LEGAL BRIEF

FORCIBLE RECRUITMENT OF ADULTS BY NON-STATE ARMED GROUPS IN NON-INTERNATIONAL ARMED CONFLICT

Diakonia Lebanon International Humanitarian Law Resource Desk

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EXECUTIVE SUMMARY

The purpose of this Brief is to demonstrate that non-State armed groups (NSAGs) are prohibited from forcibly recruiting adults in the context of a non-international armed conflict (NIAC) on the basis that such conduct amounts to an 'outrage upon personal dignity', contrary to Common Article 3(1)(c) of the four Geneva Conventions of 1949.[1] The scope of this prohibition would apply to all protected persons under Common Article 3; namely: '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' (out of combat) by sickness, wounds, detention, or any other cause.[2] It is submitted that forcing such persons to engage in military-style operations without the legal protection of the State – and often against their State of nationality – causes sufficient humiliation and degradation so as to constitute an outrage upon personal dignity.

While it is accepted that international law recognises the inherent right of States to forcibly recruit their own civilians, this right not transferrable to NSAGs using the 'equality of belligerents' principle. 'Equality of belligerents' is an IHL principle that entitles all parties to the conflict to equal application of the relevant rules of IHL.[3] It ensures that the rules governing the conflict bestow the same rights and obligations on the warring-parties, irrespective of their status under international law or the reasons for the initiation of the conflict. It therefore encourages NSAGs to comply with the law. However, the equality of belligerents principle is strictly limited to the rules of IHL and does not provide NSAGs with additional rights from external sources of law. A State's right to forcibly recruit its own civilians derives from the recognition of its sovereign independence under international law and is not attributable to a rule of IHL. Accordingly, NSAGs cannot use the equality of belligerents principle to justify forcible recruitment.

Despite the absence of any positive right of NSAGs to forcibly recruit, there is equally no provision under IHL that explicitly prohibits such conduct in the context of a NIAC. Accordingly, it is necessary to demonstrate that forcible recruitment by NSAGs violates one of the existing IHL rules applicable in NIAC; namely: the prohibition on committing 'outrages upon personal dignity, in particular humiliating and degrading treatment' against persons not actively participating in hostilities or otherwise 'hors de combat'. As demonstrated in Section V, forcing individuals to kill and commit other acts of violence, expose themselves to serious risk of injury or death, or participate in a war to which they may be fundamentally opposed, is inherently capable of causing feelings of humiliation and degradation. However, if forcible recruitment by NSAGs is to be characterised as an outrage upon personal dignity contrary to Common Article 3(1)(c), it is necessary to explain why the same conduct, when committed by States, does not violate this prohibition. Otherwise, such discriminatory application of Common Article 3 would contravene the equality of belligerents principle. In response, it is submitted that the impact that forcible recruitment has on the individual in the context of a NIAC is fundamentally dependent on the legal status of the perpetrator.

When States forcibly recruit their own civilians pursuant to State law, the individual benefits from the legal protection of the State and is a recognised and legitimate actor under both domestic and international law. While the individual may still be exposed to danger and suffer feelings of distress, the lawful authority of the State prima facie precludes such conduct from amounting to an outrage upon personal dignity. This legal authority of a State to forcibly recruit own population is distinct from the manner in which the recruitment was conducted, which may amount to a violation of IHL, provided that specific legal elements of a particular violation are met. For instance, if the manner in which the State forcibly recruits protected persons in NIACs independently constitutes a violation of IHL, providing it meets the gravity threshold of humiliating and degrading treatment and there is a sufficient nexus to the armed conflict, it may simultaneously amount to an outrage upon personal dignity, contrary to Common Article 3(1)(c).

However, when NSAGs forcibly recruit adults in the territory under their de facto control, the NSAG's inherent lack of legal

1. International Committee of the Red Cross [ICRC], Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 U.N.T.S. 31 [GCI]; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 U.N.T.S. 85 [GCII]; Convention (III) relative to the Treatment of Prisoners of War (1949) 75 U.N.T.S. 135 [GCIII]; Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) 75 U.N.T.S. 287 [GCIV], Article 3(1)(c) [Common Article 3].
2. Ibid, Common Article 3(1).
3. Common Article 3 binds 'each party to the conflict', which therefore includes NSAGs. See section IV(iii) of this Brief for a discussion on the equality of belligerents principle.

authority exacerbates those feelings of distress and causes the degree of degradation and humiliation necessary to constitute an outrage upon personal dignity. Indeed, NSAGs' lack of de jure authority forces those individuals to contravene the domestic laws of the State, lose the legal protection of the State, and become an unrecognised entity under international law (outside of IHL). When coupled with the inherent danger and distressing nature of being forced to fight in a war against one's will, it is submitted that this lack of legitimacy and loss of legal protection satisfied the threshold of an outrage upon personal dignity. Under the law of NIAC, persons taking no active part in hostilities and those 'hors de combat' are therefore protected from forcible recruitment by NSAGs in all circumstances.

To this end, it should be noted that under the law of international armed conflict (IAC), States are prohibited from forcibly recruiting 'protected persons' to serve in the hostile armed forces.[4] Protected persons in the IAC context refers to prisoners-of-war and other individuals who find themselves in the hands of a party to the conflict of which they are not nationals. The rationale behind prohibiting such persons from serving in the enemy's armed forces is the inherently distressing and dishonourable nature of beingforced to fight against one's State of nationality.[5] A similar argument could be made by analogy to the forcible recruitment of adults by NSAGs, given that, in the majority of NIACs, forcibly recruited persons are also forced to fight against their State of nationality.

4. CGIV (1949), supra note 1, Arts. 51 and 147. Article 51 of GCIV (1949) states: 'The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.' See also: CGIII (1949), supra note 1, Art. 130.
5. See: Louise Doswald-Beck and Jean-Marie Henckaerts, (eds.), Customary International Humanitarian Law (2006) Brussels/ Geneva, Bruylant/ICRC [CIHL Study], Rule 95: 'The reasoning behind the rule is the distressing and dishonourable nature of making persons participate in military operations against their own country – whether or not they are remunerated.'

SCOPE OF THE BRIEF

This legal Brief examines the international legal framework applicable to forcible recruitment of adults by NSAGs in the context of a NIAC. It is based on the sources of IHL; namely: treaty law contained in the 1949 Geneva Conventions (GCI-IV (1949)[6]) and their 1977 Additional Protocols (API-II (1977)[7]); the official International Committee of the Red Cross (ICRC) Commentaries to those treaties; and on customary law as compiled in the 2005 ICRC Study on Customary International Humanitarian Law (CIHL Study).[8] Further support is gleaned from academic writing and other scholarly commentary on the applicable law. Information is also taken from official Reports of various organs of the United Nations (UN), as well national and international organisations and NGOs.

The application of IHL is dependent on the existence of an armed conflict. The relevant conflict to which Common Article 3 applies is referred to as a 'non-international armed conflict' or NIAC. The following prerequisites are necessary to satisfy the definition and threshold of a NIAC:

i. *At least one of the parties to the conflict must be a non-State entity. As recognised by the ICRC[9] and in ILC jurisprudence,[10] fighting between two NSAGs without the involvement of any State also satisfies the definition of a NIAC.*

ii. *NSAGs party to a NIAC must possess a sufficient degree of organisation. This is typically defined by the ability to sustain military operations, the existence of a chain-of-command and military-style hierarchy, and the ability to plan military-style campaigns.* [11]

iii. *The violence between the parties must meet the requisite threshold of intensity. Indicative factors include the seriousness of attacks, distribution of weapons, extent of material destruction, injury and loss of life, geographical spread, reactions of the UN Security Council, and the existence of cease-fire agreements.*

Pursuant to Common Article 3 of the four Geneva Conventions of 1949, '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.' The provisions contained within Common Article 3 bind each party to the conflict and shall be applied 'as a minimum'. The prohibition on committing outrages upon personal dignity under Common Article 3(1)(c) therefore applies to both States and NSAGs in accordance with the equality of belligerents principle.

The scope of this Brief is limited to forcible recruitment and does not address (voluntary) enlistment.[12] While the proposed prohibition is most likely applicable to NSAGs that exercise de facto control over part of a territory, it is important to note that NSAGs would be prohibited from forcible recruitment in all circumstances; i.e. the prohibition is not limited to situations in which the means used to forcibly recruit independently violate IHL. Finally, the scope of this Brief is restricted to the forcible recruitment of persons over 15 years of age. The reason for this delimitation is that the incorporation of persons under 15 years of age into armed forces or groups is categorically prohibited under customary IHL and ICL, irrespective of whether such incorporation is voluntary or compulsory.

6. GCI – IV (1949), supra note 1.
7. ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) 1125 U.N.T.S 3 [API]; Protocol Additional to the Geneva Conventions of August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1949) 1125 UNTS 609 [APII].
8. ICRC, CIHL Study, supra note 5.
9. ICRC, Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 2nd edition (2017) available at: <https://ihl-databases.icrc.org/> [ICRC 2017 Commentary GCII], Common Article 3, at paras. 415 and 416.
10. ICTY, Prosecutor v. Dusko Tadić, IT-94-1-AR72, Appeals Judgement (2 October 1995), at para. 70.
11. International Criminal Court [ICC], The Prosecutor v. Gemain Katanga, ICC-01/04-01/07-3436, Trial Judgement (7 March 2014), paras. 1183, 1185-1187; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Judgment (14 March 2012), at paras. 534-538.
12. However, under certain circumstances, propaganda aimed at securing (voluntary) enlistment could amount to forcible recruitment by way of coercion. See: GCIV (1949), supra note 1, Article 51. The scope of Article 51 and its relevance by analogy to the law of NIAC is discussed in Section IV(ii) of this Brief.

The remainder of this Brief is divided into three further sections:

Section III
Discusses the differing terminology used to define forcible recruitment under IHL and ICL. Ultimately, this Brief defines forcible recruitment as 'the compulsory incorporation of individuals into armed forces or groups'.

Section IV
Details the extent to which forcible recruitment is currently regulated under IHL. Firstly, is noted that IHL explicitly prohibits forcible recruitment of Protected persons under the law of IAC due to the distressing and dishonourable nature of forcing persons to participate in military operations against their own country. Secondly, the incorporation of children into the armed force, whether voluntarily or by force, is categorically prohibited under IHL and ICL. To this end, ICL jurisprudence helps to define the scope of forcible recruitment in two significant ways: (i) it recognises that the element of compulsion covers legal obligation (including the 'law' of the NSAG), brute force, threat of force, or psychological pressure amounting to coercion; and (ii) forcible recruitment is automatically satisfied where the individual is forcibly incorporated into the armed force or group; i.e. there is no requirement that the person is recruited to actively participate in hostilities. Finally, Section IV explains that the equality of belligerence principle does not give NSAGs the right to forcibly recruit persons under their territorial control because the parallel right of States to forcibly recruit their own civilians does not derive from IHL and is therefore inapplicable.

Section V
Demonstrates how the forcible recruitment of adults by NSAGs amounts to an outrage upon personal dignity. Firstly, this Section analyses relevant jurisprudence from the International Criminal Tribunal for the former-Yugoslavia (ICTY) and the International Criminal Court (ICC). It shows that the conduct of forcing individuals to expose themselves to the dangers of the conflict against their will is, in certain circumstances, capable of satisfying the requisite threshold of inhumane and degrading treatment so as to amount to an outrage upon personal dignity. Secondly, it is demonstrated why forcible recruitment amounts to an outrage upon personal dignity when committed by NSAGs but not when committed by States, notwithstanding the equality of belligerence principle. In short, the legal characterisation of the conduct depends on the identity of the actor; NSAGs are automatically prohibited from forcible recruitment in all circumstances because they lack the requisite legal authority and therefore expose the individual to increased danger, humiliation, degradation, and loss of legal protection. Meanwhile, a State's forcible recruitment of its own civilians is only prohibited under IHL in limited circumstances where the recruited person benefits from special protection under IHL, or where the means used by the State independently amount to a violation of IHL; e.g. cruel and inhumane treatment.

