Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara

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Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara

Orla Marie Buckley†

"Wars between sovereign states appear to be a phenomenon in distinct decline. Tragically, however, the lives of millions of people around the globe continue to be blighted by violence."

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† B.A. Journalism and International Studies, 2005, University of North Carolina at Chapel Hill; M.A. International Relations, 2009, Dublin City University; J.D. expected May 2012, University of North Carolina School of Law. I would like to thank my fiancé Dara O'hAnnaidh, family and friends for their support.

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I. Introduction

The majority of armed conflict today occurs within states and involves one or more non-state armed groups (NSAGs). In 2007, there were over 261 active non-state armed groups. The repercussions of internal armed conflict involving NSAGs include extensive violations of international humanitarian law (IHL). NSAGs are responsible for a range of violent acts, such as deliberately targeting civilians, destroying civilian property, and

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2 See Jörn Grävingholt, Claudia Hofmann & Stephan Klingebiel, Development Cooperation and Non-State Armed Groups 1 (2007), http://www.isn.ethz.ch/isn/Current-Affairs/ (search publications for “Development Cooperation and Non-State Armed Groups”) (“Civil wars and other intrastate violent conflicts, which by their nature are characterized by the participation of NSAGs on at least one side, have dominated warfare since the end of the Second World War, so much so that war between states has increasingly become the exception rather than the rule.”); see also Human Security Report Project, Human Security Brief 2007 (2007), http://www.hsrgroup.org/human-security-reports/2007/text.aspx (reporting no inter-state conflicts in 2006, yet there were thirty civil wars involving at least one non-state actor, and twenty-four internal conflicts between only non-state armed groups. The report considers conflicts in Iraq and Afghanistan “internationalized intrastate conflicts” and not inter-state conflicts).


4 See generally id. (describing the challenges involved with bringing NSAGs into compliance with IHL).
committing rape and other forms of sexual violence.\textsuperscript{5} Despite the increasing role of NSAGs in armed conflict, IHL remains state-centric and provides limited opportunities for armed groups to comply with its provisions or engage in its development.\textsuperscript{6} This comment argues that the legal framework regulating internal armed conflict and NSAGs is inadequate and much weaker than the rules that govern states involved in international armed conflict. Nonetheless, all populations in areas of armed conflict, whether international or internal, deserve the same level of protection by IHL.

Part II examines the definition and development of NSAGs and discusses the advantages and disadvantages of accommodating NSAGs under IHL. Part III outlines the current legal framework of IHL to determine the level of regulation of NSAGs during an internal armed conflict. This consideration necessitates an analysis of conventional and customary provisions of IHL that govern the actions of NSAGs, focusing primarily on Common Article 3 of the Geneva Conventions of 1949\textsuperscript{7} and their Additional Protocols of 1977.\textsuperscript{8} This section also analyzes alternative legal measures to regulate NSAGs, such as special and military agreements. Part IV looks specifically at the application of IHL to one NSAG, the Polisario Front. The case study demonstrates that IHL violations have been taking place for more than forty years in the context of internal armed conflict in Western Sahara. The analysis provides insight into the ability of NSAGs to engage and comply with IHL. Part V offers recommendations, focusing on measures to hold NSAGs more accountable and to better incorporate NSAGs into the IHL legal framework.

\textsuperscript{5} See Greta Zeender, Protecting the Internally Displaced: An Opportunity for International NGOs to Engage NSAs, in GENEVA CALL 2007 CONFERENCE REPORT, supra note 3, at 98-99 (2008) (explaining that “killing, displacement, sexual violence, property destruction, and other abuses” are purposefully used by NSAGs).


\textsuperscript{8} Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1, ¶ 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].
II. Overview of Non-State Armed Groups

A. Defining Non-State Armed Groups and Internal Armed Conflict

NSAGs vary widely in size, organization, motives, goals and resources, making the term “non-state armed group” difficult to define.\(^9\) The vast number of NSAGs and the fact that these groups often have a fluid membership and rapidly changing goals compound the difficulty of agreeing on a useful definition.\(^10\) The International Council on Human Rights Policy defines NSAGs as “groups that are armed and use force to achieve their objectives and are not under state control.”\(^11\) This definition incorporates two elements: lack of state control and the use of force. Geneva Call, a neutral organization with the goal of achieving non-state actors’ compliance with international humanitarian and human rights laws, introduces an additional element by defining armed groups as “involved in situations of armed conflict that operate outside effective State control and are primarily motivated by political goals.”\(^12\) This definition suggests that NSAGs have a political agenda instead of a private one. Therefore, the term NSAG generally refers to “rebel groups, liberation movements and de facto governments” with a political agenda.\(^13\) The term NSAG


\(^10\) See id.


\(^12\) About Us, GENEVA CALL, http://www.genevacall.org/about/about.htm (last visited Jan. 17, 2012). Geneva Call is a NGO that works with NSAGs to increase compliance with IHL. See also Soliman Santos Jr., Will An Agreement On Respect for Human Rights and International Humanitarian Law Forged Between Governments and Nonstate Actors Promote Human Security?, 21 KASARINLAN: PHILIPPINE J. THIRD WORLD STUD. 176, 176 (“Nonstate armed groups (NSAGs) refer mainly to rebel or insurgent groups, i.e., groups that are armed and autonomous from the state and use force to achieve their political/quasi-political objectives.”) [hereinafter Santos, Agreement on Respect for Human Rights].

\(^13\) Hofmann, supra note 9, at 396.
does not include criminal organizations, such as the mafia and drug cartels, private security companies, and mercenaries. This comment bases its definition of NSAG loosely on the three elements identified above: lack of state control, use of force, and some degree of politically motivated action.

While no international treaty explicitly defines the term NSAG, the two Additional Protocols of 1977 provide guidelines regarding the types of armed groups that are covered under the Protocols’ provisions. Article 1(1) of Protocol II stipulates that the Protocol applies to armed groups with an organizational hierarchy that enables leaders to control subordinates and permit them to carry “sustained and concerted military operations.” Protocol I excludes “mercenaries,” who are described in part as parties motivated by “the desire for private gain.” While it seems logical to define NSAGs based on command relations, territorial control, relationship with the State, and political motives, there are shortcomings to this approach. First, many NSAGs do not have clearly defined command structures and instead operate as loosely organized groups or cells. The degree of discipline and the amount of control superiors have over their subordinates is extremely difficult to measure, especially when an NSAG operates underground or there is limited public information or access to the group. An NSAG’s control over territory is also difficult to measure and varies widely. Some NSAGs control

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14 See id.

15 The substantive limitations of the Additional Protocols will be discussed in more detail in Part II. The aim of this section is to demonstrate the difficulty of defining NSAGs both academically and legally.

16 Protocol I, supra note 8, art. 1.


18 See Liesbeth Zegveld, Accountability of Armed Opposition Groups in International Law 1 (2002).

19 See Hofmann, supra note 9, at 398-99; see also Gravingholt et al., supra note 2, at 55 (discussing the complex organization of NSAGs, including the high level of secrecy that characterizes many NSAGs).

20 See Zegveld, supra note 18, at 1 (“At one extreme, such groups [NSAGs] resemble de facto governments, with control over territory and population. At the other extreme, they are militarily and politically inferior to the established government, exercising no direct control over territory and operating only sporadically.”).
sufficient territory to operate similarly to a state, providing public safety and services, and even collecting taxes.\textsuperscript{21} For example, the Free Aceh Movement (Gerakan Aceh Merdeka: GAM), which is no longer an NSAG as it now forms part of Indonesia’s government,\textsuperscript{22} visibly controlled large parts of territory in Aceh, Indonesia, and funded its operations through an extensive tax system.\textsuperscript{23} Other NSAGs influence territory through non-physical means, such as using the area to recruit members, traffic small arms and light weapons, plant landmines, block the delivery of aid, and engage in a range of other activities.\textsuperscript{24}

Contrary to the requirements of Article 1(1) of Protocol II, not all NSAGs act in strict opposition to the government.\textsuperscript{25} For example, in Somalia, where there is no nationally recognized government, armed groups fight against each other.\textsuperscript{26} In the Democratic Republic of the Congo (DRC), armed groups fight the government and each other.\textsuperscript{27} Other NSAGs are sponsored or controlled at some level by the government, although a
government may deny controlling the group and denounce its
support for the group's activities.\textsuperscript{28} As these examples
demonstrate, it is not always clear if an NSAG is truly a "non-
state" entity and completely disconnected from government
control.\textsuperscript{29}

Lastly, while identifying NSAGs by their objectives may be
useful, it should be noted that some NSAGs do not have clearly
identifiable political objectives, or alternatively, they may
combine such political objectives with criminal activity.\textsuperscript{30} The
International Committee of the Red Cross (ICRC) sums up many
of these obstacles to defining and classifying NSAGs:

Amongst armed groups, the distinction between politically-
motivated action and organized crime is fading away. All too
often, the political objectives are unclear, if not subsidiary to the
crimes perpetrated while allegedly waging one's struggle. Are
we dealing with a liberation army resorting to terrorist acts, or
with a criminal ring that tries to give itself political credibility?

\textsuperscript{28} See id. at 8. For example, the United Self-Defense Forces of Colombia are reported to collaborate with the State military and police, although the government denies that it has any control over the group and denounces their activities. The report argues that it is not always easy to distinguish between NSAGs that have "implicit State support from a genuinely autonomous armed group." The report provides examples from Northern Ireland, Turkey, Sierra Leone, and the Congo. See also GRÅVINGHOLT ET AL., supra note 2, at 59-61 (discussing alliances between ruling regimes and NSAGs, giving Tajikistan as an example).

\textsuperscript{29} Marco Sassòli argues that most armed conflicts today are clearly defined as international or internal, and most armed groups are not transnational. See Marco Sassòli, Transnational Armed Groups and International Humanitarian Law, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, HARVARD UNIV., OCCASIONAL PAPER SERIES, Winter 2006, http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf. However, scholars such as James Stewart argue that it is becoming difficult to distinguish international and internal armed conflict as internal conflicts become "internationalized." Id. This comment focuses on NSAGs involved in internal armed conflict. This distinction is critical when determining the IHL applicable to NSAGs. Id. As the next section demonstrates, transnational NSAGs may be held accountable to a different set of rules of IHL if they are involved in a conflict that is classified as international. See also James G. Stewart, Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict, 85 INT'L REV. RED CROSS 313 (2003), http://www.icrc.org/eng/assets/files/other/icrc_850_stewart.pdf.

\textsuperscript{30} See INT'L COUNCIL ON HUMAN RIGHTS POLICY, supra note 11, at 6.
No matter how one chooses to classify such armed groups, their lack of discipline and structured command, their unpredictability, their lack of interest in achieving external recognition... constitute additional obstacles to their observance of international standards.31

The difficulty of establishing a definition of NSAGs is compounded by the highly political nature of the topic and the groups themselves.32 Terminology surrounding NSAGs is often politically charged. Armed groups are called “terrorists” or “criminals” by some and “liberation fighters” or “revolutionaries” by others.33 Nicolas Florquin and Elisabeth Decrey, a program officer and a cofounder of Geneva Call, respectively, argue that the trend to label NSAGs as “terrorists” in recent years has “[dismissed] the challenges NSAGs present to state sovereignty and territorial control and justifies responses based on—at times unrestrained—force rather than dialogue.”34 This comment acknowledges merit in using a neutral term, namely NSAG, which encourages an unbiased and respectful discussion of key actors in today’s armed conflict.

