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ENGAGING NONSTATE ARMED GROUPS IN THE PROTECTION OF CULTURAL HERITAGE

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Many of the core norms that seek to regulate the conduct of belligerents in armed conflict, or of the perpetrators of atrocity crimes, originally focused on the behavior of sovereign states. It is states and their representatives, after all, that make and enforce international law and thus it is their rights and responsibilities that are of primary concern. But in addition, national governments have long resisted any moves that might empower actors seeking to challenge state authority or the domestic political status quo. As a result, the laws of war, from their earliest incarnation, sought to set boundaries around those who can legitimately fight by insisting that only sovereigns have the "right authority" to wage war.[1] It was not until the adoption of the Additional Protocols in 1977 that nonstate actors fighting in civil wars incurred obligations to comply with the Geneva Conventions—a delay due in large part to states' reluctance to legitimize such entities.

Over time, however, the legal and normative backdrop to armed conflict has evolved to include a broader set of actors, as a result of both the changing nature of war and the development of international criminal law. This chapter will concentrate on a particular set of actors, nonstate armed groups (NSAGs), as a critical "constituency" for any endeavor that seeks to enhance the protection of cultural heritage in contemporary situations of violent conflict. It examines the growing literature from political science and civil war studies on the motives, structure, and behavior of NSAGs, and draws out implications for those seeking to develop strategies to limit the destruction of cultural property. The discussion reveals that while both law and practice have evolved in ways that acknowledge the importance of understanding and, in some cases, engaging with nonstate armed groups, the long-standing reluctance of states to undertake actions or commitments that they believe

might legitimize such entities, or challenge the authority of existing governments, remains a formidable constraint. This reluctance also extends to state-based organizations, such as the United Nations and its agencies.

Conflict data reveal that the incidence and nature of armed conflict have changed significantly over the last two decades. While for much of the post-1945 period the phenomenon of interstate war has been on a steady decline, the same cannot be said for wars within states. Between 2001 and 2016, for example, the number of non-international armed conflicts more than doubled, from fewer than thirty to more than seventy.[2] Moreover, research organized by the International Committee of the Red Cross (ICRC) indicates that today's armed conflicts are characterized by a proliferation of NSAGs, with more such groups emerging in the last decade than the previous seven decades combined.[3] An increasing number are also highly decentralized and enter into constantly shifting alliances at the local, national, or international level,[4] thereby defying analysts' attempts to categorize the shape of many of today's armed conflicts. Only one-third of contemporary wars are fought between two belligerent parties, while close to half feature between three and nine opposing forces and just over twenty percent have more than ten parties to the conflict.[5] Just one year chosen from the decade-long conflict in Syria conveys the complexity of twenty-first century conflict landscapes: in 2014 over one thousand armed groups were engaged in hostilities.[6]

Many of these decentralized NSAGs emerged from the 2011 Arab Spring popular protests, the insurgencies in Iraq, Syria, Ukraine, and Afghanistan, and among self-proclaimed jihadi groups in Africa, South Asia, and the Middle East. In 2017, approximately forty percent of states experiencing armed conflict were confronting jihadi groups, as new recruits filled their ranks for a variety of motives, including humiliation, perceived injustices, and corruption.[7] Within these contexts, armed groups have perpetrated exceptionally brutal forms of violence and destruction that place inordinate stress on the existing frameworks for regulating armed conflict.[8]

Sovereign states, however, also bear a share of the responsibility for the erosion of norms of conduct in war and the ethic of restraint that underpins them. In response to the threat posed by NSAGs, some state representatives have proclaimed the desire to see fighters from the Islamic State of Iraq and Syria (ISIS, also known as ISIL or Da'esh) killed rather than detained or prosecuted, thus departing from longstanding international law on the treatment of captured or surrendered fighters.[9] In addition, some powerful states are increasingly "outsourcing" warfare to human or technological "surrogates" to keep their distance from the battlefield and lessen the domestic costs of direct involvement.[10] This has translated into logistical, training, intelligence, advisory, and air support to direct parties to a conflict, which—though often directed at state military forces—can flow to private security companies, nonstate armed groups, militias, or even community vigilantes. These various forms

of outsourcing amplify the trend toward diluted responsibility for battlefield conduct, as state sponsors evade accountability for their proxies' actions, despite the ongoing legal obligation of the former to ensure respect for international humanitarian law (IHL).[11]

