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Criminalizing Non-State Armed Groups' Acts of Civil Governance as War Crimes

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Abstract

This paper explores whether it is appropriate on legal and policy grounds to criminalize as war crimes the acts of civil governance performed by non-state armed groups controlling territory. Using the administration of justice by armed groups and the Al Hassan case before the International Criminal Court as a reference point, it sheds light on the problems raised by the adoption of an overly broad definition of the war crimes' nexus to the armed conflict. When the definition of 'nexus' is stretched to cover also armed groups' civilian governance activities, the outcome is at odds with international humanitarian law's provisions and nature. This approach also has detrimental consequences, including exposing non-state armed groups to unfair and asymmetric criminalization. The paper submits that non-state armed groups' acts of civil governance should not be criminalized as war crimes—other legal frameworks may be more suitable from a legal and policy standpoint to compel armed groups to comply with international standards and engage with them fruitfully.

Keywords

non-state armed groups; war crimes; civil governance; administration of justice; international humanitarian law; international criminal law; Al Hassan; International Criminal Court.

Authors

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1. Introduction

The most prevalent type of armed conflict nowadays is non-international in nature: protracted armed confrontations are carried out between government forces and one or more organized non-state armed groups, or between such groups themselves in the territory of a state. Throughout this type of hostilities, the parties attempt to take or remain in power. But, like governments, non-state armed groups[1] do much more than fight: they perform governance activities in the territories under their control, and they administer justice, too.

Acts of civil governance by non-state armed groups are not only generally seen in a negative light by the international community—they are often considered illegal or even criminal. A recent important example of this tendency is the *Al Hassan* case in front of the International Criminal Court (ICC). This case, which is concerned with the governance activities carried out by non-state armed groups active in Mali between 2012 and 2013, is crucial as, '[m]ore than any other case before the ICC, … places rebel governance initiatives … under the legal microscope'.[2] Among the charges laid against Mr. Al Hassan—a member of the Islamic Police allegedly involved in the administration of justice through the arrests and execution of sentences he carried out—there is the war crime of sentencing or execution without due process.

This paper explores whether it is appropriate from both a legal and policy perspective to criminalize as war crimes the acts of civil governance performed by non-state armed groups controlling territory. To do so, it will first analyse the factual background (Section 2) providing an overview of the civil governance activities generally performed by non-state armed groups around the world (Section 2.1); afterwards, it will present a close-up of the governance activities performed between 2012 and 2013 by non-state armed groups in Mali, which represent the backdrop of the ICC *Al Hassan* case (Section 2.2). In both subsections, specific attention is devoted to the administration of justice.

The pervasiveness of non-state armed groups exercising civil governance on the territory they control makes evident how crucial it is to seek a better understanding of how the international legal framework applies to 'everyday life' in such scenarios.[3] The paper will thus analyse the legal framework applying to such factual scenarios and to administration of justice in particular (Section 3).

The first two subsections will set the stage for the following analysis. The first will proffer a brief examination of the issue of the legality of the administration of justice by non-state armed groups and of the war crime of sentencing or execution without due process (Section 3.1). The second will analyse the definition of 'nexus' to the armed conflict war crimes needs to satisfy through an investigation of the case law (Section 3.2).

The paper will then move to analyse whether civil governance activities satisfy the nexus requirement and trigger the applicability of international humanitarian law and war crimes law (Section 3.3). This

[1] The terms 'non-state armed groups', 'armed groups' and 'rebel groups' will be used interchangeably in this paper to refer to non-state parties to a non-international armed conflict.
[2] K. Fortin, 'The Procedural Right to a Remedy When the State has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law', 1 Journal of Human Rights Practice (2022) 387-414, at 3.
[3] Ibid.

subsection will conclude that adopting an overly stretched definition of the war crimes nexus requirement to cover also armed groups' civilian governance activities that are not associated with the conflict is at odds with the current legal framework. Afterwards, the paper will demonstrate that criminalising civil governance activities performed by non-state armed groups as war crimes is undesirable also from a policy perspective (Section 3.4). It argues that the consequences would be detrimental for different reasons, including, blurring the definition of war crimes and exposing non-state armed groups to unfair and asymmetric criminalization. Finally, the paper will provide criteria to distinguish the cases in which the administration of justice is performed by non-state armed groups within the civil governance framework (Section 3.5).

In conclusion, the paper submits that non-state armed groups' acts of civil governance should not be criminalized as war crimes—other legal frameworks may be more suitable from a legal and policy standpoint to compel armed groups to comply with international standards and engage with them fruitfully (Section 5). The paper thus wishes, first, to contribute to the debate over the legal framework to apply to civil governance activities performed by non-state armed groups. Secondly, it aims to show the difficulties the interpretation of the nexus requirement poses with reference to the war crime of sentencing or execution without due process when applied to non-state armed groups.

2. The Factual Background: Non-State Armed Groups and Civil Governance Activities in the Field of Justice Administration

A. *An Overview of Governance Activities Performed by Non-State Armed Groups*

In 2020, the International Committee of the Red Cross (ICRC) estimated that around 66 million civilians were living under armed groups' exclusive control.[4] Recent findings from political science and anthropology demonstrate that non-state armed groups not only exert control and authority over territory and the persons therein more often than was thought before:[5] they often exercise civil governance activities as recognized governments would do. Governance activities are in fact needed also—and arguably even more—during armed hostilities, when 'everyday life' continues ('life-goes-on-driver'[6]) but more efforts are required for it to proceed in an orderly manner.[7] It has been estimated that, in the 1945–2018 period, one-third of all rebel groups engaged in governance activities.[8]

[4] ICRC, Communities Facing Conflict, Climate Change and Environmental Degradation Walk a Tightrope of Survival: Statement to United Nations Security Council Open Debate on the Humanitarian Effects of Environmental Degradation and Peace and Security, 2020, available at https://www.icrc.org/en/document/communities-facing-conflict-climate-change-and-environmental-degradation-walk-tightrope (visited 5 January 2023).
[5] K. Fortin, The Accountability of Armed Groups under Human Rights Law (Oxford: Oxford University Press, 2017) at 39ff and 55ff. Among the relevant studies that conclude so, there are, e.g., J. M. Weinstein, Inside Rebellion: The Politics of Insurgent Violence (Cambridge: Cambridge University Press, 2006) and Z. C. Mampilly, Rebel Rulers: Insurgent Governance and Civilian Life During War (Ithaca, New York: Cornell University Press 2011).
[6] Fortin, supra note 5; K. Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control', 63 Netherlands International Law Review (2016) 161-181, at 167.
[7] Fortin, supra note 5, at 54.
[8] T. Ginsburg, 'Rebel Use of Law and Courts', 15 Annual Review of Law and Social Science (2019) 495-507, at 496 referring on data from M. A. Stewart, 'Civil War as State-Making: Strategic Governance in Civil War', 72(1) International Organization (2017) 205-226.