In conclusion, it is argued that NSAGs are categorically prohibited from forcibly recruiting protected persons under the law of NIAC; namely, persons not actively participating in hostilities or those who are placed 'hors de combat' by sickness, wounds, detention, or any other cause. Forcing individuals to kill and commit acts of violence, expose themselves to serious risk of injury or death, and participate in a war to which they may be fundamentally opposed is inherently capable of causing distress, degradation, and humiliation. When committed by NSAGs without the legitimacy and legal protection of the State, these experiences are sufficiently exacerbated so as to meet the threshold of an outrage upon personal dignity.

TERMINOLOGY

This Brief defines the compulsory incorporation of persons into armed forces or groups, whether by law, coercion, or force, as 'forcible recruitment'. Forcible recruitment is distinct from enlistment, which is a voluntary act. The terminology used to define compulsory incorporation into an armed force or group (whether by law, coercion, or force) differs between IHL treaties, ICL jurisprudence, and common parlance. To avoid confusion, this Brief adopts the phrase 'forcible recruitment' to define any of the above means of compulsory incorporation.

Defining (forcible) recruitment under IHL

Under IHL, the term recruitment is understood to mean forcible recruitment. As stated by the ICRC, '[r]ecruitment, as distinct from enlistment, is the compulsory incorporation of individuals into an armed force or group'.[13] Accordingly, the phrase 'forcible recruitment' could technically be considered a superfluity; i.e. the word 'forcible' is redundant because it is already contained within the meaning of the word 'recruitment'. Notwithstanding, this Brief uses the phrase 'forcible recruitment' – so as to avoid ambiguity – but is otherwise consistent with the ICRC's definition.

IHL prohibits (forcible) recruitment in two contexts: (i) forcibly recruiting children into armed forces or groups;[14] and (ii) compelling protected persons under the Fourth Geneva Convention to serve in the hostile party under the law of IAC (i.e. the forcible incorporation of individuals into the enemy armed forces).[15] With regard to the first category, Articles 77(2) of API and 4(3)(c) of APII prohibit the forcible recruitment of children.[16] However, the incorporation of children into armed forces or groups is prohibited under customary IHL and ICL irrespective of whether conduct is voluntary or forced.[17]

The prohibition on recruiting persons to serve in the hostile armed forces is therefore more relevant to the present discussion. As demonstrated in Section V(ii), the fact that compelling persons to participate in military operations against their own country is prohibited due to its inherently distressing and dishonourable nature provides part of the rationale for prohibiting the forcible recruitment of adults by NSAGs under the law of NIAC.[18]

For the purpose of defining the impugned conduct, it is sufficient to note that the term 'recruitment' under IHL is synonymous with the phrase 'forcible recruitment' used in this Brief; i.e. the compulsory incorporation of individuals into an armed force or group.

Defining forcible recruitment under ICL

ICL prohibits the same two categories of forcible recruitment in the context of armed conflict: (i) the incorporation of children into an armed force or group and/or using children to actively participate in hostilities, applicable in both international[19] and non-international armed conflicts;[20] and (ii) compelling a

13. ICRC How does law protect in war? Online Casebook, available at: <https://casebook.icrc.org/glossary/armed-groups> [Online Casebook], Glossary, under 'recruitment', (emphasis added).
14. On the prohibition of recruitment of children, see: API, supra note 7, Art. 77(2); APII, supra note 7, Art. 4(3)(c); ICRC, CIHL Study, supra note 5, Rule 136. See also: UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, [Convention of the rights of the Child], Art. 38.
15. CGIV (1949), supra note 1, Art. 51: 'The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.' A 'Protected person' is defined in Art. 4 of GCIV as: 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. See also: ICRC, Customary International Humanitarian Law Study: Online Database [CIHL Study Online Database], Rule 95, under 'Rules', available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule95>; CGIV (1949), supra note 1, Art. 147; CGIII (1949), supra note 1, Art. 130. See also: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907), International Peace Conference, The Hague, Official Record, at Art. 23(h) in fine: 'A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.'
16. API, supra note 7, Art. 77(2); APII, supra note 7, Art. 4(3)(c); ICRC, CIHL Study, supra note 5, Rule 136.
17. The Commentaries on API-II (1987) state that, for the situation of children, the principle of non-recruitment also prohibits accepting voluntary enlistment: Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1986) Geneva, ICRC, at pp. 1391 to 1393, para. 4557 [Sandoz Commentary (1986)]. See also: Consideration of Draft Protocol I (CDDH/L) Summary Record of The Forty-Fifth Meeting held on Wednesday, 5 May 1976, O.R. XV, pp. 65-69, CDDH/III/SR.45, paras. 11-31, available at: <http://www.legal-tools.org/doc/7d6223/pdf/>.
18. ICRC, CIHL Study, supra note 5, Rule 95: 'The reasoning behind the rule is the distressing and dishonourable nature of making persons participate in military operations against their own country – whether or not they are remunerated.'
19. UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, art. 8(2)(b)(xxvi).
20. Ibid art. 8(2)(e)(vii).

prisoner-of-war or other Protected person to serve in the forces of a hostile Power,[21] or compelling the nationals of the hostile party to take part in the operations of war directed against their own country,[22] both of which are applicable in IACs only.

While the Rome Statute uses the term 'conscription' rather than 'recruitment' or 'forcible recruitment' when referring to the forced incorporation of children into armed forces or groups, the ascribed meaning is identical. As stated by the ICC Pre-Trial Chamber in Lubanga, relying on the separate opinion of Judge Robertson in the Sierra Leone Special Court's judgment in the Child recruitment Case[23] and on the work of the Preparatory Committee for the Rome Statute:[24]

> *'[C]onscripting' and 'enlisting' are two forms of recruitment, 'conscripting' being forcible recruitment, while 'enlisting' pertains more to voluntary recruitment. (...) It follows therefore that enlisting is a 'voluntary' act, whilst conscripting is forcible recruitment.'*[25]

This formulation was affirmed by the Lubanga Trial Chamber[26] and was not challenged on appeal.[27] Forcible recruitment is therefore synonymous with the term 'conscription' used in the Rome Statute. Following the ICC's distinction between forcible and voluntary recruitment – and notwithstanding the fact that 'voluntary recruitment' is technically an oxymoron under IHL - this Brief refers exclusively to the terminology of 'enlistment' to define voluntary incorporation and 'forcible recruitment' to define compulsory incorporation or conscription.[28]

It is curious that the drafters of the Rome Statute used the term 'conscription' rather than '(forcible) recruitment', as the former is not defined under IHL instruments and is typically understood as the compulsory incorporation of individuals into a State's armed forces;[29] whereas the prohibition on conscripting children under article 8(2)(e)(vii) of the Rome Statute clearly applies to both State and NSAGs party to a NIAC. However, it is sufficient for present purposes to note that 'conscription' under ICL and 'recruitment' under IHL are both synonymous with the definition of 'forcible recruitment' used in this Brief.

Finally, ILC jurisprudence confirms that forcible recruitment includes acts of coercion; e.g. 'legal obligation, brute force, threat of force, or psychological pressure amounting to coercion';[30] and that the mere act of recruitment is prohibited irrespective of whether the individual is earmarked for active participation in hostilities.[31] This is examined in more detail in **Section IV.**

21. Ibid art. 8(2)(a)(v).
22. Ibid art. 8(2)(b)(xv).
23. Prosecutor v. Sam Hinga Norman, SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment), separate opinion, Judge Robertson (31 May 2004), at para. 5, p. 7417: '[The] crime of child recruitment, as it was finally formulated in 4(c) of [SCSL] Statute, may be committed in three quite different ways: a) by conscripting children (which implies compulsion, albeit in some cases through force of law); b) by enlisting them (which merely means accepting and enrolling them when they volunteer), or c) by using them to participate actively in hostilities (i.e. taking the more serious step, having conscripted or enlisted them, of putting their lives directly at risk in combat).'
24. Indeed, the Report of the Preparatory Committee on the establishment of an International Criminal Court (A/CONF.183/2/Add.1) shows that the use of the term 'recruiting' was not retained at the drafting stage, as none of the following formulations ended up in the final document: Option 1: forcing children under the age of 15 years to take direct part in hostilities; Option 2: recruiting children under the age of 15 years into armed forces or using them to participate actively in hostilities; Option 3: i) recruiting children under the age of 15 years into armed forces or groups; or ii) allowing them to take part in hostilities.
25. ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges (29 January 2007), at paras. 246 and 247.
26. ICC, Lubanga Trial Judgement (14 March 2012), supra note 11, at paras. 609; 1358.
27. ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Appeals Judgment (1 December 2014), at paras. 37-38.
28. It should be noted that enlistment cannot be narrowly defined as a formal process and can include any conduct accepting the child as a part of the militia or the armed group: SCSL, Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-T, Trial Judgment (18 May 2012), at para. 442, citing SCSL, Prosecutor v. Alex Tamba Brima et al., SCSL-04-16-T-613, Trial Judgment, 20 June 2007, at para. 734-735; and SCSL, Prosecutor v. Issa Hassan Sesay et al., SCSL-04-15-T, Trial Judgment (2 March 2009), at para. 184. See also: Fofana and Kondewa, SCSL-04-14-A, Appeals Chamber (28 May 2008), at para. 144.
29. For example: 'compulsory enlistment for State service, typically into the armed forces', Oxford Dictionary, available at: <https://en.oxforddictionaries.com/definition/conscription>. See also the definition provided in the Penguin English Dictionary as quoted in Paul Richards, 'Militia conscription in Sierra Leone: Recruitment of young fighters in an African War' 20 Comparative Study of Conscription in the Armed Forces (2015) 255-276, at 255: 'compulsory enrollment of persons for military service'.
30. ICC, Lubanga Appeals Judgment (1 December 2014), supra note 26, at para. 278. See also: paras 279-282, in which the Lubanga Appeals Chamber provides its legal justification for including coercion within the definition of conscription, pursuant to relevant case-law and statutory interpretation of the Rome Statute.
31. ICC, Lubanga Trial Judgment, supra note 11, at para. 609: 'Bearing in mind the use of the word 'or' in Article 8(2)(e)(vii), in the Chamber's view the three alternatives (viz. conscription, enlistment and use) are separate offences. It follows that the status of a child under 15 who has been enlisted or conscripted is independent of any later period when he or she may have been 'used' to participate actively in hostilities, particularly given the variety of tasks that he or she may subsequently be required to undertake. Although it may often be the case that the purpose behind conscription and enlistment is to use children in hostilities, this is not a requirement of the ICC Statute. The Chamber therefore rejects the defence contention that 'the act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group' [footnotes omitted]'.

Disambiguation of terms

In light of the linguistic differences between IHL and ICL on the concept of compulsory incorporation of persons into armed forces or groups, this Brief adopts the terminology of 'forcible recruitment'. Consistent with the definition of 'recruitment' provided for by the ICRC and 'conscription' in the jurisprudence of the ICC, 'forcible recruitment' can be defined as the compulsory incorporation of persons into an armed force or group. Compulsion is inclusive of coercion and therefore encompasses the threat of punishment and other forms of psychological pressure.