The discussion of these issues in the chapter proceeds as follows. The first section explains how the category of NSAG must be further disaggregated, given the significant differences in the central purposes of such groups, the types of authority and hierarchy within their organizational structures, and the range of their ideological commitments. Next, I show that while some NSAGs have brazenly challenged the legal and normative framework designed to protect populations and cultural heritage in situations of violent conflict, others have proved crucial to the safety and preservation of cultural property. The third section demonstrates that NSAGs and their individual members do not operate in a legal vacuum, but rather are bound in meaningful ways by a considerable range of obligations under international humanitarian law, international criminal law, and the legal instruments relating specifically to cultural heritage. The next section, drawing on the ICRC's *Roots of Restraint in War* project and report, argues that rather than formulating one general recipe to address the challenges posed by NSAGs, we should situate such groups on a spectrum, and employ a deeper understanding of the variation in their structures and behavior to inform the development of tailored strategies aimed at protecting cultural heritage. The chapter concludes with a discussion of the challenges confronting efforts to engage with NSAGs, including the effects of counterterrorism policies that have affected the willingness of both states and nongovernmental organizations (NGOs) to enter into a dialogue with such groups. Although existing law does not itself prohibit contact or dialogue, counterterrorism measures have had the indirect effect of limiting efforts to engage NSAGs on issues related to the protection of populations and, by extension, could limit the strategies of those seeking to protect cultural heritage.

Deconstructing the Category of NSAG

As a first step to understanding how NSAGs (and their sponsors) might challenge the protection of cultural heritage, and how such challenges could be mitigated, it is crucial to unpack this category and identify its many variants. Here I adopt NGO Geneva Call's definition of an NSAG as "any organized group with a basic structure of command operating outside state control that uses force to achieve its political or allegedly political objectives."[12] Note that in order to distinguish NSAGs from drug cartels or criminal gangs, we need to move beyond the general criterion of any actor that challenges the state's monopoly on the use of legitimate violence, to include the strategic use of violence for *political* ends.

Similarly, in differentiating NSAGs, we might begin by recognizing the various types of political objective that shape their behavior. These can range from the push for particular government reforms (e.g., the Revolutionary Armed Forces of Colombia, or FARC), to secession and new state creation (e.g., the Liberation Tigers of Tamil Eelam in Sri Lanka), to regime overthrow (e.g., the Houthis in Yemen), to the creation of a new territorial and political order (e.g., the case of ISIS). As I suggest below, the more concrete the overall political objective, the more likely an NSAG is to engage with other actors if such engagement contributes to achieving its overarching goals.[13] Entities oriented toward independent statehood, for example, are particularly concerned with recognition by the international community and thus often demonstrate openness to political negotiation and compliance with international humanitarian law.[14] Conversely, the lack of a clear political objective can frustrate attempts at political dialogue with NSAGs and often intensifies the nature of the violence used by and against them.

A second feature of NSAGs is variation in the nature of the relationship between their political and military wings, with some groups having parallel organizations (e.g., Sinn Féin and the Irish Republican Army in Northern Ireland), others featuring political and military branches within the same organization (e.g., the Sudan People's Liberation Movement/Army, SPLM/A, in South Sudan), and others having fully integrated politico-military structures (e.g., the Farabundo Martí National Liberation Front in El Salvador). Those NSAGs with separate political and military structures have been found to be less violent toward civilians, more likely to comply with international humanitarian law, and more open to political negotiation.[15]

The third axis along which NSAGs vary is organizational type. Some groups have state-like features, with clear command structures and a leadership that exercises effective control over the rank and file, particularly through indoctrination, training, and the exercise of military discipline. Many anticolonial and secessionist movements have organized themselves in this hierarchical fashion precisely in order to demonstrate their approximation to sovereign states.[16] Most NSAGs, however, are either divided into competing factions or participate in loose coalitions with ambiguous lines of command and weak control by the "center."[17] Common rules of behavior in this context are either inconsistent or nonexistent, and subcommanders frequently exercise considerable authority and discretion. Indeed, some NSAGs consciously embrace fragmentation and rely on loosely allied self-managing units in order to strengthen their resilience and protect themselves from decisive attacks on their core organization.[18] This is particularly true for al-Qaeda, which consists of more than forty distinct groups, each with its own structure and history, and—despite sharing a common identity—exhibiting significant variation in the patterns of violence and behavior vis-à-vis external actors.[19]

The degree to which NSAGs are "vertically integrated"[20] or horizontally organized is thus a critical factor affecting an individual combatant's understanding of and respect for norms of restraint. But analysts have pried open the black box of the NSAG even further, to examine the potential differences between leaders and followers. Research on leaders, for example, has explored whether they are simply instrumentalizing conflict to access power or resources and whether they are playing a "game" of survival—in which case they are likely to be resistant to efforts at negotiation.[21] Research on followers has sought to determine which individuals are most likely to fight, the factors that enable their mobilization into armed groups,[22] and how specific modes of recruitment may be connected to the way in which NSAGs treat civilian populations. The findings indicate that NSAGs that are made up mainly of "consumers"—those who pursue economic gain—are much more likely to mistreat civilian populations and use indiscriminate violence than those consisting of individuals more invested in a particular political cause.[23]

