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Covering the Expenses of Rebel Administration: are rebels taxing or pillaging towns?

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1. Introduction

A recent quantitative study shows that 35% of 235 armed groups operating between 1945 and 2012 have collected taxes from the population living under their control.[1] This shows not only how old this phenomenon is, but also how extensive it is and may become. In this regard, it is unsurprising that some armed groups are already getting more revenue than the government through taxation,[2] or that they are capable of building complex governance structures[3] providing the population with public goods partly financed by these taxes. For instance, for years now the Autonomous Administration of North and East Syria (AANES) has put in place a Finance Commission in charge of taxes collection and management whose revenues are directed, amongst other purposes, to road maintenance, electricity provision, public health and education.[4]

Contrary to traditional 'greed' approaches, which attribute tax collection by armed groups exclusively to the generation of profits for their members, examples like the AANES provide solid counterarguments, but also open several new questions, as to what drives armed groups to collect taxes. Some scholars in the political science academia have addressed this issue and introduced a variety of reasons explaining taxation by armed groups, including ideology, demographic engineering, institution-building, legitimacy-building and control of civilians.[5] This phenomenon raises thus the question of how international law can deal with this practice, particularly when it is done for the purpose of funding rebel governance, which as will be discussed in this thesis entails the provision of order and organization of social interactions by rebel groups in territory under their control. While conceiving this activity as mere theft would imply falling into a simplistic and reductionist approach, it is not clear whether and to what extent armed groups could be legally entitled to collect money contributions even for public purposes.

As a matter of law and in the context of international armed conflicts (IACs), it is accepted under the law of occupation that an Occupying Power (OP), an entity other than the recognized sovereign exerting authority over a territory, is eventually entitled to collect taxes and other money contributions for the administration of the occupied territories and even for 'the needs of the army'.[6] However, when it comes to armed groups and non-international armed conflicts (NIACs), the law is not as straightforward. With the predominant traditional legal perspective rejecting the application of the law of

[1] Based on my own analysis with R Studio of the data presented in the 'Rebel Quasi-State Institutions Dataset' available at <https://rebelgovernance.weebly.com/data.html> accessed 9 May 2023.
[2] 'Somalia Conflict: Al-Shabab "Collects More Revenue than Government"' *BBC News* (26 October 2020) <https://www.bbc.com/news/world-africa-54690561> accessed 5 May 2023.
[3] 'Gouvernance AANES' (*AANES*) <https://aanesgov.org/fr/?page_id=319> accessed 5 May 2023.
[4] Sinan Hatahet, 'The Political Economy of the Autonomous Administration of North and East Syria' (European University Institute 2019) Technical Report, 1. <https://cadmus.eui.eu/handle/1814/65364> accessed 5 May 2023.
[5] See for example, Tanya Bandula-Irwin and others, 'Beyond Greed: Why Armed Groups Tax' (Institute of Development Studies (IDS) 2021) <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/16929> accessed 6 May 2023; Jori Breslawski and Colin Tucker, 'Ideological Motives and Taxation by Armed Groups' (2022) 39 Conflict Management and Peace Science 333; Mara Revkin, 'What Explains Taxation by Resource-Rich Rebels? Evidence from the Islamic State in Syria' (20 January 2019). Journal of Politics, 2020, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3023317.
[6] *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,* (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 ("1907 Hague Convention IV"), Regulations, Arts. 48, 49.

occupation to NIACs,[7] it remains to be assessed whether the broader corpus of international humanitarian law (IHL) is already equipped to deal with the reality of taxation by armed groups. In a context of absence of explicit rules on taxation by armed groups, it is likely that the regulation of such practice will be done under the light of IHL provisions regulating appropriations of private property and, particularly, of the prohibition of pillage,[8] considering it counts with a broader scope of application than other property-related rules in the context of an armed conflict.[9]

Studies on international criminal law (ICL) have already been written analyzing the extent to which the exploitation of natural resources by actors other than the State could fall under the crime of pillage, and also on the 'for private or personal use' requirement of this crime under the Statute of the International Criminal Court (ICC).[10] Additionally, the International Court of Justice (ICJ) in the *Congo v Uganda* has applied the prohibition of pillage to a case of exploitation of natural resources by an occupying state.[11] Yet, taxation by armed groups for the purpose of funding rebel governance has not been addressed in international case law. While the question 'How can armed groups collect taxes without pillaging?' has been raised by eminent scholars in the discussion,[12] there have been fewer attempts to answer it. Therefore, this thesis will seek to contribute to the discussion that has arisen since then, offering insights into the topic.

1.1 Methodology and structure

This thesis will seek to answer the evaluative research question:

'To what extent is the collection of taxes by non-state armed groups for the purpose of funding rebel governance permitted taking into account the prohibition of pillage?'.