B. The Potential to Accommodate Non-State Armed Groups

The growth of interest in NSAGs has also brought about a debate over the advantages and disadvantages of accommodating NSAGs under IHL.35 Jörn Gravingholt points out that certain governments, such as Switzerland and Norway, as well as several international humanitarian agencies have dealt with NSAGs on a regular basis.36 Nonetheless, engagement with NSAGs by other

31 Id. (citing HOLDING ARMED GROUPS TO INTERNATIONAL STANDARDS: AN ICRC CONTRIBUTION TO THE RESEARCH PROJECT OF THE ICHRPT 2-3 (1999)).
32 Hofmann, supra note 9, at 396.
33 See INT’L COUNCIL ON HUMAN RIGHTS POLICY, supra note 11, at 6.
35 Gravingholt et al., supra note 2, at 2-3 (noting that interest in NSAGs has attracted attention since the early 1990s and more recently with the 9/11 terrorist attacks).
36 See Jörn Gravingholt, Engaging Armed Groups in Development Cooperation, in GENEVA CALL 2007 CONFERENCE REPORT, supra note 3, at 36.
actors has been very low. NSAGs are a reality for states, international development, humanitarian agencies, the United Nations (U.N.), international organization (IO) representatives, and any other actor working in the area of armed conflict as well. As Marco Sassòli asserts, “[w]e have to deal with this reality [of armed groups] and the first step towards gaining respect for some rules is to speak to the people involved and to have mechanisms engaging with these people.”

NSAGs play an important role in the success of humanitarian operations and the protection of humanitarian personnel. During an armed conflict, the population affected by the conflict requires humanitarian assistance and services. In some cases, NSAGs control large parts of a territory and are even considered to be de facto governments. In these circumstances, organizations must reach an understanding with the NSAG, rather than with the established government, to gain access and provide unhindered assistance to the population. Furthermore, engagement with NSAGs lowers the risks posed to personnel working in a region controlled by NSAGs. This same logic can be applied to

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37 See id.
38 See generally Marco Sassòli, Engaging Non-State Actors: The New Frontier for International Humanitarian Law, in GENEVA CALL 2007 CONFERENCE REPORT, supra note 3, at 8 (discussing how various organizations and entities can engage NSAGs).
39 See id. at 11.
40 See, e.g., GRÄVINGHOLT ET AL., supra note 2, at 7 (discussing engagement of NSAGs, such as “negotiations with kidnappers, agreements with NSAGs on transport routes for aid supplies, political appeals to NSAGs not to recruit child soldiers or to use land mines” and suggesting four motives for engagement to improve development efforts).
41 See id. at 6 (explaining that humanitarian organizations are often unable to avoid direct contact with NSAGs during conflicts to carry out their goals).
42 See id. at 90-91 (discussing the Liberation Tigers of Tamil Eela’s de facto power and administrative structures that were “able to cope fairly effectively with the direct consequences of the tsunami”).
43 See Grävingholt, supra note 36, at 38; see also GRÄVINGHOLT ET AL., supra note 2, at 91 (“Engagement with groups completely or largely in control of an area may be necessary at least from a humanitarian viewpoint and for granting access to information. Such engagement may concern negotiated access to an area or even cooperation.”).
44 See Grävingholt, supra note 36, at 39. Humanitarian workers are often the deliberate targets of attacks, kidnappings, robbery and murder by NSAGs. Examples are numerous and include Chechyna, Rwanda, Bosnia and Herzegovina, West Timor, Liberia, Afghanistan, Somalia, and Sudan. See Ros Thomas, Aid Worker Safety and
improve the safety and effectiveness for other workers operating in areas under NSAG control, such as journalists, peacekeepers, and religious and medical personnel.\(^4^5\)

NSAGs are important actors not only during times of conflict, but also after an armed conflict has ended. They can play a role in the effectiveness of disarmament, demobilization, and reintegration (DDR) programs.\(^4^6\) NSAGs have knowledge of the terrain and the placement of mines, so it is critical that they are involved in any de-mining process.\(^4^7\) Furthermore, a group that was originally an NSAG may form a political party and become part of a state’s government; therefore, it is important to engage NSAGs from early on in the conflict.\(^4^8\) Hofmann asserts that increased engagement and communication with NSAGs can lead to “increased information sharing and understanding of problems on both sides,” which in turn increases the likelihood of a successful peace process.\(^4^9\) It is logical that any peace process or ceasefire agreement should, by necessity, include all actors to the armed conflict, including the NSAGs involved in the conflict.

States and NSAGs have expressed concerns about any process of engagement.\(^5^0\) NSAGs fear that they are more susceptible to

\(^{45}\) See Thomas, supra note 44, at 157 (noting the increasingly dangerous environment and susceptibility to attacks faced by “military, peacekeepers, journalists, and disaster relief workers”).

\(^{46}\) See Hofmann, supra note 9, at 397. For information on DDR programs, see What is DDR?, UNITED NATIONS DISARMAMENT, DEMOBILIZATION AND REINTEGRATION, http://www.unddr.org/whatisddr.php (last visited Jan. 17, 2012).


\(^{48}\) For example, the Sudan People’s Liberation Movement/Army (SPLM/A) is now part of the Government of National Unity; the Conseil National pour la Défense de la Démocratie-Forces pour la Défense de la Démocratie (CNDD-FDD) forms part of Burundi’s national government. As mentioned earlier, GAM has formed part of Indonesia’s government. See GRÄVINGHOLT ET AL., supra note 2, at 93 (discussing the transformation of NSAGs into a legitimate “state actor” after elections, such as Hamas and Somalia’s NSAG structure).

\(^{49}\) Hofmann, supra note 9, at 406.

\(^{50}\) See SOLIMAN M. SANTOS, JR., THE OTTAWA TREATY AND NON-STATE ACTORS 12 (1999), http://www.genevacall.org/resources/other-documents-studies/f-other-
intelligence-gathering and surveillance if they engage with the government.\textsuperscript{51} They also might question the government’s motives and believe that the government might use the engagement as “part of a counter-insurgency or low-intensity conflict scheme to disarm them.”\textsuperscript{52} Some governments have argued that engaging NSAGs in a formal dialogue might give “legitimacy, recognition, and status of belligerency” to armed groups.\textsuperscript{53} States may be concerned that engaging with the NSAG increases the NSAG’s credibility by signaling that the armed group has legitimate grievances.\textsuperscript{54} Furthermore, government officials may argue that according NSAGs legal personality and responsibilities makes state sovereignty increasingly irrelevant.\textsuperscript{55}

While concerns by both governments and NSAGs are valid, a number of counter-arguments should be noted. First, applying IHL to the conduct of all parties of an internal armed conflict does not legitimize the armed groups. This view is clearly stated in IHL instruments and supported by legal scholars.\textsuperscript{56} Common Article 3 of the Geneva Conventions, which is considered customary law,\textsuperscript{57} explicitly states that the application of norms to a party does not “affect the legal status of the Parties to the conflict.”\textsuperscript{58} Therefore, holding the armed groups to IHL obligations does not give them any entitlements to use violence or result in a change in their legal status.\textsuperscript{59}

\textsuperscript{51} See id.

\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} See Hofmann, supra note 9, at 397-98; see also ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 46 (2006) (discussing criticism by some that holding NSAGs to international laws “may seem to legitimize the use of violence by both sides”).

\textsuperscript{55} See CLAPHAM, supra note 54, at 25-26; see generally GRÅVINGHOLT ET AL., supra note 2, at 10-11 (discussing the risks and factors third parties should consider before engaging with NSAGs).

\textsuperscript{56} See, e.g., CLAPHAM, supra note 54, at 51; see also SANTOS, supra note 50, at 12-13. Part II will discuss the IHL instruments and their application to NSAGs in more detail.

\textsuperscript{57} See Geneva Conventions of 1949, supra note 7 (analyzing customary international humanitarian law).

\textsuperscript{58} Id.

\textsuperscript{59} See SANTOS, supra note 50, at 12-13; CLAPHAM, supra note 54, at 51.
There are also incentives for governments and NSAGs to respect and ensure compliance with the provisions of IHL.\textsuperscript{60} As Heather Wilson notes, “[c]lemency is often in the interests of the victor as much as to the benefit of the vanquished.”\textsuperscript{61} Wilson argues that it is in parties’ interests to follow certain standards of warfare as there is a threat of retaliation.\textsuperscript{62} Reports by Geneva Call from interviews with leaders of NSAGs support this hypothesis.\textsuperscript{63} Informants have often been directly affected by landmines or witnessed the devastating effects of armed conflict on civilian populations.\textsuperscript{64} Additionally, NSAGs may increase their internal and international credibility by following the norms of IHL.\textsuperscript{65} Santos argues that adherence to certain IHL provisions is important for an NSAG that has aspirations to become part of or take over a government, as these actions demonstrate responsibility.\textsuperscript{66}

Furthermore, there are advantages to using international law as opposed to national law when regulating the actions of NSAGs during internal armed conflict. NSAGs are often in disagreement with the state—particularly when the NSAG is engaged in armed conflict against the state—and NSAGs are therefore unlikely to accept the legitimacy of the national laws created by that state.\textsuperscript{67} As the Council on Human Rights Policy explains, “National law is tainted by its association with the state or government in power. International law, even though it is developed by states, has the advantage of being distinct from any particular state.”\textsuperscript{68} This is not to suggest that NSAGs will accept the legitimacy of international law in all cases; however, evidence shows that many

\begin{footnotesize}
\begin{enumerate}
\item See HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 36 (1988).
\item Id.
\item See id.
\item See id. at 11.
\item See id. at 13.
\item See SANTOS, supra note 50, at 14.
\item See INT’L COUNCIL ON HUMAN RIGHTS POLICY, supra note 11, at 59.
\item Id.
\end{enumerate}
\end{footnotesize}
NSAGs have voluntarily complied with provisions of IHL.\textsuperscript{69} As the next section will illustrate, the work of humanitarian organizations, such as Geneva Call and the ICRC, have demonstrated the benefits of dialogue with NSAGs for civilian populations living in armed conflict areas.\textsuperscript{70}

C. The Nature of Armed Conflict and Non-State Armed Groups

As noted earlier, the majority of armed conflict today is internal and involves one or more NSAGs.\textsuperscript{71} Along with government forces, NSAGs contribute to the deaths of thousands of civilians every year.\textsuperscript{72} NSAGs are responsible for a range of violent acts, including deliberately targeting civilians, destroying civilian property, and committing rape and other forms of sexual violence, as well as indiscriminate violent attacks that completely disregard IHL and international human rights law (IHRL).\textsuperscript{73} While NSAGs are certainly a reality of today's world, it should not be assumed that they are new actors in armed conflict.\textsuperscript{74} Rather, NSAGs have participated in armed conflict throughout history.\textsuperscript{75} Although the occurrence of internal armed conflict has

\textsuperscript{69} Refer to Part III.D and Part IV.A for examples of special agreements and unilateral declarations voluntarily undertaken by NSAGs. Furthermore, the attendance by eleven National Liberation Movements (NLMs) at the drafting of the Additional Protocols of 1977 was initiated by the NSAGs themselves. See Claude Pilloud \& Jean De Preux, \textit{Introduction to International Committee of the Red Cross, Commentary on the Additional Protocols I and II of 8 June 1977} (1987), http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument.