A fourth differentiating feature of NSAGs is their level of community embeddedness—i.e., whether their strength and longevity are dependent on a local community, or whether they are largely self-sustaining. At one end of the spectrum is ISIS, which has relied heavily on foreign fighters and extra-community sources of funding, or the Lord's Resistance Army of central Africa, which does not attempt to hold territory or establish deep connections to local communities. This contrasts with those NSAGs that draw their support from a particular sector of the community and hence try to enhance their legitimacy by providing social services and other governance functions to that population.[24] The extent of this "rebel governance" has been shown to influence the nature of NSAG–civilian relations, with some groups having either predatory or parasitic relationships with local populations, and others more symbiotic and constructive ties.[25] At the far end of the spectrum are NSAGs explicitly formed to defend community interests, such as South Sudan's Titweng, Gelweng, and Gojam armed cattle-keeping groups. Overall, the degree of community embeddedness can have a significant impact on the propensity of NSAGs to resort to lethal violence against civilians and the destruction of civilian infrastructure.

The presence and strength of ideology is a fifth differentiating factor among NSAGs, as ideologies can both motivate and justify behavior. Although much of the early scholarship on the microfoundations of civil conflict downplayed the role of ideology as a driver for violence against civilians or civilian infrastructure,[26] in favor of economic or other instrumental motives for violence, more recent political science research has reasserted the significance of ideology.[27] More specifically, we now understand how ideology can impact both the deeper structural context and more immediate situational incentives facing members of armed groups, and thus exerts both indirect and direct effects. It can socialize combatants into a cohesive collective that is then better able to execute difficult orders and prevent individual "defection,"

and it can directly define the normative commitments of combatants which shape their interpretation of their context and influence their actions and responses.[28] In brief, ideas help members of NSAGs determine who is a friend and who is an enemy, who and what gets protected, and against whom or what violence can be used.[29]

For violent extremists, such as those that have operated in Syria, Iraq, and Afghanistan, "atrocity-justifying ideologies" can provide a powerful resource for individuals in leadership positions within NSAGs, as well as for those who carry out their orders.[30] These exclusionary ideologies justify the targeting or even extermination of members of particular groups—along with key symbols of their culture. In fact, there is mounting evidence that we can only account for the variation in belligerents' proclivity to engage in mass killing and other atrocities by analyzing these preexisting negative attitudes and beliefs toward a targeted group.[31]

Ideology is therefore a particularly crucial element for discerning the "why" and "how" of attacks on cultural heritage, since such acts do not always take the form of collateral damage from poorly executed military strikes, but rather represent a subcategory of conflict behavior that is both deliberate *and* public. Extreme forms of violence or destruction present a puzzle for many analysts of civil conflict, as they frequently entail costs for perpetrators—in terms of lost credibility or retaliation—or provoke moral outrage that fuels resistance. In explaining why belligerents nonetheless engage in time-consuming and costly displays of "extra-lethal" violence or "extreme atrocity,"[32] scholars have argued that certain war-time behaviors are "performative": they are designed to produce particular effects for both local and international audiences, such as enhancing the power and prestige of perpetrators[33] or proving loyalty to the group.[34] Understood in this way, the public displays of extreme violence (such as beheadings or crucifixion) that constitute ISIS's "global spectacle" are neither instances of random brutality nor exceptional evil, but rather strategic practices aimed at unsettling audiences through their transgression of prevailing norms, and forcing them to confront the reality of a new political order.[35]

In sum, NSAGs differ considerably in their core purposes, the relationship between their military and political leadership, their organizational structure, their degree of community embeddedness, and the nature of their ideological commitment. These factors in turn influence how NSAGs engage strategically and tactically with legal and normative frameworks for regulating conduct in war. Some groups consciously attempt to adhere to principles of international humanitarian law, such as those that have signed pledges brokered by Geneva Call,[36] while others, such as ISIS, intentionally flout international legal obligations—either for the ideological reasons suggested above or to coerce opponents or populations under their control. All five of the dimensions discussed here should also be understood as fluid and dynamic. The nature and behavior of NSAGs can shift across both space—the geography of a conflict—and time—the lifespan of a conflict. When considering whether and how to

engage with NSAGs, it is therefore essential not only to develop a tailored approach, depending on the type of actor, by also to regularly reassess these factors and how they might be shaping their behavior.

The Engagement of NSAGs with Cultural Heritage

It has been a convenient diversionary tactic of many national governments to depict NSAGs as the primary perpetrators of war crimes and therefore as *the* key problem when it comes to such atrocities. During my tenure as special adviser to the UN Secretary-General on the responsibility to protect, I was frequently encouraged by state diplomats to focus on understanding and addressing the challenge posed by these "bad actors." Yet it is worth remembering that states themselves are still responsible for many violations of IHL. Moreover, even when concentrating exclusively on NSAGs, we should resist the temptation to categorize all as potential perpetrators, particularly when it comes to attacks on cultural heritage.

