that have direct implications when it comes to the implementation of this legal regime. The perspectives of ANSAs towards IHL, as well as their actual behaviour in the battlefield, are diverse and may change over time. They are contingent on a number of factors. For instance, a lack of capacity can explain the difficulty some encounter in complying with certain rules.¹²

7 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005.

8 See in particular: S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012; M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare* (n 6); and M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (n 6).

9 See: A. Jackson, *Perceptions of armed non-state actors on humanitarian action*, Geneva Call, 2016, available at https://www.genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WHS_Report_2016_web.pdf (last accessed 25 September 2022); E. Heffes and J. Somer, *Inviting non-state armed groups to the table. Inclusive strategies towards a more fit for purpose international humanitarian law*, ODI, Briefing Note, December 2020, available at <https://cdn.odi.org/media/documents/odi-ec-nonstatearmedgroups-briefingnote-dec20-proof01a.pdf> (last accessed 25 September 2022).

10 J.-M. Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty and Customary Law', *Collegium*, No. 27, 2003, at p. 126-127.

11 E. Heffes and M. Kotlik (n 6), at p. 1202.

12 Geneva Call, *Administration of Justice by Armed Non-State Actors. Report from the 2017 Garance Talks*, The Garance Series: Issue 2, 2018, available at https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf (last accessed 25 September 2022).

Other factors affecting their level of compliance are linked to the groups' organizational structure, their aims, ideology, leadership, and external support and the relationships they have with local communities.¹³ Research has shown that those ANSAs constituted around economic endowments are predicted to be more violent, while rebellions rooted in social endowments are expected to show restraint.¹⁴ Critical historical analysis has also unveiled the ideological evolution of certain Islamist ANSAs, such as the ISg and AQ and their affiliates, to attack civilians as a deliberate military and political strategy.¹⁵ Finally, legal scholarship has also reminded us that the effectiveness of any legal system depends also on the norms reflecting the needs and characteristics of the actors that they are supposed to govern.¹⁶

In sum, despite the multiplicity of the factors affecting ANSAs' behaviour in armed conflicts, there is an increasing sense that their compliance with humanitarian norms is likely to improve if they are more actively consulted about the creation and implementation of the rules they are expected to respect.¹⁷

PROVIDING TOOLS TO THE HUMANITARIAN COMMUNITY TO BETTER ENGAGE ANSAs

It has long been recognized that engaging ANSAs is a critical element in any effort to strengthen compliance with humanitarian norms. IHL provides a solid legal basis by establishing the right for impartial humanitarian organizations to offer their services to the parties to a conflict, which includes non-State parties.¹⁸ The case for engagement with ANSAs has also been endorsed in a number of UN resolutions and reports. For instance, since 2009, the UN Secretary-General has repeatedly stressed in his reports on the protection of civilians in armed conflict the importance of engaging and training ANSAs on IHL.¹⁹ In his report of 2019, he noted that:

'Enhancing respect for the law requires changing the behaviour and improving the practices of non-State armed groups. Key to this is principled and sustained engagement by humanitarian and other relevant actors that is, moreover, strategic and based on a thorough analysis of the group(s) concerned'.²⁰

¹³ For various recent explanations as to why IHL is respected or not, see E. Heffes, 'Let's Talk About Compliance with International Humanitarian Law', Blog post, *Just Security*, 24 August 2022, available at <https://www.justsecurity.org/82750/lets-talk-about-compliance-with-international-human-law/> (last accessed 25 September 2022).

¹⁴ J. Weinstein, *Inside Rebellion, The Politics of Insurgent Violence*, Cambridge University Press, 2012.

¹⁵ M.-M. Ould Mohamedou, *A theory of ISIS, Political Violence and the Transformation of the Global Order*, Pluto Press, London, 2017.

¹⁶ M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (n 6).

¹⁷ E. Heffes and J. Somer (n 9); A. Bellal, 'Welcome on Board: Improving Respect for International Humanitarian Law Through the Engagement of Armed Non-State Actors', *19 Yearbook of International Humanitarian Law*, 2016.

¹⁸ Common Article 3 of the 1949 Geneva Conventions reminds that: 'An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict'.

¹⁹ The reports are available at https://www.securitycouncilreport.org/un_documents_type/secretary-generals-reports/?ctype=Protection%20of%20Civilians&cbtype=protection-of-civilians (last accessed 25 September 2022).

²⁰ UN Security Council (n 5).

12 Yet, humanitarian actors on the ground often lack the knowledge to effectively engage with these entities.²¹ They often fail to understand ANSAs' perspectives and motives to behave in a certain way and what makes them respect or violate IHL. Without a thorough understanding of compliance dynamics and ANSAs' practices, humanitarian actors may not be able to fulfil their mandate. The 2018 ICRC Study, *The Roots of Restraint in War*, underscored the acute need for a solid knowledge base to inform humanitarian engagement, notably by 'understanding the structure of armed groups [as] a first step in identifying potential sources of influence over their behaviour'.²² According to this study, 'familiarity with an armed group's history and ideological references is essential for effective dialogue with that group'.²³ In a similar sense, during the Global Consultation for the 2016 World Humanitarian Summit, it was recommended that humanitarian actors should reinforce their capacities to engage in dialogue with ANSAs.²⁴

The present study is conceived as a result of these conclusions as it aims at providing tools for the humanitarian community for a more informed engagement of ANSAs in order to improve the protection of civilians. These tools take the form of a number of policy recommendations and conclusions, drawn from the analysis of ten key humanitarian norms which implementation has proven to be challenging.

METHODOLOGY

The project has sought to answer the following overarching research questions:

- **Knowledge and understanding:** Are ANSAs *familiar* with the international rules applicable upon them in armed conflicts? Do they have different degrees of knowledge according to the rule under analysis? How do they understand these rules? Do they share the same interpretations States have?
- **Ownership and internalization:** Do ANSAs *agree* with the international rules binding upon them in armed conflict? Are these rules reflected in their internal policies or codes of conduct? What factors contribute to their acceptance or rejection?
- **Capacity:** What are the *practical challenges* ANSAs face when attempting to comply with the international rules applicable to them? Are some of these difficulties linked to their organizational structure, the way norms are drafted, or the lack of technical external assistance?

Different research methods were relied on to address these questions. These include document analysis, case studies, interviews, and field research.

21 S. Jackson, *Humanitarian Negotiations with Armed Non-State Actors: Key Lessons from Afghanistan, Sudan and Somalia*, ODI/HPG, March 2014, available at <https://odi.org/en/publications/humanitarian-negotiations-with-armed-non-state-actors-key-lessons-from-afghanistan-sudan-and-somalia/> (last accessed 25 September 2022).

22 ICRC, *The Roots of Restraint in War*, Report, Geneva, 2018, at p. 9.

23 *Ibid.*, at p. 51.

24 World Humanitarian Summit: Global Consultation. Geneva, 14-16 October 2015, Final Report, available at <https://reliefweb.int/report/world/world-humanitarian-summit-global-consultation-geneva-14-16-october-2015-final-report>, at p. 83 (last accessed 25 September 2022).

The first step entailed desk research analysis to examine ANSAs' positions with respect to ten core humanitarian norms. This was done by assessing different documentary sources found in Geneva Call's database, www.theirwords.org. The goal of this initial phase was to map ANSAs' written policies and to have a general overview of the norms that different types of ANSAs have (at least theoretically) agreed or committed to respecting. The documents analysed include internal regulations, unilateral declarations, and bilateral/multilateral agreements. They can be defined as follows:

- Internal regulations are measures put in place by ANSAs to control their members' behaviour and in some cases the civilian population living in areas under their control. They include oaths of allegiance, codes of conduct, command orders, military manuals, decrees, legislation, and penal or disciplinary codes. They may address issues related to IHL or human rights.²⁵
- Unilateral declarations are public statements made by ANSAs in which they pledge to abide by IHL in general or specific rules.²⁶ The Geneva Call's *Deeds of Commitment* are standardized unilateral declarations that allow ANSAs to undertake to respect specific humanitarian norms. To date, such documents have been developed on five thematic areas: the ban on anti-personnel (AP) mines, the protection of children, the prohibition of sexual violence and elimination of adverse gender discrimination, the protection of healthcare, and the prevention of famine.²⁷
- Bilateral/multilateral agreements are formal agreements concluded between parties to a conflict. Among them are special agreements foreseen in Common Article 3 of the Geneva Conventions, which encourages parties to a NIAC to bring into force all or part of the Geneva Conventions.²⁸ Reference to IHL have also been included in a number of peace or ceasefire accords. In some contexts, ANSAs have signed humanitarian agreements with UN agencies and/or NGOs, such as Memorandum of Understandings and/or action plans.²⁹

It is important to note, that despite their usual rejection by States, these documents are not deprived of some legal significance, even under international law.³⁰

Of course, not every ANSAs' document has the same 'analytical weight'. A code of conduct might take months or years to develop and it will usually involve or require the approval of the leadership of the group. The same can be said for the Geneva Call's *Deeds of Commitment*, special agreements concluded under Common Article 3 of the 1949 Geneva Conventions and peace treaties. On the contrary, public statements issued at a certain moment of the conflict might not bind the group in the same way.

²⁵ For an analysis of ANSAs' internal regulations and codes of conduct, see: O. Bangerter, *Internal Control. Codes of Conduct within Insurgent Armed Groups*, Small Arms Survey, 2012.

²⁶ S. Sivakumaran (n 8), at pp. 113–24; and M. Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflict*, ICRC, 2008, available at https://www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf, at p. 20 (last accessed 25 September 2022).

²⁷ For further information about Geneva Call, see: www.genevacall.org.

²⁸ E. Heffes and M. Kotlik (n 6).

²⁹ Additional information about the action plans can be found at <https://childrenandarmedconflict.un.org/tools-for-action/action-plans/> (last accessed 25 September 2022).

³⁰ For the legal value of special agreements, see for instance E. Heffes and M. Kotlik (n 6). Sassòli has also suggested that the practice of ANSAs may contribute to the development of customary law. M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (n 6).

14 In addition to ANSAs' documents, an extensive desk review of relevant literature was conducted, primarily of reports from UN agencies and bodies and international and local NGOs. This has allowed the researchers to assess the information shared by the ANSAs and provide a more nuanced picture of the events on the ground.

Case studies on representative ANSAs

According to the ICRC, 'worldwide, around 600 armed groups have the capacity to cause violence of humanitarian concern – and more than 100 of those can, as a matter of international humanitarian law, be considered parties to armed conflict'.³¹ Quite understandably, this research was not able to embark into an exhaustive study of all existing ANSAs parties to armed conflict. For methodological reasons, it was decided to select a number of actors and to examine in depth their practice in the form of case studies.

ANSAs were selected according to the following criteria: 1) diversity in geographical scope; 2) existence of a situation of armed conflict entailing the applicability of IHL; 3) existence of IHL and IHRL compliance challenges; 4) diversity in terms of type of ANSA, organizational structure, motivations for violent action, and territorial control; and 5) existence of ANSA's practice and access by the research team to a variety of sources that would allow to conduct a critical evaluation of the collected information.

The case studies were elaborated based on desk and field research, which included semi-structured interviews³² with members (or former members) of the ANSAs' leadership (e.g. Chairman, Commander in Chief, Secretary-General, Secretary for External Affairs, Chief of Military Staff, or individuals with a similar rank), military commanders, humanitarian coordinators, human rights' officers, legal advisers and thematic focal persons³³ of the FARC-EP (Colombia), MNLA (Mali), MILF/BIAF (the Philippines), the Taliban (Afghanistan, until August 2021), Hezbollah (Lebanon), the SDF/AANES (Syria), APCLS (DRC), and KNU/KNLA (Myanmar).³⁴ It is important to note that, for security reasons, the case studies on Al Qaeda (AQ) and the Islamic State group (ISg) only contain in-depth desk research and no in-person interviews were conducted.³⁵ Finally, key external stakeholders (i.e. humanitarian agencies and human rights NGOs) as well as other relevant experts were also consulted.

31 B. Demeyre, 'Editorial', 102 *International Review of the Red Cross* 915 (2021), at p. 979.

32 The research team conducted semi-structured interviews, which were preceded by a consent form that followed strict ethical research guidelines. It also included gender perspectives into the questionnaire and in the analysis of ANSAs' practice and interpretation. The team notably assessed ANSAs' views through a gender lens and tried to ensure that men and women were equally involved throughout the project, including in the interviews.

33 Note that the research team did not interview each category or ranking files for every single group, as the hierarchy and structure may vary. In addition, sometimes certain ANSAs' members were not available for interviews.

34 For the SDF/AANES, APCLS, and KNU/KNLA, research was conducted and the collected information and material were used for the development of the present document. Case studies of such ANSAs have not (yet) been published.