\textsuperscript{70} See infra Part IV. To provide a few examples: NSAGs have agreed to ban the use of mines, facilitated humanitarian assistance and access, allowed visits to prisoners, incorporated IHL provisions into military training and codes, and made unilateral declarations to abide by IHL provisions.

\textsuperscript{71} See ZEGVELD, supra note 18, at 1-2.

\textsuperscript{72} See id. at 2.


\textsuperscript{74} Bangerter, supra note 3, at 75.

\textsuperscript{75} See, e.g., id. at 75 (noting that King David participated in guerrilla warfare in the Desert of Judea, and the Ming dynasty, which ruled China from 1368-1644, began as an armed group revolting against the Yuan Mongol dynasty); IAN F.W. BECKETT, MODERN INSURGENCIES AND COUNTER-INSURGENCIES: GUERRILLAS AND THEIR OPPONENTS SINCE 1750 1 (2001) (providing examples of NSAGs active in armed conflict since the fifteenth
increased since World War II, the incidence of international armed conflict has decreased.\textsuperscript{76} The increase of internal armed conflict coincides with an increase in the involvement of NSAGs in armed conflict, making NSAGs the “dominant face of modern warfare.”\textsuperscript{77}

Santos identifies three shifts of NSAG involvement in armed conflict involving three distinct periods: Cold War, post-Cold War to pre-9/11, and post-9/11.\textsuperscript{78} Between the 1940s and the 1970s, the “classic revolutionary guerrilla groups” were the dominant form of NSAGs, which were based around ideological movements that aimed to seize political power.\textsuperscript{79} Beckett supports this claim, noting that ideologies of nationalism and communism motivated armed groups in the immediate post-1945 period.\textsuperscript{80} There were also many secessionist movements of ethnic or religious minorities during this period.\textsuperscript{81} According to Ewumbue-Monono, between 1955 and 1976, a large number of NSAGs formed in Africa as liberation movements.\textsuperscript{82}

Armed conflict in the 1980s and 1990s, often referred to as a period of “new wars,” consisted of civil wars that differed from conventional inter-state wars.\textsuperscript{83} During this period, NSAGs had greater access to small arms, light weapons and modern communications, and they were “less ideological, less disciplined, less trained in combat, less formal, but more pragmatic, resembling ‘social bandits.’”\textsuperscript{84} Ewumbue-Monono asserts that a
new type of conflict arose in Africa in the 1990s that was based on identity and fought between ethnic militias, such as the Mai Mai (DRC), Interahamwe (Rwanda), Kamajors (Sierra Leone) and Janjaweed (Darfur, Sudan). According to Santos, the post-9/11 period is marked by increased activity of Islamist NSAGs fighting against the U.S.-led “global war on terror.” Since 9/11, world attention has focused on terrorist networks and NSAGs that tend to operate in “highly dispersed and autonomous but somehow well-coordinated and resourced small unit cells.” This section very briefly outlines the role of NSAGs in armed conflict throughout history. The next part of this comment argues that, despite the long history of NSAGs in armed conflict, IHL developed almost entirely with a focus on states. It concludes that IHL must refocus on NSAGs, as they will continue to play an active role in armed conflict in the future.

III. International Humanitarian Law Applied to Non-State Armed Groups

A. Overview of International Humanitarian Law

This section provides an analysis of the conventional and customary sources of IHL that regulate the actions of NSAGs. The analysis focuses on the Geneva Conventions of 1949, in particular, Common Article 3, the two Additional Protocols of 1977, and several other multilateral treaties. It also includes an examination of other legal instruments, such as special agreements, which have been used successfully to accommodate NSAGs under IHL. The analysis demonstrates that IHL struggles to keep pace with the reality of today’s armed conflict and the role

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GRAVINGHOLT ET AL., supra note 2, at 2 (discussing the post-Cold War “new wars”: “[f]rival is now the privatization of armed groups, the economization of motives for using force, the brutalization of strategies of violence and the criminalization of economies of violence. The change in the form that war takes is accompanied by the rise of new kinds of armed groups.”).

85 Ewumbue-Monono, supra note 82, at 906.
86 Santos, Agreement on Respect for Human Rights, supra note 12, at 178.
87 Id.
88 Bangerter, supra note 3, at 75 (noting that NSAGs will “remain active for the foreseeable future” and nothing in academic literature contradicts this prediction).
of NSAGs.\textsuperscript{89} As a result, people living in areas of internal armed conflict suffer from the actions of NSAGs and are not afforded a similar level of protection as those living in areas of international armed conflict.\textsuperscript{90}

This section begins with a brief overview of the basic principles of IHL. IHL "aims to restrict the methods and scope of warfare through treaties and customs that limit the use of violence in armed conflict and protect civilians and persons who are no longer participating in hostilities."\textsuperscript{91} The basic principles of IHL are distinction, proportionality, necessity, and the prohibition on inflicting unnecessary suffering or attacks on those who are hors de combat.\textsuperscript{92} The importance of IHL principles and their customary nature is often described by referring to the Martens Clause.\textsuperscript{93} This clause, introduced by a Russian delegate at the 1899 Hague Peace Conference, provides that "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."\textsuperscript{94} According to Antonio Cassese, accomplished

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\textsuperscript{89} See generally ZEGVELD, supra note 18, at 14-15 (addressing the changes in IHL regarding NSAGs).
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\textsuperscript{90} See generally LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 2-3 (2002) (discussing the different protections for civilians living in areas of internal armed conflict and international conflict).
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\begin{footnote}
\textsuperscript{91} Id.; see MARCO SASSOLI & ANTOINE A. BOUVIER, How DOES LAW PROTECT IN WAR? CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 81 (2d ed. 2006).
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\textsuperscript{92} See generally CASSESE, supra note 92, at 161 (discussing the Martens Clause and customary law).
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\textsuperscript{93} The clause appears in the preambles of Hague Convention No. II of 1899, Hague Convention No. IV of 1907, and of the 1980 U.N. Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. It also appears in articles 63/62/142/158, respectively, of the four Geneva Conventions, and art. 1(2) of Protocol I. Similar wording appears in the preamble of paragraph 4 of Protocol II, but there is no reference to established custom.
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Italian jurist, the “[Martens Clause] puts the ‘laws of humanity’ and the ‘dictates of public conscience’ on the same footing as the ‘usages of States’ (that is, State practice) as historical sources of ‘principles of international law.’”95 The clause encapsulates the importance of customary law in IHL.96


From a humanitarian perspective, IHL should place the same restrictions and obligations on all parties to the conflict. This is to

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95 CASSESE, supra note 92, at 161.
98 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW at ix (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).
ensure that victims, who are not responsible for the use of force and who are affected by conflict, receive the same level of protection—regardless of whether the conflict is internal or international. In other words, IHL should treat parties in armed conflict equally. Yet, IHL has developed with a distinction between international and non-international armed conflict since the Geneva Conventions of 1949. This is evident by the creation of two Additional Protocols to the Conventions, one that deals solely with international armed conflict (Protocol I) and the other with non-international armed conflict (Protocol II). As will be demonstrated in the following section, the rules contain substantial differences in their requirements and application.

B. International Legal Personality of Non-State Armed Groups

The question of legal personality is often unclear and complicated for NSAGs. The increasing role of NSAGs in both domestic and international affairs, especially in armed conflict, highlights the importance of determining the legal personality of NSAGs. Clapham argues that international lawyers recognize that NSAGs are important, but they “feel constrained by the ‘rules’ on subjectivity to develop a framework to explain the rights and duties of non-state actors under international law.”

It should not be assumed that states have always been the sole actors to legitimately wage war. The origin of the state system is generally traced to the Peace of Westphalia in 1648. War existed before the Peace of Westphalia and before states were

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102 SASSOLI & BOUVIER, supra note 91, at 108-09.
103 MOIR, supra note 90, at 2-3.
104 SASSOLI & BOUVIER, supra note 91, at 249 (stating that, in practice, IHL is generally applied ex post facto by a court or tribunal. States do not determine if a conflict is international or domestic at the time of the conflict.).
105 See generally CLAPHAM, supra note 54, at 60-61 (addressing the distinctive legal nature of NSAGs).
106 Id.
placed at the center of authority. From the middle of the twelfth century to the late thirteenth century, canonists, inspired by Augustine of Hippo and Thomas Aquinas, engaged in debate on who had legitimate authority to wage war—whether the right belonged to a pope, emperor, or feudal lord. Wilson argues that beginning in the sixteenth century, sovereign states "gradually asserted a monopoly on the use of violence both within their borders and against other sovereigns" and that this monopoly on force was fully recognized by the nineteenth century. Nevertheless, Wilson argues that in recent years, the idea that states are the sole legitimate authority to use force has been questioned.

While states have been at the center of the international legal system since the Westphalian Peace Treaties of 1648, there are many examples of NSAGs and other non-state actors that were accorded with legal personality. For example, many of the earliest treaties outlawing piracy and slavery were directed at private parties. Individuals were held responsible in both the 1948 Genocide Convention and the Nuremberg Tribunal established at the end of World War II. As early as 1948, the International Court of Justice (ICJ) acknowledged the importance of non-state actors when it stated that "the progressive increase in the collective action of states has already given rise to instances of action upon the international plane by certain entities which are

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108 Id. at 135.
109 WILSON, supra note 60, at 14-15. These dates coincided with Gratian’s Decretum and Thomas Aquinas’ Summa Theological.
110 Id.
111 Id. at 16.
112 The right to capture pirates, regardless of nationality, and the obligation of all individuals to refrain from piracy are two of the earliest rules established in international law, dating back to the seventeenth and eighteenth centuries. Many scholars argue that international rules on piracy imposed direct obligations on individuals. See CASSESE, supra note 92, at 143-44.
113 For example, the Slavery Convention of 1926 provides that forced labor is only permissible if administered by the government, not a private citizen. The 1956 Supplementary Convention makes slavery a criminal offense, and private persons are liable for “severe penalties.” See LYAL SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 90 (1992).
114 ZEGVELD, supra note 18, at 108.
115 Id. at 106-08.
Along with the term “High Contracting Parties,” which generally refers to states, the term “powers” was used in the four Geneva Conventions of 1949. Furthermore, Common Article 3 of the Geneva Conventions pertains to “each Party to the conflict,” including states and NSAGs.

State practice demonstrates that actors governing a specific territory are treated as partial subjects of international law. These actors with state-like qualities include “de facto regimes, insurgents recognized as belligerents, national liberation movements (NLMs)…the Holy See, and even the Order of Malta.”

A number of court rulings also confirm that NSAGs have legal rights and duties under IHL. In 2004, the Appeals Chamber of the Sierra Leone Special Court 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.” Similarly, the ICJ ruled that law applicable to non-international (internal) armed conflict also binds all parties to a conflict.