The following list provides a quick point of reference for understanding the definition and scope of forcible recruitment in relation to other terms:

- **Incorporation.** The act of assimilation into the armed force or group. It can be compulsory (i.e. recruitment; forcible recruitment; conscription) or voluntary (i.e. enlistment).
- **Forcible recruitment.** The compulsory incorporation of persons into an armed force or group.
- **Recruitment (IHL treaty-term).** The compulsory incorporation of persons into an armed force or group.
- **Conscription.** The compulsory incorporation of persons into an armed force or group. Conscription is used in the Rome Statute by reference to child soldiers but is otherwise commonly used to refer to compulsory incorporation by States pursuant to State law.
- **Enlistment.** Voluntary incorporation into an armed force or group. The enlistment of children is prohibited under customary IHL and ICL notwithstanding the lack of compulsion.
- **Active participation in hostilities.** The physical description of engaging in armed hostilities against the opposing side.
    - Active participation in hostilities is distinct from the concept of incorporation into armed forces or groups. An individual may actively participate in hostilities without having been incorporated into an armed force or group and, as explained above, an individual can be considered incorporated into an armed force or group irrespective of whether that person will actively participate in hostilities.
    - A person who actively participates in hostilities becomes targetable under IHL and may be prosecuted for such participation under domestic law.
    - Using children to actively participate in hostilities is prohibited under customary IHL and ICL.
    - A substantive discussion on the concept of active participation in hostilities is outside the scope of this Brief.

Having defined forcible recruitment as the compulsory incorporation of individuals into an armed force or group, the remainder of this Brief is focused on demonstrating that the forcible recruitment of adults by NSAGs is prohibited under IHL on the basis that it amounts to an outrage upon personal dignity.

STATE OF THE LAW: TO WHAT EXTENT IS FORCIBLE RECRUITMENT REGULATED BY IHL?

IHL explicitly regulates forcible recruitment in only two contexts: the prohibition on compelling Protected persons to serve in the hostile armed forces under the law of IAC and the absolute prohibition on incorporating children into armed forces or group (see **Sections IV(i)** and **IV(ii)** below). There is no IHL provision that explicitly regulates the forcible recruitment of civilians by the sovereign State, and no provision that explicitly prohibits NSAGs from forcibly recruiting adults under their territorial control.

Absent specific IHL rules regulating the power of the State to forcibly recruit its own civilians, some may argue that the equality of belligerents principle entitles NSAGs to forcibly recruit civilians under their territorial control. However, as demonstrated in **Section IV(iii)**, such an interpretation misrepresents the equality of belligerents principle. In short, 'equality of belligerents' only entitles parties to the conflict to the equal application of the specific rules of IHL that regulate their conduct; it does not entitle a NSAG to rely on the laws or principles that are not regulated by IHL.

The prohibition on recruiting Protected Persons to serve in the hostile armed forces

It is necessary to explain the prohibition on (forcibly) recruiting protected persons under the law of IAC to serve in the hostile armed forces for two reasons: (i) it highlights the absence of a provision under IHL regulating the forcible recruitment of a State's own civilians; and (ii) it demonstrates that the purpose behind the law – forcing persons to engage in military activity against their own State – is relevant by analogy to the proposed prohibition on the forcible recruitment of adults by NSAGs under the law of NIAC, which is discussed in Section V.

Under Article 23(h) of the Hague Regulations (1907),[32] it is forbidden to compel nationals of the hostile party to take part in operations of war directed against their own country, even if they were in the belligerent's service before the war. Article 51(1) CGIV (1949), which reiterates the prohibition under the Hague Regulations, deals specifically with prohibiting compulsory military service for protected persons under Occupation. Article 51 has a broader scope than Article 23(h) insofar as it goes beyond the nationals of the hostile party to include all civilians who find themselves in the hands of a party to the conflict of which they are not nationals. Article 147 of GCIV further states that compelling a protected person to serve in the forces of a hostile Power is a grave breach, while Article 130 of GCIII specifically characterises compelling a prisoner-of-war to serve in the hostile armed forces as a grave breach.[33]

Rule 95 of the ICRC's CIHL Study construes the action of compelling persons to serve in the forces of a hostile power as 'a specific type of forced labour that is prohibited in international armed conflicts'.[34] Furthermore, the prohibition against compelling protected persons to serve in the forces of a hostile power is contained in numerous military manuals and domestic legislation, as documented in the 'practice' section of the CIHL Study,[35] and is codified as a war crime in the Rome Statute of the ICC. [36]

The reasoning behind this rule is the 'distressing and dishonourable nature' of forcing persons to participate in military operations against their own country, whether or not they are remunerated.[37] As noted in the Pictet Commentary, 'the prohibition is absolute and no derogation from it is permitted. Its object is to protect the inhabitants of the occupied territory from actions offensive to their patriotic feelings or from attempts to undermine their allegiance to their own country.'[38]

32. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (1907), International Peace Conference, The Hague, Official Record, at Art. 23(h): 'A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.'

33. CGIV (1949), supra note 1, Art. 147. See also: CGIII (1949), supra note 1, Art. 130.

34. ICRC, CIHL Study Online Database, supra note 15, Rule 95.

35. See the military manuals of Argentina, Australia, Belgium, Benin, Burkina Faso, Cameroon, Canada, France, Germany, Israel, Italy, Kenya, Republic of Korea, Mali, Morocco, Netherlands, New Zealand, Nigeria, Russian Federation, Senegal, South Africa, Sweden, Switzerland, Togo, United Kingdom and United States, as reported in the ICRC's CIHL Study Online Database, ibid., 'Practice', under Rule 95, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule95>.

36. ICC Statute, supra note 19, Art. 8(2)(b)(xv): Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (...) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

37. ICRC, CIHL Study Online Database, supra note 15, Rule 95, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule95>.

38. See: Jean Pictet (dir.), The Geneva Conventions of 12 August 1949 Commentary, Geneva, International Committee of the Red Cross (1952), under Art. 51 GCIV (1949), available at:<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=2C777C1F24172394C12563CD0042C5AA>[Pictet Commentary], at p. 293.

In terms of the constitutive elements of the word 'compelling' under Article 51 of GCIV, it covers a wide range of actions and includes propaganda aimed at securing (voluntary) enlistment.[39] In certain situations, the use of propaganda could amount to forcible recruitment through coercion,[40] otherwise, (voluntary) enlistment is outside the scope of this Brief.

It should be emphasized that it is the element of incorporating an individual into the hostile party's armed forces that is considered offensive. The Occupying Power may compel protected persons to work if they are over 18 years of age, and if the work is necessary for the needs of the army of occupation, for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country, providing that such work does not include any involvement in military operations.[41] The rationale behind this prohibition is relevant by analogy to the law of NIAC. In the majority of situations, persons forcibly recruited by NSAGs will be forced to engage in military operations against their State of nationality. At the very least, such persons will be forced to engage in military operations without the consent or legal protection of the State.

The prohibition on the recruitment and enlistment of children under 15 years of age

The incorporation of children into armed forces or groups and the use of children to actively participate in hostilities is prohibited under customary IHL.[42] The scope of this prohibition has been developed in ICL and is codified as a war crime in the Rome Statute of the ICC applicable in both international and non-international armed conflicts.[43]

Although referring specifically to the prohibition on recruiting children into armed forces or groups, ICL jurisprudence helps to clarify the scope of forcible recruitment in two significant ways. Firstly, the Special Court for Sierra Leone in the case of Brima, Kamara and Kanu held that the expression 'conscripting' would also encompass 'acts of coercion, such as abductions, and forced recruitment'.[44] This was confirmed in the ICC Lubanga Appeals Chamber decision in which the Court held that:

> *'[T]he element of compulsion necessary for the crime of conscription can be established by demonstrating that an individual under the age of fifteen years joined the armed force or group due to, inter alia, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion.'* [45]

Applying this formulation to the present context, NSAGs are prohibited from forcibly recruiting persons by way of coercion, including the threat of physical punishment or other retribution pursuant to the 'laws' of the armed group.

39. According to the Pictet Commentary, ibid., under Art. 51 CGIV (1949), ibid.: 'Certain delegations at the Diplomatic Conference did not hold propaganda aimed at securing the voluntary enlistment of protected persons in the armed or auxiliary forces of the Occupying Power to be unlawful; they proposed that the second sentence in paragraph 1 should be deleted. Their proposal was rejected. Remembering the painful impression left by certain propaganda during the last two world wars, the Conference decided to keep the prohibition as it was; they appear to have acted rightly, as it is difficult to distinguish between propaganda and a more or less disguised form of constraint.'

40. Ibid. Although using propaganda aimed at securing (voluntary) enlistment amounts to 'recruitment' under GCIV (1949), this would only satisfy the ICL interpretation of 'compulsory' where such propaganda amounts to some form of coercion; see: ICC, Lubanga Appeals Judgement (1 December 2014), supra note 26, at para. 278. However, it is important to note that, consistent with the above Commentary to GCIV, the use of propaganda could amount to coercion where it creates the impression that the individual is under a legal obligation to enlist or is otherwise denied a reasonable choice.

41. CGIV (1949), supra note 1, Art. 51(2).

42. ICRC, CIHL Study, supra note 5, under Rules 136, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136>. It should be noted that the International Red Cross and Red Crescent Movement promotes the principle that persons under 18 years of age should not be recruited into armed forces or armed groups. See ICRC statement to the UN General Assembly on the 'Promotion of Protection of the rights of children', 18 October 2013, available at: <www.icrc.org/eng/resources/documents/statement/2013/united-nations-children-statement-2013-10-18.htm>. See also: ICRC, CIHL Study, supra note 5, under Rule 137 on the prohibition of children taking part in hostilities, available at: <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule137>. See also: Pictet Commentary GCIV (1958), supra note 38, under Art. 51 CGIV (1949) at p. 288; and: Sandoz Commentary, supra note 17, at para. 4557, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B>.

43. ICC Statute, supra note 19, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii).

44. SCSL Prosecutor v. Alex Tamba Brima et al., SCSL-04-16-T-613, Trial Judgment (20 June 2007), at para. 734. See also: Christine Byron, War crimes and crimes against humanity in the Rome Statute of the International Criminal Court (2009) Manchester, Manchester University, at p. 182.

45. ICC, Lubanga Appeals Judgment (1 December 2014), supra note 26, at para. 278. See also: paras 279-282, in which the Lubanga Appeals Chamber provides its legal justification for including coercion within the definition of conscription, pursuant to relevant case-law and statutory interpretation of the Rome Statute.

Secondly, the Lubanga case clarifies that the concept of incorporation into armed forces or groups (inclusive of forcible recruitment/conscription and enlistment) is distinct from the concept of active participation in hostilities.[46] Under the Rome Statute, conscripting or enlisting a child into an armed force or group is criminalised irrespective of whether that child is earmarked for active participation in hostilities.[47] In accordance with the reasoning of the Court in Lubanga, it is argued that NSAG's are prohibited from forcibly recruiting adults irrespective of whether such recruitment leads to active participation in hostilities. It is worth noting that a blanket prohibition on forcible recruitment in certain contexts, regardless of the role assigned to the recruited person, is consistent with the prohibition on compelling Protected persons to serve in the armed forces of the hostile party under the law of IAC.

The current age-limit on the prohibition of incorporating children into the armed forces under customary IHL is 15 years;[48] although, there is a definitive trend under the synthesis of IHL and IHRL to increase that limit to 18 years.[49] Interestingly, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits States from forcibly recruiting children under the age of 18 while permitting (voluntary) enlistment, whereas the same Convention prohibits NSAGs from incorporating persons under the age of 18 in all circumstances.[50] However, no specific legal justification is given for the unequal application of this rule.

Further discussion on the prohibition of incorporation and use of child soldiers is outside the scope of this Brief. It is sufficient to note that this is the only example in which IHL/ICL explicitly regulates States' ability to forcibly conscript its own citizens. Importantly, the fact that this prohibition is specifically contained within the law of IHL regulating NIACs means that it applies equally to NSAGs under the equality of belligerents principle.

46. ICC, Lubanga Trial Judgment (14 March 2012), supra note 11, at para. 609: 'Bearing in mind the use of the word 'or' in Article 8(2)(e)(vii), in the Chamber's view the three alternatives (viz. conscription, enlistment and use) are separate offences. It follows that the status of a child under 15 who has been enlisted or conscripted is independent of any later period when he or she may have been 'used' to participate actively in hostilities, particularly given the variety of tasks that he or she may subsequently be required to undertake. Although it may often be the case that the purpose behind conscription and enlistment is to use children in hostilities, this is not a requirement of the ICC Statute. The Chamber therefore rejects the defence contention that 'the act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group' [footnotes omitted]'.