35 A few remarks are warranted to justify the choice of AQ and ISg as objects of research in the study. Indeed, it could be argued that these ANSAs, given their practice and rejection of the international legal order are beyond the pale of humanitarian engagement. Despite this possible argument, it must first be noted that AQ, ISg, and their affiliates qualify as ANSAs parties to NIACs and, as such are or were bound by IHL as are all the ANSAs analysed in this research. Second, these ANSAs represent huge challenges for the implementation of IHL and IHRL. Third, while without a doubt these ANSAs have committed international crimes, reducing them to the Manichean category of 'terrorist organisations', as is often heard in policy fora might not explain adequately their positioning on humanitarian norms. It seems to us that considering their deep anti-colonialist approach to international law, as well as their sometimes clear political (and military) strategy to violate IHL and human rights, is a better way to approach these groups. Because of their rejection of IHL, even if they are bound by it, the evaluation of the practice of AQ and ISg was done from the perspective of Islamic law, which, despite the different interpretations and school of thoughts, represent these ANSAs' frame of reference. See M.-M. Ould Mohamedou (n 15).

While there is no single typology of ‘armed non-State actor’ broadly accepted, this research nonetheless classifies ANSAs in terms of their operational and organizational rationale. The hypothesis behind this is that the examined actors are illustrative of the main types that are active in armed conflict, and that this way of categorizing them may facilitate a better comprehension of the reasons and incentives leading to situations of respect and violations of international law.³⁶

Before presenting and defining each type, three methodological caveats should be mentioned: (I) obtaining precise data on the features of an ANSA is a difficult exercise; (II) “groupings may be active in terms of various characteristics, since it is often impossible to reduce actual ANSAs to one dominant motive, one principal opponent, one clear territorial reference unit or one typical form of the use of force”; and (III) groups may change with time, and thus may transition from one topological stage to another over extended periods.³⁷ As a result, the categories proposed below should be seen as ideal types, rather than as a comprehensive description of the actors under analysis. The goal of this classification is a practical one, as the ANSAs included within each of these specific types may present similar approaches to the humanitarian norms under examination.³⁸

Four types of ANSAs can be identified in this regard: (I) non-recognized or partially internationally recognized States or so-called “*de facto*” authorities; (II) armed opposition movements that aim to reform or replace a government or a political system; (III) paramilitary groups or militias; and (iv) vigilante groups or self-defence militias.³⁹

Non-recognized or partially internationally recognized States or ‘de facto’ authorities are defined as entities that display State-like structures and share the main features of exercising an effective *de facto* authority over some territory, ‘no matter whether they are engaged in warfare with the sovereign State or are subsisting in times of peace.’⁴⁰ These entities often aspire to become or to be recognized as States, legitimate authority over a certain territory’ or autonomous regions, claiming to represent a certain segment of the country’s inhabitants.⁴¹ Our research has only considered those engaged in warfare, with examples including the SDF/AANES, the Taliban in certain parts of Afghanistan before August 2021, and the ISg.

36 IHL, however, has a less-than-nuanced approach to ANSAs. As long as any given ANSA reaches a ‘minimum degree of organization’ that enables it to respect and implement basic IHL provisions, its structure is rather irrelevant. This approach may be justified in order to cast the IHL net as broadly as possible and ensure the maximum protection possible for the civilians.

37 Jörn Grävingsholt, Claudia Hofmann and Stephan Klingebiel, *Development Cooperation and Non-State Armed Groups*, German Development Institute, 2007, at p. 25–28. As an example, the FARC-EP is included within the ‘armed opposition movements’ type, yet during a certain period of time (1998–2002) they were granted the control of a territory the size of Switzerland. Amnesty International, ‘Colombia. San Vicente Del Caguán after the Breakdown of the Peace Talks: A Community Abandoned’, 2002, at p. 3–4, available at <https://www.amnesty.org/download/Documents/112000/amr230982002en.pdf> (last accessed 25 September 2022).

38 Typologies identify ‘multiple ideal types, each of which represents a unique combination of the organizational attributes that are believed to determine the relevant outcome(s)’. D. Doty and W. H. Glick, ‘Typologies as a Unique Form of Theory Building: Toward Improved Understanding and Modeling’ 19 *The Academy of Management Review* 230 (1994), at p. 232.

39 As noted above, National Liberation Movements (NLM) and armed gangs have been excluded from the scope of this research, mainly because NLM are usually considered parties to international armed conflicts, and because the research team did not have access to armed gangs.

40 M. Schoiswohl, ‘De Facto Regimes and Human Rights Obligations - The Twilight Zone of Public International Law?’ 6 *Austrian Review of International and European Law Online* 45 (2003), at p. 50.

41 Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law. Foundations and Framework of Obligations and Rules on Accountability*, Routledge, London, 2017, at p. 40.

16 The second category of ANSAs considered in this research are the so-called *armed opposition movements*. These actors often aim to reform or replace a government or a political system. According to Thompson, such ANSAs represent ‘the prototypical armed group’, as they are considered a threat to the State’s legitimacy, ‘whether due to a breakdown in the rule of law or an inability to provide governance in areas under insurgent control’.⁴² For instance, the FARC-EP, the MILF/BIAF, the MNLA, the KNU/KNLA, and Al Qaeda affiliated groups can be considered as armed opposition movements.

The third identifiable type of ANSAs are the so-called *paramilitary groups or militias*. These can be understood as irregular combat units that usually act on behalf of, or at least tolerated by, the territorial State’s authorities – although they are not necessarily under their effective control. These groups often emerge in areas of ‘military statehood’⁴³ and became more numerous and prominent in the 1990s.⁴⁴ An example of this type is Hezbollah in Syria.

The last type of ANSA examined in this research is formed by *vigilante groups or self-defence militias*. These are usually composed of armed civilians that aim to defend themselves and their communities against the attack of enemy armed forces and other ANSAs. As Asfura-Heim and Espach note, ‘[a] growing body of research suggests that when states are unable or unwilling to provide security, local self-defense groups may be an imperfect but effective alternative’.⁴⁵ These ANSAs differ from other militias, such as those described in the third category, notably because their membership is commonly based on local ethnicities and they have a traditional leader (from a rather small community).⁴⁶ For the purposes of our research, the APCLS is representative of this fourth type.

42 Thompson, however, refers to ‘insurgents’ and not to ‘armed opposition movement’. As ‘insurgency’ in the historical international legal context has had specific consequences, this research uses instead the latter. P. G. Thompson, *Armed Groups. The 21st Century Threat*, Rowman & Littlefield, New York/London, 2014, at p. 77.

43 These have been defined as ‘those parts of a country in which central authorities lack the ability to implement and enforce rules and decisions in which the legitimate monopoly over the means of violence is consequently lacking’. T. Risse and T. A. Börzel, ‘Human Rights: The New Agenda’, *Working Paper No. 7, Transworld: Transatlantic Relations and the Future Global Governance*, 2012, at p. 10.

44 R. H. Shultz, D. Farah and I. V. Lochard, ‘Armed Groups: A Tier-One Security Priority’, USAF Institute for National Security Studies 2004, INSS Occasional Paper 57, at p. 22, available at https://www.files.ethz.ch/isn/49704/2004-09_OCP57.pdf (last accessed 25 September 2022).

45 P. Asfura-heim and R. Espach, ‘The Rise of Mexico’s Self-Defense Forces: Vigilante Justice South of the Border’ 92(4) *Foreign Affairs* (2013) at p. 146.

46 C. Raleigh, ‘Pragmatic and Promiscuous: Explaining the Rise of Competitive Political Militias across Africa’ 60(2) *The Journal of Conflict Resolution* (2016), at pp. 283–310.

This analysis included in this section is mainly based on the case studies published in the companion website of the project.⁴⁷ In addition, the website also includes a database, where most of the documents referred to in the case studies and collected during the project can be found.

1. The protection of civilians from attacks

While ANSAs usually do not have a very detailed understanding or approach to norms on the conduct of hostilities, many of them, including the majority of ANSAs studied in this research, have policies on the protection of civilians and agree that certain categories of persons can never be directly targeted. For instance, the MNLA, in internal regulations, proclaims that those ‘who do not take part of the fighting’ cannot be attacked.⁴⁸ The MILF/BIAF, in its General Order n°2, states ‘that the object of the fight is directed against fighting troops and not to non-fighting personnel’,⁴⁹ and the FARC-EP’s internal regulations exhorted its members to ‘respect the non-combatant population, its goods and interests and their social interests’.⁵⁰ For those groups that refer to Islamic law, although diverse interpretations exist, as to whom may be targeted, usually the specific category of civilian ‘women, children and the elderly’ are always considered as non-targetable (see for instance MILF/BIAF, AQ, Hezbollah, and the Taliban).

That said, most of the documents examined in the context of the present research do not contain a definition of who precisely is a civilian. More problematic is the fact that many ANSAs disagree with IHL in their interpretation of who ‘takes a direct part in hostilities’, and thus falling into the category of targetable military objectives. In particular, many ANSAs consider that those who work for the enemy government are not protected from attacks. For the Taliban, ‘key figures of the Kabul admin who support the invasion and make plans against their people, religion and homeland’ could be targetable.⁵¹ The FARC-EP, in a 1994 communiqué, affirmed ‘that paramilitary informants and collaborators, traders who sell goods to hire gunmen, or farmworkers on farms which are paramilitary bases’, could also be targeted.⁵² While Hezbollah considers unarmed enemy fighters as non-targetable, it also affirms that Israeli settlers, even if not directly participating in hostilities, are legitimate targets.⁵³ For ISg, neither the police nor government officials were protected, and the group also included in targetable categories government supporters.⁵⁴ In addition, both AQ and ISg adopted an extended definition of those participating in hostilities, including for instance all citizens of non-Muslim States that would attack Muslims, even if this position was firmly condemned by modern mainstream and renowned scholars of Islamic law. Interestingly, AQ distanced itself from ISg with regard to targeting Muslims in Muslim territories, as well as non-Muslims in Muslim territory, protected by the regime of *dhimma* or *aman*.⁵⁵

⁴⁷ See <https://words2deeds.org/publications/> (last accessed 25 September 2022).

⁴⁸ Art 4, MNLA military code of conduct. See database of the project, available at www.words2deed.org (last accessed 25 September 2022).

⁴⁹ Case study, MILF/BIAF.

⁵⁰ Case study, FARC-EP.

⁵¹ Case study Taliban.

⁵² Case study FARC-EP.

⁵³ Case study Hezbollah.

⁵⁴ Case study ISg.

⁵⁵ Case study Al Qaeda.

18 With regard to civilian objects, the MILF/BIAF proclaimed in its 2002 statement against Kidnap for Ransom, that 'Islam [...] prohibited the destruction of properties, orchards'.⁵⁶ During the interviews conducted with the MNLA, while the group considered that civilian objects were protected, it offered a different interpretation to IHL on what constituted such a civilian object. In particular, the group seemed to distinguish between 'private property' and essential infrastructure, such as schools and hospitals, considered not targetable, and government buildings (such as a town hall) which, according to the MNLA official interviewed, belonged to the targetable category of objects.⁵⁷

Some ANSAs have also included in their internal regulations provisions concerning proportionality and precautions in attack (e.g. APCLS, MNLA, FARC-EP, MILF/BIAF, Hezbollah). The FARC-EP gave, in a public communiqué, information on specific precautionary measures the group adopted during the conflict.⁵⁸ In the 2010 version of *Layha*, the Taliban, speaking about suicide attacks, (a practice which is contrary to Islam, but authorized and even regulated by the group), recognized that 'the utmost effort should be made to avoid civilian casualties'.⁵⁹ With regard to conduct of hostilities in urban settings, the MNLA had the declared strategy to 'attract enemy forces out of cities so as to avoid civilian casualties and the destruction of civilian property and that they would take special precaution when combat took place in an urban environment'.⁶⁰ A study conducted by Geneva Call also highlighted the effort that some groups take to avoid the use of IEDs or explosive devices in populated areas to avoid a high number of civilian casualties.⁶¹ The same study did, however, highlight the fact that very few groups had actually articulated written policies on the issue.

The reasons why ANSAs enact these codes are ambiguous. Often, these are adopted for legitimacy reasons or for propaganda purposes (e.g. the Taliban). Other motives include a declared will to protect the group's own constituency (e.g. the MILF/BIAF). Many ANSAs mentioned the need to control and discipline fighters (e.g. FARC-EP, MNLA, Taliban). ANSAs also refer to their own culture or religious precepts, rather than IHL, as a basis for the respect of the civilian population in conflicts (for instance, Tuareg warrior culture for the MNLA, Twelver ideology for Hezbollah, or Islamic law for the MILF/BIAF and other Islamist ANSAs).

Numerous NGO and international organization reports also indicate how these words are not matched by ANSAs actual deeds in the field. The reasons underlying the violations are diverse. A number of ANSAs interviewed (e.g. SDF/AANES, KNU/KNLA, MILF/BIAF) justified these violations with regard to the conduct of hostilities by invoking a lack of discipline (so-called 'revenge killings' or fighters 'being led by emotions').

56 Case study MILF/BIAF.

57 Case study MNLA.

58 FARC-EP, 'Comunicado del Bloque Sur y recomendaciones a la población civil', available at http://theirwords.org/media/transfer/doc/co_farc_ep_2008_28-8a41dad59e38814764f65c02b960c0d.pdf (last accessed 25 September 2022).