Instead, following the analysis conducted by Geneva Call, two broad categories of NSAG can be identified: those which destroy such heritage as a matter of policy and deliberate method of warfare, which the organization refers to as the "destructive trend"; and those which have demonstrated appreciation for cultural heritage and in some cases have taken conscious actions to protect it—the "non-destructive trend." In the latter case, particular military tactics or ignorance of obligations under IHL may still expose cultural heritage to incidental damage.[37]

The destructive acts of those in the first category, such as ISIS or radical Islamists in the Sahel, are most often ideologically motivated and justified on religious grounds. Attacks on statues, shrines, or temples are driven by the conviction that the worshipping of these objects is idolatrous or impious, and that prevailing religious or cultural beliefs which are heretical must be erased in favor of a more perfect or "true" interpretation of Islam. To borrow from the words of Irina Bokova, the former director-general of the UN Educational, Scientific and Cultural Organization (UNESCO), the destruction of mosques, mausoleums, and tombs is part of a larger campaign of "cultural cleansing," in which alternative or diverse cultural beliefs and practices are denied.[38] But as suggested above, such attacks can also be theatrical and aimed at alternative audiences: the international community and potential recruits. For the former, the destruction of cultural heritage—as in Mosul in Iraq or Palmyra in Syria—represents an "act of defiance" against the outside world that calls into question the power and authority of the international community, and its norms and principles.[39] For the latter audience, the demolition of high-profile monuments is a means of proving strength and success, which serves as a magnet for prospective fighters. Finally, some violations of the rules and norms surrounding the protection of cultural heritage stem more directly from economic incentives. In conflict contexts from Iraq to Somalia, looting and trading in antiquities are key sources of revenue for

NSAGs to prolong their fighting. Even if valuable objects themselves are not destroyed, illegal excavations can result in destruction of their "contextual background."[40]

Turning to the non-destructive trend, there are many striking examples in which NSAGs have either expressly committed to be bound by laws and norms relating to the protection of cultural heritage and thus willingly agreed to restrain their actions, or in which members of such groups have established special departments or procedures to catalogue and safeguard antiquities, and secured sites with armed guards or reinforcements such as sandbags. In Sudan in the 1980s, for example, the high command of the SPLM/A issued a directive to its rank and file to respect cultural property (including religious monuments), while in the Philippines, members of the National Democratic Front agreed with the government in Manila to be bound by IHL—including provisions on historical monuments, cultural objects, and places of worship. Kurdish Peshmerga fighting in Iraq were also trained in the need to protect cultural heritage and were given a "Guide to Mosul Heritage" prior to their military operations. In Libya, the Free Libyan Army (the precursor to the country's National Transition Council) took steps to protect the National Museum of Tripoli during the fighting that followed the fall of Muammar Gaddafi. In a similar way, the commanders of the Free Syrian Army have deployed personnel and established protective measures for key archaeological sites as well as the Umayyad Great Mosque of Aleppo.

These examples indicate how some NSAGs are potentially part of the *solution* to protecting cultural heritage. At the same time, a general recognition of the values underpinning the regime of protection on the part of armed group members often proves insufficient. Cultural sites have suffered collateral damage when they are situated in strategic military locations (as was the case for some valuable sites in Aleppo), or when NSAGs fail to fulfill the obligation to take precautions to protect cultural heritage. In addition, many of the interviews conducted by Geneva Call for its study of attacks on cultural heritage revealed a lack of clarity on the part of armed groups as to when and whether sites could be used for military purposes and how to operationalize the principle of military necessity. To take just one illustration: the Crac des Chevaliers, a medieval Crusader fortress near Homs in Syria, was used as a military base by NSAGs in the summer of 2013 but then quickly became a target of government-led bombardment. Finally, discussions with NSAGs indicate that some are simply unaware of the Blue Shield emblem used to denote cultural heritage, as established by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, or are unsure of the obligations associated with it.

The discussion above suggests that some NSAGs are and will remain key culprits in attacks on cultural heritage, particularly if they are ideologically motivated to engage in "extreme atrocity" or are indifferent to the alienating effects of their actions on local and international audiences. But it also points to the potential to enhance the respect of some NSAGs for rules and norms protecting cultural heritage through

different strategies of engagement (discussed further below). This is particularly true for those NSAGs fighting for the rights of national, ethnic, and religious minorities—and which are therefore likely to be aware of the symbolic value of cultural heritage—as well as groups seeking international recognition for their claims. Political scientists such as Hyeran Jo have identified a subset of rebel groups that exhibit a greater tendency to comply with the laws of war, either because their local norms are consistent with global norms or because compliance is instrumentally valuable in enhancing the legitimacy of their armed struggle. These "legitimacy seeking" NSAGs, who make strategic calculations in the context of a larger political environment, are thus more open to the overtures of humanitarian organizations or other international agents of international law as they seek to encourage restraint and respect for IHL.[41]

The Responsibilities and Obligations of NSAGs

Although NSAGs are frequently depicted as being outside the boundaries of the international community, they do not operate beyond the reach of the law. They are bound by a considerable range of relevant obligations under existing IHL, and individual members of such groups can be subject to international criminal law in cases where they commit international crimes. The discussion in this section addresses the law of armed conflict before analyzing the legal regime protecting cultural heritage.