The growing importance acquired by armed groups in the past decades has been an important driving force in deciding the topic of this study. Moreover, the peculiarity of taxation as a means of appropriation of property that does not necessarily fall under plain theft in the context of an armed conflict has also been a determining factor. Furthermore, the purpose of funding rebel governance was chosen for setting the scope of this study due to its similarities to occupation regimes in the context of IACs. Both governance by

[7] *Prosecutor v Issa Hassan Sessay, Morris Kallon and Augustine Gbao (Trial Judgement)* [2009] Special Court for Sierra Leone (SCSL) SCSL-04-15-T, para. 982; Marco Sassòli, 'L'administration d'un territoire par un groupe armé, peut-elle être régie par le droit?' in Thierry Tanquerel and others (eds), *Etudes en l'honneur du professeur Thierry Tanquerel: entre droit constitutionnel et droit administratif: questions autour du droit de l'action publique* (Schulthess éditions romandes 2019), 270.

[8] Henckaerts, Jean-Marie and Doswald-Beck, Louise, 'Customary International Humanitarian Law' (International Committee of the Red Cross (ICRC) 2005) Volume I: Rules ("CIHL Study"), Rule 52, 182-185.

[9] Larissa Van Den Herik and Daniëlla Dam-De Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict' (2011) 22 Criminal Law Forum 237, 250-263.

[10] *See* Yulia Nuzban, '"For Private or Personal Use": The Meaning of the Special Intent Requirement in the War Crime of Pillage under the Rome Statute of the International Criminal Court' (2020) 102 International Review of the Red Cross 1249; Stewart, James G., *Corporate War Crimes: Prosecuting Pillage of Natural Resources* (Open Society Foundations 2010); Van Den Herik and Dam-De Jong (n 9).

[11] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 2005 ("Armed Activities in the Congo case"), paras. 245-246.

[12] Marco Sassòli, 'Armed Groups and International Law - Organizing Rebellion Symposium: Sex and Crime*' (*Armed Groups and International Law*, 16 September 2019) <https://www.armedgroups-internationallaw.org/2019/09/16/organizing-rebellion-symposium-sex-and-crime/> accessed 7 May 2023.

rebels and occupation regimes include the provision of order in a territory where the administering entity is not the recognized sovereign. However, while the law of IACs has overtly addressed the issue of tax collection by the OP, the law of NIAC has not done the same for the case of armed groups. In this regard, a final compelling reason for the election of this topic was the necessity to make a small contribution to the collective effort in the international law community to regulate NIACs.

In order to answer the research question, this thesis will be divided into three chapters, with the first two providing the descriptive conceptual and legal frameworks that will be employed in the last chapter to evaluate the legality of taxation by NSAG for funding rebel governance taking pillage into consideration. In this light, the first chapter will dig into the concept of rebel governance and, within it, the role taxation plays in administering the territory under the armed group's control. Considering the concept of rebel governance originated in the field of international relations rather than in legal doctrines, this chapter will rely substantively on this field. This will also imply that the whole thesis will rely on basic interdisciplinary research, which consists in finding the answer to legal questions by resorting to other disciplines, such as social sciences or international relations.[13] In this thesis, the question is a 'micro-legal question' focused on the specific legal concept of pillage and the extent to which taxation by armed groups falls under its scope.[14] The concept of rebel governance, partly provides the answers to the micro-legal question, since determining whether taxation for funding rebel governance can be considered pillage will require understanding what that concept is. Throughout this chapter, books and articles from prominent scholars in the field of rebel governance will be reviewed and employed to describe what rebel governance is, what activities are covered by it, what its purpose is, and most prominently, what the characteristics of rebel taxation are as well as its role in governance mechanisms. For such purposes, an array of academic perspectives will be combined to provide the necessary definitions, and case studies addressed by the literature will be used to exemplify concepts.

Interdisciplinary research does not imply however, that legal desk research will not be conducted. In the second chapter, a description of the relevant legal framework will be provided based on primary and secondary sources, mainly in the field of IHL and ICL. Specifically, this chapter will focus on the regulation of property appropriation in the context of armed conflict. This approach was chosen due to the inexistence of explicit rules in the law of NIAC regulating taxation by a NSAG, which implies regarding taxation as a form of property appropriation.[15] This contrasts with the law of IAC, which counts with specific provisions in this regard and thus separates the regulation of booties, seizure or requisitions (appropriations) from that of taxation and levying of money contributions. In this context, this chapter will start with a revision of IHL property-related rules, as found in the Hague Regulations and Geneva Conventions, and an explanation on why the prohibition of pillage was chosen among them to assess the legality of taxation by armed groups. Such review will also entail defining pillage and its sources. Afterwards, the elements of the prohibition of pillage will be listed and developed in a second section, relying principally on the Geneva Conventions, their commentaries and international criminal law. Finally, a third section will focus on the application of the prohibition of

[13] Mathias M Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert' (2009) 7 Journal of Commonwealth Law and Legal Education 5, 6-7.
[14] ibid.
[15] Briefly, taxation entails the collection of compulsory payments from individuals or collective entities, which is a form of appropriation.

pillage to a state by the ICJ, which will entail not only an analysis of its judgement but also of the evidence considered. Immediately after, a subsection will briefly discuss whether the application of the same rule would vary if the legal subject was a NSAG instead of a State.