The governance activities performed by armed groups can include providing health care and education, regulating the economy, resolving civil disputes, carrying out policing functions, prosecuting crimes, and running prison services.[9] Rebel groups therefore regulate everyday life and provide public services to the civilian population. To do so, they apply state law or set in place a series of new rules, and also establish *ad hoc* institutions (either within or outside of their 'military wings'[10]).[11] The trend is widespread—37% of rebel groups involved in the major civil wars between 1950 and 2006 established 'law' or 'order' institutions,[12] and numbers seem to be increasing. By exercising governance, armed groups are 'serving their own agenda'.[13] However, being provided such services is of utmost importance for the civilian population's needs, so much so that studies have shown that, if armed groups do not do so, the population will attempt to fill the 'void' left by the state's government.[14]

One of the central governance activities performed by non-state armed groups is the administration of justice, which is, traditionally, a state's prerogative that meets an important universal need.[15] Undertaking policing activities and establishing dispute resolution mechanisms able to deal with both civil and criminal matters are fundamental for effective governance,[16] so much so that administering justice has been considered to be the 'backbone of rebelocracy'.[17] As a matter of fact, about one-third of armed groups establishes judicial institutions, and 222 processes by 67 groups across 57 armed conflicts have been recorded throughout the globe since the end of the Second World War.[18]

The establishment of courts, in particular, has important core functions: dispute resolution, social control, and even law-making.[19] Moreover, courts are used by armed groups to consolidate and strengthen their rule.[20] The so-called 'rebel courts' are busy resolving civil disputes (for example, on divorce, adoption, and property issues) and trying different categories of crimes: a) crimes related to the armed conflict, such as participation in the fighting against the armed group and international crimes committed by group's members, civilians or opposing forces;[21] b) 'ordinary' crimes, like murder, theft and fraud; and c) infractions of behavioural codes—usually driven by religious and/or ideological grounds—such as dress code's violations.[22] In so doing, rebel courts meet the 'everyday life' needs of the civilian

[9] See, e.g., Mampilly, supra note 5, at 4; R. Provost, Rebel Courts: The Administration of Justice by Armed Insurgents (Oxford: Oxford University Press, 2021) at 7.
[10] Mampilly, supra note 5.
[11] Control of territory, establishment of ad hoc institutions and the setting in place of rules are the three requirements identified by the political science scholarship to ascertain a rebel group's governance. On this, see Weinstein, supra note 5, at 164. On different types of laws adopted by armed groups and examples, see Fortin, supra note 2, at 13-14.
[12] R. Huang, The Wartime Origins of Democratization: Civil War, Rebel Governance, and Political Regimes (Cambridge: Cambridge University Press, 2016) at 78.
[13] Fortin, supra note 2, at 8.
[14] Fortin, supra note 5, at 44ff.
[15] T. Ginsburg, 'Book Symposium – "Rebel Courts and the Rule of Law', Armed Groups and International Law, 9 June 2022, available at <www.armedgroups-internationallaw.org/2022/06/09/rebel-courts-book-symposium-rebel-courts-and-the-rule-of-law> (visited 5 January 2023).
[16] Mampilly, supra note 5, at 17.
[17] A. Arjona, Rebelocracy: Social Order in the Colombian Civil War (Cambridge: Cambridge University Press, 2016) at 183.
[18] Huang, supra note 12, at 72 and 188. A non-exhaustive list of countries affected by the phenomenon is provided by Provost, supra note 9, at 2.
[19] On the role of courts, see M. Shapiro, Courts: A Comparative and Political Analysis (Chicago: University of Chicago Press, 1981).
[20] See, e.g., C. E. Loyle, 'Rebel Justice during Armed Conflict', 65 Journal of Conflict Resolution (2021) 108-134, at 116; Huang, supra note 12, at 74 and Arjona, supra note 17, at 73.
[21] J. Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict', 89 International Review of the Red Cross (2007) 655-690, at 682–83.
[22] Loyle, supra note 20, at 113.

population, maintain law and order, and protect the community from common crime, which could increase during armed hostilities.[23]

As daily life goes on during armed conflicts and needs to be regulated, rebel groups have thus felt a duty to establish justice mechanisms, which they did with different degrees of formality and sophistication. While some rebel systems of justice are pretty rudimentary and have been defined as 'jungle' justice systems or 'kangaroo courts',[24] others are much more advanced, resembling, or even surpassing, some state systems.[25] In many cases, 'rebel courts' are the only courts available and national courts have no jurisdictions;[26] in others, competing justice systems can be found in the same territory. Some studies have even shown that where there are competing mechanisms, civilians sometimes chose to employ the justice system administered by armed groups over those administered by states or other customary systems.[27] Among the reasons for this choice is that some states' institutions that are automatically considered legitimate by the international system are in fact non-functioning, inadequate and corrupt.[28] On the contrary, some non-state armed group's systems are considered more akin to local values, less corrupted and thus better placed to deliver a remedy.[29]

Taking this reality into consideration sheds light on what really happens during armed conflicts of a non-international character. These studies from political science and anthropology allowed the legal scholarship to finally visualize this reality, a reality that is definitely 'messy and hard to unpack',[30] and that has been neglected for a long time by scholars and the practice.[31]

B. *The Example of Mali: The Backdrop of the Al Hassan Case*

Since 2012, Mali has been the theatre of several non-international armed conflicts between the government and Islamic insurgent armed groups.[32] Between April 2012 and January 2013, Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQMI)—two Salafi Jihadist armed groups—exercised effective power over the city and region of Timbuktu after having taken control of its territory and replaced the

[23] On this, see Fortin, supra note 5, at 43ff and 53ff; S. N. Kalyvas, The Logic of Violence in Civil War (Cambridge: Cambridge University Press 2006) at 70.
[24] Somer, supra note 21.
[25] See, e.g., S. Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?', 7 Journal of International Criminal Justice (2009) 489-513, at 494.
[26] R. Provost, 'Book symposium "Rebel Courts: The Administration of Justice by Armed Groups": Introduction', Armed Groups and International Law, 30 May 2022, available at <www.armedgroups-internationallaw.org/2022/05/30/book-symposium-rebel-courts-the-administration-of-justice-by-armed-groups-introduction> (visited 5 January 2023); Fortin, supra note 2, at 2.
[27] E.g. Mampilly, supra note 5, at 199; M. Revkin, 'The Legal Foundations of the Islamic State', The Brookings Project on US Relations and the Islamic World, no. 23 (2016) at 11; A. Jackson and F. Weigand, 'Rebel Rule of Law: Taliban Courts in the West and North-West Afghanistan', Briefing Note (2020), at 6–7.
[28] Revkin, supra note 27.
[29] E.g., Mampilly, supra note 5, at 118-119.
[30] J. Pejic, '"Rebel Courts" Book Symposium – Rebel Courts: A Tour de Force', Armed Groups and International Law, 6 June 2022, available at <www.armedgroups-internationallaw.org/2022/06/06/rebel-courts-book-symposium-rebel-courts-a-tour-de-force> (visited 4 January 2023).
[31] The issue has recently been the object of groundbreaking enquiries also in the legal field. See, in particular, Provost, supra note 9; Fortin, supra note 5; and F. Ledwidge, Rebel Law: Insurgents, Courts and Justice in Modern Conflict (London: Hurst & Company 2017).
[32] For more details, see, e.g., RULAC: Rule of Law in Armed Conflicts, Non-international Armed Conflicts in Mali, available at <https://www.rulac.org/browse/conflicts/non-international-armed-conflits-in-mali> (visited 5 January 2023).

authority of the Malian government.[33] Although the armed conflict continued in Mali, in that period Timbuktu was firmly under the rebels' control and no military activities were carried out during the time of the charges.[34] The groups' organization had, at the time, an identifiable political structure by the means of which the groups performed acts of civil governance aimed at regulating the everyday life of civilians. Under their rule, certain prohibitions and obligations inspired by the groups' religious ideology were imposed. It was prohibited, for example, to watch television, listen to music, smoke, drink alcohol, or play sports, and a specific dress code was dictated.[35]