A difficult aspect of examining NSAGs’ obligations under IHL is the fact that NSAGs are not parties to the treaties that bind them. Common Article 1 to the Geneva Conventions refers to “High

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117 Common Article 2 of the Geneva Conventions of 1949 refers to the “Powers which are party.” According to the commentary on the Conventions, the drafters of the Conventions intended for the term “Powers” to be limited to states; however, the term leaves room for an interpretation that may include NSAGs. See INT’L COMM. OF THE RED CROSS, Commentary on the Geneva Conventions of 1949, http://www.icrc.org/ihl.nsf (follow “1949 Conventions & Additional Protocols, & their Commentaries” hyperlink) [hereinafter ICRC Commentary].

118 Geneva Conventions of 1949, supra note 7.

119 See, e.g., CLAPHAM, supra note 54, at 59 (addressing the treatment of NSAGs as if they have the qualities of a state).

120 Id.; see CASSESE, supra note 92, at 126; WILSON, supra note 60, at 26-27.

121 See, e.g., Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (May 31, 2004).

122 Id.

Contracting Parties, and Articles 20 and 22 of Protocol II stipulate that only the parties to the Geneva Conventions can become parties to the Protocol. Cassese argues that Articles 34 to 36 of the Vienna Convention on the Law of Treaties, which are customary law, provide that treaties may impose rights and obligations on third parties, even if the third party is not formally a party to the treaty. It should be noted that a number of NSAGs attempted to become parties to the Geneva Conventions and other IHL instruments, but certain states such as Switzerland, the depository of the Conventions, rejected their requests.

According to Eric David, the legal grounds for binding NSAGs to IHL are very simple:

The legal answer is straightforward: the State is bound by the rule and the State includes not only the government but also the entire population that is made up of individuals and groups. Whether these groups are rebels or insurgents is irrelevant. As a component of the State, they are bound by the rule that binds the State. That is why international humanitarian law is applicable to these movements.

Liesbeth Zegveld, a professor of public international law at the University of Leiden, identifies a number of weaknesses to this conception of the international legal status of NSAGs. She argues that this explanation implies that the relationship between the established government and the armed groups is hierarchical. For the most part, however, NSAGs challenge the authority and the laws of the established government. Zegveld

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124 Geneva Conventions of 1949, supra note 58.
125 Protocol II, supra note 8, arts. 20 & 22.
126 CASSESE, supra note 92, at 129-30.
127 ZEGVELD, supra note 18, at 14 (noting also that several armed groups have unsuccessfully attempted to adhere to the Geneva Conventions; for example, the Provisional Revolutionary Government of Algeria, the Smith government in Rhodesia, and the Kosovo Liberation Army (KLA)).
129 ZEGVELD, supra note 18, at 16.
130 Id.
131 Id.
asserts that NSAGs are different from individuals, who “derive rights and obligations” through the state.\textsuperscript{132} NSAGs, under Common Article 3 and Protocol II, assume several obligations as groups to comply with IHL, and these obligations exceed those placed on individuals.\textsuperscript{133} In summary, NSAGs create both complex legal and political challenges to international relationships and IHL. The next two sections will analyze customary and conventional IHL principles that are applicable to NSAGs.

\textbf{C. Customary International Humanitarian Law}

Common Article 3 of the Geneva Conventions is one of the most relevant sources of IHL applicable to NSAGs.\textsuperscript{134} With 194 parties, there is little disagreement that the Geneva Conventions, including Common Article 3, bind all states regardless of whether they are parties to the Conventions.\textsuperscript{135} The ICJ has stated that the Geneva Conventions, including Common Article 3, were principles of customary law.\textsuperscript{136} Furthermore, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) declared that Common Article 3 has become a part of customary law, and its IHL provisions apply to the parties.\textsuperscript{137}

Protocol II, which applies to non-international armed conflict, does not include a reference to custom, while Protocol I—dealing with international conflict—does.\textsuperscript{138} Commentary on the preamble

\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{135} Id.
\textsuperscript{138} Protocol I, supra note 8, art. I, ¶ 2 ("[C]ivilians and combatants remain under the
of Protocol II justifies the omission of any reference to custom by
arguing that "the attempt to establish rules for non-international
armed conflict only goes back to 1949 and that the application of
Common Article 3 in the practice of States has not developed in
such a way that one could speak of ‘established custom’ regarding
non-international conflict." The ICRC commentary on the
preamble of Protocol II argues that customary norms in internal
armed conflict do exist. It states, for example, respect for and
protection of the wounded exists “[i]rrespective of the
qualification of conflict as an internal or international conflict.”
The commentary continues: “This is shown by the Lieber Code, as
it was developed for a civil war, based on the existing principles of
the laws of war. In their turn the negotiators of the 1899 and 1907
Conventions did not hesitate to seek inspiration from it.” Furthermore,
international bodies provide evidence that various
provisions of Protocol II are considered customary law. In Tadić,
the ICTY stated, “Many provisions of this Protocol can now be
regarded as declaratory of existing rules or as having crystallized
emerging rules of customary law or else as having been strongly
instrumental in their evolution as general principles.” In Prosecutor v. Kordić and Others, the ICTY referred to Article 13(2) of Protocol II, regarding unlawful attacks on civilians, as
custodial law.

139 M. BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 620 (1982).
140 See Commentary on the Additional Protocols of 8 June 1977 to the Geneva
Conventions of 12, August 1949, in ICRC Commentary, supra note 117.
141 Id.
142 Id.
143 Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision of the Defence Motion
for Interlocutory Appeal in Jurisdiction, ¶ 117; see also ZEGVELD, supra note 18, at 19-
21 (asserting that the Tribunal did not specify which provisions were to be considered
custodial law). Zegveld also argues that the tribunal was referring to the provisions of
Protocol II that overlap with the norms of Common Article 3.
144 Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-PT, Decision on the Joint
Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on
the Limited Jurisdictional Reach of Articles 2 and 3, ¶ 30 (Int’l Crim. Trib. for the
“while both Protocols I and II have not yet achieved the near universal participation
enjoyed by the Geneva Conventions, it is not controversial that major parts of both
In 2005, the ICRC released a study that identified 161 rules of customary international humanitarian law. A number of important conclusions can be drawn from the study. First, many IHL principles and rules, in treaties not yet universally ratified, exist as customary law. The report found that the "gaps" in the regulation of the conduct of hostilities "have largely been filled through state practice." More specifically, "[s]tate practice has gone beyond existing treaty law and expanded the rules applicable to [internal] armed conflicts." Therefore, the legal framework for internal armed conflict is extended by customary law. This extension means that states that have not ratified the Additional Protocols, for example, would still be bound by many of their provisions because those provisions have become customary law. Second, the authors of the study found that many of the customary rules and norms of IHL should apply to both international and internal armed conflict. This finding suggests that a conflict's legal qualification, whether international or internal, should be less relevant in applying customary IHL.

One scholar, Clapham, argues that parties to an internal armed conflict, regardless of recognition by the state or a third party, have certain obligations. He asserts that "recognition regimes have been replaced by compulsory rules of international humanitarian law which apply when the fighting reaches certain thresholds." As this section demonstrates, NSAGs are accountable to certain provisions of IHL. Many of these obligations stem from customary laws, such as those identified by the ICRC study and the establishment of the customary nature of Common Article 3 and certain provisions of Protocol II. Many

Protocols reflect customary law.”

145 See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra note 98, at ix.
146 Id. at xxix.
147 Id.
148 This is true of the Geneva Conventions, which became “widely accepted as part of customary international law,” and are therefore binding on all states, “irrespective of any formal accession.” See CLAPHAM, supra note 54, at 119 (citation omitted) (internal quotation marks omitted).
149 See id.
150 See id. at 272.
151 Id.
152 See id.; see also CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra note
areas of IHL have not reached customary status, so it is necessary to examine conventional law to determine the full extent of NSAGs’ legal obligations and rights during internal armed conflict.

D. Conventional International Humanitarian Law

This section examines the legal rights and duties applicable to non-state actors through conventional IHL. While there is debate over the legal ground on which NSAGs may derive rights and obligations from treaties, this section demonstrates that certain international conventions are applicable to the actions of NSAGs. Common Article 2 of the Geneva Conventions states that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”153 Only states can be parties to the Conventions, so the Conventions only have limited applicability to armed conflict between states.154 The one exception to the scope of the application of the Conventions is found in Common Article 3 of the four Conventions, which extends the scope of protection to those involved in armed conflict “not of an international character.”155

While clearly stating that the legal status of parties to the conflict is not affected, Common Article 3 provides: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions. . . .”156 The provisions prohibit violence, cruel treatment, torture, taking of hostages, degrading treatment, and sentences without judgment by a regular court to “[p]ersons taking no active part in the hostilities” or those that have “laid down their arms.”157 The provisions also hold each party responsible for

98, at ix.
153 Geneva Conventions of 1949, supra note 7, art. 3.
154 Consider, for example, when a State engaged in armed conflict has not ratified a Convention. That State will not be bound by the Convention’s terms.
155 Geneva Conventions of 1949, supra note 7, art. 3.
156 Id.
157 Id. art. 3, ¶ 1.
collecting and caring for "[t]he wounded and sick." The final part of Common Article 3 stipulates that parties to the conflict "should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." While this does not legally obligate parties to create special agreements, it encourages parties to do so.

The provisions of Common Article 3, described as a "convention in miniature," were seen as landmark in the development of IHL. While Common Article 3 brings internal wars into the scope of international law and places responsibilities and limitations on NSAGs, the provisions of Common Article 3 do not offer the same level of protection as the full Geneva Conventions. As Wilson points out, "Article 3 does not prevent the established government from punishing the rebels under municipal law, nor does it change their status in law." Furthermore, Common Article 3 is limited to the protection of "persons taking no active part in the hostilities." Therefore, it does not prohibit certain weapons or methods of warfare found in international armed conflict. Additionally, there is no agreed-upon definition of "armed conflict not of an international character," which results in states interpreting Common Article 3 very broadly.

While some states question the applicability of Common Article 3 to armed opposition groups, international practice suggests its applicability is sound. In *Military and Paramilitary Activities In and Against Nicaragua*, the ICJ held that law applicable to armed conflict not of an international character, including Common Article 3, was binding against the NSAGs in Nicaragua known as the "contras." The court referred to the

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158 Id. art. 3, ¶ 2.
159 Id.
160 See Wilson, supra note 60, at 43-44.
161 See id. at 43.
162 Id. at 44.
163 Geneva Conventions of 1949, supra note 7, art. 3.
164 Id.
165 See Wilson, supra note 60, at 45-46.
166 See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 219 (June 27). The Contras generally referred to two NSAGs: Fuerza Democratica Nicaraguense (FDN) and Alianza Revolucionario Democratica
provisions in Article 3 as “a minimum yardstick” that reflected “elementary considerations of humanity.” In a similar ruling, the Inter-American Commission on Human Rights ruled in the Tablada case that “Common Article 3’s mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces.” The court found the obligation to apply Common Article 3 as “absolute” and equal for both the Argentine armed forces and the Movimiento Todos por la Patria (MTP), an NSAG that attacked an army base in La Tablada. Similarly, in both the Rwanda and Yugoslavia Tribunals, the court declared that Common Article 3 has become a part of customary law and its IHL provisions applied to the parties to the armed conflict.

Another criticism of Common Article 3 is the inconsistent record of the application of its provisions. This is largely due to both a lack of political will and the desire of states to deal with internal armed conflict domestically. There are a number of weaknesses of Common Article 3 that add to the difficulty of its application. First, there is no designated authority to decide if a conflict falls under the scope of Common Article 3. Since Common Article 3 automatically applies to internal conflict without any state recognition of the conflict, one party to a conflict may think that it should apply while another party may not.