The third chapter, which is the actual evaluative assessment, will entail analyzing whether rebel taxation for the purpose of funding rebel governance fulfills each of the constitutive elements of the prohibition of pillage. As such, this chapter will rely on the frameworks previously presented but also on additional sources, such as case law and academic books and articles, which show how these elements have been applied to other practices, particularly similar practices if found. This process will not only shed light on the scope of pillage, but also on its possible limitations to address practices it was not designed for, such as rebel taxation. However, the purpose of this thesis is plainly evaluative and not normative, therefore, although normative issues may arise and be exposed, they will not be the focus of this work.

Finally, the conclusion of this thesis will summarize the main findings and expose the main challenges found in applying the law we have to a practice it was not designed for.

2. Rebel governance and the role of taxation in the interaction with civilians

This chapter will address the rebel governance framework with a particular focus on rebel taxation, departing from a conception which regards rebel groups as more than mere criminal groups controlling territory and searching for profit. Throughout the following four sections, the studies of various prominent scholars will be combined to define (i) rebel governance, (ii) the activities covered by it, (iii) its purpose and, most importantly, (iv) the characteristics of taxation under it as well as its role.

2.1 Defining 'rebel governance'

For a long time, the assumption that states were the sole providers of order was predominant in political science and legal academia.[16] Supporters of this view claimed that wherever states could not exert their authority, the territory would be characterized by anarchy. This changed with the appearance of rebel governance literature, which certainly contested the hegemony of state-centric approaches to international affairs. In this light, the idea of non-state actors holding territory and governing the people living therein is no longer bold but a partly accepted one.[17] This does not mean, however, that defining rebel governance is an effortless task. On the contrary, no agreed definition exists. This section will attempt to reconcile the various voices amongst 'rebel scholars' and provide an operative definition on which the subsequent sections and chapters can rely.

To begin with, Jeremy Weinstein has asserted that rebel governance consists in a rebel group exercising control over a territory and establishing institutions to manage relations with the civilian population, institutions that can be formal or informal but shall define a hierarchy of decision making and a system of taxation.[18] Close to this approach, Nelson Kasfir has labeled rebel governance as "the organization of civilians within rebel-held territory for a public purpose", arguing that such public purpose can adopt three forms, namely, 'political mobilization', 'civilian administration' or 'commercial production', and explaining that whenever a group provides any trait of at least one of these clusters then governance exists.[19] He has also highlighted the role of violence as a necessary

[16] Zachariah Cherian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (ProQuest Ebook Central Edition, Cornell University Press 2011), 35. However, the existence in international law of the belligerency framework applying to civil wars of high intensity should be noted, which granted the insurgents the status of 'belligerents' and thus recognized their capability to administer a part of the territory and its population. *See, in this regard,* Katharine Fortin, 'The Law on Belligerency and Insurgency, and International Legal Personality' in Katharine Fortin (ed), *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

[17] *See* Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (ProQuest Ebook Central Edition, Cambridge University Press 2006); Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (ProQuest Ebook Central Edition, Cambridge University Press 2016); Nelson Kasfir, 'Rebel Governance – Constructing a Field of Inquiry: Definitions, Scope, Patterns, Order, Causes' in Ana Arjona, Nelson Kasfir and Zachariah Mampilly, *Rebel Governance in Civil War* (Cambridge University Press 2015); Mampilly (n 16).

[18] Weinstein (n 17), 164.

[19] Kasfir (n 17), 24-39.

precondition for rebel governance.[20] In this sense, while he excluded the necessity of a taxation system, he coincided with Weinstein in the focus on the management of civilians inhabiting a territory over which the group has achieved control. Ana Arjona has also referred to the organization of the relations with civilians, which is done through the enactment of a social contract that provides predictability and hence order.[21] According to her, rebel governance is a form of social order amidst civil war provided by an armed group which can vary within a continuum ranging from what she calls 'aliocracy' to 'rebelocracy', depending on the amount and quality of functions enacted by the rebels to rule upon civilians.[22] Finally, Zachariah Mampilly has provided a different approach, explaining that governance by rebels is a process by which rebel leaders develop both the structures necessary to provide goods and the practices that enforce their legitimacy.[23] According to him, rebels strive for obtaining legitimacy and authority in order to achieve their ultimate goal of building a 'counterstate sovereign'.[24] In his framework, governance is a broad network of social interactions encompassing "all the practices and norms that regulate the daily life of civilians" which goes beyond the mere provision of public goods.[25]

What is clear, based on commonalities found across the literature, is that rebel governance entails three components: (i) control over territory, (ii) the existence of a population living therein, and (iii) the organization of social interactions with and within that population. Not as straightforward is the provision of public goods as a necessary requirement, which, although being a usual trait in most rebel governance mechanisms, does not appear in all conceptualizations as a condition *sine qua non*. This will be addressed in the following section.