The rebel groups, however, also addressed civilian needs that, otherwise, would have been left most likely unaddressed. Ansar Dine undertook policing activities and established a system of justice that dealt with 'everyday' civil issues (for instance, land disputes and divorce) and criminal matters (for example, theft, but also infractions to the behavioural code, like adultery, and the consumption and selling of alcohol).[36] The Islamic Police, the Hesbah (the 'morality brigade') and the Security Batallion had the power to arrest and punish those who violated the rules. In the case of ta'azir crimes (for which punishment is not set by the Quran),[37] they could also directly impose a penalty at their discretion—usually, detention or flagellation. A newly established Islamic Tribunal was otherwise in charge of delivering judgements and imposing punishments, which were then executed by the Islamic Police, the Hesbah or the Security Batallion.[38]

The Islamic Tribunal applied and acted according to Sharia law. The system of justice was thus very far from European or Western standards of fairness. For instance, the procedure followed was summary, no right to a lawyer was afforded,[39] and torture was even employed as an 'ordinary' method of suspect questioning.[40] For these reasons, the ICC Pre-Trial Chamber I deemed that there are substantial reasons to believe that the Islamic Tribunal lacked independence, impartiality and regular constitution, and had violated fair trial guarantees provided by international law.[41]

Notwithstanding the (serious) shortcomings of the justice system established by Ansar Dine/AQMI, the Malian system of justice in place before the armed groups took control of Timbuktu left a lot to be desired as well. The Malian system of justice was (and still is) inadequate and dysfunctional, most notably, in the North of the country. There were several obstacles accessing formal justice, including, the cost of the fee to file a complaint, and corruption,[42] which was widespread in courts[43] and seriously affected the

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[33] Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud – Version publique expurgée, Al Hassan (ICC ICC-01/12-01/18), Pre-Trial Chamber I, 30 September 2019 (hereinafter: Confirmation of Charges Decision), § 70.
[34] W. A. Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit', 49 Case Western Reserve Journal of International Law (2017) 75-102, at 76.
[35] Confirmation of Charges Decision, § 94, 690, 957.
[36] Ibid., § 95.
[37] For an outline of the main features of Islamic law and more details on ta'azir crimes, see, inter alia, K. S. Gallant, The Principle of Legality in International and Comparative Criminal Law (Cambridge: Cambridge University Press 2008), at 51-54.
[38] The repartition of functions and powers among the different organs is explained in the Confirmation of Charges Decision, § 131–140.
[39] Ibid., § 483.
[40] Ibid., § 922.
[41] Ibid., § 515–516 and at 458–462.
[42] American Bar Association, Access to Justice Assessment for Mali (January 2012) at 2.
[43] E.g., E. van Veen, D. Goff and T. Van Damme, 'Beyond Dichotomy: Recognising and Reconciling Legal Pluralism in Mali' (CRU Report October 2015) available at <www.clingendael.org/pub/2015/beyond_dichotomy> (visited 5 January 2023); Risk & Compliance Portal, available at <www.ganintegrity.com/portal/country-profiles/mali> (visited 5 January 2023), which states that in Mali 'there is 'a very high risk of corruption in the judicial system, especially through bribery and influence peddling in courts'.

fairness of trials. The executive also influenced the judiciary[44] and prompt access to a lawyer was hindered by administrative backlogs and the low number of lawyers in the country.[45]

As a member of the Islamic Police, Mr. Al Hassan was allegedly entrusted with many and varied tasks, in particular, checking compliance with the new rules, drafting police reports to be transmitted to the Islamic Tribunal, arresting and putting in detention offenders, and executing punishments.[46] For his alleged involvement in the administration of justice as a police officer, Mr. Al Hassan is charged with the war crime of sentencing or execution without due process under Article 8(2)(c)(iv) of the Rome Statute.[47] In its confirmation of charges decision of November 2019, the ICC Pre-Trial Chamber I concluded that there are substantial grounds to believe that Mr. Al Hassan committed the above-mentioned war crime.[48]

The Al Hassan case illustrates the risk of being charged with war crimes in which can incur also those involved with the non-state armed groups' civilian governance only (and not with their military activities), in particular, when administering justice and carrying out law enforcement activities.[49] Given the pervasiveness of non-state armed groups' civil governance activities and being Al Hassan the first case at the international level looking in detail at such activities, the case represents an important reference point.[50]

3. Criminalising Non-State Armed Groups' Acts of Justice Administration as War Crimes: An Assessment of the Opportunity to Do So From a Legal and Policy Perspective

A. The Legality of the Administration of Justice by Non-State Armed Groups and The War Crime of Sentencing or Execution without Due Process

The administration of justice is traditionally considered an essential component and prerogative of states' sovereignty.[51] The legality of the administration of justice by non-state armed groups—and, more specifically, of courts established and run by such groups—has thus been traditionally debated. The very idea of non-state armed groups administering justice is often contrasted and judged negatively—at best, 'rebel justice' is considered inadequate.[52] This is explained by the fact that non-state armed groups are 'typically represented as wholly permeated by illegality'—'they are taken to be truly *outlaws*,

[44] Risk & Compliance Portal, supra note 43.
[45] United States Department of State, 2011 Country Reports on Human Rights Practices – Mali (24 May 2012). According to the American Bar Association, supra note 42, there were less than 300 lawyers in Mali in 2012, the majority of them located in the capital, Bamako, at more than 1,000 km from Timbuktu (a journey of approximately 16 hours by car and ferry, according to Google Maps).
[46] The functions and powers allegedly exercised by Mr. Al Hassan within the Islamic Police are described in details by the Confirmation of Charges Decision, § 724ff.
[47] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc 2187 UNTS 90 (hereinafter: ICC Statute or Rome Statute).
[48] Confirmation of Charges Decision, § 458-462.
[49] Similarly, Fortin, supra note 1, at 3-4.
[50] Ibid., at 3.
[51] M. Stewart, '"Rebel Courts" Book Symposium – The Paradoxical Recognition of Rebel Rule', Armed Groups and International Law, 1 June 2022, available at <www.armedgroups-internationallaw.org/2022/06/01/rebel-courts-book-symposium-the-paradoxical-recognition-of-rebel-rule> (visited 5 January 2023).
[52] See, inter alia, UN, OHCHR-Nepal, Human Rights Abuses by the CPN-M: Summary of Concerns, September 2006, at 8, where it is stated that trials by non-state armed groups, even against members of the group itself, 'cannot substitute for … prosecutions carried out in a state court'.

and often encompassed under a very broad understanding of "terrorism"'.[53] Although this may be the case under domestic law, there is no norm of international law that supports such an 'all-encompassing illegality'.[54]

The practice has recently started considering non-state armed groups as legitimate actors to administer justice in the territory under their control. The scholarship now tends to agree that Common Article 3 of the Geneva Conventions (Common Article 3)[55] and the Second Additional Protocol to the Geneva Conventions (AP II)[56] do not require non-state armed groups to conduct trials and do not grant them a right to conduct trials, but they do not prevent them from doing so: they only prohibit unfair trials.[57]