47. Ibid. For interpretations of what constitutes the element of having the perpetrator used one or more persons to participate actively in hostilities, see: Ibid at para. 620 and 628; ICC, Lubanga Pre-Trial Decision (29 January 2007) at para. 262; ICC, Katanga Trial Judgement (7 March 2014), supra note 11; International Tribunal for Rwanda (ICTR), Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Trial Judgment (2 September 1998), at para. 629; SCSL, Taylor Trial Judgment (18 May 2012), supra note 28, at para. 444; ICTR, Prosecutor v. Georges Rutaganda, ICTR-96-3, Trial Judgment (6 December 1999), at para. 100, as reported in: Centre for International Law Research and Policy, Case Matrix Network - Elements Digest, 'Art. 8(2)(e) War crimes, Art. 8(2)(e)(vii) Using, conscripting and enlisting children', section 3. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities, available at: <https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/art8/e/8-2-e-vii/3/#_ftn29> [Case Matrix Network].

48. ICRC, CIHL Study Online Database, supra note 15, under Rules 136, available at: <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule136>; Sandoz Commentary (1986), supra note 17, at para. 4557, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B>; Pictet Commentary GCIV (1958), supra note 38, under Art. 51 CGIV (1949) supra note 1, at p. 288.

49. It should be noted that the International Red Cross and Red Crescent Movement promotes the principle that persons under 18 years of age should not be recruited into armed forces or armed groups. See ICRC statement to the UN General Assembly on the 'Promotion of Protection of the rights of children', 18 October 2013, available at: <www.icrc.org/eng/resources/documents/statement/2013/united-nations-children-statement-2013-10-18.htm>. See also, ICRC, CIHL Study Online Database, supra note 15, under Rule 137 on the prohibition of children taking part in hostilities, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule137>. See also: Convention on the Rights of the Child, (1989) 1577 U.N.T.S. 3, Art. 38 (3) and (4). Upon ratification of the Convention, Colombia, Netherlands, Spain, and Uruguay expressed their disagreement with Art. 38, which sets the age limit at 15 years, favouring the age limit of 18 years for incorporation of children into their armed forces: Reservations and declarations made upon ratification of the Convention on the Rights of the Child, supra note 14. See also ICRC, CIHL Study Online Database, supra note 15, under Rule 136, at footnote 15, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136#refFn_84AA34D9_00015>. 18 years is also the age limit for recruitment supported by Canada, Denmark, Finland, Guinea, Iceland, Mexico, Mozambique, Norway, South Africa, Sweden, Switzerland, Thailand and Uruguay through their 1999 pledge: 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999 - Daily bulletin of the 27th International Conference of the Red Cross and Red Crescent, issue 4 (4 November 1999) 'pledge to protect women and children' available at: <https://www.icrc.org/eng/resources/documents/misc/57jq3e.htm>.

50. Ibid, Convention on the Rights of the Child arts. 38 (3) and (4). See also: UN Secretary-General, Report on the protection of civilians in armed conflict, Doc. Off. Security Council, S/1999/957, 8 September 1999, at § 42; and: African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), Arts. 2 and 22.

Applying the current state of the law to NSAGs: forcible recruitment of adults and the equality of belligerents principle

The equality of belligerents principle provides that IHL rules are equally applicable to all parties to the conflict.[51] Under the law of IAC, the principle primarily serves to distinguish jus in bello (the laws governing armed conflict; or 'IHL') form jus ad bellum (the laws governing the initiation of armed conflict), such that the reasons for going to war do not impact the equal application of the laws that govern the conflict itself. This principle is codified in Common Articles 1 and 2 of the four Geneva Conventions of 1949, which specify that State parties must 'undertake to respect and ensure respect for the present Convention in all circumstances' and that the Conventions 'apply to all cases of declared war or of any other armed conflict'.[52] The equal application of the Conventions irrespective of the reasons for the conflict finds support in the travaux preparatoires,[53] the ICRC 'Pictet commentaries',[54] and was 'reaffirmed' in unequivocal terms in the preamble to API:

> *'[T]he provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origins of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.'* [55]

The equality of belligerents principle takes on a slightly different meaning under the law of NIAC. In this context, the principle ensures the equal application of IHL rules irrespective of the fact that the NSAG may be an unrecognised entity under international law. Common Article 3 specifically states that each party to the conflict shall be bound to apply the provisions contained therein. The law of NIAC is therefore directly binding on and applicable to NSAGs as subjects of this body of IHL. It is generally accepted that States have bestowed such status on NSAGs under international law by virtue of signing treaties to govern their reciprocal relationship.[56]

However, States also ensured that such recognition does not go beyond the equal application of IHL principles. It is specifically stated in Common Article 3 that that '[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.[57] Accordingly, outside the rights and obligations bestowed upon them by IHL, NSAGs otherwise retain their status as illegitimate or unrecognised actors under international law.

The equality of belligerents principle ensures that the laws of NIAC can be applied by all parties to the conflict, including NSAGs, and thus encourages NSAGs to comply with IHL.[58] A clear example of States' acceptance of this principle can be seen in the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*.[59] In drafting what would become Article 6 of APII on penal prosecutions, which 'supplements and develops Common Article 3 without modifying its existing field of application', States were aware that NSAGs would not be able to comply with the obligation in Common Article 3(1)(d) to pass sentences by a 'regularly constituted court' unless this phrase was interpreted to include the courts of NSAGs.[60] As stated by the delegate of the United Kingdom:

51. See: API, supra note 7, Art. 96(3)(c): 'the Conventions and this Protocol are equally binding upon all Parties to the conflict.'
52. GCI – IV, supra note 1.
53. Final Record of the Diplomatic Conference of Geneva of 1949 (undated), Federal Political Department, Berne, Vol.3, annex no. 85, at 59. The Danish delegate had suggested that persons fighting against an illegal war were to be afforded prisoner of war status. The UK responded that the Conventions must be applied equally to all parties. This was not challenged and the Danish suggestion did not appear in the text. See: Vaios Koutroulis, 'Yet it Exists: In Defence of the 'Equality of Belligerents' Principle' Leiden Journal of International Law 26 (2013) 449, at pp. 452-453.
54. As stated in the Commentary to GCI: 'The words 'in all circumstances' mean in short that the application of the Convention does not depend on the character of the conflict. Whether a war is 'just' or 'unjust', whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.' Pictet Commentary GCI (1951), supra note 38, at p. 27. The same principle is discussed in the Commentary to Common Article 2, see: see Pictet Commentary GCI (1951), at p. 32; Pictet Commentary GC II (1960), at p. 28; Pictet Commentary GC III (1960), at p. 23; Pictet Commentary GC IV (1958), at p. 20.
55. API, supra note 7, preamble, 7 (emphasis added).
56. ICRC, Online Casebook, Glossary, supra note 4, available at: <https://casebook.icrc.org/law/implementation-mechanisms>.
57. Common Article 3 of the Geneva Conventions of 1949, supra note 1.
58. Online Casebook, supra note 4, available at: <https://casebook.icrc.org/law/implementation-mechanisms>. See also: Jonathan Somers, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' 89 International Review of the Red Cross (2007) 867 [Somer, IRRC].
59. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), Geneva, 1974–7, Federal Political Dept., Bern, 1978, Volume VIII. (hereafter 'Official Records of the Diplomatic Conference of 1974-1979'), Volume XIII, 346-347.
60. Article I of APII states: This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups (emphasis added).

> *[T]he principle that 'the rights and duties of the Parties to the conflict under the present Protocol are equally valid for all of them' must clearly be given special consideration when provisions concerning penal law were being drafted.*[61]

While debate remains on whether NSAGs can legislate their own laws in the territory under their control,[62] it is clear that States recognised that NSAGs must be able to establish their own courts so as to give effect the equality of belligerents principle.[63] This understanding is implicitly recognised in article 28 of the Rome Statute of the ICC, which imposes individual criminal responsibility on military-style commanders in NSAGs for failing punish breaches of IHL due to the fact that NSAGs would be incapable of complying with this obligation if their courts systems were not recognised. ICC jurisprudence confirms this interpretation of Article 28. The Pre-Trial Chamber in Bemba held that the Mouvement de Libération du Congo maintained a 'functional military judicial system',[64] which the Trial and Appeals Chambers subsequently agreed was capable of fulfilling a commander's duty to repress, prevent, and punish violations of IHL under Article 28 of the Statute. This practice is also evident in the jurisprudence of the ICTY.[65]

The equality of belligerents principle is equally reflected in the obligation under Article 31(1) of the Vienna Convention on the Law of Treaties to interpret provisions in light of their object and purpose,[66] as well as the principle ut res magis valeat quam pereat, which provides that 'a treaty must be given an interpretation that enables its provisions to be 'effective and useful'.[67] In short, pursuant to the equality of belligerents principle, a provision applicable to States under the law of NIAC must be equally applicable to NSAGs party to the same conflict.

However, the equality of belligerents principle is limited to the rules of IHL and does not apply to the rights and obligations of States pursuant to other areas of international law or the State's own domestic laws. The right of States to forcibly recruit their own citizens is understood as an internal matter that is regulated pursuant to domestic law.

The only explicit recognition of this right under international law is contained within various IHRL instruments that recognise forcible recruitment by the State as an exception to the prohibition on forced labour.[68]

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61. Official Records of the Diplomatic Conference of 1974-1979'), Volume XIII, at p. 350.
62. ICRC's 2017 Commentary, supra note 9, para. 714: 'Common Article 3 requires 'a regularly constituted court'. If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group.' See also: Sandoz Commentary, supra note 17, at para. 4605, under Art. 6 APII (1977) supra note 7, which deals with penal sanctions: 'The possible co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents, makes the concept of national law rather complicated in this context.'
63. See also USSR delegate statement, Official Records of the Diplomatic Conference of 1974-1979'), Volume XIII, at p. 365: 'It was not correct to say that the provisions of article 10 would be applied only by the representatives of legal Governments, since article 5 stated quite clearly that each Party to the conflict would have equal rights and duties.'
64. ICC, Prosecutor v. Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC01/05-01/08 (15 June 2009), at para. 501. See also: Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC Bemba Gombo (ICC-01/05-01/08-406), Pre-Trial Chamber II (20 April 2009), paras. 22–23, in which Amnesty International's argument that the MLC Courts were not 'regulrly constituted' and therefore unlawful was dismissed.
65. ICTY, Prosecutor v Kordic, IT-95-14/2-T, Trial Judgement (26 February 2001), at para. 444: 'The duty to punish naturally arises after a crime has been committed.... This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.' See also regarding command responsibility being applicable in NIACs: ICTY, Prosecutor v Hadzihasanovic, Alagic and Kubura, Case No. IT-01-47-ar72, 'Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility' (16 July 2003) at para. 17.
66. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, which reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'
67. Antonio Cassese, International law (2008: Oxford University Press), 179.
68. UN General Assembly, International Covenant on Civil and Political Rights (16 December 1966), 999 U.N.T.S. 171, Art. 8(3) c)(ii): 'No one shall be required to perform forced or compulsory labour; ... (c) For the purposes of this paragraph the term 'forced or compulsory labour' shall not include: ... (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors. See also: Venier and Nicholas v. France, CCPR/C/69/D/690/1996 (1 August 2000) and Foin v. France, CCPR/C/67/D/666/1995 (9 November 1999) where the HRC stated that under Article 8 ICCPR, States may require service of a military character. See also: Article 6 of the American Convention on Human Rights, (1969) 1144 U.N.T.S. 123; Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950) 213 U.N.T.S. 222; Article 2(2)(a) of the Convention concerning Forced or Compulsory Labour, 1930 (No. 29) 14th ILC session (28 Jun 1930), Art. 2(2) a) available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029>. See also: United Nations Human Rights Committee (UNHCR), Guidelines on international protection no. 10: claims to refugee status related to military service, HCR/GIP/13/10/corr. 1 (12 November 2014), at para. 5, footnote 12 [UNHCR, Guidelines re. Military Service] documenting discriminations cases where this 'non-violation' have been confirmed: M.J.G. (name deleted) v. Netherlands, CCPR/C/32/D/267/1987 (24 March 1988), at para. 3.2; R.T.Z. (name deleted) v. Netherlands, CCPR/C/31/D/245/1987 (5 November 1987).