It is helpful to look at these three components in greater detail considering what they mean. Firstly, control over territory is a requirement because organizing social life implies a space where social life can take place. According to Stathis Kalyvas, control of territory in the context of civil war refers to the degree of interference by governmental forces in rebel-held territory.[26] In this regard, Kasfir has stated that as long as it is possible for rebel leaders to enact structures in which civilians can participate, there is control for the purpose of rebel governance, and has explained that full control (no governmental interference) is hence not required.[27] Similarly, Weinstein has explained that the government may eventually be able to infiltrate the area but never be able to become the strongest player, and has further qualified control as the 'monopoly of the use of force within that territory'.[28] The second component is civilian population, which means that a population must reside in the territory controlled by the rebels. This is a crucial element of governance considering the field was born to study interactions between rebels and civilians.[29] Finally, the organization of social interactions refers to the creation of institutions (either formal or informal) which regulate the behavior of actors within the

[20] ibid.
[21] Arjona (n 17), 26-28.
[22] ibid.
[23] Mampilly (n 16), 55.
[24] ibid, 49-50.
[25] ibid, 55-56.
[26] Stathis N Kalyvas, *The Logic of Violence in Civil War* (Cambridge University Press 2006), 210-213.
[27] Kasfir (n 17), 28.
[28] Weinstein (n 17), 164.
[29] Arjona (n 17), 21-40.

territory and thus create order, which is understood as the existence of predictability in the interactions between them.[30]

The presence of violence could be considered another requirement, referring to the first act of violence that triggers the rebellion as well as the constant threat of violence that must prevail in rebel-held territory for rebel governance to exist.[31] Kasfir openly refers to this element as a requirement, while Mampilly, Arjona and Weinstein situate their conceptual frameworks for rebel governance in the context of a civil war, which necessarily entails violence.[32] Based on these elements, rebel governance can be defined as the provision of order by a rebel group over a population and within a territory under their control, through the establishment of institutions and in a context of protracted or constant threat of violence.

2.2 The spectrum of rebel governance: different choices and means of interaction with civilians

The functions rebel governance performs are not always the same. Scholars' contributions explain that governance mechanisms vary along a continuum. In Arjona's view, this continuum ranges from 'Aliocracy' to 'Rebelocracy'. On the one hand, 'Aliocracy' consists of the minimal form of rebel governance, where the rebel group intervenes in social life merely in terms of security and collection of taxes, although the latter is not always necessary since other forms of funding can be available.[33] The rest of civilian affairs are thus in the hands of others, such as state officials, traditional leaders or religious figures. She exemplifies this type of governance with the case of Sudan People's Liberation Movement (SPLM), where local chiefs were in charge of governing civilians and ensuring compliance with the group's rules in exchange for the safety of the community.[34] Still, in the case of SPLM, police forces were deployed by the group to control borders and enforce the law on the territory, and a system for the administration of justice was also enacted with participation of civilians but also of the group's members.[35] This implies that the administration of justice either partly or fully by the group would also fit in this ideal category of 'Aliocracy'. On the other hand, 'Rebelocracy' consists in intervening beyond security and, when applicable, taxation.[36] This entails providing public goods such as health or education, as the Eritrean People's Liberation Front did for the people living in the territory under their control.[37]

Similarly, Mampilly also contends that rebel governance can vary across a continuum of functions. In his view rebel governance provides, at a minimum, strategic services, which would consist for instance in the creation of a police force or a justice system (what he summarizes as 'security'). To a further extent it can provide technical services, such as the enactment of a health or/and an education system ('welfare'). And finally, to its full extent, rebel governance can also provide feedback mechanisms, which refer to the

[30] ibid.
[31] Kasfir (n 17), 30-31.
[32] Weinstein (n 17), 16; Kasfir (n 16), 23.
[33] Arjona (n 17), 28.
[34] ibid, 32.
[35] Douglas Johnson, 'The Sudan People's Liberation Army and the Problem of Factionalism', *African Guerrilas* (1998), 65-70.
[36] Arjona (n 17), 28.
[37] ibid, 34.

creation of legislatures or similar bodies through which the civilians can express their voices ('representation').[38]

As can be seen, there are strong similarities between both frameworks. The provision of security appears as the minimum function that any rebel governance structure entails. The administration of justice, although explicitly included in Mampilly's framework does not have a recognized place in that of Arjona's, despite being present in one of her examples of 'aliocracy'. Beyond these two, further functions can be incorporated to rebel governance to make it broader, such as health and education, but also food supply, infrastructure and road maintenance, the collection of rubbish, and even loan systems; to name some examples of public goods. This raises the question whether the provision of public goods is thus another requirement for rebel governance to exist. Arjona openly contends that only 'rebelocracies' and not 'aliocracies' provide public goods, implying thus that security does not amount to a public good. However, the Stanford Encyclopedia of Philosophy, based on the findings of the economics scholars who coined the concept of 'public good' such as John Stuart Mill, includes security as a form of public good, understanding it as the 'ability to live safely and peacefully in a neighbourhood, city, region, or country.'[39] On his side, Mampilly asserts overtly that rebel governance *is* about the provision of goods, considering the purpose of it, as will be seen in the next section, is gaining civilian support and compliance which can only be achieved by striking a bargain with them through these goods.[40] In view of these considerations, it can be concluded that the provision of public goods for the civilian population is another inherent element of rebel governance.