International criminal law also prohibits unfair trials within non-international armed conflicts, criminalising the violation of Common Article 3. Specifically, Article 8(2)(c)(iv) of the Rome Statute prohibits '[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable'—the so-called 'war crime of sentencing or execution without due process'.[58] Benefit from the protection of this provision 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause'.[59] These are 'hors de combat, or […] civilians, medical personnel or religious personnel taking no active part in the hostilities'.[60]

Al Hassan is the first case that has ever dealt with the war crime of sentencing or execution without due process in a non-international armed conflict at the international level.[61] The lack of case law on this crime as well as its peculiarities render the crime difficult to interpret. As underlined by the Prosecution in Al Hassan, its application requires addressing 'important legal issues which have not yet been

[53] Provost, supra note 26.
[54] Provost, supra note 9, at 171.
[55] Common Article 3(1)(d) in Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded and Sick of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 ('the Geneva Conventions').
[56] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II).
[57] See, e.g., Sivakumaran, supra note 25, at 498 (also quoting A. La Rosa, 'Sanctions as a Means of Obtaining Greater Respect for Humanitarian Law: A Review of their Effectiveness', 90 International Review of the Red Cross (2008) 221-247, at 236); Somer, supra note 19, at 670; W. A. Schabas, '"Rebel Courts" Book Symposium – Rebel Justice Can Be Music to My Ears', Armed Groups and International Law, 3 June 2022, available at <www.armedgroups-internationallaw.org/2022/06/03/rebel-courts-book-symposium-rebel-justice-can-be-music-to-my-ears> (visited 5 January 2023). The argument is also recalled by Public Redacted Version of 'Submissions for the Confirmation of Charges', Al Hassan (ICC-01/12-01/18), 4 July 2019, § 254.
[58] Article 8(2)(c)(iv), Elements of Crimes.
[59] Article 8(2)(c), ICC Statute.
[60] Article 8(2)(c)(iv), element 2, Element of Crimes.
[61] The crime has sporadically been charged at the domestic level. The author is aware of three of these cases: Stockholm Tingsrätt (District Court), Sweden, Prosecutor v. Haisam Sakhanh, Judgement, B 3787-16, 16 February 2017, translated and reproduced in 'On the Establishment of Courts in Non-International Armed Conflict by Non-State Actors: Stockholm District Court Judgment of 16 February 2017', 16 Journal of International Criminal Justice (2018) at 403; Rechtbank Den Haag (The Hague District Court), The Netherlands, Prosecutor v. Abdul Razaq Rafief, Judgement, 09/748011-12, 14 April 2022, available in English at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2022:4976> (visited 5 January 2023); Rechtbank Den Haag (The Hague District Court), The Netherlands, Prosecutor v. Esthetu Alemu, Judgement, 09/748013.12, 15 December 2017, available in Dutch at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:14782> (visited 5 January 2023).

considered in detail by international courts and tribunals'.[62]Among these issues, there is the scope of application of this provision and the interpretation of the necessary 'nexus' the crime needs to have with the armed conflict. As for any other war crime, the ICC Elements of Crimes requires the conduct underlying the war crime of sentencing or execution without due process to have occurred 'in the context of' and to be 'associated with an armed conflict not of an international character'.[63]

B. The Issue of Defining the 'Nexus' to the Armed Conflict for Non-State Armed Groups' Civil Governance Activities

The accurate identification of war crimes requires reflecting on their nature.[64] War crimes are those particularly serious violations of international humanitarian law that give rise to individual criminal responsibility under international law. As criminalized violations of international humanitarian law, they are so 'intimately related to the art of warfare' that they should be considered as 'perversions of accepted military practice and tactics in armed conflict'.[65] International humanitarian law applies only during an armed conflict and to the conducts associated with it (the nexus is a condition of applicability of international humanitarian law). For certain conducts to qualify as war crimes they must have a nexus to an armed conflict. As put by the ICC Elements of Crimes, the conduct underlying the offence needs to have occurred 'in the context of' and to be 'associated with an armed conflict not of an international character'.[66] As a result, the conduct can amount to a war crime only if international humanitarian law applies to the conduct in the first place.[67]

This does not mean that any conduct committed during an armed conflict can be qualified as a war crime: an additional connection to the armed conflict is needed[68] for not all violations or crimes perpetrated during an armed conflict are war crimes, and they do not become so for the only fact of being committed during an armed conflict. The nexus has precisely the aim to differentiate war crimes from 'ordinary' (or 'common') crimes under domestic criminal law[69] and other human rights violations. The case law of international criminal tribunals has been clear and consistent in underlining that the existence of an armed conflict and the applicability of international humanitarian law to the territory is not enough to justify the nexus—'a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law'[70] (and, thus,

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[62] Transcript, Al Hassan (ICC-01/12-01/18), 9 July 2019, at 25, line 25 and at 26, lines 1-2. The full range of legal issues posed by this crime is analysed by the author in their doctoral thesis. For more information on the full PhD project, see *anonymized*. On the interpretative and applicative issues that the material element of the crime raises, see D. Marchesi, 'The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements', 54 Israel Law Review (2021) 174-204.
[63] Article 8(2)(c), element 6, Element of Crimes.
[64] H. Van der Wilt, 'War Crimes and the Requirement of a Nexus with an Armed Conflict', 10(5) Journal of International Criminal Justice (2012) 1113-1128, at 1127.
[65] Ibid., at 1128.
[66] Article 8(2)(c), element 6, Element of Crimes.
[67] E. Pothelet, 'Life in Rebel Territory: Is Everything War?', Armed Groups and International Law, 20 May 2020 <www.armedgroups-internationallaw.org/2020/05/20/life-in-rebel-territory-is-everything-war> (visited 5 January 2023).
[68] M. Cottier, 'Article 8' in K. Ambos (ed.), Rome Statute of the International Criminal Court: Article-by-Article Commentary (London: Hart Publishing, Oxford and Nomos Verlagsgesellschaft, Baden-Baden, 2022) at 313.
[69] W. A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford: Oxford University Press 2016) at 235.
[70] Judgment, Tadić (IT-94-1-T), Trial Chamber, 7 May 1997, § 572. In the same vein, see also Judgement, Delalić et al. (IT-96-21-T), Trial Chamber, 16 November 1988, § 193: '[i]t is axiomatic that not every serious crime committed during the armed conflict in Bosnia and Herzegovina can be regarded as a violation of international humanitarian law. There must be an obvious link between the criminal act and the armed conflict.'

to war crimes law). Emphasis is therefore placed on the need to establish the nexus with reference to every specific crime.[71]

It is evident that the nexus exists in case the conduct is committed in the course of actual armed hostilities (i.e. at the place of combat during the fighting).[72] How to establish the nexus far from the battlefield, 'at a time when and in a place where no fighting is actually taking place',[73] is, however, difficult to pinpoint. Concluding that the nexus exists in these cases as long as the act is 'closely related' to the hostilities—as declared first in *Tadić*[74] and then underlined by the ICC case law[75]—is tautological: it does not 'spell out the nature of the required relation'.[76]

The issue has been widely explored by case law, especially by the *ad hoc* tribunals in their early cases. One of the most famous ones is *Kunarać*. In this case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has argued that the conduct has a nexus with the conflict if it is 'committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and … in furtherance or tak[ing] advantage of the situation created by the fighting'.[77] The Appeals Chamber in the same case then delved into the matter, holding that:[78]

57. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place.

58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established … that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.