IHRL also imposes limitations on this right under certain circumstances.[69] However, given that there is no IHL provision authorising forcible recruitment, the equality of belligerents principle is inapplicable. The fact that the State in which the NSAG is operating may be entitled to forcibly recruit its own civilians under its domestic law is irrelevant. IHL does not provide an avenue for NSAGs to benefit from the full sovereign powers of the State and apply State laws unto themselves as if they were the *de jure* government.[70] As stated by Jonathon Somer, the equality of belligerents principle 'does not necessarily mean equal standing, but equal rights and obligations flowing from the international law norms regulating the subject matter of IHL'.[71]

The legal rights of NSAGs are naturally limited to IHL due to the fact that such groups are otherwise unrecognised under international law and are often specifically criminalised under the domestic law of the State in which they operate.[72] To grant NSAGs State-like legislative powers equivalent to those of the *de jure* sovereign government would thus create inherent legal contradictions with disastrous effects on the civilian population. For example, if an armed group adopts a (rebel) law to forcibly conscript civilians in the territory over which it exercises de facto control, civilian populations would find themselves under two competing sets of laws with which it is impossible to comply: to refuse forcible recruitment would violate the rebel law, while to comply would invoke individual criminal responsibility under the State's domestic law prohibiting insurrection.[73] The fact that persons forcibly recruited by NSAGs would face domestic criminal sanctions is one of the reasons put forward in the next Section as to why such conduct amounts to an outrage upon personal dignity when committed by NSAGs.

It should be noted that there is equally no basis in IHL treaties to imply a right of NSAGs to forcibly recruit. This can be distinguished from the position that there is an implied right to detain persons in NIAC due to 'imperative security reasons' of the detaining authority (also known as internment).[74] While there is no specific IHL provision applicable in NIAC that authorises internment, the ICRC holds the view that this is an inherent right under customary and treaty law due to its widespread practice and explicit acknowledgment in Articles 5 and 6 of APII as a form of deprivation of liberty to which IHL protections apply.[75] Importantly, interment is a necessary measure taken against the person who is posing the imperative security threat to the armed force or group; if a right to interment did not exist it would thus significantly increase the risk of such groups using lethal force as an alternative.[76] Subject to various procedural safeguards, internment therefore strikes an appropriate balance between military necessity and humanitarian protection and can be considered an implied right under IHL that is equally applicable to both State and NSAGs. Conversely, forcible recruitment is not a legitimate means of responding to a security threat posed by individuals and does not constitute a humanitarian alternative to the use of force. There is accordingly no basis to imply this right under IHL.

To conclude this section, the equality of belligerents principle only bestows legal rights and obligations on NSAGs pursuant to IHL rules applicable in NIAC. The fact that a State's right to forcibly recruit its own civilians is not contained within IHL – either explicitly or implicitly – categorically precludes NSAGs from using the equality of belligerents principle to justify their own forcible recruitment campaigns.

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69. See Sections V(ii) of this Brief for a full discussion on the IHRL limitation on a State's right to forcibly recruit its own civilians.
70. Zakaria Dabone, 'International law: armed groups in a state-centric system' 93 International Review of the Red Cross 882 (2011) 395. See also: Marco Sassòli, 'Ius ad bellum and ius in bello – the separation between the legality of the use of force and humanitarian rules to be respected in warfare: crucial or outdated?', in Michael Schmitt and Jelena Pejic (eds), International Law and Armed Conflict: Exploring the Faultlines, Martinus Nijhoff Publishers, Leiden/Boston (2007), at p. 257); 'Armed groups basically trigger the application of jus ad bellum. In general, they are not themselves endowed with a right to peace. (...) Armed groups have a more explicit place in situations of jus contra bellum (thus clearly a right against the use of force) and are set apart from international jus ad bellum (which refers to the 'mere' regulation of recourse to armed force). However, cross-border armed groups appear to be upsetting traditional assumptions. In all cases, jus ad bellum is profoundly 'anti-armed group'.' Dabone, ibid. 407-408.
71. Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' 89 International Review of the Red Cross (2007) 867 at p. 663.
72. See generally: Zakaria Dabone (2011), supra note 70.
73. This argument was brought forward by Jonathan Somer to explain the policy— rather than legal—reasons for the Swedish District Court's ruling that non-State armed groups have the capacity under international law to establish courts and carry out penal sentences, but only under certain circumstances: 'Opening the Floodgates, Controlling the Flow: Swedish Court Rules on the Legal Capacity of Armed Groups to Establish Courts' EJIL :Talk! (March 10, 2017) available at: < https://www.ejiltalk.org/opening-the-floodgates-controlling-the-flow-swedish-court-rules-on-the-legal-capacity-of-armed-groups-to-establish-courts/> [Somer, EJIL].
74. ICRC 2017 Commentary, supra note 9, at para. 750.
75. Ibid. The ICRC cites the following sources in support of its view: 32nd International Conference of the Red Cross and Red Crescent, Geneva, 2015, Res. 1, Strengthening international humanitarian law protecting persons deprived of their liberty, Preamble, para. 1; ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', Opinion Paper, November 2014, p. 7; and Jann K. Kleffner, 'Operational Detention and the Treatment of Detainees', in Terry D. Gill and Dieter Fleck (eds), The Handbook of the International Law of Military Operations, 2nd edition (2015) Oxford University Press 518, at pp. 524–525.
76. Zakaria Dabone (2011), supra note 70, at p. 415, footnote 92. It should be noted, however, the Dabone refers to the practical necessity of interment by NSAGs but denies that this amounts to a legal right to detain.

The lack of any positive right of NSAGs under IHL to forcibly recruit has led multiple UN agencies to declare such conduct prohibited under international law, without providing a specific legal basis for this prohibition.[77] As stated by the UN High Commissioner for Refugees:

> *'The position of non-State armed groups is different from that of States, in that only States can require military conscription. International law does not entitle non-State armed groups, whether or not they may be the de facto authority over a particular part of the territory, to recruit on a compulsory or forced basis.'* [78]

However, the purpose of this Brief is to demonstrate that the forcible recruitment of adults by NSAGs is specifically prohibited under IHL. It is therefore necessary to show that such conduct violates one of the existing provisions of IHL applicable in NIAC; namely, the prohibition on committing outrages upon personal dignity, contrary to Common Article 3(1)(c) and customary international law. Given that characterising the forcible recruitment of adults as a violation of Common Article 3(1)(c) when committed by NSAGs but not when committed by States amounts to an unequal application of IHL, it must further be demonstrated how this prohibition can be substantiated without offending the equality of belligerents principle.

77. UNHCR, Guidelines re. Military Service, supra note 68, at para. 7; and United Nations Human Rights Council, Report of the Office of the High Commissioner on Human Rights Investigation on Sri Lanka, A/HRC/30/CRP.2, (16 September 2016), pp. 128-132.

78. UNHCR, Guidelines re. Military Service, supra note 68, at para. 7.

PROHIBITING THE FORCIBLE RECRUITMENT OF ADULTS BY NSAGS AS AN OUTRAGE UPON PERSONAL DIGNITY

The impact and consequences of forcible recruitment are dependent on the identity and legal authority of the actor. When State authorities forcibly recruit pursuant to State law, the conduct has an inherently legal character that is recognised under international law. Any limitations on this right flow from States' domestic law or IHRL. When committed by NSAGs, who by definition lack legal authority from the State and are unrecognised under international law, forcible recruitment not only exposes individuals to extreme danger, it does so without any legal basis and therefore forces them to participate in unsanctioned violence. Recruited persons are thereby exposed to criminal punishment in their State of nationality and would invariably suffer feelings of shame, humiliation, and distress. This consequence is exacerbated where the individual is forced to engage in violence against his or her State of nationality which, unlike conflicts between two NSAGs, is the most common form of NIAC. For these reasons, it is argued that the forcible recruitment of adults by NSAGs automatically constitutes an outrage upon personal dignity without offending the equality of belligerents principle.

It should also be noted that the manner in which a NSAG conducts forcible recruitment can *independently* amount to an outrage upon personal dignity. For example, if the individual is forcibly recruited through extreme violence, kidnapping, death threats directed at his or her family, or other substantially similar conduct, the means themselves may constitute a violation of Common Article 3. However, for NSAGs, it is submitted that the very act of forcible recruitment is prohibited irrespective of how it has been executed.

The Current scope of outrages upon personal dignity under Common Article 3(1)(c) and customary IHL

Common Article 3 CGI-IV (1949) reads as follows:

> *'In the case of armed conflict not of an international character (...), each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*
>
> *(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated* ***humanely,*** *without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*
>
> *To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
>
> *(...)*
>
> *(c)* ***outrages upon personal dignity,*** *in particular humiliating and degrading treatment.'*

Indicating that this approach was also reaffirmed in Article 4(1) and (2) APII (1977), the 2017 ICRC Commentary states that:

> *'[T]he formulation 'to this end' makes clear that the obligation of humane treatment is the substantive core of common Article 3. Humane treatment has a meaning of its own, beyond the prohibitions listed. These prohibitions are merely specific examples of conduct that is indisputably in violation of the humane treatment obligation.'*[79]

Rule 90 of the CIHL Study also prohibits torture, cruel or inhumane treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, in both international and non-international armed conflicts. Under ICL, the crime of committing 'outrages upon personal dignity, in particular humiliating and degrading treatment' is incorporated into the ICTY Statute as a violation of the laws and customs of war,[80] and is specifically provided for in the Statute of the International Criminal Tribunal for Rwanda,[81] Statute of the Special Court for Sierra Leone,[82] and the Rome Statute.[83]

79. ICRC 2017 Commentary, supra note 9, at para. 577, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5>.
80. ICTY Statute, Art. 3.
81. ICTR Statute, Art. 4(a) and (e). See also: ICTR, Prosecutor v. Ngirabatware, MICT-12-29, Indictment, 28 September 1999, counts 9-10.
82. SLSC Statute, Art. 3(a) and (e). See also: Sesay, Trial Judgment (2009) supra note 28, at paras. 174-177, noting that it is 'well established that the offence of outrages upon personal dignity exists under customary international law and entails individual criminal responsibility'.
83. ICC Statute, Art. 8(2)(c)(ii).