Common Article 3 of the Geneva Conventions binds all parties to a non-international armed conflict to refrain from using violence against individuals taking no active part in hostilities. Additional Protocol II also requires NSAGs to respect and protect civilian populations, and contains specific rules relating to the protection of cultural objects. While the protocol has traditionally applied only to situations in which such groups control territory, many of its provisions are now recognized to form part of customary international law and are thus also applicable where NSAGs are not in full control.[42] More generally, many aspects of IHL applicable to international armed conflict, as a matter of treaty law, are now also considered to apply in non-international armed conflict and therefore also to NSAGs as a matter of customary law—regardless of whether such groups control territory. This includes aspects of the Geneva Conventions that relate to prohibitions on the destruction of cultural property.[43]

In addition, while international human rights law is still relatively limited with respect to NSAGs, given that it is focused on obligations of the *state* toward individuals within its jurisdiction, developments in international criminal law—particularly the broadening of the scope of crimes against humanity and war crimes to include acts committed in non-international armed conflict—have provided possibilities for establishing individual criminal responsibility for members of such groups.[44] In the context of Syria, the 2016 report of the Independent International Commission of

Inquiry, established by the UN Human Rights Council, therefore emphasized the need for all groups to be held accountable for violations of IHL that amounted to war crimes.[45] This includes, for example, those offenses specified in Articles 8.2.c and 8.2.e of the Rome Statute of the International Criminal Court (ICC), which apply to conflicts "not of an international character." These steps and others have helped to address what was previously a notable imbalance in the impunity enjoyed by nonstate and state actors. It is now the gravity of the crime, rather than the requirement of statehood, that has become crucial for criminal accountability.[46] It should also be noted that international criminal law establishes the responsibility of individual members of nonstate armed groups for international crimes not committed in the context of armed conflict (and thus outside the ambit of IHL), including genocide and crimes against humanity.

In situations where international criminal law cannot be applied or where the protection of populations requires more than general compliance with common Article 3, the task of establishing responsibility is more complex. Agreement to restrain behavior and assume responsibilities will then depend on the consent and compliance of members of NSAGs themselves,[47] a fact that has fostered the attempts by Geneva Call to encourage NSAGs to sign its public pledges, called deeds of commitment, to follow the principles of IHL. Skeptics of this approach might argue that by attributing responsibilities to NSAGs, the international community is headed down a slippery slope of not only legitimizing such actors but also endowing them with state-like attributes—a move that some states with secessionist movements strongly resist. But organizations like Geneva Call insist that this further step is not implied. Its engagement with NSAGs is directed at setting expectations for behavior with respect to a population and civilian infrastructure over which an NSAG exercises a measure of control, rather than to pass judgment on the rightness or wrongness of that control.[48]

On first sight, the legal framework regarding the protection of cultural heritage appears to apply more explicitly and directly to NSAGs than does the general legal regime for armed conflict. Article 19 of the 1954 Hague Convention enunciates core obligations for all parties in non-international armed conflict—state and nonstate—while Article 4 outlines those relating to the prohibition of the use of cultural property in ways that might expose it to damage; the prohibition of acts of hostility or reprisal against cultural property; and the obligation to take precautionary measures to prohibit, prevent or cease acts of theft, misappropriation, or vandalism.

Nevertheless, when digging a bit deeper, one finds structural asymmetries in the convention which result in more limited provisions for nonstate than for state parties. For example, Article 7's provisions on training and safeguarding measures apply only to states, and there are no mechanisms for the exchange of information between warring parties with respect to the location of cultural property. The latter gap places

NSAGs at a distinct disadvantage vis-à-vis national governments in terms of compliance, since knowing "the location of cultural property is a prerequisite to ensuring respect for its integrity." Similarly, Article 28 is ambiguous as to whether NSAGs have the same obligations as state parties when it comes to prosecuting individuals that have breached the convention. Finally, Article 23 stipulates that only state parties can call upon UNESCO for "technical assistance" in organizing the protection of their cultural property. This has created a "unidirectional" means of communication between NSAGs and UNESCO that exposes the former to difficulty when they require specialist advice or assistance, as was the case in Mali in 2012–13, for example, with respect to the protection of rare manuscripts.[49]