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[71] Confirmation of Charges Decision, § 226.
[72] Judgment, Delalić et al., § 193.
[73] Judgement, Kunarać et al. (IT-96-23 & IT-96-23/1-A), Appeals Chamber, 12 June 2002, § 57.
[74] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1), Appeals Chamber, 2 October 1995, § 70.
[75] Decision on the Confirmation of the Charges, Lubanga (ICC-01/04-01/06), Pre-Trial Chamber, 29 January 2007, § 288; Decision on the Confirmation of the Charges, Katanga et al. (ICC-01/04-01/07), Pre-Trial Chamber, 30 September 2008, § 380.
[76] Judgement, Rutaganda (ICTR-96-3-A), Appeals Chamber, 26 May 2003, § 569.
[77] Judgement, Kunarać et al. (IT-96-23T & IT-96-23/1-T), Judgement, Trial Chamber, 22 February 2001, § 568.
[78] Judgement, Kunarać et al. (IT-96-23T & IT-96-23/1-T), Appeals Chamber, § 57-58. Similarly, see also Judgment, Tadić, Trial Chamber, § 573 and Judgment, Bagilishema (ICTR-95-1A-T), Trial Chamber, 7 June 2001, § 105.

The judgement becomes even more precise, stating that:[79]

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrators official duties'.

This decision and the criteria set therein have been widely referred to and accepted by the subsequent case law, including that of the ICC.[80] However, the definition of the nexus adopted by *Kunarać* has also been criticized for being overly broad and providing a too low threshold.[81] This broad interpretation leads to outcomes that have been rejected by the scholarship[82] and the case law,[83] like considering war crimes offences that are 'purely opportunistic'[84] (i.e. that have been committed merely taking advantage of the circumstances created by the conflict, for example, committing theft because the police are not as effective as usual during an armed conflict).

For these reasons, the subsequent case law has attempted to refine the *Kunarać* definition of nexus. For instance, in *Rutaganda*, the International Criminal Tribunal for Rwanda (ICTR) has stressed that: a) 'the expression "under the guide of the armed conflict" does not mean simply "at the same time as an armed conflict" and/or "in any circumstances created in part by the armed conflict"'; and b) 'the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one'—'particular care is needed when the accused is a non-combatant'.[85]

This case law has, however, not advanced the fine-tuning of the *Kunarać* definition for what concerns non-international armed conflicts, ending up being hardly compatible with the reality of non-international armed conflicts and the actors that fight therein. This is also proved by the fact that, for instance, one of the *Kunarać* definition's most important criteria in assessing whether the conduct has a nexus with the armed conflict is establishing whether the perpetrator is a combatant and the victim is a non-combatant. However, these are the categories typical of international armed conflicts and that can be used in non-international armed conflicts only in a non-technical sense and with some precaution.[86] In non-

[79] Ibid., § 59.
[80] See, e.g., Decision on the Confirmation of Charges, Abu Garda (ICC-02/05-02/09), 8 February 2010, § 90; Decision on the Confirmation of the Charges, Katanga et al., § 380; Decision on the Confirmation of the Charges, Lubanga, § 287.
[81] See, e.g., Van der Wilt, supra note 64, at 1125.
[82] Inter alia, G. Mettraux, International Crimes and the Ad Hoc Tribunals (Oxford: Oxford University Press, 2006) at 41.
[83] Judgement, Rutaganda, Appeals Chamber, § 569–570.
[84] Pothelet, supra note 67.
[85] Judgement, Rutaganda, Appeals Chamber, § 570.
[86] While state armed forces may be considered combatants for purposes of the principle of distinction, practice is not clear as to the situation of non-state armed groups. International humanitarian law uses different terms that can apply to 'fighters' in the context of non-international armed conflicts, including: persons taking active part in the hostilities, members of dissident armed forces or other organized armed groups, persons who take a direct part in hostilities, civilians who take a direct part in hostilities, civilians taking direct part in hostilities; and combatant adversary. See ICRC, IHL Database Customary International Humanitarian Law, Rule 3, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3> (visited 5 January 2023).

international armed conflicts, the concept of 'battlefront' does not apply in the same way as in international armed conflict.[87]

C. *Do Civil Governance Activities Satisfy the Nexus Requirement? The Legal Framework Applicable to Non-State Armed Groups' Civil Governance Activities in the Administration of Justice Field*

The establishment of the nexus between certain conducts like those subsumed under the analysed war crime and the armed hostilities raises specific issues in contemporary armed confrontations involving non-state armed groups. The peculiar objectives and development of events that characterize such realities and the nature of activities carried out by rebel groups in such a framework cannot be disregarded.[88] Rather, they impose a focused analysis that takes into account their traits and distinctiveness. The peculiarity of civil governance activities as opposed to other acts (for instance, acts strictly related to the fighting and the military campaigns) is evident: governance activities are acts aimed to regulate civilian 'everyday' or 'ordinary' life events. Such activities, when carried out by states governments, would not trigger the application of international humanitarian law. Any offence or violation committed in that context would not be labelled as a war crime for a lack of nexus with the armed conflict. Most notably, those who commit 'ordinary' crimes would be tried according to the domestic laws of the state, and international humanitarian law will not apply to such trials.[89] One may thus wonder whether the same holds for non-state armed groups performing civil governance activities in the territory they control.

Establishing whether civil governance activities performed by non-state armed groups during non-international armed conflicts satisfy the nexus requirement and thus trigger the applicability of international humanitarian law and war crimes provisions is a complicated endeavour. The definition of 'nexus' has been devised with reference to international armed conflicts and it has also evolved mainly by looking at that type of conflict. Also when applied to non-international armed conflicts, the tribunals had generally not dealt with civil governance activities put in place by non-state armed groups fighting such wars. The *Al Hassan* case can be considered a first in this respect.

However, in its confirmation of charges decision in *Al Hassan*, the ICC Pre-Trial Chamber I seems not to have grasped the distinctness of the situation and charges at hand. It did not motivate the reason why the specific conducts subsumed under Article 8(2)(c)(iv) allegations should be considered as satisfying the nexus requirement. It dealt with the issue of the nexus only in general in the section of the decision dealing with the contextual elements of war crimes. Therein, however, it focused its attention to

[87] Schabas, supra note 69, at 237.
[88] The scholarship has, since long ago, underlined the difficulties that the nexus poses in non-international armed conflicts. See, e.g., A. Cassese, 'The Nexus Requirement for War Crimes', 10 Journal of International Criminal Justice (2012) 1395-1417, at 1395–1396; P. Gaeta, 'War Crimes and Other International "Core" Crimes' in A. Clapham and P. Gaeta (eds), The Oxford Handbook of International Law in Armed Conflict (Oxford: Oxford University Press, 2014), at 751.
[89] In clarifying the meaning of the concept of persons affected by an armed conflict, the ICRC Commentary of Article 75 of Additional Protocol I of the Geneva Conventions concerning fundamental guarantees underlined that 'it cannot … be denied that there are persons who are not affected [by the armed conflict] in the sense of this article. In general those who contravene the normal laws of the State (ordinary criminals) and who are punished on these grounds, are not "affected" within the meaning of this article' (ICRC Commentary to the Additional Protocol I to the Geneva Conventions, Article 75 available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E46340B132AC1B86C12563CD004367BF> (visited 5 January 2023).

establishing that there are substantial reasons to believe that a non-international armed conflict was taking place in Timbuktu at the time of the facts.[90] It seems thus to have assumed the nexus of the war crime of sentencing or execution without due process (as of all the other war crimes) merely on the basis that the conducts occurred *where* and *when* the hostilities were taking place—Timbuktu, which was at the time under the control of the non-state armed groups. Shall we deem that *anything* done by non-state armed groups in zones of conflict during a non-international armed conflict is *necessarily* related to the conflict?