In the Aleksovski case before the ICTY, outrages upon personal dignity were defined as 'a species of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*'.[84] In Kunarac, the ICTY Trial Chamber held that outrages upon personal dignity require that 'the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity'.[85] Furthermore, while the outrage must have a sufficiently serious impact on the victim, it does not necessarily require proof of prolonged suffering.[86] The Trial Chamber in Kvočka similarly stated that, 'the focus of violations of dignity is primarily on acts, omission, or words that do not necessarily involve long-term physical harm, but which nevertheless are serious offences deserving of punishment'.[87]

Significantly, the Trial Chamber in Aleksovski held that forcing protected persons to contribute to the war effort by digging trenches amounts to an outrage upon personal dignity.[88] A similar conclusion was reached by the Trial Chamber in Orić, which held that forcing civilians to dig trenches constitutes 'cruel treatment' in violation of Common Article 3(1)(a). The Chamber in that case held that 'cruel treatment' under the law of NIAC has the same elements as the prohibition on 'inhumane treatment' under the law of IAC; namely, 'causing serious mental or physical suffering, serious injury, or constituting a serious attack on human dignity'.[89] The Chamber therefore relied on the decision of the ICTY Trial Chamber in Blaskič, which, although committed in the context of an IAC, demonstrates that forcing protected persons to dig trenches or otherwise exposing them to the conflict is prohibited due to its degrading impact on the victim.[90] As stated by the Blaskič Appeals Chamber:

> *'The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury. Any order to compel protected persons to dig trenches or to prepare other forms of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes cruel treatment.'* [91]

The ICC Elements of Crimes confirm that the essence of the war crime of outrages upon personal dignity is the humiliation and degradation suffered by the victim, providing that the severity of those elements are 'generally recognized as an outrage upon personal dignity'.[92] This formulation has been applied by the ICC Pre-Trial Chambers in *Katanga* and *Bemba*,[94] and leaves the door open for other violations of dignity to be dealt with as outrages upon personal dignity.[95] The *Elements of Crimes* also recognise that the context in which the conducted is committed and the identity of the victim are important by stipulating that relevant aspects of the victim's cultural background are to be taken into consideration.[96] Scholarly writing has argued that this was inserted to include, as a war crime, forcing persons to act against their religious beliefs.[97]

84. ICTY, Prosecutor v. Zlatko Aleksovski, IT.95-14/1-T, Trial Judgment (25 June 1999), at para. 54.
85. ICTY, Prosecutor v. Dragoljub Kunarac and Others, IT.96-23 and IT 96-23/1-T, Trial Judgment (22 February 2001), at para. 514.
86. Ibid at para. 501; ICTY, Prosecutor v. Dragoljub Kunarac and Others, IT-96-23& IT-96-23/1-A, Appeal Judgment (12 June 2002), para. 161; ICTY Prosecutor v Kvočka and Others., IT-98-30/1-T, Trial Judgment (2 November 2001) at para. 168.
87. ICTY, Kvočka, Trial Judgement (2001), para. 172.
88. ICTY, Aleksovski Trial Judgment (1999), supra note 84, at para. 229.
89. Ibid, at paras. 350-351
90. Ibid.
91. ICTY Prosecutor v Tihomir Blaskič, IT-95-14-A, Appeals Judgement (29 July 2004), para. 597.
92. Preparatory Commission for the International Criminal Court, Elements of Crimes (2000) UN Doc. PCNICC/2000/INF/3/Add.2, Addendum/UN Doc. ICC-ASP/1/3 (2002) and ICC-ASP/1/3/Corr.1 (2002), Article 8(2)(c)(ii)).
93. ICC, Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the confirmation of charges (30 September 2008), at paras. 367-372.
94. ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision on the confirmation of charges (15 June 2009), at paras. 303-304.
95. See: Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (2003) Cambridge, Cambridge University Press, at p. 315 [Dörmann, Elements of War Crimes].
96. ICC Elements of Crimes, supra note 92, footnote 57, relating to Article 8(2)(c)(ii)).
97. See: Dörmann, Elements of War Crimes, at p. 315; See also: Michael Cottier, 'Article 8', at p. 246 in Otto Triffterer (ed.), Commentary of the Rome Statute of the International Criminal Court: Observers' notes, Article by Article, 1st ed. (1999), Oxford, Beck/Hart [Commentary on the ICC Statute], under Art. 8(2)(b)(xxi), at p. 315. See also ICRC, CIHL Study, supra note 5, under Rule 104.

Accordingly, it is our position that the forcible recruitment of protected persons under the law of NIAC by NSAGs objectively satisfies the gravity threshold of humiliating and degrading treatment such that it amounts to an outrage upon personal dignity.[98]

Why forcible recruitment amounts to an outrage upon personal dignity when committed by NSAGs but not when committed by States

The conduct of forcing individuals to kill and commit other acts of violence, expose themselves to serious risk of injury or death, participate in a war to which they may be fundamentally opposed on either personal, philosophical, religious, or other grounds, is inherently capable of satisfying the gravity threshold of an outrage upon personal dignity.[99] However, as demonstrated below, the exclusive ability of the State to forcibly recruit pursuant to the State's legal authority and protection is sufficient to negate the inherently distressing nature of forcible recruitment to the extent that it does not, prima facie, amount to an outrage upon personal dignity.[100] Meanwhile, it is argued that NSAGs' intrinsic lack of legal authority exacerbates the already distressing impact of forcible recruitment such that it unequivocally amounts to an outrage upon personal dignity in all circumstances.[101]

The right of a State to forcibly recruit its own civilians is not absolute. In addition to the absolute prohibition on incorporating children in the armed forces, IHRL imposes several safeguards against unlawful, arbitrary, or discriminatory forcible recruitment practices by States. For example, the Inter-American Commission on Human Rights held that a 'lottery draft' does not satisfy the above legal guarantees.[102] Pursuant to developments in IHRL, forcible recruitment by States must be:

- Prescribed by a law and accompanied by regulations, which should be widely publicised;[103]
- Accompanied by conscription offices which are responsible for organizing and implementing conscription;
- Accompanied by internal mechanisms to make sure its implementation does not infringe upon fundamental rights of the population and is not executed in an arbitrary or discriminatory fashion; which means, for example,
  - Having the possibility of conscientious objection;[104]

98. Ibid. See also: Roy S. Lee and Hakan Friman (eds), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (2001), Ardsley, Transnational Publishers, at p. 184.
99. Like Sivakumaran, we contend that the prohibition of 'outrage' under IHL is even wider than the one under ICL: Sandesh Sivakumaran, The Law of Non-International Armed Conflict (2012) Oxford, Oxford University Press, at p. 264. Furthermore, unlike torture, an outrage upon personal dignity does not require sever mental or physical pain, but must be sufficient to be distinguisged from a mere insult: Ibid. See also: Aleksovski, Trial Judgment (1999) at para. 56.
100. While it is accepted that States are entitled under international law to forcibly recruit their own civilians, this right it limited by IHRL and prohibited in certain circumstances, see Section V(iii) of this Brief.
101. This is also the position supported by Maja Janmyr, 'Recruiting Internally Displaced Persons into Civil Militias: The Case of Northern Uganda' 32 Nordic Journal of Human Rights 3 (2014) 199-219, at p. 203: 'By the same token, under international human rights and humanitarian law, recruitment practices amounting to cruel, inhuman or degrading treatment would be prohibited (quoting the Convention against Torture (1984), Common Art. 3 of the Four Geneva Conventions (Article 3) and Art. 4(2) of the Additional Protocol to the Geneva Conventions. See also: UNCHR, 'Compilation and Analysis of Legal Norms' (5 December 1995) UN Doc E/CN.4/1996/ 52/Add.2, at para. 166.
102. See: Inter-American Commission on Human Rights, 'Fourth Report on the Situation of Human Rights in Guatemala' (1 June 1993) OEA/Ser.L/V/II.83, Doc. 16 rev., chap. V, available at: <http://www.cidh.org/countryrep/Guatemala93eng/chapter.5.htm> [IACHR, Fourth Report on Situation of Human Rights in Guatemala]: 'Nevertheless, those exceptions—military recruitment and military service—cannot be exacted unlawfully, arbitrarily or in a manner that is discriminatory in nature. Military service must be just that, but not a form of servitude for the soldiers calculated to satisfy the personal needs of their superiors in the military hierarchy. The functions and discipline of the recruits must be based on military needs and plans, as established in the Constitution.' See also: In June 2013, Peru suspended a lottery to draft conscripts (12,500 names of men aged 18-25 years) to its military after a high Peruvian court judge granted an injunction on the grounds the lottery would be discriminatory: Financial Times, 'Peru suspends military draft lottery' (19 June 2013) available at: <https://www.ft.com/content/bee10e9c-d8c5-11e2-84fa-00144feab7de>.
103. This could be read with occupation law, where the occupying Power is barred from promulgating new laws other than to comply with IHL (and arguably human rights standards), to maintain orderly government, or to ensure the security of the occupying power (CGIV (1949), supra note 1, Art. 64); and where it must uphold the principle of legality by publicizing new laws in the language of the inhabitants and not applying them retroactively (CGIV (1949), supra note 1, Art. 65).
104. Under international human rights law, forcible recruitment contrary to a person's genuinely held convictions or religious beliefs where such conduct would amount to a specific denial to practice that religion or belief freely is arguably prohibited by Art. 18(2) ICCPR,; however, recalling that the ICCPR also specifically excludes conscription as an act of forced labour under Art. 8. See also art 12(2) of the American Convention on Human Rights. See: United Nation's Human Rights Committee, Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea, Comm. No. 1321-1322/2004, (Merits), CCPR/C/88/D/1321-1322/2004 (23 January 2007).

  - Setting up specific screening mechanisms to make sure youth (conscripted or enlisting) meet age, educational and physical requirements;[105]

- Based on military needs and plans, especially for the functions and discipline of the recruits; and

- Challengeable in a court of law.[106]

When it comes to NSAGs, it is true that some groups will have the capacity to provide substantially similar *de facto* protections pursuant to the rules and regulations of the armed group in the territory under their control. However, the inherent inability of NSAGs to provide genuine lawful justification or authority to forcibly recruit – whether under domestic or international law – renders such conduct arbitrary and consequently unlawful. Forcible recruitment by NSAGs can never be 'prescribed by law'. In certain contexts – for example the recognition that NSAGs must be able to pass judicial sentences relating to the conflict – it is generally understood that NSAGs' lack of de jure authority does not preclude the equal application of IHL. Indeed, the non-recognition of NSAG 'law' is generally irrelevant to the *lex specialis* application of IHL, so long as its consequences do not violate the IHL's fundamental provisions. However, any NSAG 'law' that purports to legitimise forcible recruitment not only places those individuals in extreme danger, but forces them to violate the law of the sovereign State. Forcible recruitment by NSAGs therefore strips individuals of the protections afforded to them by IHL, while simultaneously removing the legal protection of the State.

The significance of lawful justification in determining the quality of the impugned conduct can equally be seen in other rules of IHL applicable in NIAC. The prohibition in Common Article 3(1)(a) on committing 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' provides a suitable example. With regard to the prohibition on murder, it is apparent that the nature and legality of the act is entirely dependent on whether it is undertaken pursuant to law. Triffterer notes that murder is defined as 'the intentional killing of one or more persons protected under that provision *without lawful justification*'.[107] The Commentaries to other provisions of the *Geneva Conventions* prohibiting murder clearly state that the death penalty issued by a court of law is not prohibited under IHL.[108] Killing a member of the opposing armed force or group is equally lawful under the *lex specialis* of IHL and therefore not classified as murder. If the legal justification in any of the above scenarios is removed, the conduct becomes prohibited under Common Article 3(1)(a) as violence to life and person, in particular murder of all kinds. This conclusion is supported by Dörmann's commentary to Article 8(2)(a)(i) (wilful killing) which, based on a survey of post-World War II jurisprudence, notes that summary execution or killing in the absence of a fair trial constitutes a war crime.[109]

See also: UNHRC's obiter in Dr. J.P. v. Canada, Communication No. 446/1991, U.N. Doc. CCPR/C/43/D/446/1991 at 36 (1991), at para 4.2, to the effect that Article 18 'certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures'. Ms. Ruth Wedgwood's dissenting opinion is important here, as it does point out the discrepancy between Article 8(3)(c)(ii) ICCPR, which expressly excludes military service as forced labour, and the non-binding, soft law character of deriving the right of conscientious objection from Article 18, which confirms the contentious aspect of claiming conscientious objection as a human right.

105. As a point of comparison, see the report submitted by China on the implementation of the Optional Protocol to the Committee on the Rights of the Child where it describes the State's management structure for military-service work for the People's Armed Forces: United Nations, Committee on the rights of the Child, Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, CRC/C/OPAC/CHN/1 (6 June 2012), at para. 20.