59 Case study Taliban.

60 Case study MNLA.

61 Geneva Call, 'Six armed non-State actors share their policies and practice with regards to protecting civilians from explosive weapons', 2017, available at https://www.genevacall.org/wp-content/uploads/dlm_uploads/2017/12/Explosive-Weapons.pdf (last accessed 25 September 2022).

For instance, one representative of the APCLS explained that ‘sometimes civilians are targeted on the basis of their ethnicity but we try to discipline this’.⁶² With regard to the numerous reports on pillaging of civilian objects, MNLA officials justified these violations by a lack of control of its troops, rather than a disagreement over the rules.⁶³ Deliberate violations of IHL by ISG were motivated by ideological reasons, but also as a declared ‘strategy’ to terrorize not only the population, but also enemy fighters. Many of the ANSAs analysed (for example the MNLA or Hezbollah) denied the accusations of violations of civilians they were accused of committing, therefore confirming rather than rejecting the norm.

The structure of the groups may also, to a certain extent, explain some of the violations. For self-defence groups, such as the APCLS, because they are usually loosely organized, the dividing line between civilians and fighters might be blurry, as their members will easily slide from one status to another. It is also clear that for some ANSAs, it will be more challenging to collect the information to be able to clearly distinguish between civilian objects and military objectives, even more so when the group might have at their disposal only one weapon capable of reaching the enemy. For those ANSAs that exert *de facto* authority and control over territory, such as the SDF/AANES, compliance issues may arise because of the ‘transfer’ of fighters, who are coming from the battlefield, to subsequent ‘law and order’ functions. During the interviews conducted with such ANSAs, knowledge about the applicable legal framework (in this case, of IHRL) was limited, and specific capacity-building and ‘police’ training was not frequent.

Interestingly, highly organised ANSAs, such as the Taliban, also adopted specific mechanisms of implementation, such as the ‘Commission for Prevention of Civilian Casualties and Inquiry of Complaints (PCCIC)’, that were meant to track civilian harm, as well as internal disciplinary and investigation procedures. Finally, reference to the group’s own culture or religion, increasing ownership of the norms, should not be underestimated as both an incentive to adopt, but also to ensure respect of the norms by the fighters.

2. Sexual violence and gender discrimination

Many ANSAs have committed, notably through Geneva Call’s *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination*,⁶⁴ unilateral communiqués,⁶⁵ internal regulations or other means, to prevent and respond to conflict-related sexual violence. This includes most ANSAs studied as part of this research (e.g. APCLS, Hezbollah, KNU/KNLA, MNLA, SDF/AANES). Under the *Deed of Commitment*, signatory ANSAs have agreed to prohibit all forms of violence and endeavour to eliminate discriminatory policies against women or men, as well as to ensure greater participation of women in decision-making processes. There are documented cases of sexual abuses committed by members of these groups, which have been sometimes acknowledged but tolerated by the leadership and which led to no disciplinary sanctions being imposed upon the perpetrators.

⁶² Geneva Call, ‘Conduct of hostilities by armed non-state actors. Report from the 2020 Garance Talks’, at p. 15, available at <https://www.genevacall.org/wp-content/uploads/2020/12/Garance-Series-Issue-3.pdf> (last accessed 25 September 2022).

⁶³ Case study MNLA.

⁶⁴ For further information on this mechanism and the number of signatory ANSAs, see: <https://www.genevacall.org/how-we-work/>.

⁶⁵ Examples can be found online at <https://www.un.org/sexualviolenceinconflict/digital-library/joint-communiqués/> (last accessed 25 September 2022).

20 Although its statute explicitly includes the prohibition of rape, the FARC-EP is believed to be responsible for a high number of instances of sexual abuse against civilians and female members of their own ranks.⁶⁶ As a matter of policy, ISg has raped and enslaved women, in particular Yazidis and Christians, on a large scale.⁶⁷ There are also reports of forced marriage by Jabhat al-Nusra and Al Qaeda in the Arabian Peninsula (AQAP) fighters.⁶⁸

Sexual violence appears to be sensitive for many ANSAs. Our research found little explicit mention of these issue in their rules and regulations. For example, the *Taliban Layha* and other internal documents do not mention rape or sexual violence.⁶⁹ There is a provision in the 2006 edition that prohibits Taliban fighters from taking underage boys into their military bases, which could be interpreted as an attempt to curb the practice of sexual abuse or exploitation. Al-Qaeda in the Indian Subcontinent (AQIS) codes of conduct simply do not address the issue.⁷⁰ When they do address sexual violence, ANSA codes of conduct often refer to the prohibition of rape without providing any definition of it and without considering other forms of sexual violence, such as sexual slavery, sexual exploitation, or forced abortion.

The capacity of the group, as highlighted with respect to other rules, can also play a role with regard to the respect of this norm. For instance, one of the requirements of IHL (see the *Annex*) is to separate men from women in detention. Some of the ANSAs interviewed (e.g. KNU/KNLA) do not have this capacity, as they do not even have detention centres, but also do not seem to consider this an issue.⁷¹

In terms of gender discrimination, several ANSAs (such as FARC-EP, Hezbollah, MNLA, SDF/AANES)⁷² have, to various extents, women in leadership positions, whether in the armed and/or police forces, political wing or civilian administration, and/or in the delegations to peace negotiations. Women in the MILF mainly served in the Bangsamoro Islamic Women Auxiliary Brigade (BIWAB), undertaking functions such as being medics and cooks, or the Social Welfare Committee.⁷³ That said, in some interviews, including in AANES-controlled areas, women's associations pointed out the high number of domestic sexual violence and gender discrimination violations committed.

66 Case study FARC-EP.

67 Case study ISg.

68 Case study Al Qaeda.

69 Case study Taliban.

70 Case study Al Qaeda.

71 Interview documents on file with the authors.

72 Case studies FARC-EP, Hezbollah, MNLA, and SDF/AANES.

73 Case study MILF/BIAF.

Many ANSAs have committed, through signing action plans with the UN,⁷⁴ Geneva Call's *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict*,⁷⁵ internal regulations or other measures,⁷⁶ to prohibit the recruitment and use of hostilities of persons below the age of 18 years. This goes beyond their strict obligations under IHL (see Annex).⁷⁷

Many ANSAs studied as part of this research (e.g. APCLS, KNU/KNLA, MILF/BIAF, MNLA as part of the CMA and SDF/AANES) have signed an action plan and/or the Geneva Call *Deed of Commitment*. Both instruments refer to relevant international treaties, notably the Convention of the Rights of the Child and its Optional Protocol. It is interesting to note that while APCLS and the MNLA had adopted an 18-year standard in their internal rules since the beginning of their armed struggle, other groups (e.g. FARC-EP, KNU/KNLA, MILF/BIAF) changed their policy over time, both as a result of internal and external pressure. For instance, while initially guided by Islamic doctrine, MILF/BIAF moved to a straight-18 minimum age in 2006 with the incentive to be removed from the UN 'list of shame' of grave violators against children, which occurred in 2017.⁷⁸ During the first decades of the conflict in Myanmar, the KNU/KNLA openly accepted children into its ranks. In 2003, partly due to interaction with humanitarian and human rights organizations, the group raised the age to 18 in its internal constitution and subsequently signed the Geneva Call's *Deed of Commitment*.⁷⁹ In the case of the FARC-EP, the peace negotiations with the government of Colombia triggered the policy change. While their internal regulations set the minimum age for recruitment at 15 years, the FARC-EP gradually raised the age to 18 in 2015.⁸⁰

Our research found that a number of ANSAs which have committed to the straight-18 policy have faced compliance challenges and are still listed in the annexes of the UN Secretary-General's annual reports on children and armed conflict for having recruited and used children. ANSAs interviewed acknowledged the challenge to enforce this standard, especially for non-military auxiliary roles. Most common explanations include command and control issues, the challenge in verifying the age of new recruits, and a lack of capacity to address the root causes of recruitment.⁸¹ The MILF is the only group among them that has been delisted so far by the UN.

74 For further information, see: <https://childrenandarmedconflict.un.org/tools-for-action/action-plans/> (last accessed 25 September 2022).

75 For further information, see <https://www.genevacall.org/how-we-work/> (last accessed 25 September 2022).

76 For a comprehensive analysis, see Child Soldiers International, *A Law Unto themselves: Confronting the recruitment of children by armed groups*, March 2016, available at <https://www.refworld.org/docid/574809d24.html> (last accessed 25 September 2022).

77 ANSAs which have entered into an action plan with the UN commit not only to end and prevent the recruitment and use of children but also, in accordance with the Paris Principles and Commitments, the association of children with the armed forces in other roles. This includes the use of children in any type of non-military supporting or auxiliary roles, such as cleaners or cooks. Several ANSAs, such as the National Democratic Front of the Philippines/New People's Army/Communist Party of the Philippines NDFP/NPA/CCP, have criticized the Paris Principles as 'overbroad' and not as a binding legal instrument. The group has also criticized the fact that some treaties impose more stringent standards on them than States, such as the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict (OPAC) regarding the age for voluntary recruitment (18 years for armed groups compared to 16 for State armed forces). For further information, see: Case study MILF/BIAF.

78 Case study MILF/BIAF.

79 Interview documents on file with the authors.

80 Case study FARC-EP.

81 For further information, see P. Bongard and E. Heffes, 'Engaging armed non-State actors on the prohibition of recruiting and using children in hostilities: some reflections from Geneva Call's experience', 101 *International Review of the Red Cross* 911 (2019).

22 Hezbollah differentiates between the minimum age of recruitment and training (set at 15) and actual participation in hostilities (set at 18 except in imperative circumstances where Islam would allow for exceptions).⁸² Other ANSAs, such as NDPF/NPA/PPP, have indicated that it uses the age of 18 for the purposes of combat but children between the ages of 15 to 18 can receive training for self-defence purposes.⁸³

While above policies demonstrate a tendency towards the adoption of the standard of 18 years of age, there are ANSAs that do not accept a prohibition in respect of children under the age of 15. Islamist groups frequently assert that they do not use child soldiers because a child reaches maturity before the age of 15. For example, the Taliban *Layha* prohibits the recruitment and use of underage boys (those who have not yet grown beards) in hostilities without specifying the age.⁸⁴ In practice, the Taliban have consistently used children, including some below 15, in combat functions. Al Qaeda ideologues also do not specify the age of recruitment of children or make a distinction of permissible roles if recruited.⁸⁵ The AQIS code of conduct is silent on the issue whereas AQAP has regularly lauded children fighting for jihad and often use children in military activities. ISg has enlisted and used child soldiers, including abducted Yezidi, as young as 8 years of age.⁸⁶ It has justified this practice on religious grounds, supported by some Muslim scholars, to argue that boys are allowed to participate in jihad once they have reached puberty and are capable of fighting.

4. The protection of education

Through signing action plans with the UN,⁸⁷ Geneva Call's *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict*,⁸⁸ or other means, many ANSAs recognize the importance of access to education and have committed to protect schools from attack or to avoid their use for military purposes. This includes APCLS, KNU/KNLA, MILF/BIAF, MNLA and SDF/AANES. For some of them, exceptions to these rules are foreseen in case of imperative military necessity, when schools are used by enemy forces or exposed to attacks and need protection. Moreover, interviews revealed that several of these ANSAs, such as the MNLA, make a distinction between abandoned schools, which could potentially be used for military purposes, and functioning schools, which must be protected from use in all circumstances.⁸⁹ Geneva Call found similar views in a 2017 survey.⁹⁰

82 Case study Hezbollah.

83 Case study MILF/BIAF.

84 Case study Taliban.

85 Case study Al Qaeda.

86 Case study ISg.

87 For further information, see <https://childrenandarmedconflict.un.org/tools-for-action/action-plans/> (last accessed 25 September 2022).

88 For further information, see <https://www.genevacall.org/how-we-work/> (last accessed 25 September 2022).

89 Case study MNLA/BIAF.

90 Geneva Call, 'Armed non-State actors share their policies and practice with regards to education in armed conflict', 2017, available at <https://reliefweb.int/report/world/their-words-armed-non-state-actors-share-their-policies-and-practice-regards-education> (last accessed 25 September 2022).

Some ANSAs (e.g. KNU/KNLA and SDF/AANES) have established education departments, which run schools in territories under their control.⁹¹ They have amended State curricula and introduced new subjects, such as their ethnic language(s). Yet, their education system, including diplomas, are not recognized by the government or by the international community.

Taliban policy on education has significantly evolved over time.⁹² While initially attacks on schools and teachers, seen as an extension of State and Western values, were encouraged, the 2009 *Layha* removed the provision authorizing attacks. Similarly to the above-mentioned ANSAs, only when schools are used by enemy forces would they lose their protected status. In practice, military imperatives often took precedence over protecting educational facilities. In terms of access to education, the Taliban allowed schools in areas under their control as long as they functioned according to their rules. These varied but could include vetting of teachers, changes to the curriculum, changes to the nature of gender segregation and female attendance.