The 1999 Second Protocol to the Hague Convention reaffirms the application of its rules to non-international armed conflict and contains a number of "enhanced protection" obligations that are directly relevant to NSAGs.[50] Most notably, unlike the Additional Protocols to the Geneva Conventions, this one applies to all such groups even if they do not control a portion of a state party's territory or if the conflict only involves NSAGs. Furthermore, Article 15.1 of the Second Protocol identifies a subset of conduct in violation of its rules that gives rise to universal criminal jurisdiction; as a result, a member of an NSAG that has allegedly committed such acts can be prosecuted or extradited by the state party on the territory of which the individual in question is situated.[51] Article 15.2 extends the principle of command responsibility to the leaders of NSAGs, by enabling them to be held criminally responsible for the failure to exercise control over criminal actions that they knew, or had reason to know, were being committed by forces under their control. Nonetheless, some of the asymmetries established in the 1954 convention have echoes in the more recent protocol, including the lack of an explicit right for NSAGs to request technical assistance from UNESCO, and the lack of access for NSAGs to a special fund established by the protocol to assist with undertaking safeguarding measures for cultural property (Articles 29 and 32).

Beyond the 1954 convention and 1999 Second Protocol, other hard and soft law instruments relate to the protection of cultural property and heritage that create varying obligations for NSAGs. In addition, as noted above, significant advances in international criminal law, through the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC's Rome Statute, now establish that attacks by members of NSAGs on cultural heritage can constitute a war crime (in both non-international and international armed conflicts); can be considered a crime against humanity when they amount to "persecution" against an identifiable group; or can be deemed to demonstrate the intent to commit genocide.[52] Lastly, it is worth underscoring the moves taken by the UN Security Council to request that all parties to conflicts—state and nonstate—halt damage to cultural heritage (e.g., resolution 2056

in relation to Mali[53]) or take proactive steps to protect cultural property (e.g., resolution 2139 in regard to Syria).

This overview of the legal framework suggests that the primary challenge in protecting cultural heritage is not the creation of new rules to regulate the behavior of NSAGs, but rather ensuring compliance with already existing obligations. While ideally some of the imbalance between state and nonstate rights and obligations should be rectified—much in the same way that lawyers are pressing for harmonization in the rules applying to international and non-international armed conflict[54]—the more urgent task is to develop strategies and tactics for encouraging and enabling NSAGs to adopt safeguarding measures and exercise restraint in their belligerent conduct.

Understanding Sources and Possibilities for Restraint

The discussion thus far has highlighted two main openings for engagement with NSAGs with respect to the protection of cultural heritage: the fact that not all NSAGs are alike and that some have strong motivations for modifying destructive behavior; and that such groups can be held accountable for breaches of international humanitarian law and their individual members for violations of international criminal law. For almost two decades, the ICRC has built on these insights to intensify its efforts to persuade belligerents to comply with the legal and normative regime regulating armed conflict. The first ICRC-sponsored study on this theme, *The Roots of Behaviour in War*,[55] explored the social and psychological processes that condition the behavior of fighters during armed conflict, including the pressures of group conformity. The findings of this initial wave of research led the ICRC to expand its focus from boosting awareness of the law to ensuring that it was better integrated into the inner workings of armed forces and armed groups, including through doctrine, training, and measures for sanctioning breaches of legal frameworks. But despite the merits of this "integrated approach," the ICRC continued to pursue modifications in levels of violence through the lens of legal obligation, without sufficient attention to more local norms or values that underpin the behavior of conflict parties, and to the degree of variation in levels of restraint exhibited by belligerents. Moreover, while the integrated approach had some traction in conflict parties with a vertical or hierarchical structure, it struggled to address the increasingly horizontal and decentralized structure of many NSAGs.[56]

The most recent research sponsored by the ICRC has therefore focused more squarely on how restraint is, or could be, generated in different types of armed actors.[57] In so doing, it builds on a new wave of conflict studies that goes beyond describing and explaining different types or "repertoires" of violence in war and instead treats restraint as the "outcome of interest."[58] While to date this scholarship has mostly considered state forces and has not yet generated a parsimonious causal

explanation for how restraint is achieved,[59] the ICRC's *Roots of Restraint in War* project and report have more closely examined the *process* of engendering restraint, with the hope of providing more policy-relevant and actionable insights.