106. See: UNHRC, Guidelines re. Military Service, supra note 68, at paras. 5 and 6, and IACHR, Fourth Report on Human Rights situation in Guatemala, supra note 102. See also: Inter-American Commission on Human Rights (IACHR) Alejandro Piché Cuca v. Guatemala, Report N.36/93 - Case 10.975, (6 October 1993), indicating that the conscription process must be challengeable in a court of law.

107. Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court, (1999), supra note 97 p. 273, para. 272.

108. Pictet Commentary GCIV (1958), supra note 38, Article 32, p. 222. The ICRC Commentary to Article 11 of Additional Protocol I notes that Article 11 'is not intended to prevent the executions of persons who have been lawfully condemned to death': Sandoz Commentary (1986), API, Article 11, para. 467. This is also supported by negotiations for the Rome Statute which saw debate over the death penalty, with some States arguing that their established penal system should be respected. This debate resulted in Article 80 of the Rome Statute which provides for non-prejudice towards the national application of penalties and laws. Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court, (1999), supra note 97, p. 46, para. 76, footnote 239.

109. Knut Dörmann, Elements of War Crimes, supra note 95, p. 40. For example United Nations War Crimes Commission, Trial of Werner Rohde et al., Case No. 31, British Military Court (Wuppertal, Germany, 29 May – 01 June 1946), Law Reports Volume V, p. 58 (in examining whether spies could be executed). The Judge Advocate noted that a person who takes no part in a judicial execution bears no criminal responsibility.

It is clear under IHL that the application of the equality of belligerents principle provides NSAG with the legal justification to kill members of the opposing side (although they can be subsequently prosecuted under the State's domestic law for mere participation in hostilities). As to whether a NSAG can sentence an individual to death, this is a particularly vexed question and outside the scope of this Brief. However, the practical necessity for NSAGs to establish courts so as to comply with their obligations under IHL and effectively maintain the civilian population under their territorial control is generally recognised under customary IHL and ICL as an exception to the requirement to only pass sentences by a 'regularly constituted court', contained in Common Article 3(1)(d).[110] Whether this would extend to passing the death sentence for matters unrelated to those limited circumstances is less a clear.[111] A recent decision by the Swedish Court of Criminal Appeal has held that NSAGs are limited to enforcing the pre-existing law of the State or at least law that is not 'considerably stricter' than that which existed before the outbreak of the conflict, which would appear to be a reasonable compromise.[112] For present purposes, it is sufficient to note that while a State is entitled to impose the death penalty for a criminal offence during a NIAC, the same conduct by a NSAG may be classified as a violation of 'violence to life' under Common Article 3(1)(d), not withstanding the equality of belligerents principle. The reason for such discrepancy is that the NSAG's lack of de jure authority fundamentally changes the nature of the act.

Returning to the forcible recruitment of protected persons in NIAC, NSAGs' lack of de jure authority equally changes the nature of the act from one that is not specifically regulated by IHL to one that amounts to an outrage upon personal dignity. However, unlike violence to life, lack of lawful justification to forcibly recruit is potentially insufficient in and of itself to render the conduct a violation of Common Article 3. With violence to life, the act of killing automatically becomes murder once the lawful justification is removed. With an outrage upon personal dignity, it must be shown that NSAGs' lack of lawful justification to forcibly recruit actually causes the humiliation and degradation necessary to constitute an outrage upon personal dignity.

As previously stated, the reason that NSAGs forcibly recruiting an individual without lawful justification amounts to an outrage upon personal dignity is that, in addition to exposing the person to extreme danger and hostile conditions for which they may not have adequate preparation and training, the individual is simultaneously forced to contravene the laws of the State. The individual consequently loses the protected status of a civilian under IHL (as would a civilian forcibly recruited by the State), but is also exposed to criminal sanction for having violated State laws. In addition, the individual becomes an unrecognised entity under international law (outside of IHL) and is therefore denied the same legal status as a civilian who is forcibly recruited into the State armed forces. When coupled with the inherent danger and distressing nature of being forced to fight in a war against one's will, the lack of legitimacy and loss of legal protection renders such conduct an outrage upon personal dignity.

110. ICRC's 2017 Commentary, supra note 9, para. 714: 'Common Article 3 requires 'a regularly constituted court'. If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group.' See also: See also: Sandoz Commentary, supra note 17, at para. 4605, under Art. 6 APII (1977) supra note 7, which deals with penal sanctions: 'The possible co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents, makes the concept of national law rather complicated in this context.' See also: ICC, Prosecutor v. Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC01/05-01/08 (15 June 2009), para. 501. See also: Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC, Bemba Gombo, ICC-01/05-01/08-406, Pre-Trial Chamber II (20 April 2009 at paras. 22–23, in which Amnesty International's argument that the MLC Courts were not 'regulrly constituted' and therefore unlawful was dismissed.

111. See, for example, jurisprudence from the European Court of Human Rights in recognising the courts of non-State entities providing they enforce the existing law: Ilaşcu and others v. Moldova and Russia, 48787/99, Council of Europe: European Court of Human Rights 8 July 2004, at para. 460; Cyprus v. Turkey, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001, at paras. 231; and 237. See also the decision of the ICJ in: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971), 12, at para. 125. This is also supported in the literature: A. Roberts & S. Sivakumaran, 'Lawmaking by NonState Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, Yale Journal Of International Law, 1, 2012, p. 133: '[G]iving armed groups plenary lawmaking powers would effectively upgrade them to the level of states and would subordinate the interests of the international community as a whole to the interests of armed groups.'

112. Prosecutor v. Omar Sakhanh Haisam Sakhanh, Svea hovratt (Svea Appeal Court), B 2259-17, Judgment of 31 May 2017. See also: Prosecutor v. Omar Haisam Sakhanh, Stockholms tingsratt (Stockholm District Court), B 3787-16, Judgment (16 February 2017), at para. 26.

In the majority of situations, individuals forcibly recruited by NSAGs will also be forced to engage in military operations against their own State of nationality, thereby raising the same rationale for the prohibition on compelling persons to serve in the hostile armed forces under the law of IAC. The prohibition on compelling protected persons to serve in the enemy armed forces under the law of IAC is due to the inherently distressing, offensive and dishonourable nature of making persons participate in military operations against their own country.[113] This reasoning is equally applicable by analogy to forcing civilians to fight against their own State of nationality in the context of a NIAC.[114] Even if the persons forcibly recruited by the NSAG are sympathetic to the cause of the NSAG, they are still being forced to take up arms against their own de jure State, which, in addition to the inherent danger and distress, is a **crime** against that State, the consequences of which could include serious punishment or death.

It is for these reasons that the forcible recruitment of protected persons by NSAGs amounts to an outrage upon personal dignity notwithstanding the equality of belligerents principle.

Could forcible recruitment by States amount to an outrage upon personal dignity in certain circumstances?

States retain the inherent right to forcibly recruit their own civilians under international law. However, if States were to forcibly recruit pursuant to a discriminatory policy that targeted persons with a specially protected status under IHL applicable in NIAC, it is arguable that such conduct could amount to an outrage upon personal dignity. Using the ICC Elements of Crimes as a guide, it would need to be demonstrated that the manner in which the State forcibly recruited such persons has a sufficient nexus the armed conflict and independently satisfies the requisite threshold of humiliation and degradation.

To this end, it is worth considering the potential application of the Tadić allegiance test to a State's forcible recruitment of its own civilians. In Tadić, the Appeals Chamber of the ICTY held that in conflicts defined by ethnic or religious divisions, the nationality of individuals who find themselves in the 'hands of the Party to which they are not nationals' is insufficient to determine the party to which they actually belong and, therefore, their protected status under the fourth Geneva Convention. As stated by the Chamber:

> *'[E]thnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.*[115]'

While this aspect of the decision represents a judicial development of the law, it is difficult to argue with the reasoning of the Appeals Chamber. The object and purpose of the fourth Geneva Convention is clearly to protect persons who are detained by or otherwise in the control of a hostile party. [116] Where allegiance to a party to the conflict cannot be determined by nationality but is rather predicated on ethnicity, religion, or some other form of presumed affiliation, it is arguably necessary to uphold the substance of the provision by interpreting an individual's allegiance on a case-by-case basis in light of the relevant facts and circumstances. For these reasons, the Tadić interpretation of 'nationality' in GC IV has proved influential. It was confirmed in subsequent ICTY cases by the Appeals Chamber in *Delalić*[117] and *Aleksovski*.[118] More recently, the ICC Trial Chamber in Lubanga endorsed the definition when it held that the phrase 'national armed forces' was not restricted to government troops but included the armed forces of non-State entities.[119]

113. Pictet Commentary GCIV (1958) supra note 38, under Article 51, at p. 293. Article 51 of GCIV (1949) states: 'The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.' See also: ICRC, CIHL Study, supra note 5, Rule 95.
114. This is also the position supported by Janmyr, supra note 101, at p. 203: 'By the same token, under international human rights and humanitarian law, recruitment practices amounting to cruel, inhuman or degrading treatment would be prohibited (quoting the Convention against Torture (1984), Common Art. 3 of the Four Geneva Conventions (Article 3) and Art. 4(2) of the Additional Protocol to the Geneva Conventions. See also: UNCHR, 'Compilation and Analysis of Legal Norms' (5 December 1995) UN Doc E/CN.4/1996/ 52/Add.2, at para. 166.
115. ICTY, Prosecutor v. Tadić, IT-94-1-AR72, Appeal (July 15, 1999), at para. 166. See also: ICTY, Prosecutor v. Tadić, IT-94-1-A, Jurisdictional Appeal (October 2, 1995), at para. 76.
116. The Chamber made reference to the Preparatory Work of the Convention in which protection was intended to be extended to nationals of a State who had acquired refugee status by fleeing to another State, only to subsequently find themselves detained by their own government, which had since occupied the host State's territory. The example provided was that of German Jews fleeing to France who were then detained by German forces following Germany's occupation of France. ICTY, Prosecutor v. Tadić, IT-94-1-AR72, Appeal (July 15, 1999), at para. 164.
117. ICTY Prosecutor v Delalić, IT-96-21-A, Appeals Chamber, (20 February 2001), at para. 418.
118. ICTY Prosecutor v. Aleksovski, IT-95-14/1-A, Appeals Chamber (24 March 2000), at para. 152.
119. ICC, Lubanga Pre-Trial Decision (29 January 2007), supra note 25, at paras. 277-281.

Applying this reasoning to the right of States to forcibly recruit their own civilians under the law of NIAC, it could be argued that where such persons clearly demonstrate an allegiance to the NSAG against which the State is fighting, in particular where such allegiance is determined by ethnic or religious affiliations, it would amount to an outrage upon personal dignity to force such persons to engage in military operations against that group. While it must be noted that the Tadić allegiance test is a judicial invention that applies to interpreting the word 'national' in the fourth Geneva Convention under the law of IAC and therefore can only apply to the law of NIAC by analogy, it is apparent that the **reasoning** behind the decision is equally applicable to forcible recruitment. A State's right to forcibly recruit its own civilians – in addition to the fact that it can be legitimately prescribed by law – presupposes that forcibly recruited individuals will be compelled to fight for their State of nationality and thus, presumably, in accordance with their allegiance. However, forcing civilians in a NIAC to fight against the group to which they hold genuine allegiance would arguably cause sufficient degradation and humiliation so as to amount to an outrage upon personal dignity.[120]

Prohibiting forcible recruitment by the State in this context would thus be comparable to the rationale behind the prohibition on compelling persons serve in a hostile party under the law of IAC.

Of course, the *Tadić* test could not be used in reverse to justify forcible recruitment by NSAGs on the basis of presumed allegiance. The test was developed to extend IHL's application to civilians who would otherwise be denied protection in a manner contrary to the purpose of the law; it could never be legitimately used to justify narrowing that protection. Irrespective of presumed allegiance, persons forcibly recruited by NSAGs would suffer the humiliation and degradation of being forced to fight without the legal protection of the State and usually against their State of nationality.