2.3 The purpose of rebel governance

Having defined rebel governance and addressed the spectrum across which it can vary, it becomes relevant to understand the purpose rebels have in mind when enacting governance. This is because such purpose will not only shape the characteristics of rebel administrations (and taxation therein) but also confirm the public grounds on which rebel governance relies, a crucial point for the following chapters.

In Arjona's words, "one of the tenets of decades of research on guerrilla and insurgency is the centrality of civilian support for rebel survival or success."[41] In this light, most authors agree on the fact that rebel governance is an instrument to articulate civilian support in the pursuit of the rebels' military and political agenda, that is, to help the rebels achieve their cause. Weinstein, for instance, has asserted that rebel groups depend on civilian support for their survival, considering essential resources derive from them such as food supply, shelter, labor and even information.[42] For this reason, he states, rebel groups enact governance structures which mobilize political support from civilians and enable the extraction of those resources.[43] Mampilly also conceives rebel governance as instrumental, in that it allows an insurgent organization to derive support from civilians

[38] Mampilly (n 16), 62.
[39] Julian Reiss, 'Public Goods' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/fall2021/entries/public-goods/> accessed 8 May 2023.
[40] Mampilly (n 16), 4-13.
[41] Arjona (n 17), 299.
[42] Weinstein (n 17), 163.
[43] ibid.

in favor of its political authority and subsequently the achievement of some form of legitimacy.[44] While Weinstein has in mind more material resources, Mampilly regards legitimacy as the main resource to be obtained by rebels enacting governance. Finally, Arjona also agrees with this underlying assumption of rebel governance as a tool for the advancement of the rebel cause, and further focuses on the ensuing bargain power this offers to civilians.[45]

While it is apparent that rebel governance is an instrument to achieve a cause, it is not as clear whether that cause is a public one. However, when scholars use the term rebels, they are referring to an organized group pursuing the specific objective of becoming the undisputed political authority over a territory, which usually entails overthrowing the existing and recognized government but may also involve fighting other armed groups.[46] This is a public cause and therefore it implies that if the purpose of rebel governance is to facilitate the achievement of this cause, then the purpose of rebel governance is also a public one.

2.4 Understanding rebel taxation

While the previous sections presented the broader conceptual framework of rebel governance, exposing the public grounds on which it relies, this section will focus on the specific practice of taxation by rebel groups. It will begin by providing a definition of rebel taxation, after which the roles it can play in rebel governance will be presented. Finally, an example of rebel taxation will be introduced.

2.4.1 What do we understand as rebel taxation?

From the collection of a part of the harvest by guerrillas in Colombia to extensive taxation systems like the one enacted by the LTTE in Sri Lanka, rebel taxation constitutes an enigma within rebel governance literature. There is no uniform practice to describe what amounts to taxation by rebels, as such practice is as diverse as the rebel groups themselves. From a literature review, it is clear that rebel taxation amounts to the collection of payments by the rebel group from the civilian population inhabiting the territory under their control. According to Mampilly, such payments do not need to be in the form of money but can also be in-kind. He affirms that various rebel groups only collect nonpecuniary forms of taxation such as rations of food, harvest, or other non-monetary goods.[47] Arjona also calls it "economic contributions", a catch-all term which appears to be in accordance with Mampilly's view.[48]

In a same vein, a recent quantitative study on 235 armed groups has explored, amongst other variables, the collection of taxes by those armed groups.[49] In this regard, the study's codebook regards "taxation" as the collection of taxes from the civilians or civilians

[44] Mampilly (n 16), 8-9.
[45] Arjona (n 17), 298-300.
[46] Kasfir (n 17), 24.
[47] Zachariah Mampilly, 'Rebel Taxation: Between the Moral and Market Economy' in Nicola Di Cosmo, Didier Fassin and Clémence Pinaud (eds), *Rebel economies: warlords, insurgents, humanitarians* (Lexington Books 2021), 86.
[48] Arjona (n 17), 182.
[49] 'Rebel Quasi-State Institutions Dataset - Codebook' (*REBEL GOVERNANCE NETWORK*) <https://rebelgovernance.weebly.com/data.html> accessed 9 May 2023.