(AARDE).

167 Id. ¶ 218 (citation omitted) (internal quotation marks omitted).


169 See id.; see also ZEgveLD, supra note 18, at 10.


171 See CASSESE, supra note 92, at 432.

172 See id. at 429-30.

173 See ZEgveLD, supra note 18, at 13 (“[D]etermination of applicability of Common Article 3 and Protocol II is largely left to auto-interpretation.”).

174 See CLAPHAM, supra note 54, at 275. For example, NLMs will often apply Common Article 3, while the opposing State will refuse to recognize a Common Article 3 situation and instead will treat the rebels as criminals.
practice, the application of Common Article 3 has been limited.\textsuperscript{175} Article 3 was officially recognized "in Guatemala (1954 and 1994), Algeria (after 1956), Lebanon (1958), Yemen (1962-[6]7), the Dominican Republic (1965), Vietnam (after 1965), Nigeria (1967-70), Chile (1971), Uruguay (1972), and the Portuguese territories in Africa after 1974."\textsuperscript{176}

On the other hand, there are numerous examples of parties to armed conflict refusing to apply Common Article 3. For example, the United Kingdom was "unwilling to admit the applicability" of Common Article 3 in Malaya and Cyprus.\textsuperscript{177} This same unwillingness was exhibited by the Portuguese in Angola and Mozambique, as well as in the armed conflicts in Pakistan and Ceylon.\textsuperscript{178} Similar resistance came from Kenya (1954), Algeria (before 1956), Malaysia (1956), Indochina (1957-65), Northern Ireland (from 1971), the Philippines (from 1972), Afghanistan (from 1981), El Salvador (after 1983), and Chechnya (1994-95).\textsuperscript{179}

\textbf{E. Additional Protocols I and II of 1977}

Expanding on the 1949 Geneva Conventions, Additional Protocols I and II were drafted simultaneously from 1974 to 1977 to increase the protection of victims during hostilities.\textsuperscript{180} The Additional Protocols of 1977 have not yet achieved the universal acceptance of the Geneva Conventions, nor have the Protocols achieved the status of customary international law.\textsuperscript{181} Nevertheless, many of the Additional Protocols' provisions are declaratory of customary international law.\textsuperscript{182} As noted earlier, Protocol I is applicable to international armed conflict, and Protocol II is applicable to non-international (internal) armed conflict.\textsuperscript{183}

\textsuperscript{176} Id.
\textsuperscript{177} Wilson, \textit{supra} note 60, at 47.
\textsuperscript{178} See id.
\textsuperscript{179} See Provost, \textit{supra} note 175, at 268.
\textsuperscript{180} See Moir, \textit{supra} note 90, at 89.
\textsuperscript{181} See Cassease, \textit{supra} note 92, at 432-33.
\textsuperscript{182} See discussion \textit{supra} Part III.C.
\textsuperscript{183} See discussion \textit{supra} Part III.A.
Article 1(4) of Protocol I elevates certain wars of national liberation to the status of international armed conflict.\textsuperscript{184} Supplementing Article 2 of the Geneva Conventions, Article 1(4) includes armed conflict “in which peoples are fighting against colonial and alien occupation and against racist regimes in the exercise of their right of self-determination.”\textsuperscript{185} Cassese, in his comprehensive book on international law, describes this definition of NLMs as “restricted,” as it only includes three categories of conflict.\textsuperscript{186} NLMs recognized by regional organizations were invited as observers to the drafting of the Additional Protocols.\textsuperscript{187} Furthermore, Article 96(3)\textsuperscript{188} of Additional Protocol I states:

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a

\textsuperscript{184} See Protocol I, \textit{supra} note 8, art. 1, ¶ 4.

\textsuperscript{185} Id.

\textsuperscript{186} See Antonio Cassese, \textit{The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts}, 30 \textit{Int’l & Comp. L.Q.} 416, 417 (1981). The three “categories” in Article 1(4) “include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes.” Protocol I, \textit{supra} note 8, art. 1, ¶ 4. There is some discussion as to whether Article 1(4) is limited to the three categories, or whether the drafters were merely providing three examples of types of armed conflict. See ICRC Commentary, \textit{supra} note 117, ¶ 108 (“[O]ne delegation considered that in interpreting the word ‘include’ literally [in Article 4(1)], the list following it is not exhaustive.”).

\textsuperscript{187} According to Henckaerts, this was a “unique situation” that would be hard to repeat today given the vast number of armed groups and the difficulty in determining which groups would be invited. Furthermore, Henckaerts argues that the codification of IHL is almost complete, and therefore, another conference of this nature would be unlikely. See Jean-Marie Henckaerts, \textit{Binding Armed Opposition Groups Through Humanitarian Treaty Law and Customary Law}, 27 \textit{Collegium} 123, 128 (2003).

\textsuperscript{188} Eight nations issued reservations pertaining to this Article (Belgium, Canada, France, Germany, Ireland, the Republic of Korea, Spain, and the United Kingdom). Many of these reservations expressed the importance of recognition by the U.N. or an intergovernmental organization of the group making the declaration (including Belgium, Canada, Ireland, and the Republic of Korea). Other states declared that the group making the declaration must meet the requirements of Article 1(4) (France and the United Kingdom). Germany and Spain, while emphasizing certain components of the Article, did not attempt any modifications. Julie Gaudreau, \textit{The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims}, 849 \textit{Int’l Rev. Red Cross} 143, 150 (2003).
unilateral declaration addressed to the depositary.\textsuperscript{189}

This provision leaves room for the accession of armed groups that meet the requirements of Article 1(4) to the Protocol. In practice, however, no party has applied Article 96(3) yet.\textsuperscript{190}

Some lawyers argue that international bodies should apply Protocol I to the obligations of parties in non-international conflict as Protocol I provides more specific rules and regulations than Protocol II.\textsuperscript{191} Protocol I includes over 100 articles, whereas Protocol II includes only twenty-eight. Zegveld asserts that the realities of internal armed conflict are complex and the "few and simple" provisions of Common Article 3 and Protocol II are insufficient.\textsuperscript{192} For this reason, the Geneva Conventions and Protocol I guide international bodies when interpreting and applying IHL to internal armed conflict.\textsuperscript{193} The U.N. Commission on Human Rights suggested that Protocol II may be applied to armed opposition groups.\textsuperscript{194} The ICTY recognized that the distinction between internal and international armed conflict is "losing its value as far as human beings are concerned."\textsuperscript{195} The

\textsuperscript{189} The article continues:
Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and (c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.
Protocol I, supra note 8, art. 96, ¶ 3.

\textsuperscript{190} While some NLMs such as the African National Congress (ANC) have made Article 96(3) declarations, "no such Declarations are listed by the Depository or have been transmitted to the High Contracting Parties." Noelle Higgins, The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements, 17 HUM. RTS. BRIEF 12, 14 (2009) (citations omitted); see also CLAPHAM, supra note 54, at 273 (explaining that the Depository refers to the Swiss Federal Council).

\textsuperscript{191} For example, Zegveld notes that international bodies apply the more detailed regulations of Protocol I "to overcome the lacunae of Protocol II." ZEGVELD, supra note 18, at 77. For further discussion of this argument, see id. at 33-38, 76-84.

\textsuperscript{192} Id. at 34.
\textsuperscript{193} See id. at 34.
\textsuperscript{194} See id. at 11.
\textsuperscript{195} Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion
Tribunal stated:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of the human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.196

Sassòli supports the claim that rules regulating internal armed conflict “[have] been drawing closer” to those of international armed conflict.197 He provides the following evidence:

The jurisprudence of the two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda which have a very expansive view of customary international law; in the crimes defined in the Statute of the International Criminal Court; by States’ acceptance of the fact that both categories of conflicts are covered by the same rules in recent treaties on weapons and cultural objects; the growing influence of international human rights law; and the ICRC’s very optimistic assessment of customary IHL.198

There is a clear trend in international practice to apply IHL equally to international and internal armed conflict.199 While the relevance of the distinction between internal and international armed conflict seems to be diminishing, it is not absolute.200 As the ICTY noted, not all rules and principles of international armed

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196 Id.
197 Sassòli, supra note 29, at 14.
198 Id. at 14-15.
199 See id.
200 See id.
conflict have been extended to internal armed conflict; although the "general essence" of those rules may be applied to internal armed conflict, the "detailed regulation" is not applicable.\footnote{Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 126.} Since there are divergent and unclear opinions regarding the application of Protocol I to internal armed conflict, it is necessary to examine Protocol II in detail to determine what rules definitely apply to NSAGs during an internal armed conflict.

\textbf{F. Additional Protocol II}

Protocol II further develops the general provisions of Common Article 3 of the Geneva Conventions in regulating internal armed conflict, and the provisions of Protocol II contain much more detail than Common Article 3.\footnote{See Sylvie Junod, \textit{Additional Protocol II: Scope and History}, 33 AM. U. L. REV. 29, 35 (1983). The impact of the development is also readily apparent just by comparing the length of the two instruments.} In practice, however, several shortcomings limit Protocol II's applicability to internal armed conflict.\footnote{See CASSESE, supra note 92, at 433-34 (discussing the shortcomings of Protocol II).}

Protocol II includes a definition of non-international armed conflict in Article 1:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article I of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being
armed conflicts.\textsuperscript{204}

The scope of Protocol II’s applicability is narrower than that of Common Article 3. Common Article 3 refers only to “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”\textsuperscript{205} This definition does not require that armed groups fight against the government of the territory in which operations are conducted.\textsuperscript{206} Instead, it covers armed conflict between armed groups or between an armed group and the state outside the territory of the armed group.\textsuperscript{207} Protocol II only applies to armed conflict that has reached a certain threshold of intensity.\textsuperscript{208} Article 1 requires that the conflict must exist between the government and its armed forces or “organized armed groups,” which “under responsible command,” control enough of the territory to carry out “sustained and concerted military operations.”\textsuperscript{209} Paragraph 2 of Article 1 specifically excludes the application of Protocol II to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.”\textsuperscript{210} In reality, this threshold only applies to “large-scale armed conflict,” and consequently, the majority of internal conflict is not covered by the Protocol’s provisions.\textsuperscript{211} As Arturo Carrillo-Suárez argues, “this standard is rarely if ever met by the ‘low-intensity’ armed conflict prevalent today.”\textsuperscript{212} Furthermore, the threshold criteria rely on a government accepting that the armed groups have authority over an area of territory, and the responsibility is on states to make parties comply with the Protocol.\textsuperscript{213} States are

\textsuperscript{204} Protocol II, supra note 17, art. 1.
\textsuperscript{205} Geneva Conventions of 1949, supra note 7, art. 3.
\textsuperscript{206} See Junod, supra note 202, at 29.
\textsuperscript{207} See id. at 36-37.
\textsuperscript{208} CASSESE, supra note 92, at 433.
\textsuperscript{209} See Protocol II, supra note 17, art. 1.
\textsuperscript{210} See id.
\textsuperscript{211} CLAPHAM, supra note 54, at 277; see also CASSESE, supra note 92, at 433.
\textsuperscript{213} CLAPHAM, supra note 54, at 287-88.
"reluctant" to admit that internal issues are armed conflict.\textsuperscript{214}