While Al Qaeda ideologues make no reference within the examined texts to the right of education, the AQIS code of conduct considers attacks on schools as ‘un-Islamic’ due to the potential harm to children and teachers.⁹³ Both AQAP and ISg are listed in the latest annual report of the UN Secretary-General on children and armed conflict for having attacked schools.⁹⁴ The ISg established a department of education that imposed its policies and amended curricula on all schools under its control, with a strong emphasis on propagation of its brand of religious education and segregation of the sexes.⁹⁵

5. Humanitarian access and denial thereof

Many ANSAs have expressed their consent to the delivery of humanitarian assistance, and they have often done so through bilateral agreements between parties to conflict and/or with humanitarian actors.⁹⁶ A well-known example can be found in the Ground Rules agreement between the UN’s Operation Lifeline Sudan (OLS) and various ANSAs in 1995 and 1996 to improve delivery of humanitarian aid in Sudan.⁹⁷

Although few have specific written policies on humanitarian access, most ANSAs studied as part of this research (e.g. APCLS, FARC-EP, Hezbollah, KNU/KNLA, MILF/BIAF, MNLA, SDF/AANES) agree with their international obligations regarding humanitarian access. However, they all consider they are entitled to exert some measures of control over relief operations and certain groups have created structures to liaise with relief agencies. The most frequently conditions imposed on humanitarian agencies include adherence to humanitarian principles, prior consultation or registration, and at times interference with programming decisions (such as the selection of beneficiaries), as well as taxation.

91 Interviews with KNU/KNLA and SDF/AANES on file with the authors. See PEIC/Geneva Call, Report, Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda, 23-25 June 2015, Geneva, Switzerland, available at https://www.genevacall.org/wp-content/uploads/dlm_uploads/2015/12/Geneva_Call_Paper1.pdf (last accessed 25 September 2022).

92 Case study Taliban.

93 Case study Al Qaeda.

94 For the latest Report, see: UN General Assembly/Security Council, ‘Children and armed conflict. Report of the Secretary-General’, 23 June 2022, A/76/871-S/2022/493, available at <https://childrenandarmedconflict.un.org/document/secretary-general-annual-report-on-children-and-armed-conflict/> (last accessed 25 September 2022).

95 Case study ISg.

96 A. Jackson (n 9). All Geneva Call’s *Deeds of Commitment* contain a provision related to the facilitation of humanitarian access.

97 SPLM/OLS (Operation Lifeline Sudan) Agreement on Ground Rule, available at http://theirwords.org/media/transfer/doc/sd_splm_a_1995_06-231ae906230a30c0a15a29fa99e67511.pdf (last accessed 25 September 2022).

24 Research has found no evidence that these ANSAs had a policy to deliberately attack relief workers. Nevertheless, the MNLA was accused to have sacked aid agencies' offices and warehouses in 2012.⁹⁸ Several ANSAs reportedly denied access to organizations they suspected were infiltrated by the enemy and gathering intelligence under the cover of humanitarian activities. In one case, a FARC-EP commander wrongly executed health workers from the government he believed were intelligence agents.⁹⁹

As with education, Taliban stance on humanitarian access has significantly evolved.¹⁰⁰ While the 2006 *Layha* condoned attacks on aid workers, stating that foreign humanitarian organizations were propagating ideas contrary to Islam, the Taliban progressively endorsed humanitarian access. This appears to have been motivated by the fact that they could not provide much aid on their own and that their attacks on services were alienating communities whose support they needed. In practice, humanitarian access was typically subject to Taliban demands, including a vetting process, taxation, interference over staffing, and beneficiary selections.

Our case-studies show that while there are documented reports of abduction and instances of denial of humanitarian access, Al Qaeda-affiliated groups AQAP and Jabhat al-Nusra have generally refrained from attacking aid workers compared to the ISg which considered them as parties to conflict and 'concealing crusader spies in Islamic countries'. Jabhat al-Nusra criticized the killing of aid workers by ISg arguing they were under the protection of the Muslims under the *aman* principle (which stipulates that non-Muslims entering Muslim territory must be granted protection to life and property for the duration of stay).

One of the challenges shared by one ANSA (KNU/KNLA) during the interviews was the difficulty for humanitarian actors to access zones under its control when *both* the territorial state *and* a neighbouring third state, not necessarily one that was party to the armed conflict, restrict aid delivery for the civilian population living there. It was suggested to temper the issue of consent to humanitarian aid by sovereign States by creating 'humanitarian corridors' in trans-border zones.

6. The protection of healthcare

Many ANSAs have recognized the importance of access to healthcare and have agreed, through Geneva Call's *Deed of Commitment for the Protection of Healthcare in Armed Conflict*,¹⁰¹ bilateral agreements with medical organizations, or other means,¹⁰² with the need to respect and protect the wounded and sick without adverse distinction as well as medical personnel, facilities and transports. The National Coalition of Syrian Revolution and Opposition Forces declared for instance to 'respect the wounded and the sick' and to allow for the reception of medical care without discrimination, to 'respect and protect [...] hospitals' and 'provide rapid and unimpeded passage of relief'.¹⁰³

98 Case study MNLA.

99 Case study FARC-EP.

100 Case study Taliban.

101 For further information, see <https://www.genevacall.org/how-we-work/> (last accessed 25 September 2022).

102 ICRC, 'Safeguarding the Provision of Health Care, Operational Practices and Relevant International Humanitarian Law concerning Armed Groups', 2015, available at <https://shop.icrc.org/safeguarding-the-provision-of-health-care-operational-practices-and-relevant-international-humanitarian-law-concerning-armed-groups-print-fr.html> (last accessed 25 September 2022).

103 National Coalition of Syrian Revolution and Opposition Forces, 'Declaration of Commitment on Compliance with IHL and the Facilitation of Humanitarian Assistance', 2014, available at http://theirwords.org/media/transfer/doc/march_19_2014_sc_ihl_declaration-270988dac16e258e445a5cfc37485b3.pdf (last accessed 25 September 2022).

Similarly, the National Transitional Council/Free Libyan Army prohibits in its code of conduct the targeting of ‘medical personnel, facilities, transports or equipment’, and requires the protection and treatment of the sick and wounded while prioritizing only by ‘medical criteria’.¹⁰⁴ Although none of these declarations refers to all relevant norms under IHL, they do illustrate the fact that ANSAs agree with the content of the basic rules on healthcare.

Interestingly, during the outbreak of the COVID-19 pandemic, various ANSAs took measures to contain the spread of the virus in areas under their control. These measures included closing business, establishing lockdowns, increasing health checks, and imposing travel controls and other restrictions to the freedom of movement.¹⁰⁵

Most ANSAs studied as part of this research (e.g. APCLS, FARC-EP, Hezbollah, KNU/KNLA, MILF/BIAF, MNLA, SDF/AANES) have protective policies on healthcare. Our research suggests that these policies were adhered to a large extent, although there have been reported cases of looting of medicine and medical supplies as well as attacks on health workers. In one instance, the SDF apologized in a public statement for the ill-treatment of the medical staff and pledged to compensate for the material damage caused.¹⁰⁶

Several ANSAs (FARC-EP, Hezbollah, KNU/KNLA, SDF/AANES) have established dedicated health units or departments and provided medical services in territories under their control. Interestingly, 181 former doctors and nurses of the FARC-EP were certified by the Colombian Agency for Reincorporation and Normalization after the peace agreement.¹⁰⁷ In the case of the COVID-19 pandemic, the SDF/AANES only received a limited quantity of vaccines from the World Health Organization.¹⁰⁸ During the interviews, the SDF/AANES pointed out that this transfer of vaccines through the Syrian government was the preferred (and only possible) mode for the concerned international organization. This was notably because it was argued that the delivery of the vaccines could not be done *directly* with an ANSA for legal and political reasons. As a result, this deprived the civilian population living under the SDF/AANES control of their access to health care.

The Taliban showed an openness to healthcare from early stages, as demonstrated by their facilitation of access for polio campaigns.¹⁰⁹ There were nevertheless instances when they suspended these activities due to the suspicion that the government was using them to gather intelligence. In a bilateral agreement with a humanitarian organization, the Taliban explicitly endorsed IHL rules related to healthcare. However, there have been documented attacks on health workers and facilities as a result of specific concerns (i.e. ‘spying’) or military expediency. Although very few ANSA used the protective emblem, the Taliban have misused it (on ambulances) to gain proximity to their targets, in clear violation of international law.

¹⁰⁴ National Transitional Council/Free Libyan Army, ‘To the members of the Libyan Liberation Army. Code of rules and attitudes of the organization for the successful conduct of fighting’, 2014, available at http://theirwords.org/media/transfer/doc/ly_ntc_2011_04_eng-37607a6aa5ec5080127c21e730a8f9e9.pdf (last accessed 25 September, 2022).

¹⁰⁵ See: Geneva Call, ‘COVID-19 Armed Non-State Actors’ Response Monitor’, December 2021, available at <https://www.genevacall.org/covid-19-armed-non-state-actors-response-monitor-2/> (last accessed 25 September 2022); and Sandra Krähenmann et al., ‘Emergency governance: armed-non-state actors facing COVID-19’, Armed Groups and International Law Blog, 2 March 2022, available at <https://www.armedgroups-internationalallaw.org/2022/03/02/emergency-governance-armed-non-state-actors-facing-covid-19/> (last accessed 25 September 2022).

¹⁰⁶ Interviews with SDF/AANES on file with the authors.

¹⁰⁷ Case study FARC-EP.

¹⁰⁸ Interviews with SDF/AANES on file with the authors.

¹⁰⁹ Case study Taliban.

26 Al Qaeda militant texts and AQIS code of conduct make no reference to a right to health. On the contrary, both Jabhat al-Nusra and AQAP have targeted hospitals.¹¹⁰ Yet, Jabhat al-Nusra justified the attacks on the basis of its use for military purposes, indicating a rejection of targeting hospitals in other cases. In 2013, after an assault on a hospital attached to the Ministry of Defence where medical personnel and patients were killed, AQAP publicly apologized for the attack, claiming that their fighters disobeyed orders.

Unlike other Islamist ANSAs, the ISg has asserted that wounded non-Muslims may be killed and, though it has provided medical service to civilians under its control, its fighters have reportedly used them to shield against air strikes. It should be noted that classical jurists have mostly referred to as impermissible targets in combat with Muslims,¹¹¹ whereas modern interpretations exclude anyone who does not participate in combat, including the wounded, from attacks.¹¹²

7. The prohibition of forced displacement

Many ANSAs have addressed issues related to displacement, often with a focus on the voluntary return and reintegration of displaced persons in the context of ceasefire or peace agreements.¹¹³ For instance, the 2015 National Ceasefire Agreement concluded by the government of Myanmar and eight ethnic armed organizations provides that the parties to the agreement shall 'ensure the safety and dignity of the IDPs when undertaking a prioritised voluntary return of IDPs to their places of origin or resettlement of IDPs into new villages in suitable areas'.¹¹⁴

While no ANSA studied as part of this research possess internal rules or regulations specifically dealing with displacement issues, most of them (APCLS, Hezbollah, KNU/KNLA, MILF/BIAF, MNLA, SDF/AANES) agree with the IHL rule prohibiting forced displacement of civilians, except if the safety of the civilians is involved or imperative military reasons so demand. For example, the MNLA code of conduct states that 'populations must not be moved, unless their security is threatened or in situations of force majeure'.¹¹⁵ Some groups have also facilitated the evacuation of civilians, often members of their communities or sympathetic to their cause, to ensure their safety.

The research found no evidence to suggest that there has been a systematic policy on the part of these groups to cause unlawful forced displacement. Yet, there have been reports of expulsion of individuals, often justified by the ANSA on security grounds. For example, Taliban *Layha* 2010 edition allows commanders to expel a suspected spy who they believed presents a threat.¹¹⁶ MNLA detained and expelled individuals they suspected of working for the Malian army or enemy ANSAs.¹¹⁷

110 Case study AQ

111 Ibn Qudama, *Al-Mughni*, ed by A. ibn Abdul Muhsin al-Turki and A. F. Muhammad al-Hulw, Dar 'Alam al-Kutub, 1997, 12:252. See: case study ISg.

112 Abu Zahra, *Al-Ilaqat al-Dawliya fi l-Islam*, Al-Dar al-Qawmiyya lil-Tiba'a wa-l-Nashr, 1995, p 103.

113 H. Ruadel, 'Armed non-State Actors and Displacement in Armed Conflict', Geneva Call, 2013 available at <https://www.genevacall.org/wp-content/uploads/2019/02/Armed-non-State-actors-and-displacement-in-armed-conflict1.pdf> (last accessed 25

September 2022).

114 The National Ceasefire Agreement between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations, available at <http://theirwords.org/media/transfer/doc/nca-2967a3dcdc28726636cbea72471878cc.pdf> (last accessed 25 September 2022).