The international legal framework to apply to the *de facto* administration of territories by non-state armed groups is controversial. In particular, there are diametrically opposite views on whether civil governance activities performed by non-state armed groups during non-international armed conflicts satisfy the nexus requirement and thus trigger the applicability of international humanitarian law and war crimes provisions. A first approach—referred here as the 'all-encompassing nexus' approach and adopted also by the ICRC—believes that international humanitarian law governs the full human experience during armed conflicts.[91] In a 2019 report, the ICRC argued that:[92]

the way in which non-State armed groups exercise control over, and interact with, persons living in territory under their de facto control is inherently linked to the conflict in question. The conflict plays a substantial part in the group's ability to control the lives of those living under its control and the manner in which such control is exercised. As a result, [international humanitarian law] applies and therefore protects persons living in territory under the de facto control of non-State armed groups.

The ICRC seems to suggest that the nexus requirement is always satisfied and all interactions between armed groups controlling territory and the civilian population are therefore governed by international humanitarian law.[93] The ICRC position is arguably based on the nexus definition adopted by the ICTY in *Kunarać*.[94] From a practical perspective, this approach has been deemed to be 'attractive' as it would minimize several 'applicability dilemmas'.[95] However, it has been noted that a group's territorial control may predate the conflict or even be unrelated to that specific conflict. It may well be that the group had acquired control over the territory, for instance, during a previous conflict that ended years before or without the use of armed force at all—for example, the area could have been abandoned by state authority or power could have been obtained through democratic elections.[96] If power had been taken without the armed force by non-state armed groups, or had been exercised by a state government, acts of civil governance would not have deserved to be labelled as war crimes, thus creating illogical outcomes.

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[90] Confirmation of Charges Decision, § 193-227.
[91] See, inter alia, Pejic, supra note 30.
[92] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Recommitting To Protection In Armed Conflict on the 70th Anniversary of the Geneva Conventions, 22 November 2019, at 53.
[93] Pothelet, supra note 67.
[94] Ibid.
[95] Ibid.
[96] Ibid. Similarly, see also Schabas, supra note 34, at 97.

A second approach—referred here as the 'restricted nexus' approach—has harshly criticized this proposal and its shortcomings by upholding that only acts with a clear and narrow(er) link to the conflict would satisfy the nexus requirement. International humanitarian law does not regulate 'every aspect of life' in situations to which it is applicable as not all aspects of life during an armed conflict revolve around the conflict.[97] Hence, 'everyday life' activities, including governance activities like law and order acts or the provision of essential services which have no nexus to the armed conflict, fall outside the scope of international humanitarian law[98] and should not be criminalized as war crimes, no matter how 'repressive and objectionable' these acts are.[99] Such activities are instead regulated by other bodies of law, namely national law and/or international human rights law, which continue to apply during armed conflicts.[100]

According to the 'all-encompassing nexus' approach, the administration of justice by non-state armed groups would thus automatically be considered as satisfying the nexus with the armed conflict, regardless of any other factor, for instance, the types of crimes prosecuted. It has been argued that the basis for such a position is that the very existence of any action of the armed groups is defined by their link to the insurgency—rebel courts are 'part and parcel of the project of insurgency'.[101] On the contrary, states are not defined by their involvement in the conflict and much of what they do predates and is unrelated to the hostilities.[102] Thus, state justice 'mostly lacks the nexus to the conflict that would bring it under the umbrella of international humanitarian law'.[103] Any administration of justice carried out by non-state armed groups (including non-penal matters) would thus be governed by international humanitarian law, specifically, Common Article 3 and Article 6 of AP II.[104] In the same vein, war crimes law would apply.[105]

On the contrary, according to the 'restricted nexus' approach, the fact that non-state armed groups have seized power during an ongoing non-international armed conflict 'should not in and of itself be sufficient to constitute the nexus required for prosecution as war crimes with respect to the efforts of the rebel group to govern the territory that it holds.'[106] A strict interpretation of the nexus should envisage a precise link between a certain prosecution or trial and the armed conflict.[107] The prosecution of 'ordinary' crimes (such as thefts and frauds) and infractions of behavioural code are among the governance activities with no nexus to the armed conflict; the prosecution of crimes related to the conflict (i.e. those acts other than international crimes and offences committed by members of the group that armed groups consider prejudicial to them in relation to the conflict and which are thus worthy of punishment, for example, taking part in insurrections, posing security threats related to the hostilities, committing treason, or the

[97] Among the representatives of this approach, there are Katharine Fortin and Elvina Pothelet. William Schabas seems also to adopt this view. In his book, René Provost (supra note 9) seems to support the idea that international humanitarian law does not regulate any aspect of life in situations to which it is applicable, however, he arrives at conclusions that seem to contradict this statement.
[98] Fortin, supra note 5, at 172-179.
[99] Schabas, supra note 34, at 96-97.
[100] Fortin, supra note 5, at 47.
[101] Provost, supra note 26. See also Provost, supra note 9, at 174.
[102] Ibid.
[103] Ibid.
[104] Ibid; Provost, supra note 9, at 167, 170, 179 (as mentioned, in contrast to the premise that international humanitarian law does not regulate every aspect of life during the armed conflict). These conclusions are accepted also by Pejic, supra note 30.
[105] Provost, supra note 26.
[106] Schabas, supra note 34, at 97.
[107] Fortin, supra note 6, at 178-79.

allegiance with other parties of the conflict)[108] has a nexus with the armed conflict. Hence, to these last prosecutions only international humanitarian law and war crimes provisions apply.[109]

The 'restricted nexus' approach in the field of justice administration is justified by the letter of international humanitarian law. The wording of Common Article 3 and Article 6 of APII indicates that both provisions apply to criminal matters only: Common Article 3 prohibits 'the passing of sentences and the carrying out of executions' without due process, thus employing terms which belong to the criminal domain only; Article 6 of AP II is entitled to 'penal prosecutions' and its first paragraph holds that the article 'applies to the prosecution and punishment of criminal offences related to the armed conflict'.[110] Most notably, this last provision is prominently at odds with the 'all-encompassing nexus' approach as it emphasizes that it does not apply to any prosecution and punishment of criminal offences, but only to those 'related to the armed conflict'. It thus clarifies that the type of criminal offence matters to assess which legal framework to apply, contrarily to what is purported by the 'all-encompassing nexus' approach.