Protocol II "develops and supplements" Common Article 3 "without modifying its existing conditions of application."\textsuperscript{215} Therefore, the restrictive criteria of Article 1 are only relevant for the application of Protocol II; it does not extend to IHL in general. The threshold criteria are lower in the Rome Statute of the ICC, which was adopted in 1998.\textsuperscript{216} Article 8(2)(f) of the Statute provides:

\begin{quote}
Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.\textsuperscript{217}
\end{quote}

Unlike Protocol II, this non-international armed conflict definition eliminates the responsible command requirement, control over the territory, and the participation of government forces.\textsuperscript{218} This definition sets a lower threshold for internal armed conflict and is more inclusive.\textsuperscript{219}

Another weakness of Protocol II is that it almost exclusively protects "victims of armed conflict" and includes only a handful of provisions on the "conduct of hostilities."\textsuperscript{220} Cassese notes that the

\textsuperscript{214} Id.
\textsuperscript{215} See Protocol II, supra note 17, art. 1, ¶ 1.
\textsuperscript{216} See ZEGVELD, supra note 18, at 141-42.
\textsuperscript{218} See ZEGVELD, supra note 18, at 141-43.
\textsuperscript{219} Id. (discussing the removal of territorial control which may actually "limit the application of the instrument").
\textsuperscript{220} CASSESE, supra note 92, at 419. Protocol I outlines the following: a rule against giving no quarter (art. 4, ¶ 10), prohibitions on taking hostages, on terrorism, and pillage (art. 4, ¶ 2(c), (d), and (g)); prohibitions of attacks on medical units and transport (art. 11); protection of civilian populations against dangers arising from military operations (art. 13); the provision protecting objects indispensable to the survival of the civilian population (art. 14); a rule protecting works and installations containing dangerous forces (art. 15); and a rule protecting cultural objects and places of worship (art. 16). See
few provisions applying to conduct mostly benefit those who are not participating or who have stopped participating in the conflict.221 Additionally, the Protocol does not include any enforcement or supervision mechanisms,222 and this severely weakens the effectiveness and strength of the treaty. No international body is given the responsibility of determining whether or not parties comply with the provisions set out in the Protocol.223 In contrast, some states224 and commentators, such as Cassese, argue that since the Protocol "develops and supplements" Common Article 3, it is therefore "under the aegis of Common Article 3."225 Common Article 3 provides that a humanitarian organization, such as the ICRC, "may offer its services to the Parties to the conflict."226 Cassese concludes that a humanitarian organization may "legitimately cover [the] monitoring [of] the implementation of the Protocol" based on the broad language of Common Article 3.227

Moreover, although the provisions of Protocol II were adopted by consensus, many developing countries raised "strong and unequivocal objections" and entered reservations severely weakening the effectiveness of the Protocol.228 The Protocol is only open for signature and ratification by states which are parties to the Geneva Conventions,229 and it is only applicable to armed

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221 Cassese, supra note 92, at 419.
222 Id.
223 Id. at 418-19.
225 Cassese, supra note 92, at 419.
227 Cassese, supra note 92, at 420.
228 Id. at 433; see Diplomatic Conference on Humanitarian Law of Armed Conflict, supra note 224, at 199, 201, 203, 250-51.
229 See Protocol II, supra note 17, arts. 20-22.
conflict taking place in a territory of a state that has ratified it. While 165 states have ratified Protocol II, a number of states in which internal armed conflict is taking place have not yet done so.

**G. Other Multilateral Treaties**

There are a number of other multilateral treaties that apply to NSAGs. Article 1(2) of the Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention of 3 May 1996 states: "This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949." Furthermore, Article 1(2) binds all parties to a conflict in High Contracting Parties' territory to apply the Protocol.

Article 19(1) of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict requires armed opposition groups to implement the rules "which relate to respect for cultural property" in the event of an internal conflict.

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231 For example, Protocol II has not been ratified by Iran, Iraq, Israel, Mexico, Pakistan, Somalia, or Syria. See INT'L COMM. OF THE RED CROSS, State Parties to the Following International Humanitarian Law and Other Related Treaties, supra note 224.

232 Additionally, Article 7(4)(b) of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), while not referring to all non-international conflict, leaves room for the accession of NLMs. The Article states that High Contracting Parties meeting the requirements of 96(3) of Additional Protocol I, even if not a formal party to the CCW or Protocol I, may accept and apply the Geneva Conventions, CCW, and annexed Protocols to conflict "with immediate effect" and that they are "equally binding upon all parties to the conflict." See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S 137, 19 I.L.M. 1523 (1980) (entered into force Dec. 2, 1983) [hereinafter CCW].

233 "This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 Common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." See Protocol II, supra note 17, art. 1, ¶ 2.

234 Convention for the Protection of Cultural Property in the Event of Armed
Further, Article 19(2) encourages the parties to implement other provisions of the Convention through special agreements. Similarly, Article 22 of the Second Protocol to the Cultural Property Convention of 26 March 1999 applies the Protocol to armed conflict “not of an international character.” The Rome Statute is the first treaty to contain a detailed list of war crimes and to confirm that war crimes are applicable to internal armed conflict. The Statutes of the ICTR, SCSL, and ICC, as well as a ruling by the ICTY all set forth the view that serious violations of customary or treaty rules may amount to war crimes in internal armed conflict.

In conclusion, treaty law governing internal armed conflict is less developed than the treaty law of international armed conflict. This is true despite the fact that most armed conflict today occurs within states. Internal armed conflict is subject to fewer treaty provisions than international armed conflict, with only a handful of treaties applying to internal armed conflict. While Common Article 3 and Protocol II demonstrate an attempt by states to regulate internal armed conflict, in practice, the


In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property. The parties to the Conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

Id.

235 Id. art. 22, ¶ 1.
236 SASSOLI & BOUVIER, supra note 91, at 323.
237 CASSESE, supra note 92, at 432; see also Statute of ICTR, art. 4; Statute of the Special Court for Sierra Lion, art. 3; Statute of the International Criminal Court, art. 8, ¶ 2; Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 128-34.
238 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra note 98, at xxviii.
239 See HUMAN SECURITY REPORT PROJECT, supra note 2.
provisions lack detail and implementation mechanisms. These treaties provide a rudimentary framework of laws protecting the victims of internal armed conflict when compared to the detailed rules governing international armed conflict.

IV. Case Study of Polisario Front (Western Sahara/Morocco)

A. Special Agreements and the Work of Geneva Call

Common Article 3 recognizes the importance of special agreements as a method of bringing NSAGs under the scope of IHL. These agreements are particularly important as the NSAGs agree to the IHL norms and provisions themselves. This may increase NSAGs’ willingness to comply with the provisions. According to Zegveld, the benefits of special agreements are twofold: (1) they “compel groups to explicitly state their will and capacity to adhere to the relevant norms,” and (2) they “induce the state to accept the applicability of the relevant norms to the conflict in question.”

While some states and actors are hesitant to engage NSAGs, a number of actors have used a range of methods to interact with NSAGs. One of the most commonly cited and useful models of positive engagement with NSAGs is found in the work of Geneva Call. As previously mentioned, Geneva Call is an international humanitarian organization “dedicated to engaging armed non-state actors (NSAs) towards compliance with the norms of international humanitarian law. . . . [T]he organization focuses on NSAs that

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241 Id.
242 “The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.” Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S 135.
243 ZEGVELD, supra note 18, at 28.
244 Id. at 17.
245 See supra Part I.B.
operate outside effective State control."  

Geneva Call works with non-state actors, who are otherwise not allowed to sign the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, to sign a "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action." The Deed prohibits "all use, development, production, acquisition, stockpiling, retention, and transfer of such mines, under any circumstances." The signatories also agree to undertake stockpile destruction, victim assistance, mine education, and training, among other responsibilities.  

In 2005, sixty non-state actors were reported to have emplaced landmines in twenty-four countries. Presently, forty-one armed groups have signed the Deed of Commitment, including armed groups in Africa, Asia, and the Middle East. The signatories acknowledge in Article 6 of the Deed that it "does not affect their legal status, pursuant to the relevant clause in the common Article 3 of the Geneva Conventions." Clapham praises the Deed as a mechanism that allows non-state actors to make humanitarian commitments "beyond the limiting inter-state framework" and "beyond their obligations under a formal reading of international humanitarian law." Geneva Call monitors the non-state actors through a number of mechanisms, including compliance reports from the groups themselves and an obligation

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250 Id.  
251 Id.  
253 GENEVA CALL, supra note 247.  
254 Deed of Commitment, supra note 2499, art. 6.  
255 CLAPHAM, supra note 54, at 295.
to allow Geneva Call to monitor and verify compliance.\textsuperscript{256} Next, this comment introduces an ongoing conflict, which is currently taking place in the Western Sahara, between the NSAG Polisario Front and the Moroccan government. The comment also examines Geneva Call’s work with the NSAG to ensure IHL compliance.\textsuperscript{257}

\section*{B. Non-State Armed Group Polisario Front and Humanitarian Violations}

The Polisario Front (formally known as the Popular Front for the Liberation of Saguia el Hamra and Rio de Oro) has been seeking the independence of Western Sahara since 1973.\textsuperscript{258} The group was created to oppose Spanish control over Western Sahara and the claims over the territory by the Kingdom of Morocco and Mauritania.\textsuperscript{259} Mauritania renounced claims over the area in 1979.\textsuperscript{260} Nonetheless, Morocco annexed the territory in 1975, and the conflict has continued between Polisario Front and Morocco despite mediation efforts largely promoted by the United Nations.\textsuperscript{261} The U.N. brokered a cease-fire in 1991, making way for a process of negotiations.\textsuperscript{262} Polisario Front and Morocco agreed on a referendum led by the U.N. Mission for the Referendum in Western Sahara (MINURSO) which asked the Sahrawi population to choose between independence and

\begin{itemize}
\item \textsuperscript{256} \textit{About Us}, GENEVA CALL, http://www.genevacall.org/about/about.htm (last visited Jan. 21, 2012).
\item \textsuperscript{257} Pamela Epstein, \textit{Behind Closed Doors: “Autonomous Colonization” in Post United Nations Era—the Case For Western Sahara}, 15 ANN. SURV. INT’L & COMP. L. 107, 111 (2009) (“Located in northwestern Africa, Western Sahara borders Morocco on the north, Algeria on the northeast, Mauritania to the east and south with 600 miles of Atlantic Ocean coastline on the west.”).
\item \textsuperscript{258} \textit{Id.} at 111-12.
\item \textsuperscript{259} \textit{Id.} at 110-11; see also Dr. Barry A. Feinstein & Julia Weiner, \textit{Israel’s Security Barrier: An International Comparative Analysis and Legal Evaluation}, 37 GEO. WASH. INT’L L. REV. 309, 321 (2005) (“In 1975, despite the ICJ’s denial of Morocco’s claim over Western Sahara and its holding that the local inhabitants should be granted self-determination, Morocco invaded the region. When Spanish colonial forces departed in 1976, Morocco proceeded to take control of the northern two-thirds of Western Sahara while Mauritania took over the southern third.”).
\item \textsuperscript{260} Epstein, \textit{supra} note 2577, at 115.
\item \textsuperscript{261} \textit{Id.} at 115-16.
\item \textsuperscript{262} \textit{Id.} at 115.
\end{itemize}
integration into Morocco.\textsuperscript{263} The referendum has been postponed several times, and despite extensions, the negotiations have led to little progress.\textsuperscript{264}

The conflict in the Western Sahara involves violations of IHL by Polisario Front, Morocco, and actors from neighboring states.\textsuperscript{265} An independent commission led by Belgian deputy Denis Ducarme in 2006 reported many allegations of crimes and abuses carried out by the Polisario Front, including “systematic torture” until the 1990s.\textsuperscript{266} A detailed report by the European Strategic Intelligence Security Centre called the group’s human rights record “mediocre” and stated that its treatment of prisoners “goes against all the standards established by international agreements.”\textsuperscript{267} The Moroccan government is reported to “plunder” Western Sahara’s national resources, and the “Moroccan forces humiliated the population, including through torture, intimidation and disappearances.”\textsuperscript{268} The conflict has forced thousands of refugees from Western Sahara to flee to bordering countries\textsuperscript{269} and resulted in thousands of deaths.\textsuperscript{270} This

\textsuperscript{263} Id.