115 Case study MNLA.

116 Case study Taliban.

117 Case study MNLA.

Similarly, FARC-EP allegedly forcibly displaced individuals suspected of collaborating with the government or associated paramilitaries.¹¹⁸ Some groups (MILF, SDF/AANES) were also accused of having demolished homes to prevent the return of displaced persons considered ‘undesirable’ or, on the contrary, of having expropriated land to control territory and maintain its support base. On this issue, Amnesty International issued a report in 2015 exposing a wave of forced displacement and home demolitions allegedly carried out by the People’s Protection Unit (YPG), an ANSA that would later become the SDF/AANES. This report provoked a reaction from the group, which argued in a detailed statement that the use of the term ‘forced displacement’ was ‘arbitrary’, and that the legal analysis in the report was inaccurate. In particular, the ANSA contested the conclusion that the cases presented amounted to war crimes and referred to the exception for ‘imperative military reasons’ provided under the Rome Statute of the International Criminal Court.¹¹⁹

Although none of the examined literature from Al Qaeda and its affiliated groups deals with the question of displacement, practice shows significant violations of the relevant international rules. In Syria, for example, the Jabhat al-Nusra attacks led to extensive displacement of Kurds, whose properties were looted and burned. Similarly, the ISg’s sectarian policy and expansion of targetable categories triggers systematic displacement. For example, Yazidi villages in Iraq were emptied and their populations either executed or forcibly transferred.

8. The use of landmines and other explosive devices

Many ANSAs have accepted a total ban on anti-personnel mines, though it is not prohibited by IHL (see Annex) and it is often a weapon of choice for ANSAs. They have renounced anti-personnel mines through signing the Geneva Call’s *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*,¹²⁰ unilateral declarations, internal regulations, or by other means.¹²¹

The *Deed of Commitment* refers to the Ottawa Convention and provides for a total ban on the use, production, stockpiling and transfer of Anti-personnel mines, under all circumstances. anti-personnel mines are defined as devices that are designed to explode by the presence, proximity or contact of a person, which includes both commercially-manufactured mines as well as improvised explosive devices (IED) that are victim-activated. Both MILF and SDF/AANES signed the *Deed of Commitment*. Despite isolated incidents and interpretation issues on the concept of ‘command detonation’¹²², no systematic violations were found by the research. Interestingly, APCLS and MNLA internal rules oppose both the use of all landmines, including anti-vehicle mines, which are not formally prohibited in international law.¹²³ Moreover, a number of ANSAs which support the anti-personnel mine ban operate—or were operating—in States not party to the Ottawa Convention (such as Myanmar or Syria).

118 Case study FARC-EP.

119 YPG General Command: Amnesty International report is contradictory, 15 October 2015, available at <https://anfenglish.com/kurdistan/ypg-general-command-amnesty-international-report-is-contradictory-12971> (last accessed 25 September 2022).

120 For further information, see <https://www.genevacall.org/how-we-work/> (last accessed 25 September 2022).

121 <http://www.the-monitor.org/en-gb/home.aspx>.

122 The MILF/BIAF admitted to having used in 2000-2001 ‘string-pulled’ improvised devices for the defense of its military camps against attacks by the Philippines armed forces. It viewed the use of such devices, in trip-wire mode and in no-man’s land zones where civilians are given prior warning, as consistent with the Geneva Call’s Deed of Commitment. However, the devices used by the MILF/BIAF were not electronically detonated and, when they were left behind by fighters after withdrawal, they became potentially victim-activated, and were thus prohibited under the Deed of Commitment. After discussion, the MILF/BIAF agreed to no longer employ string-pulled improvised devices under any circumstances. See: case study MILF/BIAF.

123 Case study MNLA. Information on the APCLS is found on file with the authors.

28 The Taliban *de facto* government issued in 1998 a public ban on the use of landmines but when it turned back to being insurgency, the ANSA reversed its policy and engaged in an indiscriminate use of IEDs in their military campaign against government and allied forces.¹²⁴ While IHL does not prohibit the use of IEDs per se, the Taliban's use often violated the rules of distinction and proportionality and precautions in attack. The group insisted that it warned the civilian population of targets; yet, a large share of civilian casualties from IEDs occurred when they were placed on public roads and triggered by civilian vehicles.

Hezbollah has a different stand. While it has never pledged to never use anti-personnel mines, it has mainly resorted to command-detonated IEDs directed against military targets.¹²⁵ Other ANSAs, such as the KNU/KNLA and FARC-EP, have regularly used anti-personnel mines and IEDs for military reasons but claim their use is subject to some internal regulations and restrictions (such as warning of the local population, recording of their placement, removal after hostilities, etc.) to minimize their indiscriminate effects and civilian harm.¹²⁶ These regulations appear to be consistent with customary rules of IHL but have not been implemented systematically in practice, mainly due to capacity and coordination issues. According to several sources, the groups do not have a centralized system for recording the location of mined areas or the capacity to remove mines quickly enough to avoid accidents.

Although the AQIS code of conduct considers it impermissible to cause blasts in public areas, Al Qaeda ideologues justify the use of indiscriminate weapons on the basis of reciprocity and AQAP and Jabhat al-Nusra have extensively resorted to the indiscriminate use of IEDs.¹²⁷ A few ANSAs, notably ISg, have relied on IEDs and booby-traps to inflict damage and fear among civilians on the basis of its expansive interpretation of who may targetable (see section 1, *the protection of civilians from attacks*).¹²⁸

9. Detention, fair trial and administration of justice

Several ANSAs have positioned themselves with respect to the legal regulation of their activities in the realms of detention and administration of justice.

With respect to detention, comparably to what occurs with respect to other norms, ANSA practice can be divided into two groups. The first group has relied on a language similar to the one included in international law in their own practice without necessarily making references to international customary or treaty sources. This nonetheless seems to evidence their agreement with such frameworks. For instance, the MNLA affirms in its code of conduct that '[a]ll persons deprived of their liberty must be treated humanely',¹²⁹ arguably in line with Common Article 3 to the 1949 Geneva Conventions. The FARC-EP's Statute also indicates that its fighters should '[r]espect the prisoners of war in their physical integrity and convictions'.¹³⁰

124 Case study Taliban.

125 Case study Hezbollah.

126 Case study FARC-EP. Information on the KNU/KNLA is found on file with the authors.

127 Case study Al Qaeda.

128 Case study ISg.

129 Art 3, MNLA military code of conduct.

130 FARC-EP, Statute, Art. 7(k).

During an interview, an MILF leader shared that captured fighters were given food, first aid and medicine, and that they were held in separate locations from those detained for other reasons.¹³¹ The Taliban had policies developed by the Commission for Management and Release of Prisoners focused on the well-being and rights of detainees,¹³² although it would allow the commission of torture if it was 'required for interrogation of a detainee'.¹³³ It has also been reported that Hezbollah would be keen on protecting detainees 'to ensure prisoner exchange agreements can be concluded'.¹³⁴ Other examples, although with different level of detail, can be found in the internal documents and laws of the Nduma Defence of Congo-Rénové (NDC-R), from the DRC,¹³⁵ and the SDF/AANES.¹³⁶

Despite the adoption of these codes and legal frameworks, some ANSAs have also shared certain practical difficulties to actually hold individuals in detention. A former FARC-EP's commander, for instance, noted that because the group was constantly moving due to the existence of military operations, detainees 'suffered'.¹³⁷ In a meeting held in 2017, another former member explained that this ANSA did not have detention facilities, but only designated areas for custody.¹³⁸ A judge belonging to the Sudan People's Liberation Movement-North also shared during the same event that this ANSA does not have 'regular prisons'.¹³⁹ During an interview with the KNU/KNLA, the same comment was made, and it was highlighted that detainees were usually held in simple rooms in normal houses.¹⁴⁰

The research found no evidence to suggest that there has been a systematic policy on the part of most of these groups to ill-treat detainees. Yet, there have been reports of torture or degrading treatment by various ANSAs, including the MNLA,¹⁴¹ the SDF/AANES,¹⁴² and the Taliban.¹⁴³ The FARC-EP has also acknowledged engaging in kidnapping.¹⁴⁴

A second group of ANSAs has rejected the application of international law to their activities, which they claim are grounded instead on religious sources. This is the case, most notably, of the ISg and Al Qaeda. While the former has dismissed the application of secular laws, the latter has not considered itself bound by IHL, claiming instead that Muslim States' acceptance of international legal obligations evidences infidelity to Islam. Most of their rules related to detention come from Quranic verses and religious interpretations. The ISg has published documents specifying these norms,¹⁴⁵ and it has permitted the killing of captives on the basis of some classical views that accept such conduct without a clear distinction being made between fighters and civilians.¹⁴⁶

131 Case study MILF/BIAF.

132 Case study Taliban.

133 Ibid.

134 Case study Hezbollah.

135 Its article 43 affirms that 'prisoners and captives will be kept in humane conditions and no degrading treatment or torture will be done to them until they are handed over to the adverse party'. NDC-Renové, 'Règlement d'ordre Intérieur (ROI)' art 43, available online at http://theirwords.org/media/transfer/doc/roi_ndcr-5853f20294d11be399ddeb8368b4d92.pdf (last accessed 25 September 2022).

136 Rojava Information Center, 'North and East Syria's Anti-Terrorism Act used to try local ISIS suspects', available online at <https://rojavainformationcenter.com/2020/05/translation-north-and-east-syrias-anti-terrorism-act-used-to-try-local-isis-suspects/> (last accessed 25 September 2022).

137 Case study FARC-EP.

138 Geneva Call (n 12), at p. 11.

139 Ibid, at p. 12.

140 Information on file with the authors.

141 Case study MNLA.

142 Information on file with the authors.

143 Case study Taliban.

144 Case study FARC-EP.

145 Case study ISg.

146 Ibid.

30 It has also been reported that AQ's affiliate, Jabhat al-Nusra, has a systematic policy of hostage-taking, in addition to having committed summary executions, the disappearance of hostages, torture, corporal punishment, and degrading treatment, including the denial of food and health care.¹⁴⁷

Given the lack of references to specific international treaty and customary IHL norms related to detention in the laws of those ANSAs belonging to the first group, this research argues that it is relevant to compare their actual content. One relevant example is the inclusion of the category of 'prisoners of war' – which only exists in international armed conflicts. Certain ANSAs, in particular some of those considered as 'armed opposition movements' for the purposes of this study, have referred to this term in their rules and agreements with other actors when dealing with enemy detainees. Examples can be found in the FARC-EP,¹⁴⁸ the MILF/BIAF,¹⁴⁹ and the MNLA,¹⁵⁰ among others.¹⁵¹ Our research suggests that the inclusion of this term is not wholly without justification or logic, and it responds to the political goals of this type of ANSA and their attempt to legitimize their armed and political struggle vis-à-vis States and the international community.

In addition to these practices, various ANSAs have allowed the ICRC to access their detention facilities, sometimes also relying on this organization to release individuals deprived of their liberty. Examples can be found in the MNLA¹⁵² and the MILF/BIAF,¹⁵³ and in agreements concluded by various stakeholders and the Mouvement Patriotique de Côte d'Ivoire,¹⁵⁴ the Resistência Nacional Moçambicana (RENAMO),¹⁵⁵ from Mozambique, and the União Nacional para la Independência Total de Angola (UNITA), of Angola.¹⁵⁶

With regard to fair trial and administration of justice, all ANSAs under analysis have administered justice with respect to their own members, enemy fighters, and civilians living in the territories under their control. The sophistication with which this has been done has nonetheless depended on the level of organization of the respective ANSA. While those highly sophisticated groups would set tribunals and adopt laws for different cases, such as the SDF/AANES, the Taliban or the ISg, ANSAs such as the FARC-EP would solve certain local disputes by setting up a table in a public space in a community and listening to civilians' problems.¹⁵⁷

On occasions, the regulation of some of these practices has been included in the internal laws of the groups. For instance, the FARC-EP's Statute establishes that a Revolutionary Council of War should be convened to judge its own members for possible crimes.¹⁵⁸

147 Case study Al Qaeda.

148 Case study FARC-EP.

149 Case study MILF/BIAF.

150 Case study MNLA.

151 PKK Statement to the United Nations, available at http://theirwords.org/media/transfer/doc/tr_pkk_hpg_1995_01-90c5d761c7a40e338ec2bcec99fee78f.pdf (last accessed 25 September 2022); National Democratic Front of the Philippines, 'Updated NDFP Position on the Issue of Prisoners of War and the GRP-NDFP Peace Negotiations' (10 January 2000), para. 1; Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 1999, available at http://theirwords.org/media/transfer/doc/1_sl_ruf_1999_02-d8e24cefa04616f68f02294b0d3a28dc.pdf (last accessed 25 September 2022).

152 Case study MNLA.

153 Case study MILF/BIAF.

154 Accords de Lomé, available at http://theirwords.org/media/transfer/doc/ci_mpci_2002_06-2b51e84aa47624dbc41cf653f2a0ba43.pdf (last accessed 25 September 2022).

155 General Peace Agreement for Mozambique, available at http://theirwords.org/media/transfer/doc/1_mz_renamo_1992_02-5eac436793034881cac929553c8739b7.pdf (last accessed 25 September 2022).

156 Peace Accords for Angola, available at http://theirwords.org/media/transfer/doc/1_ao_unita_1991_02-24e1626926de6f5826a16b81401ada07.pdf (last accessed 25 September 2022).