More specifically, the project advances an analytical framework centered on processes of socialization, whereby a "culture of restraint" is generated and maintained through the instilling of social norms. Drawing on research on different types of socialization,[60] the report emphasizes the need to move from situations in which norms are adopted by actors on the basis of instrumental calculation (to secure reward or avoid punishment) or in order to conform to group expectations, toward a situation in which norms become part of a belligerent's identity and are seen as the "right thing to do." Though IHL remains vital in setting standards for behavior, it is only by encouraging individual combatants to internalize the values underpinning law, through socialization, that restraint becomes more enduring.[61]

Two of the five axes of variation in NSAGs outlined earlier are the starting point for determining how norms conducive to restraint can be formed and reinforced: organizational structure and community embeddedness. A core finding of the ICRC's research is that different configurations of these two variables suggest different approaches and points of access for most effectively promoting restraint.[62] Furthermore, whether the conflict party is a state or nonstate actor will determine which influences shape an individual combatant's understanding of, and respect for, norms of restraint. Although individuals might adhere to certain norms for a range of religious, cultural, or personal reasons (which exist independently from or prior to their membership in an armed group), organizational structure will help pinpoint which of the following sources of restraint will be most influential: commanders, group ideologies and institutions, peer groups, and external pressures. For example, though hierarchical armed groups might be amenable to top-down training approaches led by commanders, decentralized armed groups often do not have written codes of conduct and individual subcommanders exercise significant authority, often through forms of charismatic leadership.

In this latter context, research shows that restraint among the members of NSAGs is more likely to be influenced by societal actors or "community notables" *external* to the group itself, including, in some cases, business elites or religious leaders.[63] External actors can thus draw on religious, social, or even economic authority to sway the behavior of combatants; yet, as the authority and status of local actors fluctuate, so too does their influence. As the cases of Mali and South Sudan highlight, multiple social and religious authorities can even compete for control over armed groups' use of violence. This may present more entry points for dialogue about behavior, but it may also dilute the impact of any single influence on the armed group. Actors seeking to influence armed groups must therefore consider the growing complexity of alliances among NSAGs—with groups composed of "networks of networks"—and

should identify and engage with key "nodes" that have the greatest leverage in promoting either violence or restraint.[64]

While for the ICRC the key norms of restraint to encourage are those ideas and practices that regulate behavior with respect to noncombatant immunity, theoretically it is possible to imagine a wider set of ideas and practices related to the protection of cultural heritage. Five other important implications flow from the ICRC's research:

1. Most obviously, a detailed understanding of the inner workings of armed groups is a key prerequisite for identifying the sources of authority, beliefs, and influence which can steer the behavior of NSAG members toward restraint. In short, as expert analysts note, "there is no one-size-fits-all approach, as behavior is also shaped by values, traditions, ideology, and communities' attitudes on acceptable behavior";[65]

2. Relatedly, understanding local viewpoints and values will be particularly important for the promotion of restraint, and therefore necessitate deeper and more sustained dialogue with communities themselves. Here it is crucial to remember that civilians living in communities are not passive actors but can often influence armed-group behavior in favor of violence or restraint;[66]

3. Training manuals on engagement with armed groups may also need to be rewritten, since they are heavily skewed toward rational actor models and currently identify leverage points based on assumptions about militants' economic or political interests;[67]

4. The *Roots of Restraint* research highlights the importance of analyzing patterns of violence and destruction over time—type, method, target, and frequency—to enable a better understanding of where and when restraint is being exercised, what sources of influence might be shaping armed group actions, and when violence and destruction are explicitly ordered by group leaders, as opposed to opportunistic behavior practiced by only a few local commanders or fighters.[68] Identifying the decisionmakers behind patterns of violence and destruction will assist local or international actors as they try to target the optimal leaders with whom to engage; and

5. The ICRC's findings indicate that the set of actors tasked with encouraging restraint will need to broaden. Although international humanitarian organizations can still play essential roles in promoting restraint in some cases (as in the integrated approach), the changing nature of armed conflicts and of NSAGs suggests the need to mobilize new societal actors to the cause of limiting violence.[69] Once again, the organizational structure of an armed group will provide important clues to the sources of influence on the behavior of its members.

Conclusion: Challenges in Engaging with NSAGs

The research conducted by the ICRC and Geneva Call illustrates that while NSAGs have not taken part in elaborating the formal rules that regulate armed conflict, including those that protect cultural heritage, some of them acknowledge the importance of the *values* underpinning the legal regime. And even in the toughest cases—extremist groups motivated by ideology—there have been documented cases of disagreement within the NSAG about the legitimacy of targeting particular religious symbols.[70] This suggests that although efforts to shape the behavior of NSAGs are inherently difficult, there are opportunities to both enhance awareness of international standards relating to cultural property and encourage forms of behavior likely to protect cultural heritage. Specialized agencies and humanitarian organizations should therefore leverage such opportunities, but so too should states which exercise a degree of control over nonstate armed groups and which are indirectly responsible for their destructive behavior.