Forcible recruitment is also prohibited under IHL applicable in NIACs where it violates the obligation to respect convictions and religious practices, as recognised in Article 4(1) of APII.[121] This principle is accepted as a fundamental guarantee for all persons who do not take a direct part or who have ceased to take part in hostilities.[122] The protection for fundamental guarantees is also set forth in numerous military manuals.[123] Moreover, under Rule 104 of the *CIHL Study*, the convictions and religious practices of civilians and persons *hors de combat* must be respected, both in international and non-international armed conflicts. Forcibly recruiting persons in a manner contrary to these fundamental guarantees could therefore cause sufficient humiliation and degradation so as to amount to an outrage upon personal dignity.

It has also been recognised that all parties to the conflict are prohibited from forcibly recruiting internally displaced persons (IDPs) and refugees. For example, Resolution 72 of 1994 on the situation of human rights in the territory of the former Yugoslavia denounced the recruitment of IDPs and refugees as an unlawful use of military force contrary to the rules of IHL, stating that:

> *'[C]ontinued deliberate and unlawful attacks and uses of military force against civilians and other protected persons by all sides (...) and condemns particularly: (g) **The forced conscription, by any party,** of internally displaced persons and of refugees in disregard of their protected status.'*[124]

120. Although in the context of IAC, The ICTY specifically applied this interpretation of a protected person based on allegiance rather than nationality to context of using such persons to participate in the war effort, holding that it would amount to degrading treatment: ICTY, Blaskič Appeals Judgement (29 July 2004), supra note 91, at para. 597.
121. For the same protections in IACs, see: API, supra note 7, Art. 75(1). Furthermore, a series of detailed rules contained in the GCI-IV (1949), supra note 1, require respect for religion and religious practices, such as burial rites and cremation of the dead (GCI, Art. 17(3) and GCIII, Art. 120(4) and (5) and GCIV, Art. 130(1) and (2)), religious activities of prisoners of war and interned persons (GCIII, Art. 34–36), the education of orphaned children or children separated from their parents (GCIV, Art. 50(3)), spiritual assistance for persons detained in occupied territory (GCIV, art 76 (3), religious services for interned persons (GCIV, Art. 86) and religious activities of interned persons (GCIV, Art. 93). Futhermore, under Art. 46 of the Hague Regulations (1907), conscription of civilians has been construed as a violation of 'family honour and rights and religious convictions and practice.'
122. API, supra note 7, Art. 4(1): 'All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.'
123. As documented in the ICRC's CIHL Study Online Database, supra note 15, under Rule 104, see: the military manuals of Argentina, Australia, Canada, Colombia, Dominican Republic, Ecuador, France, Germany, Hungary, Indonesia, Italy, Kenya, Madagascar, New Zealand, Nicaragua, Romania, Spain, Sweden, Switzerland, United Kingdom, and United States.
124. UN Office of the High Commissioner on Human Rights, Situation of human rights in the territory of the former Yugoslavia: violations of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), Res. 1994/72, UN Doc. Off. E/CN/4/Res. 1994/72 (9 March 1994), at para. 7. This resolution was identified as practice of international organizations relevant to Customary IHL under 'Practice', Rule 1 of the ICRC's CIHL Study Online Database, supra note 15, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule1>.

Furthermore, the United Nations High Commissioner for Refugees Guiding Principles for IDPs State as follows:

> *'Internally displaced people shall be* ***protected against discriminatory practices of recruitment into any armed forces or groups*** *as a result of their displacement. In particular, any cruel, inhuman or degrading practices that compel compliance or punishes non-compliance with recruitment are prohibited in all circumstances.'*[125]

Accordingly, a State's right to forcibly recruit its own civilians is limited by the following rules:

- The absolute prohibition on incorporating children into the armed forces;
- The State's own domestic law;
- Certain provisions of IHRL, which guarantee that forcible conscription must be, *inter alia:* proscribed by law, non-arbitrary, and non-discriminatory;
- The potential extension of the *Tadić* allegiance test to prohibit States from forcibly recruiting persons who clearly hold allegiance to the NSAG against which the State is fighting;
- The prohibition in Article 4(1) of *APII* and Rule 104 of the ICRC's *CIHL* Study on violating respect for the convictions and religious beliefs of persons not taking active part in hostilities; and
- The prohibition on the forcible recruitment of IDPs and refugees.

If the manner in which the State forcibly recruits protected persons in NIACs independently constitutes a violation of IHL, providing it meets the gravity threshold of humiliating and degrading treatment and there is a sufficient nexus to the conflict, it may simultaneously amount to an outrage upon personal dignity, contrary to Common Article 3(1)(c).

For NSAGs, the lack of legal authority to forcibly recruit and the fact that such persons would be forced to engage in military operations without the protection of the law – and usually against their own State of nationality – means that such conduct is categorically prohibited under Common Article 3(1)(c) as an outrage upon personal dignity. It can therefore be seen that the lack of de jure authority of the NSAG actually causes the forcible recruitment of adults to amount to an outrage upon personal dignity due to the fact that it significantly increases the risk of danger, humiliation, loss of legal protection, and the infliction of serious punishment, including death. This distinction is important because it provides a justification for the divergent application of Common Article 3(1)(c) notwithstanding the equality of belligerents principle.

125. Commission on Human Rights, Guiding Principles on Internal Displacement, 54th sess. E/CN.4/1998/53/Add.2 (11 February 1998), Principle 13.

CONCLUSION

This Brief has argued that the forcible recruitment of adults by NSAGs amounts to an outrage upon personal dignity, contrary to Common Article 3(1)(c) of the four Geneva Conventions.

Firstly, it has been shown that NSAGs do not have a right to forcibly recruit persons under their territorial control. The general right of States to forcibly recruit under international law is not transferrable to NSAGs under the equality of belligerents principle because that right does not derive from IHL. Equality of belligerents – which allows for the equal application of the relevant rules of IHL to all parties to the conflict – is therefore inapplicable.

Secondly, it has been shown that forcible recruitment by NSAGs amounts to an outrage upon personal dignity because they lack the de jure authority of the State. This lack of legal authority not only strips recruited persons of their protected civilian status under IHL and exposes them to a conflict for which they may not have adequate preparation and training, but simultaneously removes the legal protection of the State by forcing them to become criminals under domestic law. In most cases, persons forcibly recruited by NSAGs are also compelled to fight against their State of nationality, thereby causing the same feelings of shame, humiliation, and degradation that inform the prohibition on compelling persons to serve in the hostile armed forces under the law of IAC. Persons who do not or no longer take part in hostilities and those 'hors de combat' are therefore specifically protected from forcible recruitment by NSAGs in all circumstances.

Finally, the fact that NSAGs' lack of legal authority plays a significant role in the degrading and humiliating impact of forcible recruitment justifies a divergent application of Common Article 3, notwithstanding the equality of belligerents principle. Forcing individuals to kill and commit other acts of violence, expose themselves to serious risk of injury or death, and participate in a war to which they may be fundamentally opposed is inherently capable of causing humiliation and degradation. However, when committed by the State pursuant to State law, the legitimacy of the sovereign and concomitant legal protections prima facie precludes forcible recruitment from amounting to an outrage upon personal dignity. When committed by a NSAG, the lack of legitimacy and legal authority exacerbates the inherently distressing nature of forcible recruitment and is therefore categorically prohibited as an outrage upon personal dignity.

ANNEX 1 – DEFINITIONS

ARMED FORCES

The term 'armed forces' refers to a belligerent taking part in an international armed conflict and consists of:

> *'[A]ll organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or authority not recognized by an adverse party. The armed forces may also comprise paramilitary forces or armed law enforcement agency.'*

How Does Law Protect in War?
Online Casebook, Glossary

ARMED GROUP / NON-STATE ARMED GROUP (NSAG)

An 'organized armed group' is

the armed wing of a non-State party to a non-international armed conflict, and may be comprised of either:

- Dissident armed forces (for example, breakaway parts of State armed forces); or
- Other organized armed groups which recruit their members primarily from the civilian population but have developed enough degree of military organization to conduct hostilities on behalf of a party to the conflict.

The term 'organized armed group' refers exclusively to the armed or military wing of a non-State party to a non-international armed conflict. It does not include those segments of the civilian population that are supportive of the non-State party, such as its political wing.

How Does Law Protect in War?
Online Casebook, Glossary

CONSCRIPTION*

'The act or process of forcing people by law to join the armed services.'

Cambridge Dictionary

'Compulsory enlistment for State service, typically into the armed forces.'

Oxford Dictionary

'Compulsory enrolment of persons for military service.'

Penguin English Dictionary

Conscription can be universal ('universal military service')—but still limited to only men, i.e. calling all those physically capable between certain ages—or selective.

Encyclopaedia Britannica

Compulsory military service by a State is also known as conscription or 'the draft'.

'Military service primarily refers to service in a State's armed forces. This may occur in peacetime or during a period of armed conflict (...).'

UNHRC, *Guidelines on international protection no. 10: claims to refugee status related to military service,*
HCR/GIP/13/10/corr. 1 (12 November 2014)

** Under the Rome Statute, pursuant to Articles 8(2)(e)(vii) for IACs and 8(2)(b)(xxvi) for NIACs, the act of conscripting children under the age of 15 constitutes a war crime when committed by armed forces and son-State armed groups.*

RECRUITMENT

'Recruitment, as distinct from enlistment, is the compulsory incorporation of individuals into an armed force or group. Although the two terms may sometimes be used interchangeably (see Article 4(3)(c) of the Additional Protocol II and Article 38 of the Convention on the Rights of the Child), the International Criminal Court ruled in the Lubanga case that these are two separate notions.'

How Does Law Protect in War?
Online Casebook, Glossary

(Forced) recruitment is the term used in the UNHCR's Guidelines to refer to the coerced, compulsory or involuntary recruitment into either a State's armed forces or a non-State armed group.

UNHRC, *Guidelines on international protection no. 10: claims to refugee status related to military service,* **HCR/GIP/13/10/corr. 1 (12 November 2014)**

Recruitment is used both for State armed forces for non-State armed groups.

'Forced/forcible recruitment', 'coerced recruitment' and 'compulsory recruitment' are technically superfluities or tautologies under IHL. The term 'recruitment' already infers the element of compulsion under IHL, therefore adding the terms 'forced', 'coerced' or 'compulsory' is technically redundant. However, this Brief uses the phrase 'forcible recruitment' so as to avoid ambiguity or confusion.

'SERVING IN THE ARMED FORCES' / 'SERVING IN AN ARMED GROUP

A person can serve voluntarily or be compelled to serve in armed forces or groups.

The latter, which is synonymous with being forcibly recruited as defined here, is the expression used under GCIV to deal with the prohibition applicable to protected persons under occupation.

Article 51 CGIV (1951)

ENLISTMENT

Enlistment, as distinct from recruitment, is the voluntary incorporation of individuals into an armed force or group. Although the two terms may sometimes be used interchangeably (see Art. 4 (3)(c) of the Additional Protocol II and Art. 38 of the Convention on the Rights of the Child), the International Criminal Court ruled in the Lubanga case that these are two separate notions.

How Does Law Protect in War?
Online Casebook, Glossary

'Where an individual volunteers to join the State military, it is called enlistment.'

UNHRC, *Guidelines on international protection no. 10: claims to refugee status related to military service,* **HCR/GIP/13/10/corr. 1 (12 November 2014)**

Under occupation:

> *enlistment of children under formations or organizations subordinate to the Occupying Power is prohibited.*
>
> *Art. 50 CGIV*

> *propaganda aimed at enlisting protected persons is prohibited.*
>
> *Art. 51 CGIV*

Synonym: enrolling, volunteering ('to offer oneself spontaneously for military service').

'Voluntary enlistment' is a superfluity or tautology and 'compulsory enlistment' is an oxymoron.

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