157 Case study FARC-EP.

158 Ibid.

The MNLA military code of conduct also notes that any contravention must be reported to the military command for investigation and fighters could be disciplined if found responsible.¹⁵⁹ The Taliban also had policies dealing with enemy detainees and regarding common crimes,¹⁶⁰ and the MILF/BIAF's code of conduct governs the military discipline of the ANSA.¹⁶¹ Groups with a religious component have established a system of Sharia courts to settle local disputes. This is the case of the MILF/BIAF,¹⁶² the MNLA,¹⁶³ the Taliban,¹⁶⁴ Hezbollah,¹⁶⁵ and the ISg¹⁶⁶ and Al-Qaeda and its affiliates.¹⁶⁷

Whether most these mechanisms are in line with international law is disputed, and references to such legal regimes are limited. During the interviews conducted for this study, ANSAs relied on their own codes and norms to explain their practices and none of them referred to IHL. It should be noted that standards demanded by this legal regime for ANSAs to conduct trials lawfully are hardly ever met. During the interviews, the research team was told that trials may be conducted on the basis of 'draft laws', which sometimes include vague criminal offences (such as the crime of 'terrorism', for the SDF/AANES). ANSAs often lack proper defence mechanisms for accused individuals. Recruited 'judges' might not be properly trained in law, let alone in IHL or IHRL (e.g. KNU/KNLA). Some of the 'judges' have also been chosen from the military command, putting at great risk the principle of impartiality (FARC-EP). In this context, a number of the ANSAs interviewed specifically requested capacity-building to be able to meet their obligations under international law.

10. The special protection of certain objects, such as cultural property and the environment

In recent years, cultural property has increasingly become the direct target of systematic and deliberate attacks by ANSAs, notably by certain Islamist groups. A notorious example is the ISg, which has, since 2014, intentionally damaged or destroyed, often on religious grounds, places of worship, historic monuments, and cultural artefacts.¹⁶⁸ The ISg has also established a lucrative system of trafficking of antiquities.¹⁶⁹ Yet, even among those Islamist groups such as Al Qaeda affiliated groups, there are variations of attitude towards cultural property. In contrast to Al Qaeda in the Islamic Maghreb, which participated in the destruction of Sufi mausoleums in Timbuktu in 2012, both AQAP and AQIS for example have asserted that places of worship should not be targeted.¹⁷⁰

159 Case study MNLA.

160 Case study Taliban.

161 Case study MILF/BIAF.

162 Ibid.

163 Case study MNLA.

164 Case study Taliban.

165 Case study Hezbollah.

166 Case study ISg.

167 Case study AQ.

168 Case study ISg.

169 M. Lostal, K. Hausler and P. Bongard, 'Culture under fire: armed non-State actors and cultural heritage in wartime', Geneva Call, 2018, available at https://genevacall.org/wp-content/uploads/2017/10/Cultural_Heritage_Study_Final.pdf (last accessed 25 September 2022).

170 Case study AQ.

32 Interestingly, the Taliban, which deliberately destroyed the Buddhas of Bamiyan in 2001, released a public statement twenty years later prohibiting all types of trade and looting of ancient artefacts and urging the preservation of historical sites.¹⁷¹ Hezbollah has also condemned the targeting of religious sites and places of worship, including churches.¹⁷²

In fact, the spotlight placed on the ISg and other groups' destructive policies has overshadowed the many ANSAs worldwide which have taken measures to protect cultural heritage.¹⁷³ This includes many ANSAs studied as part of this research. For instance, the APCLS, FARC-EP, KNU/KNLA and the MNLA all explicitly state in their internal rules that cultural property and practices must be respected.¹⁷⁴ MNLA stored more than a thousand ancient manuscripts which they had intercepted from Islamist fighters in Mali in 2013.¹⁷⁵ In Colombia, a commander of the FARC-EP has created a museum in the Cauca region, where around 3,000 objects, including from indigenous communities, were preserved.¹⁷⁶ In the Nationwide Ceasefire Agreement signed in 2015 between the government and ethnic armed organizations, KNU/KNLA agreed to avoid use of cultural sites as military outposts or encampments and to promote cultural diversity. Its internal rules state that all religions and cultures must be respected.¹⁷⁷

In some instances, ANSAs have gone beyond their obligations under IHL by taking 'safeguarding measures', such as the designation of a competent authority, the provision of *in situ* protection, and the preparation of inventories, in accordance with Article 3 of the Hague Convention and Article 5 of its Second Protocol.¹⁷⁸ This is the case with the SDF/AANES.¹⁷⁹ It is also interesting to note that this ANSA's founding charter is an explicit affirmation of minority rights and makes reference to cultural rights and diversity in several of its provisions. In 2020, the SDF issued detailed military instructions on the protection of cultural property. In the preamble, the General Command states that, in accordance with the 1954 Hague Convention and its 1999 Second Protocol, UN Security Council Resolution 2199 (2015) and Law No. 4 (2019) of the AANES, the SDF pledges to ensure respect for cultural property during armed conflict and to ensure that cultural sites are not affected in areas under its control. These instructions were prompted by the need to prevent military use by SDF forces of archaeological sites as defensive positions and trenches against Turkish advance. The instructions enumerate a number of measures to avoid or minimize collateral damage and the risks of destruction, which follow not only Article 4 of the 1954 Hague Convention, but also Article 8 of the Second Protocol, to which Syria is not a party. In addition, support to the police force is envisaged in their efforts to ensure the protection of cultural property from unlawful practices such as theft, pillage, and the trafficking of antiquities.

171 Case study Taliban.

172 Case study Hezbollah.

173 M. Lostal, K. Hausler and P. Bongard (n 169).

174 Case studies FARC-EP and MNLA. Information on the APCLS is on file with the authors.

175 Case study MNLA.

176 Case study FARC-EP.

177 Information on the KNU/KNLA is on file with the authors.

178 K. Hausler and P. Bongard, 'The role of armed non-state actors in safeguarding cultural heritage: Beyond legal obligations?' In E. Cunliffe and P. Fox (eds.), *Safeguarding Cultural Property and the 1954 Hague Convention: All Possible Steps*, Boydell & Brewer, 2022.

179 Information on the SDF/AANES is on file with the authors.

Although our research has not found evidence of deliberate targeting against cultural property by these ANSAs, there have been reports of military use of cultural sites in a situation that did appear to fall within the military necessity requirement provided for under IHL. Moreover, in one context (the Kidal fortress built by the French colonial forces in Mali), the MNLA shared doubts as to what qualified as cultural heritage under international law and the circumstances under which they could attack the fortress if it were used by enemy forces.¹⁸⁰

Most of the ANSAs interviewed had little awareness of the 1954 Hague Convention, the landmark treaty on the subject, or the Blue Shield emblem, which was devised to signal protected cultural property. Often, they expressed a broader meaning of cultural property, seeing it as encompassing both tangible and intangible dimensions. Interestingly, several ANSAs also tied the protection of cultural heritage together with that of natural heritage (environment).

¹⁸⁰ Case study MNLA.

Across their diversity (in terms of motivations, organizational structure, territorial control, support base, etc.), the majority of ANSAs studied, including those ‘designated terrorist groups’, have engaged on IHL, albeit to various degrees. Some Islamist ANSAs, such as the MILF/BIAF, the Taliban, and Hezbollah have also engaged on these issues, although from a different angle, based on Islamic rather than international law. ISg, Al Qaeda, and other affiliated groups have taken a more radical approach to these humanitarian concerns, often in contradiction of mainstream Islamic scholars’ views.

Our research shows that the majority of ANSAs studied have manifested some form of acceptance of IHL rules, some of them from the beginning of their struggle (the MNLA) while others (FARC-EP, the MILF/BIAF, and the Taliban) have significantly changed their attitudes, at least towards some norms, over the course of the armed conflicts in which they have been engaged. Although the FARC-EP considered IHL to be an ‘elitist’ legal regime developed by states and addressing only their own interests, the group increasingly engaged with IHL-related issues, in particular during the peace negotiations. Interestingly, the MILF/BIAF consulted aligned Islamic scholars to ‘endorse’ IHL consistency with Sharia. The Taliban did not endorse IHL *per se* but made frequently reference to its rules in statements and documents and regularly engage with an array of humanitarian agencies, particularly in the later years of the insurgency. Hezbollah does not refer to IHL as a source of obligations for its fighters but has interacted with relevant humanitarian actors and concluded agreements with enemy forces that include references to IHL. ISg and Al Qaeda reject IHL, but our research found considerable differences of views over key issues such as the definition of civilians versus legitimate targets or sexual slavery.

Our research suggests that ANSAs’ policy shifts have been driven at least in part by political considerations and concern for their reputation, often at a time they engaged in peace talks.

For example, MILF/BIAF change of attitude towards IHL seems to have been motivated by its quest to demonstrate adherence to international standards in the early years of the ‘War on Terror’, thus avoiding being labelled as a ‘terrorist’ organization. In Colombia, peace negotiations with the government triggered changes of attitudes by FARC-EP on several issues, notably on child recruitment, mine clearance, and kidnapping. In Mali, the sequence of events suggests that the MNLA took measures to address abuses after the capture of key towns in 2012 at a time it was facing increasing negative publicity that was damaging its reputation among its constituencies and the international community. Taliban policy on humanitarian aid and education significantly evolved towards the end of the insurgency, particularly as they engaged in talks with the United States and sought international recognition.

The research found that some thematic rules are more acceptable for ANSAs than others. For example, many ANSAs studied, including several Al Qaeda-affiliated groups address the protection of healthcare and seem to agree with the content of IHL rules, although from an Islamic law perspective.

These ANSAs consider access to medical services is vital for their members, their families, and the population at large, especially for those who are in control of territory, pointing to a sense of responsibility to meet the basic needs of the population. Our research identified

concrete examples of ANSA provision of healthcare, or its facilitation of provision by humanitarian agencies. For instance, several groups have taken measures to combat the COVID-19 pandemic in areas under their control. More broadly, the protection of civilians may also provide another entry point for discussion. Most ANSAs studied largely support the notion that non-combatants should not be attacked. Only ISg explicitly justifies the targeting of civilians not participating in hostilities, in contradiction of a number of mainstream Islamic law scholars' view on this issue. However, some ANSAs have a narrow definition of civilians and/or an expansive interpretation of participation in hostilities that contradicts IHL standards. By contrast, certain IHL rules appear more problematic to respect for ANSAs. For example, as mentioned in section 9, very few ANSAs have the capacity (in terms of functioning courts, qualified judges and lawyers, etc) to conduct trials in accordance with international standards. A case in point is the SDF/AANES, which detain thousands of suspected members of ISg, including foreign fighters, and have repeatedly called for external support to ensure due processes.

Interestingly, many ANSAs have gone further to their obligations under IHL.

Many ANSAs have, for example, committed to a total ban on anti-personnel mines and a prohibition on the recruitment and use in hostilities of persons below the age of 18, indicating support to a growing trend towards norms, which are not yet considered customary law. A few of them are opposed to anti-vehicle mines, a weapon not prohibited under IHL, or have adopted regulations on the protection of environment. In addition, the scope of obligations of ANSAs should be clarified in some treaties, such as the 1954 Hague Convention. Engaging ANSAs on future law-making processes can thus be a useful tool to increase their ownership and compliance with IHL.

Most ANSAs studied as part of this research have undertaken commitments on IHL issues through action plans with the UN, Geneva Call's *Deeds of Commitment*, unilateral declarations, MoUs, and ceasefire or peace agreements.

Although they often have a public relations aspect, these measures tend to be overlooked as they emanate from ANSAs. Of course, as is the case with States, they should not be mistaken for actual practice. Our research found clear instances of policies enacted by ANSAs that have not been followed in deeds. Moreover, while some provisions are consistent with IHL, others fall short of required standards. Nonetheless, the potential of ANSA measures should not be underestimated. These measures provide an indication as to the views of ANSAs on humanitarian norms established by international treaties they cannot sign or negotiate. Moreover, they can serve as a basis for humanitarian agencies to engage towards better respect for international standards and hold them accountable. For example, as the Taliban is now the *de facto* government of Afghanistan, it is particularly important to sustain dialogue on their IHL obligations.

Humanitarian commitments made by ANSAs have positively impacted other ANSAs.

Thus, for example, the MNLA has influenced the policy of groups allied within the Coordination of Movements of Azawad (CMA) on a number of IHL issues, such as the prohibition of sexual violence and child protection. This is interesting as the CMA includes movements of different ideological backgrounds, notably the High Council for the Unity of Azawad (HCUA), a splinter faction of the Islamist group, Ansar Dine. ANSAs may also influence State policy. A case in point is Sudan, where the signing of the *Deed of Commitment* banning anti-personnel mines by the Sudan People's Liberation Movement/

36 Army (SPLM/A) was instrumental in Khartoum's decision to ratify the Ottawa Convention. Moreover, when the SPLM/A came to power, the Republic of South Sudan joined the Convention right after declaring independence.

The research shows the value of humanitarian engagement with ANSAs and complementarity of approaches.