\textsuperscript{265} Carlin Moore et al., Column: International Legal Updates, 16 HUM. RTS. BR. 36, 41 (2009) (“Moroccan police have historically used excessive force against Sahrawis and others involved in Polisario Front. The Moroccan government has indirectly supported the violence against innocent civilians by failing to hold police responsible for their action.”). \textit{See generally} Yahia H. Zoubir, The West Saharan Conflict: A Case Study in Failure of Prenegotiation and Prolongation of Conflict, 26 CAL. W. INT’L L.J. 173 (1996) (discussing the Western Sahara conflict).


\textsuperscript{267} \textsc{European Strategic Intelligence and Security Center}, \textit{The Polisario Front: A Destabilizing Force in the Region that is Still Active} 10 (Oct. 2008), www.corcas.com/Portals/5/Polisario%20fuerza%20desestabilizacion%20en%20el%20M agarbe.pdf.


\textsuperscript{269} Feinstein & Weiner, \textit{supra} note 2599, at 322.

\textsuperscript{270} Press Release, \textit{The Polisario Front Continues the Destruction of its Landmine
forty year conflict in Western Sahara has resulted in systematic IHL violations by government and NSAG members.\textsuperscript{271} The next section examines both how and if the provisions of IHL apply to the NSAG and other actors involved in this internal armed conflict.

**C. Polisario Front and Geneva Call—Compliance with International Humanitarian Law**

Polisario Front has made a number of positive steps to comply with IHL. In 2005, Polisario Front released 404 Moroccan prisoners of war held for more than two decades.\textsuperscript{272} Another positive step by Polisario Front is its work with Geneva Call to unilaterally comply with the provisions of the Mine Ban Treaty (MBT).\textsuperscript{273} As a result of several decades of armed conflict, mines heavily contaminate Western Sahara.\textsuperscript{274} The Moroccan army built walls to protect its territory and reinforced the walls with millions of landmines.\textsuperscript{275} In November 2005, Polisario Front committed to Geneva Call’s Deed of Commitment.\textsuperscript{276} This was after lengthy


\textit{Id.}\textsuperscript{272}

\textit{ICRC, 404 Moroccan Prisoners Released} (Aug. 18, 2005), http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/6fdgc9?opendocument.\textsuperscript{273}

\textit{GENEVA CALL, Areas of Engagement: Western Sahara Background,} http://www.genevacall.org/Africa/Western-Sahara/western-sahara.htm (last visited Jan. 21, 2012).\textsuperscript{274}

\textit{Id.; see also Pablo San Martín & Joanna C. Allan, The Largest Prison in the World: Landmines, Walls, UXOs and the UN’s Role in the Western Sahara, Grupo de Estudios Estratégicos (GEES), at 3 (Apr. 17, 2007),} http://www.genevacall.org/news/in-the-press/f-in-the-press/2001-2010/2007-17apr-gees.pdf (“[T]he U.N. peace mission . . . estimates on its website that 100,000 square kilometres out of 266,000, that is, almost 40% of the Western Sahara is affected by landmines and UXOs.”).\textsuperscript{275}


negotiations with Polisario Front’s Secretary General and the President of the Sahrawi Arab Democratic Republic.

Polisario Front began destruction of its stockpile of antipersonnel mines in February 2006 with the destruction of 3,321 antipersonnel mines. Engineers from Polisario Front’s Ministry of Defense destroyed an additional 2,000 mines in May 2008. As recently as March 4, 2011, Polisario Front destroyed 1,506 mines. Additionally, Geneva Call sponsored the attendance of a deputy leader of Polisario Front and a representative of the Sahrawi at a training camp addressing international mine action standards. In April 2011, five senior military officers of Polisario Front attended a comprehensive training course on IHL in Geneva. Geneva Call requires NSAGs to “establish self-regulating mechanisms,” such as orders, directives, training, and disciplinary actions “in case of non-compliance.” The Polisario Front reports that it has distributed training manuals and ordered all of its members to enforce the ban.

Alongside its work with Polisario Front, Geneva Call

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277 See id.
281 See GENEVA CALL 2006 ANNUAL REPORT, supra note 275, at 14.
284 See GENEVA CALL 2006 ANNUAL REPORT, supra note 275, at 14-15.
advocates for Morocco to accede to the Mine Ban Treaty (MBT).\textsuperscript{285} While Morocco is not a party to the MBT, it submitted its first voluntary Article 7 report to the U.N. on its implementation of principles of the treaty in September 2006, followed by a second report in April 2008.\textsuperscript{286} It is possible that Morocco feels increased pressure to submit reports when Polisario Front voluntarily complies with the provisions of the treaty. The success of Polisario Front and the other NSAGs that are working with Geneva Call to comply with the MBT demonstrates the benefits of engaging NSAGs.\textsuperscript{287} While there are a handful of reports of NSAGs violating the Deed, for the most part, Geneva Call has reported full compliance.\textsuperscript{288} Geneva Call’s engagement with Polisario Front and at least forty other NSAGs demonstrates the potential for bringing NSAGs closer to the provisions of IHL.\textsuperscript{289}

V. Recommendations and Conclusion

The analysis of the current legal framework reveals the framework’s inadequacy when accommodating and regulating the actions of NSAGs. The case study of Polisario Front is evidence that it is both possible and advantageous to engage NSAGs with

\textsuperscript{285} See Press Release, The Polisario Front Continues the Destruction of its Landmine Stocks, GENEVA CALL, supra note 279 (“But there is much more to be done. Twenty years after the ceasefire, landmines continue to kill and maim. Progress is greatly needed on the other side of the berm, Morocco must also join the AP mine ban.”). It may also be noted that Morocco recently ratified Additional Protocols I and II on March 6, 2011. See Protocol I, supra note 7, and Protocol II, supra note 17, for the lists of signatories.


\textsuperscript{288} See id. Geneva Call reported that three signatory groups, MILF, SPLM/A, and Kongra Gel/HPG, were “accused by their respective governments of using AP mines shortly after signing the Deed of Commitment.” Additionally, Puntland and the Jowhar Administration were reported as having received AP mines. Geneva Call said that they had no “conclusive evidence” for any of the reports except for the report on MILF.

\textsuperscript{289} See id.
IHL. This section attempts to address weaknesses of IHL as applied to NSAGs in internal armed conflict and offers recommendations that are practical and implementable. Ideally, while Common Article 3 and the Additional Protocols should be revised, it is unlikely that states will realistically create new provisions and an enforcement mechanism. Therefore, this section offers several non-legal recommendations that may be implemented within the current legal framework while aiming to improve the protection of populations during an internal armed conflict.

A. Increasing Awareness of IHL Principles

First, to ensure that IHL is respected during an internal armed conflict, a greater understanding of IHL is necessary so that those involved in the fighting recognize which rules apply and how. Protocol II governing internal armed conflict includes language that the Protocol must be “disseminated as widely as possible.” Henckaerts asserts that violations of IHL are largely rooted in the “uncertainty as to their application” and “a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.” Increasing awareness of the law applicable to internal armed conflict will help the leaders and members of NSAGs and government forces know what actions constitute an IHL violation and what instructions will ensure compliance. Education regarding IHL principles during peacetime will help increase respect and compliance with IHL provisions both before and during an armed conflict. Geneva Call has successfully

290 See Sassòli, supra note 29, at 30 (“If those who fight are not properly instructed, the rule of IHL will never be respected.”).
291 Protocol II, supra note 17, art. 19.
293 See Henckaerts, supra note 2922, at 176-77.
294 Rather than applying ex post facto provisions through a tribunal or court, such as the Special Court for Sierra Leone.
promoted IHL tenets through its training camps on IHL for Polisario Front and other NSAG members.295

There are obstacles to this effort, particularly when an armed conflict is in progress. As discussed in Part I, the “cell” structure of many NSAGs, which removes a hierarchical chain of command, makes it difficult to disseminate information since the degree to which leaders have control over members varies.296 NSAGs also vary in the degree to which they are willing to comply with IHL provisions; it might depend on whether or not doing so coincides with its goals.297 Furthermore, an NSAG might lack the necessary resources to disseminate information.298 These features of NSAGs make it difficult to effectively explain IHL principles during an armed conflict. The best “preventative action,” therefore, is to ensure that the general public is aware of IHL.299 The members of NSAGs are likely to have an awareness of IHL if an armed conflict breaks out.300

B. Involvement of NSAGs in the Development of IHL

Earlier parts of this comment discuss the state-centrism of international law and the concept that NSAGs are bound, in theory, by treaties created entirely by states.301 Since the majority of internal armed conflict is fought by both government forces and NSAGs, the effective and realistic development of IHL should involve NSAGs.302 There are several advantages to this approach.

295 See supra Part III.C.
296 See supra Part I.A; see also ZEGVELD, supra note 18, at 1.
297 See Hofmann, supra note 9, at 399.
298 See id. at 396 (noting that NSAGs vary in resources).
299 Sassòli, supra note 29, at 30.
300 It is important that education efforts reflect the literacy rates and the language of the target population. Also, certain sections of the population, such as members of an NSAG, might be more difficult to reach and require more research and targeted work.
301 See supra Part II.B.
302 Most NSAGs are barred from participating in conferences on IHL. For example, the Rome Conference on the Criminal Court included 130 state delegations, hundreds of NGOs, but no members of NSAGs were invited. See CLAUDE BRUDERLEIN, CTR. FOR HUMANITARIAN DIALOGUE, THE ROLE OF NON-STATE ACTORS IN BUILDING HUMAN SECURITY: THE CASE OF ARMED GROUPS IN INTRA-STATE WARS 7 (May 15, 2000), available at http://www.hdcentre.org/files/ (select “publications;” then select page 24). The Diplomatic Conference on the Additional Protocols included eleven national liberation movements (NLMs) as observers. However, as Sassòli notes, NLMs have a
First, if members of NSAGs are involved, it will "create[] a sense of ownership."303 By taking part in the legal process, the NSAG will become more familiar with the law, and the law itself will have more credibility with the NSAG.304 Furthermore, the NSAG will more likely respect the law if the NSAG was involved in the law's creation.305 As Sassòli reasons, "It is always easier to obtain respect of a rule invoking the acceptance of that rule by the addressee than by arguing even the most sophisticated legal construction."306

This recommendation faces several practical challenges. As noted in Part I, the relationship between states and NSAGs is often politicized, and certain states would likely object to their inclusion in any treaty-making process or formal meetings.307 The presence of NSAGs would make the process "even more cumbersome and political," and it would be very difficult to reach any agreements.308 Furthermore, it is unlikely that many more diplomatic conferences, such as those that led to the creation of the Additional Protocols, will be held since most of IHL is codified.309

Other legal instruments discussed in Part II, such as special agreements and unilateral declarations, may provide useful and more feasible mechanisms to increase the involvement of NSAGs with IHL.310 These legal instruments have an advantage in that the different legal standing than other NSAGs, and it is unlikely that a similar occasion will arise. See MARCO SASSOLI, POSSIBLE LEGAL MECHANISMS TO IMPROVE COMPLIANCE BY ARMED GROUPS WITH INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 7 (2003), http://www.genevacall.org/resources/other-documents-studies/f- other-documents-studies/2001-2010/2003-13nov-sassoli.pdf [hereinafter Possible Legal Mechanisms].