This conclusion has been rejected in *Al Hassan*. The Pre-Trial Chamber I dismissed the defence argument upholding that the persecution of adultery or sale of alcohol was unrelated to the conflict.[111] It argued that the nexus ties the prosecution and not the crime to the conflict and that all government measures applied by the armed group in the context of the conflict were associated with it.[112] The term 'related to the armed conflict' of Article 6 of AP II would thus be referred to 'prosecution and punishment', rather than to 'criminal offences', and that the prosecutions not related to the conflict can only be those carried out by states—any prosecution carried out by a non-state armed group would be related to the conflict.[113]

However, this interpretation is not convincing as the term 'of criminal offences' within Article 6 of AP II would be redundant in the sentence—if the drafters wanted to say that Article 6 applied to prosecution and punishment related to the conflict, they would have just written so; the only reason why 'the prosecution and punishment *of criminal offences*' was made explicit was to make sense of the term 'related to the armed conflict'. Hence, Article 6 of AP II implies that some prosecutions (and punishments) are not related to the conflict and that this international humanitarian law's provision applies only to the prosecutions connected to the armed conflict, establishing a very specific nexus to the conflict—'more specific' than that provided by Article 2 of AP II on the general applicability of the Protocol to 'all persons affected by [a non-international armed conflict]'.[114]

Not only the 'restricted nexus' approach is the most faithful to the literal wording of international humanitarian law provisions, but it is also the only one in line with international humanitarian law's objectives, logic as well as limitations. International humanitarian law aims to regulate the conducting of

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[108] Fortin, supra note 5, at 50; Pothelet, supra note 67; A. Spadaro, '"Rebel Courts" Book Symposium – The Prosecution of Conflict-related Offences by Courts of Armed Groups', Armed Groups and International Law, 2 June 2022, available at <www.armedgroups-internationallaw.org/2022/06/02/rebel-courts-book-symposium-the-prosecution-of-conflict-related-offences-by-courts-of-armed-groups> (visited 5 January 2023).
[109] Schabas, supra note 34, at 97.
[110] This is also recognized by Provost, supra note 9, at 169, who anyway supports an 'all-encompassing' application of international humanitarian law on any type of justice administered by non-state armed groups.
[111] This position has been defended also by Schabas, supra note 57.
[112] Confirmation of Charges Decision, § 415, 486.
[113] Provost, supra note 9, at 177-78.
[114] Pothelet, supra note 67.

armed hostilities and protect civilians and other protected persons from the *direct* effects of hostilities—it is unsuited and unable to regulate any act that occurs within conflict settings, including governance activities.[115] In the same vein, it is not the place of international criminal law to criminalize as war crimes any conduct carried out by an armed group while armed hostilities are taking place in the territory or circumstances determined by the armed conflict,[116] but rather to criminalize illicit acts that are committed in furtherance of or in association with the armed conflict.

To conclude, adopting an overly stretched definition of the war crimes nexus requirement to cover also armed groups' civilian governance activities that are not associated with the conflict is at odds with the current legal framework—international humanitarian law itself seems to point towards a 'restricted nexus' solution.

D. *A Policy Perspective*

International humanitarian, criminal and human rights law are much guided in their interpretation and application by policy reasons. As a consequence, it would be limiting to merely look at the law when addressing the issue of whether it is appropriate to criminalize non-state armed groups' acts of civil governance. This subsection will thus address the issue from a policy perspective.

The interpretation adopted by the 'all-encompassing nexus' approach is justified by policy reasons aimed to protect as much as possible those living in the territories controlled by armed groups through an extension of the scope of application of international humanitarian law.[117] Although this is a well-deserving policy aim, this approach ignores (and even hinders) other goals that it would be important to take into consideration and pursue.

As mentioned, the 'all-encompassing nexus' approach has the consequence of placing all activities carried out by non-state armed groups under international humanitarian law. When the same activities are carried out by states, such activities would be regulated by national law and international human rights law. Only non-state armed groups would hence be bound by international humanitarian law when performing civil governance activities and administering justice.[118] As a result, virtually any armed group's failure to meet fair trial standards would amount to a war crime, but the same cannot be said for government forces.[119]

This is a concerning outcome for a number of reasons. The first is between law and policy and has to do with the principle of equality of belligerents, a paramount principle in international humanitarian law. In non-international armed conflicts, both sides are seeking power and control and none of them can be

[115] Provost, supra note 9, at 170.
[116] Judgment, Rutaganda, Appeals Chamber, § 570.
[117] Fortin, supra note 2, at 20.
[118] Pothelet, supra note 67.
[119] Fortin, supra note 2, at 21; Schabas, supra note 34, at 98.

considered the 'occupier'.[120] According to international humanitarian law, non-state armed groups have 'as much right to be there as the government of the country'.[121] However, if any action of civilian governance rebel groups put in place could potentially be considered a war crime whereas those carried out by recognized governments would not, a serious asymmetry would follow.[122] The law would thus be 'tilted in favour of those in power and against those seeking to obtain it'.[123] The result is a striking violation of the principle of equality of belligerents.[124] Rebels would thus 'be judged by a different standard than those they are trying to displace'.[125] Although we seem ready to accept such a violation of the principle of equality of belligerents if rebels are Islamist groups imposing rules that are against our sensitivity, would that be the same if we had sympathized with the rebel group, for example, if the rebel group was indigenous?[126]

The second concern—purely policy-driven—relates to the fact that the 'all-encompassing nexus' approach fails to acknowledge that non-state armed groups often respond to societal needs. As mentioned in the first part of this paper, governance activities are in fact needed also—and arguably even more—during armed hostilities, when 'everyday life' continues but more efforts are required for it to proceed in an orderly manner. Non-state armed groups often respond to such needs in territories where the state is no longer willing or able to do so because of the conflict. Sometimes, they do so even in territories where the difficult life conditions predate the conflict as 'the State has left the building'[127] even before the group took control of the territory. In such cases, non-state armed groups' administration of justice can be 'a social good … in a manner that is not dependent on the legitimacy of their cause'.[128] This reality of non-international armed conflicts cannot be overlooked.

Another policy-driven concern relates to the nature of international crimes, and the role and goals of international criminal law. International crimes should be interpreted in a way that respects and emphasizes their gravity requirement and their necessary aspiration to universality. The application of criminal law is traditionally justified on a strict criterion, that of necessity[129]—being the instrument of last resort and *extrema ratio*. This means that it is justified and legitimate to have recourse to criminal law (also for the protection of the most fundamental human rights) only where the other legal responses prove inadequate.[130] Thus, criminal law is a subsidiary body in relation to other forms of intervention.[131] This means that it should not be employed where other branches of law (most notably, international human rights law, but also domestic criminal law) can succeed (even better than international criminal law could). It should intervene to protect the right where the other branches of law cannot act or are not enough to protect that specific fundamental right from a particularly serious violation. Expanding the

[120] Schabas, supra note 34, at 95 writing specifically of Ansar Dine. Although the term 'occupation' of Timbuktu has very much been used by the Prosecution in Al Hassan, the Pre-Trial Chamber has clarified that it is not possible to talk about an 'occupation' in the technical legal sense as the ICC Statute and international humanitarian law circumscribe this term to international armed conflicts (Confirmation of Charges Decision, § 225).
[121] Schabas, supra note 34, at 96.
[122] Fortin, supra note 2, at 22; similarly, see also ibid. 98 and Schabas, supra note 57.
[123] Schabas, supra note 57.
[124] In the same vein, Pothelet, supra note 67.
[125] Schabas, supra note 34, at 101.
[126] Schabas, supra note 54.
[127] Transcript of Confirmation of Charges Hearing, Al Hassan (ICC-01/12-01/18), 17 July 2019, at 27.
[128] Provost, supra note 26.
[129] F. Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights', 9 Journal of International Criminal Justice (2011) 577-595, at 582.
[130] Ibid.
[131] Ibid. See also M. van de Kerchove and S. Van Drooghenbroeck, 'Subsidiarité et droit pénal: aspects nouveaux d'une question ancienne' in F. Delpérée (ed.), Le principe de subsidiarité (Bruxelles: Bruylant, 2002) at 153-160.

definitions of war crimes by disregarding these principles would bring about a phenomenon of 'overcriminalization' that would only weaken the international criminal justice project. A broad interpretation of the nexus with the armed conflict also has the consequence of 'casting a net of individual criminal responsibility that is too wide'.[132] The expansion would also bring to diluting the definition of war crimes and blur the distinction between war crimes and ordinary crimes, human rights violations, and other international crimes. To avoid an undue expansion of international criminal law and its detrimental consequences for substantial fairness—in particular, the erosion of the principle of legality—an overly stretched definition of the nexus requirement should be rejected.