business, including customs taxes for goods coming across a rebel border, taxes paid in food or supplies by civilians, and income or wartime taxes.[50] It also clarifies that such taxation does not need to be upon the whole civilian population, but can be targeted to specific sectors, as it is common with many Marxist armed groups.[51] Furthermore, it only contemplates taxes directed by the group leadership which excludes the possibility of individual soldiers imposing and collecting a tax and keeping it for him or herself.[52] Finally, it indicates that the collection of the taxes should be regularized as opposed to sporadic or spontaneous.[53] This implies some sort of predictability for the taxpayers: while there is no requirement that taxation is written in laws or regulations set by the group, there is a system following a rationale and providing order for civilians. Similarly, a recent study by Mara Revkin on taxation by the Islamic State in Syrian districts explains that for the collection of payments to be considered rebel taxation it must be done pursuant to publicly known rules and procedures.[54] In that study, the imposition of fines as well as service and licensing fees were considered a form of rebel taxation too.[55]

It is worth noting that the destination of the funds collected does not form part of these definitions. However, as explained by Revkin, rebel taxation would not include payment systems made for the private gain of the group or individuals. On the contrary, it only covers the collection of taxes justified on "public interest grounds" such as financing public goods provision, paying the costs of war, or redistributing wealth between the poor and rich, amongst other purposes.[56] Also, rebel taxation can be enacted to fund the governance apparatus in general.[57]

Taking the above into consideration, rebel taxation can be defined as the collection of payments, both in-kind or in the form of money, from the civilian population inhabiting the territory under rebel control, in a regularized manner, pursuant to publicly known rules and as directed by the group leadership.

2.4.2 The role of taxation in rebel governance: beyond economic instrumentalism

Since the beginning of political science literature on armed groups and rebellions there has been a belief that taxation by rebels always amounts to extortion. This belief is based on two core assumptions, namely, that armed groups only tax to obtain revenues, and that they offer protection in exchange, but protection from themselves which hence entails a form of blackmail.[58] These are the foundations of what Mampilly calls 'economic instrumentalism', which according to him is a simplistic approach which ignores other fundamental factors present in taxation by rebels, such as sociopolitical and organizational factors.[59] His approach thus coincides with Revkin's conclusion presented before, that rebel taxation is incompatible with exclusive profit seeking. Before describing this approach, it is thus relevant to understand what rebel taxation is not according to it.

[50] ibid, 7.
[51] ibid.
[52] ibid.
[53] ibid.
[54] Revkin (n 5), Appendix, 1.
[55] Ibid.
[56] Ibid.
[57] Weinstein (n 17), 47.
[58] Mampilly (n 47).
[59] ibid, 77.

'Economic instrumentalism' was founded by the economist Paul Collier and conceives armed groups as profit-seeking firms whose motivations to initiate rebellion are not political but economic,[60] in the sense that through a rational cost-benefit analysis these groups arrive at the conclusion that they can achieve large revenues by taking advantage of an armed conflict. Collier's theory is aligned with the studies of Mancur Olson on state-formation in Europe, [61] who proposed that when a 'bandit group' ensures control over a territory and its population, it will decide on the basis of its governing temporal expectations, whether it prefers to expropriate capital, print money and default debts to obtain large revenues rapidly, or to respect these social contracts and extract a part of the population's income through taxes and achieve the same profits in a more gradual and lengthy manner.[62] Shortly, these theories regard taxation by rebel groups as an instrument for mere revenue generation and personal enrichment.

In proposing a new approach to rebel taxation, Mampilly first identifies several flaws in theories based on 'economic instrumentalism'. Firstly, he asserts that economic instrumentalism lacks empirical evidence and relies on a selection bias.[63] By focusing on specific cases that suit their theory, like the Revolutionary United Front in Sierra Leone or the National Patriotic Front in Liberia, scholars have ignored the existence of numerous rebel groups which are far from apolitical profit-seeking organizations such as the Sudan People's Liberation Army,[64] Al-Shabaab in Somalia[65] and even Boko Haram in Nigeria,[66] all of which pursued a complex political agenda with ethnical, religious and moral objectives. Furthermore, he signals the inappropriateness to understand rebel groups' behavior that characterizes the state-formation approaches from which 'economic instrumentalism' departs. Not every armed group seeks to build a state, nor do they operate in the same context as warlords in the Medieval era where territories had not been under previous control of a recognized sovereign.[67] In our times, armed groups emerge in a context where there is an already recognized sovereign over the territory they claim, and hence, have different motivations and face different conditions than the 'bandits' of centuries ago. On the contrary, understanding taxation should consider that there is a possibility for taxation to be another tool in the legitimacy dispute against the recognized sovereign.[68] Finally, the assumption that the protection given to civilians is based on a threat created by the rebels themselves ignores the idea that systemic disorder can exist due to other actors and the broader context of a civil war caused by a variety of factors.[69]

Considering the above, Mampilly presents a new approach to rebel taxation, capturing dynamics beyond the economic realm. He asserts that "taxation is a technology of governance that rebels deploy to resolve a variety of political, economic and