305 Id.

306 Possible Legal Mechanisms, supra note 3022, at 6.

307 See supra Part I.A.

308 See Sassoli, supra note 29, at 39; see also Possible Legal Mechanisms, supra note 302, at 6.

309 See Possible Legal Mechanisms, supra note 3022, at 7.

310 See id. at 18.
NSAG makes a commitment voluntarily and independent of the government that it might be fighting.\textsuperscript{311} These agreements help clarify the law and hold the NSAGs to specific obligations that they themselves negotiated.\textsuperscript{312} Furthermore, special agreements may be adapted to each particular armed conflict situation allowing the conflicting parties to extend the rules and offer more protection than what is required by the existing law.\textsuperscript{313}

This is where there is a role for third parties to help facilitate such agreements. As discussed in Part II, such agreements have been concluded under the auspices of the ICRC, Geneva Call, and the U.N.\textsuperscript{314} States may also facilitate and encourage NSAGs to commit themselves to the provisions of IHL through special agreements or unilateral declarations.\textsuperscript{315} While NGOs might “gain freer access” to NSAGs, states and organizations such as the EU and U.N. have the capacity to deal with problems of a “diplomatic or political nature.”\textsuperscript{316} The most effective engagement with NSAGs involves using a range of actors, each with a different tool set. This will ensure the greatest results in bringing NSAGs’ actions in line with the provisions of IHL.

\textbf{C. Incentives for NSAGs to Comply with IHL}

In international armed conflict, combatants that are captured (and “legitimately participating in hostilities”) are “entitled to prisoner of war status,” (POW) which gives them certain rights and privileges under IHL.\textsuperscript{317} Once designated a POW, an individual will not be punished for the mere fact of fighting;\textsuperscript{318} however, he may be “tried and punished” for violations of IHL committed during the hostilities.\textsuperscript{319} This provides combatants in

\textsuperscript{311} For example, see Part 3 of Geneva Call’s Deed of Commitment with NSAGs, which is agreed upon independently of states and voluntarily by NSAGs. See Deed of Commitment, \textit{supra} note 2499.
\textsuperscript{312} See Sassolì, \textit{supra} note 29, at 29.
\textsuperscript{313} See \textit{id}.
\textsuperscript{314} See supra Part II.C.
\textsuperscript{315} Possible Legal Mechanisms, \textit{supra} note 3022, at 18.
\textsuperscript{316} Hofmann, \textit{supra} note 9, at 403-05.
\textsuperscript{317} CASSESE, \textit{supra} note 92, at 408.
\textsuperscript{318} \textit{Id}.
\textsuperscript{319} \textit{Id}.
international armed conflict with an incentive to comply with IHL.\footnote{Possible Legal Mechanisms, supra note 3022, at 13-14.} One of the problems with the legal framework regulating internal armed conflict is that many states treat members of NSAGs who participate in such conflict under domestic law.\footnote{Id. at 13.} As a result, members of NSAGs may be punished simply for fighting, regardless of the combatant’s level of compliance with IHL or IHRL.\footnote{See id.}

A number of draft provisions addressing this problem were put forward and rejected by states during the drafting of Protocol II.\footnote{See id.} For example, the ICRC suggested that tribunals take into account the accused’s level of compliance with Protocol II when issuing a sentence.\footnote{Id.} Sassòli also offers a number of solutions to this difficulty. He suggests that third states deny refugee status to members of NSAGs that violate IHL and “consider prosecution for the mere fact of having participated in hostilities” as eligible grounds for obtaining refugee status.\footnote{See id.} Sassòli further suggests that third states include members of NSAGs in the “exemption from extradition for political offenders,” unless the offender violated IHL provisions.\footnote{Id.} States, the U.N., and other regional organizations should consider incorporating such incentives into their policies and agreements with NSAGs.

\section*{D. Reporting and Monitoring by NSAGs on Compliance with IHL}

NSAGs should be encouraged to report periodically on their compliance with IHL obligations. Reporting is a “traditional, less intrusive” mechanism which will increase respect for IHL while easing the task of monitoring compliance.\footnote{Id. at 14.} Sassòli argues that the “mere responsibility of writing reports” increases an NSAG’s
"awareness of and sensitivity to IHL" and also creates a sense of ownership.\textsuperscript{328} Geneva Call requires NSAGs that sign a Deed of Commitment to report on their compliance and the steps they have taken to implement the provisions of the Deed.\textsuperscript{329} The NSAGs also agree to allow monitoring and verification.\textsuperscript{330}

The recipients of such reports might be U.N. bodies, states, and NGOs. The ICRC would be a sensible organization for NSAGs to report to, since the ICRC has an explicit legal basis for working with NSAGs.\textsuperscript{331} Nonetheless, Sassòli notes that the ICRC might jeopardize its relationship with NSAGs if it has to comment on NSAGs' reports.\textsuperscript{332} For this reason, Sassòli suggests the creation of a "distinct, independent, expert body" to receive reports and comment on those reports.\textsuperscript{333} The body "might be established in the framework of the U.N." or it might operate either in conjunction with the ICRC and the Red Crescent\textsuperscript{334} or

\textsuperscript{328} Sassòli, supra note 29, at 31.

\textsuperscript{329} See Deed of Commitment, supra note 249, at part 3; see also supra Part III.


\textsuperscript{331} Common Article 3(2) provides: "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." Geneva Conventions of 1949, supra note 7, art. 3.


\textsuperscript{333} Possible Legal Mechanisms, supra note 3022, at 15.

\textsuperscript{334} The ICRC has held six international conferences since 1986 to discuss humanitarian matters. The conferences include State parties to the Geneva Conventions and representatives of ICRC organizations. Observers, such as members of NGOs, international organizations, and regional organizations were invited as observers. Michael Meyer, The Importance of the International Conference of the Red Cross and Red Crescent to National Societies: Fundamental in Theory and in Practice, 91 Int'l Rev. Red Cross 713, 722 (2009), available at http://www.icrc.org/eng/assets/files/other/irrc-876-meyer.pdf.
with the meetings of the parties to the Geneva Conventions.335

Scholars such as Sassòli have suggested that NSAGs set up a monitoring system themselves.336 This suggestion does not rely on states, and it may increase the credibility of NSAGs that claim to respect IHL. NSAGs that have signed Geneva Call's Deed of Commitment agree to monitor their implementation of the Deed.337 By incorporating IHL and a monitoring mechanism into codes of conduct, unilateral declarations, or special agreements, NSAGs may help increase their members' respect of IHL on their own initiative.338

Other international bodies may play a role in monitoring NSAGs. The U.N. Security Council and the "U.N. Human Rights Commission have condemned violations of IHL" by NSAGs during internal armed conflict,339 this illustrates international bodies' ability to assess such groups and their actions. The U.N. facilitated an agreement between the Frente Farabundo Martí para la Liberación Nacional (FMNL) and the government of El Salvador, which included arrangements for U.N. monitoring and verification of the agreement's implementation.340 The U.N. provided a report detailing the violations of all parties to the conflict and providing recommendations based on the U.N.'s observations.341 Thus, the U.N. is capable of monitoring the actions of NSAGs during internal armed conflict. A monitoring system that includes states, the U.N., NSAGs, field workers, and an independent expert body would open the lines of communication between all actors involved in the conflict and

336 Possible Legal Mechanisms, supra note 3022, at 18.
337 Id. at 11.
338 Id. at 6.
339 Id. at 15.
341 See Possible Legal Mechanisms, supra note 3022, at 15.
help ensure that IHL is respected.

In reality, certain NSAGs may neither implement and enforce the recommendations nor respect the provisions of IHL during internal armed conflict. Furthermore, states may not accept many of the recommendations and may refuse to open a dialogue with NSAGs. Yet, the creation of implementation and enforcement mechanisms signifies a move towards more serious protection and regulation of internal armed conflict, and such mechanisms would likely help close the gap between the regulation of internal and international armed conflict. There is a role for external actors to disseminate and clarify IHL in hopes of educating members of NSAGs, the general public, and states. A greater awareness of the concept that even war itself has limits and certain rules apply during a conflict, will help save lives in the future. In the end, the success of these recommendations will depend on the attitude and the will of the states and NSAGs involved in armed conflict. These recommendations, if implemented, have the potential to influence the behavior of NSAGs and states alike, as well as to ultimately improve the lives of people affected by internal armed conflict.

VI. Conclusion

The traditional type of war, involving government forces fighting on battlefields on foreign soil, has been replaced by armed conflict waged in cities and villages within a state. In much of the present-day internal armed conflict, the distinction between combatants and civilians is disregarded, and the combatants are not held accountable for their actions. Given the proliferation of internal armed conflict, the high number of NSAGs that take part in such conflict, and the atrocities that are committed by such groups, it is imperative that IHL adequately regulates the behavior of NSAGs.

Part II provided an overview of the main characteristics of

\[342 \text{ See id. at 11 ("[I]t is urgent to improve the compliance, by such armed groups, of International Humanitarian Law (IHL) and of International Human Rights Law. The latter branch, applying equally in instances short of armed conflicts, also deserves better respect by armed groups involved in internal tensions and disturbances.".).} \]

\[343 \text{ See GRAVINGHOLT ET AL., supra note 2, at 1.} \]

\[344 \text{ See ZEGVELD, supra note 18, at 1-3.} \]
NSAGs and the challenges these groups bring to IHL. Part III outlined the legal framework regulating internal armed conflict, highlighting the weaknesses of the current legal regime. This section examined legal tools, such as special agreements, which help facilitate increased respect of IHL by NSAGs. Part IV provided a case study to illustrate the ability to encourage NSAGs to cooperate and comply with IHL. Part V laid out recommendations that, if implemented, have the potential to improve the effectiveness of the legal framework, increase respect and compliance by NSAGs of IHL, and consequently improve the lives of populations affected by internal armed conflict.

In conclusion, the distinction between internal and international or state and non-state is meaningless to the people living in areas of armed conflict. All people deserve protection from the violence of armed conflict, regardless of whether the parties involved are states or NSAGs or both. There is an urgent need for a legal framework that will hold NSAGs more accountable and will provide greater protection for people living in situations of internal armed conflict.