For instance, constructive engagement with the MILF/BIAF by UNICEF, ICRC and NGOs, combined with the desire to be removed from the UN list of shame for grave violators of children's rights, constituted an incentive for the MILF/BIAF to engage on the straight-18 minimum age standard for recruitment and use of fighters. Such a combined external pressure contributed to end the practice of child recruitment. Our research also indicates the value of sustained and long-term engagement to effect positive change. This effort has resulted in tangible outcomes, such as the provision of life-saving aid to civilians, the release of detainees, the demobilization of child soldiers or the destruction of stockpiled AP mines. Yet, for many groups that we studied, the process of change from non-compliance to compliance has often taken many years to materialize. It took eight years for the MILF/BIAF to successfully complete the action plan and be delisted from the annexes of the UN Secretary-General annual report on children and armed conflict.

Lastly, it is important to consider engagement at multiple levels. Depending on the command structure of the target ANSA, engagement should not target only the leadership but also local commanders. In the case of the MNLA, for example, much of the military command is made up of officers formerly serving in the regular forces of Libya and/or Mali. These officers received training in IHL and for some of them were responsible for its implementation before the conflict in Mali broke out. Their experience has been instrumental in the establishment of internal regulations to control MNLA fighters' behaviour.

The research has identified some correlation between the types of ANSAs proposed and their potential capacity to implement IHL norms.

Though the actual degree of compliance with IHL is determined by many factors (e.g. conflict dynamics, ideology, relationships with communities), the typology of the group and its organizational structure have an important influence on its practice. To truly examine IHL compliance, we need to differentiate between the norms. There are norms that in principle can be respected by all ANSAs that are party to NIACs (the prohibitions – so-called negative obligations), although the groups might still need external support to raise awareness or increase knowledge of the norms. For example, the prohibition of sexual violence can be implemented irrespective of the types of ANSAs. There are other norms that require a higher degree of organization on the part of the ANSAs, such as the requirement to conduct fair trials, or to administer justice.

Furthermore, our research highlights how command and control challenges affected the implementation of IHL. In many cases studied, the ANSA leadership provided top-down policy guidance, but much was left to the discretion of military commanders on the ground. Implementation was variable and subject to local military imperatives, particularly in frontline areas. ANSAs are very secretive about their internal monitoring and accountability mechanisms but it appears that often sanctions have not been enforced for fear of alienating the loyalty of military commanders, some of whom have strained relationships with the leadership and operate with considerable autonomy. In some cases,

disciplinary action led to internal splits. Several ANSAs took corrective action to enforce behaviour standards as result of external pressure, or when they began to gain greater territorial control.

In addition to the lack of capacity and command and control issues, another important challenge to compliance is ignorance of international standards.

All ANSAs studied as part of this research admit to lacking detailed knowledge of IHL, having at best a basic awareness of the general rules, such as the principle of distinction. Most groups had never heard about international treaties such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, while others have a different interpretation of what qualifies as cultural heritage to that set forth in international law. This ignorance of the law significantly impedes efforts to increase respect for IHL. ANSAs cannot comply with rules they do not know about or understand. Several of them have used local customs, beliefs and values, whether secular or religious, to control the behaviour of the rank and file. There are, of course, limitations to the efficacy of such normative frameworks, especially in contexts when they deeply deviate from international standards. But, as the research shows, common values can be mobilized to engage ANSAs towards compliance.

Engage, and support engagement, with ANSAs in a dialogue towards respect for IHL.

Common Article 3 to the Geneva Conventions clearly states that impartial humanitarian organizations may engage with all parties to armed conflict, including non-State parties. Such dialogue does not affect their legal status. As our research demonstrates, many ANSAs are willing to engage on IHL rules. Promoting their adherence to such rules is instrumental to ensure ownership and compliance. This requires a thorough analysis of the target ANSA, including its internal rules and factors that may influence its attitude. It requires also support from states and donors for humanitarian organizations engaging ANSAs in order to seek improved protection of civilians.

Train ANSAs on relevant international humanitarian norms.

As our research suggests, ANSAs' comprehension of IHL is limited and significantly influenced by whether humanitarian agencies have directly engaged with them. This underscores the importance of States supporting and humanitarian agencies conducting a sustained dialogue with ANSAs. This should include repeated dissemination of IHL at all levels. Training seems particularly necessary on conduct of hostilities norms, including a clarification of notions such direct participation in hostilities. Increasing the ownership of the principle of proportionality and precaution in attack, as well as taking into account the practice of ANSAs, should also be key for a better implementation of the norms.

Mobilize actors of influence.

ANSAs do not operate in a vacuum. Many have some sort of constituency or support base. These include civil society, mass-based organizations, diaspora, and refugee communities. Sometimes, ANSAs are backed by foreign States or other armed groups. So identifying and engaging such actors is important as they may be in a position to influence behaviour from 'within'. Our research identifies several instances when this happened in practice.

Promote inclusion of IHL related issues during peace processes.

Our research found several examples of ANSAs' change of policy and practice during lulls in fighting or peace talks. ANSAs are likely be more open to engage on IHL issues during these turning moments. Such windows of opportunity should be monitored and when they arise seized upon to the extent possible as they may offer a greater chance of successful engagement.

Hold ANSAs accountable to their words.

Many ANSAs have made unilateral commitments to respect IHL or signed humanitarian agreements with the UN or NGOs. Moreover, ANSAs frequently have some sort of military doctrine, codes of conduct or internal regulations which typically stipulate rules of fighting relevant to IHL. Such internal policies and commitments should be monitored and used as a leverage to enforce compliance.

Involve and include ANSAs' views in efforts of interpretation of international law and future norm-making processes.

Our research has shown that the application of certain norms show the limits of the international legal system when it comes to ANSAs, seemingly limiting their ability to fully comply with their obligations. Furthermore, as mentioned above, many ANSAs have gone further to their obligations under IHL, paving the way for the possibility to elaborate on a more protective legal regime in non-international armed conflicts.

Unfortunately, many processes on proportionality,¹⁸¹ duty to investigate,¹⁸² and on explosive weapons in populated area (EWIPA)¹⁸³ focus on State practice and views. However, a more systematic effort is needed to understand fully ANSA practice and interpretations on these key aspects of the protection of civilians. This includes norms relating to the conduct of hostilities in populated area, the use of certain weapons, the definition of sexual violence, and fair-trial guarantees, each of which is paramount for better implementation of IHL. In addition, some ANSAs were clearly positioning themselves on the protection of the environment or the ban of certain weapons. In addition, it is worth noting that many ANSAs referred to IHRL as a basis of their action, sometimes in lieu of IHL.

There are precedents for ANSA participation in IHL treaty negotiations. These precedents arose at a unique moment in history (during decolonization) and are unlikely to be repeated. Yet, there may be creative ways to consult ANSAs about their views on future norms with which they will be expected to comply. This could be done for example by researchers and/or NGOs with ANSAs or former ANSA members. Greater inclusion could enhance their buy-in and compliance.

Increase assistance to civilians living in areas controlled by ANSAs.

As noted by the UNSG and the ICRC, millions people live under the direct governance of ANSAs, including designated terrorist groups. Despite significant needs, such people have often limited access to international assistance, whether in terms of healthcare, education or other services. Yet, the COVID-19 crisis has shown the importance of an inclusive response. Tackling the pandemic in ANSA areas is not only a humanitarian imperative but is also necessary to end its spread globally. The issue of trans-border humanitarian corridors and non-recognition of school diplomas for children living in ANSAs control areas should be considered and addressed.

Further research on ANSAs practices and engagement experiences.

In recent years, there has been increasing academic attention on the role of armed groups in contemporary warfare. A number of humanitarian agencies have also documented their negotiations with ANSAs. Yet, little is known of what motivates ANSAs to engage on IHL issues, how they make decisions and trade-offs, and what are their sources of influence. We have also limited understanding on the variation in the patterns of violence and restraint between and within ANSAs. Further accounts of humanitarian agencies would also offer valuable insights on the dilemma they face and what approaches are effective, thus contributing to learning from past experiences and identifying good practices for the future.

¹⁸¹ See for instance the international Expert Meeting Report: The Principle of Proportionality, ICRC June 2000, at: <https://www.icrc.org/fr/publication/4358-international-expert-meeting-report-principle-proportionality> (accessed 25 Sept. 2022)

¹⁸² Guidelines on investigating violations of IHL: Law, policy and good practice, ICRC, Sept. 2019, at: <https://www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice> (accessed 25 Sept. 2022)

¹⁸³ See the Draft Political Declaration on Strengthening the Protection of Civilians from Humanitarian Harm arising from the use of Explosive Weapons in Populated Areas, a purely State-driven initiative led by Ireland, available at <https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/>.

Introduction

The present document summarizes the legal framework applicable to armed non-state actors (ANSAs) and examined in this research project. It focuses on ten norms of international humanitarian law (IHL) and international human rights law (IHRL), which were selected based on the challenges that exist for their implementation in armed conflict. These norms are:

1. Protection of civilians from attacks
2. The prohibition of sexual violence and gender discrimination
3. The prohibition of using and recruiting children in hostilities
4. Protection of education
5. Humanitarian access
6. Protection of health care
7. The prohibition of forced displacement
8. Use of landmines and other explosive devices
9. Detention, fair trial and administration of justice
10. The special protection of certain objects, such as cultural property and the environment

While the present research has mostly focused on IHL rules, it is important to note that other bodies of international law are relevant when dealing with ANSAs' behaviour, notably IHRL, which touches upon the issue of the administration of civilian life by 'de facto' authorities.¹⁸⁴ As this legal framework is also relevant to the protection of civilians in armed conflict, this project has also considered ANSAs' views and practice regarding some of its norms, including the prohibition of gender discrimination, the protection of children and some provisions related to detention and fair trial guarantees.¹⁸⁵ Importantly, several ANSAs under analysis have positioned themselves both in terms of IHL and IHRL, and have often referred to both regimes in their policies and regulations.

Historically, the development of the law applicable to ANSAs has been very gradual. In 1949, Article 3 common to the four Geneva Conventions (Common Article 3) was deemed applicable to a non-international armed conflict (NIAC). Almost 20 years later, the 1977 Additional Protocol I to the 1949 Geneva Conventions was negotiated to complement these treaties and the law applicable in international armed conflicts (IAC), but included one particular type of ANSA within its scope of application: the so-called 'national liberation movements'. The 1977 Additional Protocol II (AP II), which is entirely devoted to a certain form of NIACs, was also adopted, thus creating additional obligations for ANSAs when applicable. Finally, IHL rules have been identified as having a customary nature, covering many legal issues not addressed in treaty law pertaining to NIACs, particularly the conduct of hostilities.

¹⁸⁴ See notably, K. Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control', 63 *Netherlands International Law Review* 2 (2016). See also M. Kotlik, 'Armed Non-State Actors', in C. Binder, M. Nowak, J. A. Hofbauer and P. Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishing, 2022; and E. Heffes, *Detention by Non-State Armed Groups under International Law*, Cambridge University Press, 2022, Ch. II.

¹⁸⁵ See the Research and Policy Conclusions' document for additional information.

Because ANSAs are not technically ‘parties’ to treaties, as they neither can sign them nor participate in their drafting processes, the precise legal means by which they are actually bound by IHL treaty law has been persistently questioned.¹⁸⁶ ANSAs’ practice and *opinio juris*, in addition, does not contribute to the development of customary IHL. Yet, State practice, international case law and scholarship have confirmed that Common Article 3, as well as AP II and customary IHL, apply to ANSAs directly.¹⁸⁷

This research has included ANSAs relying on international law to regulate their practices, but also Islamist ANSAs. Under international law, these actors, as parties to armed conflicts, are bound by the same rules as any other non-State party. However, despite some indirect references or allusions to IHL, the frame of reference regulating their practice and interpretation in the conduct of war is Islamic law. The case studies on these ANSAs are thus focused on Islamic law as interpreted by classical and mainstream Muslim institutions and scholars, rather than IHL (e.g. the case studies of Al Qaeda, the Islamic State group and Hezbollah).

1. Protection of Civilians from Attacks: The Principles of Distinction, Proportionality and Precautions

Under customary IHL, the parties to a conflict must at all times distinguish between civilians and combatants.¹⁸⁸ Attacks may only be directed against combatants; they must not be directed against civilians. Civilian objects are also protected against attacks.¹⁸⁹ Indiscriminate attacks are prohibited.¹⁹⁰ Article 13 of AP II, which contains similar rules, additionally provides that ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited’. Civilians are persons who are not members of the armed forces;¹⁹¹ they are protected against attack, unless and for such time as they take a direct part in hostilities.¹⁹² Civilian objects are all objects that are not military objectives;¹⁹³ they are protected against attack, unless and for such time they are military objectives.¹⁹⁴

Moreover, under customary IHL it is also prohibited to carry out an attack which may be expected to cause excessive harm to civilians and civilian property compared to the anticipated military advantage (proportionality).¹⁹⁵ And, in the planning and conduct of military operations, the parties to the conflict must do everything feasible to avoid or minimize collateral damage (precaution). Constant care must be taken to spare civilians and civilian objects.¹⁹⁶

¹⁸⁶ For the different theories on the applicability of international humanitarian law (IHL) to ANSAs, see notably S. Sivakumaran, ‘Binding Armed Opposition Groups’, 55 *International and Comparative Law Quarterly* 2 (2006).