Criminalising civil governance activities performed by non-state armed groups as war crimes is therefore undesirable from a policy perspective. Such acts might certainly attract international criminal responsibility, for example, as crimes against humanity, but not war crimes.[133] Moreover, as mentioned, international human rights law continues to apply during armed conflicts. Part of the scholarship is increasingly supporting the idea that international human rights law applies to everyday life when non-state armed groups control territories.[134] In this manner, although international humanitarian law would not apply to such activities, those living in the territories controlled by armed groups would be well protected by international human rights law, which also generally poses higher standards of protection than international humanitarian law. The protective aim pursued by the 'all-encompassing nexus' approach would thus be better fulfilled by adopting a restricted interpretation of nexus. The 'restricted nexus' approach is thus not only the most faithful to international humanitarian law's letter and purposes—it is also the most appropriate from a policy perspective.

E. *When Do Non-State Armed Groups Administer Justice within the Civil Governance Framework? Criteria to Guide the Decision*

When adopting the 'restricted nexus' approach, it is paramount to distinguish the cases in which non-state armed groups exercise civil governance activities from other acts, as neither international humanitarian law nor war crimes provisions are then applicable to civil governance activities. In sum, precise boundaries between what belongs to the domain of 'everyday life' governance and what to the domain of armed hostilities need to be drawn.

The characteristics of non-international armed conflicts and the possibility for non-state armed groups to perform civil governance activities should encourage the adoption of a different definition of 'nexus'. Particularly important would be whether the act has served the ultimate goal of a military campaign—a criterion also developed by *Kunarać*, but often overshadowed by the other criteria. This criterion would

[132] Fortin, supra note 22.
[133] Schabas, supra note 34, at 98.
[134] Fortin, in particular, is a strong proponent of this view. On this, see, for instance, Fortin supra note 2, at 2; Fortin supra note 5; Fortin, supra note 5; J. M. Henckaerts and C. Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in E. Heffes, M. D. Kotlik and M. J. Ventura (eds), International Humanitarian Law and Non-State Actors: Debates, Law and Practice (Berlin: Springer and Asser Press, 2020), at 195–227. More cautious positions underline that international human rights law do not bind armed groups de iure, but, in certain cases, armed groups in control of territory with a sophisticated civil governance can be said to have de facto human rights obligations (Pejic, supra note 30, who argues that the ICRC shares this view). Surely, to comprehend how international human rights law applies to non-state armed groups, further research is still needed on how different norms (may) remain relevant to territory under their control, as argued by Fortin, supra note 2, at 2.

be especially relevant for the acts carried out by the non-state armed groups during the performance of civil governance activities.

This subsection will provide criteria to distinguish civil governance activities performed by non-state armed groups in the field of justice administration from other activities. Such criteria will thus be fundamental when assessing whether the war crime of sentencing or execution without due process has been committed and, especially, to evaluate whether the conducts underlying the offence satisfy the nexus with the conflict. The development of specific criteria tailored to that precise war crime is in line with an important principle spelt out by the scholarship: '[t]he essence and teleological purpose of the humanitarian law rule underlying the offence may give some indication to determine what nexus is required with regard to specific war crimes.'[135] For acts of justice administration to fall within the civil governance framework, all the decisive criteria identified below need to be satisfied.

1. Decisive Criteria

(a) The *what*—the matters the tribunals deal with are 'ordinary' criminal matters, civil matters and/or infractions of behavioural codes

Justice administered within the civil governance framework deals with: a) 'ordinary' criminal matters (i.e. prosecuting and trying 'ordinary' crimes, like theft and fraud); b) civil matters; and/or c) infractions of behavioural codes. It does not deal with matters strictly related to the armed conflict, for example, prosecuting crimes related to taking part in fighting against the armed group.

(b) The *whom*—all individuals are susceptible to being prosecuted and tried

All individuals are susceptible to being prosecuted and tried, including members of the armed groups, for reasons unrelated to the conflict. Certain sectors of the population must not be targeted on the basis of reasons related to the armed conflict (for instance, individuals that swore allegiance to the government and are hostile to the armed group, political enemies, or members of the opposing parties).

(c) The *why*—the aim is to ensure law and order, and provide essential services to the civilian population

[135] Schabas, supra note 69, at 237.

The aim is to ensure law and order, and provide essential services to the civilian population in order to meet their needs. The administration of justice must not serve the ultimate goal of a military campaign (for example, prosecuting certain high-rank military individuals or politicians to facilitate the military campaign).

2. Non-decisive Criteria

(a) The *when*—justice is administered by the group during an armed conflict and after the armed group took power

The fact that the acts were committed during an armed conflict and after the armed groups took power is not decisive. Arguing otherwise would mean falling into a *post hoc* fallacy that confuses a mere chronological link between events (which is not sufficient to qualify an offence as a war crime) for the functional nexus between the crime and the conflict (which is needed to qualify an offence as a war crime). It is not true that any act carried out by a rebel group after taking power satisfies the contextual element.[136]

(b) The *who*—justice is administered by members of the armed groups

It is also not decisive that the individuals in charge of administering justice are members of the armed group or in some way affiliated or linked with it. As a matter of fact, rebel groups generally carry out governance activities by the means of individuals affiliated with the group and it would be unreasonable to expect otherwise given the very structure and reality of non-state armed groups. Such an element follows from the very nature of the confrontations involving non-state armed groups and it cannot, in and of itself, be considered an element pointing to the existence of a nexus with the armed conflict.

(c) The *how*—justice is administered by pursuing a certain ideology, policy or political agenda

Finally, it is not decisive that the administration of justice was shaped by a certain ideology, policy or agenda that is unrelated to the conflict. It is in fact within the very nature of governance activities to be informed by an agenda, which can well comprise policies directed at criminalising certain conducts and encouraging others—this is not different from what happens with states' governance activities and it is unrelated to the establishment of a nexus with the armed conflict.[137]

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[136] In the same vein, see Schabas, supra note 34, at 96-97 on the Al Mahdi case.
[137] On the need to distinguish ideological agendas and military objectives, see ibid.

4. Conclusion

The paper has demonstrated that both legal and policy grounds support the idea that non-state armed groups' acts of civil governance should not be criminalized as war crimes. In the field of justice administration as a civil governance activity, more specifically, it should be avoided to criminalize as war crimes the failure of non-state armed groups to comply with internationally recognized fair trial standards through the use of the war crime of sentencing or execution without due process. When identifying the legal framework to apply to non-state armed groups' acts of civil governance, a 'restricted nexus' approach should be preferred as an overly stretched definition of the nexus requirement is at odds with the current legal framework and brings about troubling policy outcomes. This approach is more nuanced and more apt to grasp the peculiarities of non-international armed conflicts. Other legal frameworks different from international humanitarian law and war crimes law—in particular, international human rights law—may be more suitable from a legal and policy standpoint to compel armed groups to comply with international standards and engage with them fruitfully.

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