[60] *See* Paul Collier and Anke Hoeffler, 'On Economic Causes of Civil War' (1998) 50 Oxford Economic Papers 563.
[61] *See* Mancur Olson, 'Dictatorship, Democracy, and Development' (1993) 87 The American Political Science Review 567.
[62] ibid, 568-571.
[63] Mampilly (n 47), 79.
[64] *See* Johnson (n 35).
[65] *See* Mohamed Haji Ingiriis, 'Building Peace from the Margins in Somalia: The Case for Political Settlement with Al-Shabaab' (2018) 39 Contemporary Security Policy 512.
[66] *See* Andrew Walker, 'What Is Boko Haram?' (US Institute of Peace 2012) <https://www.jstor.org/stable/resrep12178> accessed 15 May 2023.
[67] Mampilly (n 48), 80-83, 93.
[68] ibid, 85.
[69] ibid, 90.

organizational challenges."[70] It is worth noting that according to him, the purpose of rebel governance is to build a legitimate authority to ultimately achieve a counter-state sovereignty. Therefore, rather than an instrument for economic profit, taxation is an instrument for the construction of that legitimacy.

In the pursuit of this purpose, rebel taxation can play a variety of roles. While there can be cases in which taxation is merely extractive and hence follows the economic instrumentalism approach, there are numerous other functions rebel taxation can exercise. Mara Revkin's study has shown how it was used by the Islamic State for collective identity formation, demographic engineering and social control.[71] By means of different types of taxes, the NSAG would encourage or discourage the population of certain areas, punish or reward particular behaviors by the citizens, and create a sentiment of community through universal taxes used for helping the poorest of the district. Other functions explored by a recent study are ideology and data collection.[72] Taxation can serve the group's ideology, as can be seen in Marxist groups operating across the world which pursue a social change through the redistribution of wealth. Furthermore, taxation can provide useful information to better know and administer the civilian population. Normally, taxation is not only about collecting the tax but also understanding the profiles of the taxpayers, which includes learning about their income, profession, properties and religious beliefs, amongst other aspects. According to Mampilly all these functions would constitute the *political* dimension of rebel taxation.[73] But there are still two more dimensions of taxation in the context of rebel governance.

The second dimension is organizational. According to Mampilly, deploying a taxation system can promote internal discipline in the rebel group.[74] By stipulating a specific mechanism for the collection of economic contributions from civilians, order and hence predictability arise and consequently it is harder for free riders to take advantage of the armed conflict. In other words, when the taxation system is well established and known by the community, it is easier to identify and punish bribery and corruption, which do not fit in this institutional arrangement. Furthermore, rebel taxation facilitates the internal governance of the rebel group.[75] It is possible that the rebel organization has different levels of administration, for instance, a national level leadership and local units implementing their superiors' agenda. In this light, taxation can be (or not) delegated by the national leaders to local leaders pursuant to their interests and strategies, enhancing the internal government of the rebel group.

A final dimension is the economic one. Economic factors that may encourage taxation other than revenue regeneration are the generation of economic stability for traders to enter rebel-held territory and provide essential goods, the construction of a 'moral economy' based on trust and sense of collective survival, and the fulfilment of external patrons' agenda which may include the enactment of taxation, for instance, the establishment of customs is necessary for a market economy to function.[76]

[70] ibid, 83, 89.
[71] *See* Revkin (n 5).
[72] *See* Bandula-Irwin and others (n 5).
[73] Mampilly (n 47), 90-92.
[74] ibid, 92-93.
[75] ibid.
[76] ibid.

In conclusion, rebel taxation often responds to broader objectives than mere economic instrumentalism. Particularly, rebel taxation can pursue political, organizational and economic goals, while simultaneously funding the functions of rebel governance described in previous sections, such as public goods provision, or the whole political apparatus.[77]

2.4.3 An example of rebel taxation: the NSCN (IM) in India

An example that illustrates many traits of the previously explained dimensions of rebel taxation is the National Socialist Council of Nagalim (Isak-Muivah) (NSCN (IM)) in India, a rebel group pursuing the secession of a part of India's territory. As explained by Bert Suykens, the fact that the group conceived itself as the natural legitimate authority over the northeast region of the country would define the whole system of taxation.[78] According to the leaders, tax payment was a sign of honor and respect to the concerned authority, not a mere collection of money. This follows the symbolic function described by Mampilly employed in the pursuit of legitimacy. Furthermore, the group would tax every item available in the region's market and every import and export made in and out the territory,[79] which not only serves the function of provision of essential goods by providing predictability to traders but also sought to control society behavior and consumption. Moreover, every household would pay a tax according to their profile,[80] which responds partly to the function of data collection and legibility of the population; and Indian government employees would also pay an 'employee tax', which served the political agenda of the group to delegitimize the incumbent government and discourage civilian cooperation with the State. Finally, a 'loyalty tax' would be collected to directly support the secessionist enterprise, which also responds to the collective identity formation as a separate nation from India. The civilian population did not appear to be coerced into paying these contributions. According to the author's own fieldwork, civilians supported the struggle for independence and thus, although lamenting the payment of taxes, they complied to it as a means of contributing to the cause.[81] On its side, the NSCN (IM) authorities would provide civilians with public services and would also give receipts for due payment of taxes. According to the leaders, "collecting money without receipt may be regarded as extortion" which was punished by the group.[82] This further responds to the organizational logics explained by Mampilly, and to the broader argument that rebel taxation is not mere economic instrumentalism.