¹⁸⁷ In its judgment in *Nicaragua v United States of America*, for example, the International Court of Justice confirmed that Common Article 3 was applicable to the Contras, the ANSA fighting the government: ‘The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character’. ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, 27 June 1986, §219. In 2004, the Appeals Chamber of the Special Court for Sierra Leone held that ‘it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties’. SCSL, *Prosecutor v Sam Hinga Norman*, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72(E), 31 May 2004, §22.

¹⁸⁸ Rule 1, ICRC CIHL Database.

¹⁸⁹ Rule 7, *ibid.*

¹⁹⁰ Rule 11, *ibid.*

¹⁹¹ Rule 5, *ibid.*

¹⁹² Rule 6, *ibid.*

¹⁹³ Rule 9, *ibid.*

¹⁹⁴ Rule 10, *ibid.* In so far as objects are concerned, ‘military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’. Rule 8, *ibid.*

¹⁹⁵ Rule 14, *ibid.*

¹⁹⁶ Rule 15, *ibid.*

Common Article 3 to the 1949 Geneva Conventions, applicable in NIACs, prohibits sexual violence within the broad notion of ‘outrages upon personal dignity, in particular humiliating and degrading treatment’; acts that are prohibited ‘at any time and in any place whatsoever’. Article 4, Paragraph 1(c) of AP II specifically adds ‘rape’, ‘enforced prostitution’ and ‘any form of indecent assault’ to this list.

Among the general protections afforded by IHL, one practical protection is to detain women separately from men: ‘Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women.’¹⁹⁷ It is also a customary rule in all armed conflicts that the specific protection, health and assistance needs of women affected by armed conflict must be respected.¹⁹⁸

With regard to gender equality, while there are general clauses under IHL regarding equal treatment and the requirement that certain services must be provided ‘without adverse distinction’, it can be argued that the prohibition of gender discrimination rather belongs to human rights law. That being said, in its General Recommendation No 30 on women in conflict prevention, conflict and post-conflict situations, of 18 October 2013, the United Nations Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) states: ‘Under international human rights law, although non-State actors cannot become parties to the Convention, the Committee notes that under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights’. It goes on to urge ‘non-State actors such as armed groups: (a) to respect women’s rights in conflict and post-conflict situations, in line with the Convention; (b) to commit themselves to abide by codes of conduct on human rights and the prohibition of all forms of gender-based violence’.¹⁹⁹

3. The Prohibition of Using and Recruiting Children in Hostilities

IHL and IHRL prohibit the recruitment of children into armed forces or armed groups and their participation in hostilities. While article 4(3) of AP II sets the minimum age for recruitment and participation in hostilities at 15 years,²⁰⁰ Article 4(1) of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict requires that ‘[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years’.

¹⁹⁷ Rule 119, *ibid.*

¹⁹⁸ Rule 134, *ibid.* The ICRC offers the following interpretation of this rule: ‘The specific needs of women may differ according to the situation in which they find themselves – at home, in detention or displaced as a result of the conflict – but they must be respected in all situations. Practice contains numerous references to the specific need of women to be protected against all forms of sexual violence... While the prohibition of sexual violence applies equally to men and women, in practice women are much more affected by sexual violence during armed conflicts’.

¹⁹⁹ Committee on the Elimination of all Forms of Discrimination against Women (CEDAW), General Recommendation No 30 on women in conflict prevention, conflict and post-conflict situations, UN doc CEDAW/C/GC/30, 18 October 2013, §§16 and 18.

²⁰⁰ Art 4(3)(c), AP II.

In the IHL realm, the commentary of the International Committee of the Red Cross (ICRC) of AP II explains that a child should not be conscripted or voluntarily enlisted, and also that he or she will ‘not be “allowed to take part in hostilities”, i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.’²⁰¹ The ICRC confirms that the ‘principle of non-recruitment also prohibits accepting voluntary enlistment’.²⁰²

4. Protection of Education

Under customary IHL,²⁰³ children affected by armed conflict are entitled to respect and protection. This includes notably access to education, food and health care. Under Article 4(3) of AP II, it is stipulated that children must be provided with the care and aid they require. It is further specified that this includes an education, ‘including religious and moral education’, in keeping with the wishes of their parents or, in the absence of parents, of those responsible for their care.²⁰⁴ In addition, schools are considered to be civilian objects and are thus protected against attacks, unless they are used for military purposes and become lawful military objectives. Under the principle of precaution, parties to armed conflict, including ANSAs, must take constant care in the conduct of military operations to spare civilian objects, including schools. Moreover, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to schools. In light of this principle, the use of functioning schools for military purposes must be avoided except for imperative military reasons.²⁰⁵

The Safe Schools Declaration commits signatory States²⁰⁶ to the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict.²⁰⁷ These soft-law guidelines, agreed upon in 2014, do not affect existing obligations under international law.²⁰⁸ They are intended ‘to lead to a shift in behaviour that will lead to better protections for schools and universities in times of armed conflict [...]’.²⁰⁹

5. Humanitarian Access

In the context of a NIAC, Paragraph 2 of Common Article 3 provides that ‘[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’

201 ICRC, Commentary on Art 4, AP II, 1987, p 1380, Para 4557, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B> (last accessed 23 September 2022).

202 Ibid.

203 Rule 135, ICRC CIHL Database.

204 Art 4(3)(a), AP II.

205 Rules 7 and 15, ICRC CIHL Database.

206 114 States have endorsed the Declaration. See the Norwegian Government’s list of signatories, https://www.regjeringen.no/en/topics/foreign-affairs/development-cooperation/safeschools_declaration/id2460245/ (last accessed 23 September 2022).

207 Available at https://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf (last accessed 23 September 2022).

208 Global Coalition to Protect Education From Attack, *Commentary on the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict*, p 5, https://protectingeducation.org/wp-content/uploads/documents/documents_commentary_on_the_guidelines.pdf (last accessed 23 September 2022).

209 Ibid. See S. Haines, ‘Developing International Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict’, 97 *International Law Studies* 573 (2021), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2965&context=ils> (last accessed 23 September 2022). See also United Nations Children’s Fund (UNICEF), ‘Education Under Attack’, 18 February 2021, <https://www.unicef.org/education-under-attack> (last accessed 23 September 2022).

44 This provision is considered to be one of the legal bases on which impartial humanitarian organizations may provide humanitarian relief and protection to people in need.²¹⁰ Under customary IHL, the parties to an armed conflict ‘must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.²¹¹ Humanitarian relief personnel and objects must be protected and respected.²¹²

In addition to Common Article 3 and customary IHL, Article 18(1) of AP II envisages that relief societies located in the territory of the High Contracting Party, as well as the civilian population, may offer to provide humanitarian relief, including collecting and caring for the wounded, the sick and the shipwrecked. In any armed conflict, the belligerent parties are responsible under international law for ensuring the civilian population living under their control is adequately provided with the basic goods necessary for its survival.²¹³ If they are unable to do so, impartial humanitarian organizations can support the parties, provided consent is obtained to access the territory. Thus, Article 18(2) of AP II stipulates: ‘If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.’

6. Protection of Health Care

Under IHL, the protection of the wounded and sick in the context of a NIAC is provided in Sub-Paragraph 2 of Common Article 3, which simply reads: ‘(2) The wounded and sick shall be collected and cared for’. The beneficiaries of the obligation can be inferred from Sub-Paragraph 1 of Common Article 3, i.e. ‘[p]ersons 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’. The protection has been further established in AP II. Its Article 7 affirms that in all circumstances the wounded and sick ‘shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones’.²¹⁴ It has also been recognized that these provisions are customary in nature.²¹⁵

Medical personnel, facilities and transport that are exclusively assigned to medical purposes must be respected and protected in all circumstances, although they lose such protection if they carry out or are used to commit acts harmful to the enemy.²¹⁶ Attacks directed against medical personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.²¹⁷

²¹⁰ See the ICRC’s 2016 commentary on Article 3 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC> (last accessed 23 September 2022). The commentary is set forth in Paras 779, 791 and 861. ²¹¹ Rule 55, ICRC CIHL Database.

²¹² Rules 31 and 32, *ibid.*

²¹³ F. Lattanzi, ‘Humanitarian Assistance’, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, p 232, para 3.

²¹⁴ Article 7, AP II.

²¹⁵ See Rule 109, ICRC CIHL Database. The customary-law character of certain obligations linked to the wounded and sick in international as well as in NIACs has not been met with unanimous agreement within the scholarship. See J. P. Benoit, ‘Mistreatment of the Wounded, Sick and Shipwrecked by the ICRC Study on Customary International Humanitarian Law’, 11 *Yearbook of International Humanitarian Law* (2008).

²¹⁶ Rules 25, 28 and 29, ICRC CIHL Database.

²¹⁷ Rule 30, *ibid.*

7. The Prohibition of Forced Displacement

Customary IHL and treaty law prohibits the ‘forced’ displacement of civilians both in IACs and NIACs. Rule 129 of the ICRC customary IHL study states: ‘parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.’²¹⁸ Imperative military reasons include, for example, clearing a combat zone. Case law has confirmed that there are *strictly limited grounds permitted to displace civilians during a NIAC*. The International Criminal Tribunal for the former Yugoslavia (ICTY) has noted that ‘in view of the drastic nature of a forced displacement of persons, recourse to such measures would only be lawful in the *gravest of circumstances* and only as measures of last resort.’²¹⁹ Where such legitimate reasons exist, the evacuation of civilians becomes legitimate.

Rule 131 of the ICRC customary IHL study also states that ‘in case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated’. Finally, Rule 132 states that ‘displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist and security allows’.

8. Use of Landmines and Other Explosive Devices

As stated above, the rules on conduct of hostilities are binding on ANSAs by virtue of customary IHL. With regard to landmines (both anti-personnel and anti-vehicle) and other explosive weapons, their use is not prohibited per se under customary IHL applicable to ANSAs, unless they are directly aimed at civilians or violate some fundamental principles of the law of the conduct of hostilities.²²⁰ However, when landmines are used, particular care must be taken to minimize their indiscriminate effects.²²¹ In addition, parties to the conflict using landmines must record their placement, as far as possible.²²² At the end of active hostilities, they must also remove or otherwise render them harmless to civilians or facilitate their removal.²²³

9. Detention, Fair Trial and Administration of Justice

Common Article 3, Articles 4 and 5 of AP II, as well as customary IHL provide numerous rules concerning the treatment of persons in detention, notably the prohibition of ill-treatment, the provision of food and water and of safeguards with regards to health and hygiene. Generally, persons deprived of their liberty are ‘entitled to respect for their person, honour and convictions and religious practice’ and ‘shall in all circumstances be treated humanely, without any adverse distinction’.²²⁴

²¹⁸ See Rule 129, *ibid*.

²¹⁹ ICTY, *The Prosecutor v Milan Simić*, Judgment, IT-95-9-T, 17 October 2003, §§125–126.

²²⁰ If the total prohibition of anti-personnel landmines is not considered customary law yet, three-quarters of states today are parties to the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. See generally, B. Carnahan, ‘The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons’, 105 *Military Law Review* (1984); S. Maslen, *Anti-Personnel Mines Under Humanitarian Law: A View from the Vanishing Point*, Transnational Publishers, 2001.

²²¹ Rule 81, ICRC CIHL Database.

²²² Rule 82, *ibid*.

²²³ See Rule 83, *ibid*, as well as the 2003 Convention on Conventional Weapons Protocol V on Explosive Remnants of War, also applicable in NIACs.

²²⁴ Art 4, AP II.

46 Furthermore, individuals detained in relation to a NIAC ‘must be released as soon as the reasons for the deprivation of liberty cease to exist’.²²⁵ ICRC access to persons deprived of their liberty is mandatory only in the context of IACs and, as such, is not an obligation for ANSAs. In the context of a NIAC, the ICRC ‘may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families’.²²⁶

With regard to the administration of justice in NIACs, under Common Article 3 and customary IHL, ‘no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’.²²⁷ Article 6 of AP II provides further details on the prosecution and punishment of criminal offences related to the armed conflict.

10. The Special Protection of Certain Objects, Such as Cultural Property and the Environment

Under customary IHL, each party must respect and protect cultural property. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.²²⁸ Furthermore, the use of this property of great importance ‘for purposes which are likely to expose it to destruction or damage is prohibited’, subject again to imperative military necessity.²²⁹

All seizure or destruction of or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited. Parties are also obliged to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property.²³⁰ These rules are contained to a large extent in Article 4 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, a provision applicable to both IACs and NIACS.

²²⁵ Rule 128, ICRC CIHL Database.

²²⁶ Rule 124, *ibid.*

²²⁷ Rule 100, *ibid.*

²²⁸ Rule 38, *ibid.*

²²⁹ Rule 39, *ibid.*

²³⁰ Rule 40, *ibid.*