To date, however, only a few specialized organizations have sought to engage directly with NSAGs to promote respect for cultural heritage. These include Heritage for Peace as well as the Smithsonian Institution. For its part, UNESCO has exhibited caution with respect to dialogue with NSAGs in light of Article 1.3 of its constitution, which forbids the organization from intervening in matters which are essentially within member states' domestic jurisdiction. Generally speaking, UNESCO interprets contact with NSAGs to be a breach of this obligation and limits its contact to recognized governments. Article 19.3 of the Hague Convention does permit UNESCO to "offer its services" to parties to a non-international armed conflict—both state and nonstate—and expressly states that such contact does not affect the legal status of NSAGs. But in practice instances of engagement between UNESCO and such actors have been rare,[71] and most commonly consist of calls by the organization's director-general for all parties to respect legal obligations in relation to cultural heritage or to help facilitate agreements with them to create "cultural protection zones."[72] In February 2016, UNESCO entered into a memorandum of understanding with the ICRC to strengthen cooperation with respect to the protection of cultural heritage, but there was no explicit mention of NSAGs. Although the ICRC regularly engages with all conflict parties to serve its mission, UNESCO's approach—as an intergovernmental organization—reflects the long-standing concerns of governments about legitimating nonstate armed actors.

Counterterrorism measures undertaken in the wake of 9/11 have further complicated dialogue with NSAGs that have been designated as terrorist organizations. Sanctions regimes authorized by the European Union and UN Security Council, for example, prohibit making economic resources available to such groups—whether directly or indirectly. Criminal measures adopted by certain states are broader in scope and can thus extend to other forms of material support. However,

the legal instruments do not prohibit mere contact with NSAGs for humanitarian purposes, despite a widespread misperception that engagement with designated entities is somehow "outlawed." In fact, a restriction on contact would conflict with existing principles of IHL and particularly common Article 3, which expressly foresees the possibility for humanitarian actors to offer services to both states and NSAGs. The funding arrangements of donors with humanitarian NGOs often replicate the restrictions outlined in sanctions regimes, but these too only regulate the provision of funds and do preclude contact or dialogue.[73]

Yet, as hinted above, various donors and humanitarian organizations are reading into the law tighter restrictions on engagement with NSAGs than exist, and thus unnecessarily curtailing their operations. Of course, humanitarian actors can and often do set more onerous standards over and above the law for reasons related to reputation or risk tolerance. For example, where they work in areas under the control of NSAGs, they may set guidelines addressing various aspects of their engagement with group members, including visibility at public events or use of organizational logos.[74] But it is crucial in any agenda that seeks to encourage restraint in the behavior of NSAGs that legal restrictions—which humanitarian NGOs must comply with—is carefully distinguished from political and policy choices.

Furthermore, it remains the case that certain governments, and their armed forces, are broadly interpreting their own domestic terrorism legislation in ways that constrain or intimidate humanitarian organizations. The Nigerian Army, for example, has threatened international NGOs with closure of their offices if their staff make overtures to Boko Haram.[75] More generally, humanitarian organizations such as Médecins Sans Frontières have underscored the negative effects of counterterrorism policy in their attempts to offer humanitarian relief in armed conflict contexts, given the practical impossibility of avoiding all contact with NSAGs active in or in control of territory where humanitarian operations are taking place.[76] Similarly, organizations such as Civilians in Conflict, the ICRC, and Geneva Call face ongoing challenges in implementing their civilian protection programs, given the need to negotiate access to civilian populations and to engage with NSAGs to encourage restraint. In the context of cultural heritage, the work of the Smithsonian has also been constrained, as contact with entities that the US government has identified as terrorist organizations is prohibited.

Any concerted strategy to leverage the opportunities that exist for encouraging NSAGs to protect cultural heritage must therefore address barriers to dialogue through both practical measures and a broader political shift on the part of international organizations and national governments. This entails a willingness to discuss long-cherished principles such as noninterference in the domestic affairs of states, the extent of the "right of initiative" on the part of actors such as UNESCO, and the courage to challenge governments' refrain that engagement with NSAGs implies

legitimation. It also calls for states to demonstrate greater *political* will to ensure that humanitarian action and contact with NSAGs are not impeded by national or multilateral counterterrorism strategies—as called for by the UN General Assembly in 2016.[77] Above all, it requires a deeper recognition that NSAGs are not always the core problem and might instead form a crucial part of the solution to ensuring the survival of cultural heritage for the next generation.

BIOGRAPHY

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51. This right to prosecute can be activated even if the offense was committed in another state or if the individual committing the offense is not one of the prosecuting state's nationals. See 1999 Second Protocol to the 1954 Hague Convention, Art. 16.1.

52. Geneva Call, *Culture under Fire*, 21–22. There are some obvious limitations to the reach of ICC prosecution, which have particular relevance for situations involving NSAGs. According to the Rome Statute, only individuals that are nationals of a state over which the court has jurisdiction, or that have allegedly committed a crime on such a state's territory, can be prosecuted. This did not prevent the ICC from playing a role in Mali, with respect to the high-profile case of Ahmad al-Mahdi, but it has limited the possibilities for prosecution with

respect to the destruction of cultural property in Iraq and Syria, which are not parties to the statute. In addition, the ICC's jurisdiction is activated only in situations where the "most serious" international crimes are committed, which may not be the case in some instances where cultural heritage is attacked.

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