As can be seen in the case of NSCM (IM), taxation often serves many functions, such as data collection, legitimacy building and demographic engineering. At the same time, it is used to fund the whole rebel governance apparatus. In conclusion, rebel taxation goes beyond 'economic instrumentalism'.

[77] See section 2.4.1 above.
[78] Bert Suykens, 'Comparing Rebel Rule Through Revolution and Naturalization: Ideologies of Governance in Naxalite and Naga India' in Ana Arjona, Nelson Kasfir and Zachariah Mampilly, *Rebel Governance in Civil War* (ProQuest Ebook Central Edition, Cambridge University Press 2015).
[79] ibid, 150-152.
[80] ibid.
[81] ibid.
[82] ibid.

3. The legal framework regulating appropriations in the context of non-international armed conflict

With a view to evaluating whether rebel taxation, as described in the previous chapter, can fall under the prohibition of pillage, this chapter will delve into this IHL rule to provide an appropriate legal framework. As explained in the introduction, without explicit rules in NIACs regulating taxation by armed groups it is likely that this practice will be regulated by more general rules referring to property appropriation in the context of armed conflict, particularly, by the prohibition of pillage. In this light, the structure of this chapter will consist in: (i) a first section explaining the reasons for choosing pillage to assess rebel taxation, which will involve defining it and comparing it to other property-related rules, (ii) a second section which will develop on each of the constitutive elements of pillage, building partly on ICL case law and legal scholarship, and (iii) a third section which will describe a case before the ICJ in which this rule was applied to a state and which may shed light on its application to NSAGs.

3.1 Why pillage over other property-related rules in the context of armed conflict?

IHL counts with various rules regulating the appropriation of property during armed conflict. However, as will be explained, due to its broader scope of applicability in terms of type of armed conflict and property covered, the prohibition of pillage will always be a compulsory consideration in any legal assessment of rebel taxation. This does not mean that other rules may not be important when determining the legality of this practice, in fact, by definition pillage requires that the appropriation was unlawful under IHL, which necessarily entails addressing situations in which appropriations are lawful under the light of other IHL rules. Bearing this in mind, this section will firstly define the prohibition of pillage, and will secondly compare it to other rules showing the reasons for choosing the prohibition of pillage over them.

3.1.1 Defining pillage

The prohibition of pillage is an old rule of IHL that can be rooted to early relevant documents in the field. Both the Lieber Code of 1863 and the Brussels Declaration of 1874 state that pillage is prohibited.[83] This rule can also be found in several international treaties as well as in customary international law. The 1907 Hague Regulations forbids pillage in two of its provisions.[84] The 1949 Geneva Conventions prohibit pillage as well: the First Geneva Convention enacts a duty to protect the wounded and sick from pillage,[85] the Second Geneva Convention does the same with the wounded, sick and shipwrecked at sea,[86] and the Fourth Geneva Convention provides a protection applying to all persons

[83] Adjutant General's Office, 'General Orders No. 100: Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber, LL.D.' (Government Printing Office 1863) ("Lieber Code"), art. 44; Project of an International Declaration concerning the Laws and Customs of War (1874) Brussels, Belgium ("Brussels Declaration"), art. 39.
[84] 1907 Hague Convention IV, Regulations, arts. 28, 47.
[85] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (12 August 1949) 75 UNTS 31 ("First Geneva Convention"), art. 15.
[86] *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (12 August 1949) 75 UNTS 85 ("Second Geneva Convention"), art. 18.

under its scope and stating "pillage is prohibited".[87] Furthermore, and in terms of treaties applying to NIACs, Additional Protocol II to the Geneva Conventions prohibits pillage in article 4(2)(g).[88] Also, the Special Court for Sierra Leone (SCSL) has asserted that the prohibition of pillage is derived from the prohibition of inhumane treatment enshrined in Common Article 3 to the Geneva Conventions.[89]

The prohibition of pillage is also considered a rule of customary international law applicable in both IACs and NIACs according to the ICC,[90] the International Criminal Tribunal for the former Yugoslavia (ICTY)[91] as well as the ICRC, which included it as customary rule 52 in its Study on Customary International Humanitarian Law.[92] It is worth noting that some international criminal tribunals treat pillage as a synonym of 'plunder' and 'looting.'[93] However, it has been signaled by scholars that plunder may be broader in scope than pillage,[94] at least as employed by the ICTY whose statute includes this crime and not the crime of pillage.[95]

Despite its ubiquitous presence in international law, a definition of the prohibition of pillage is not provided in any international convention. Nonetheless, the commentaries to the Geneva Conventions do specify a definition for this rule, drawn from the jurisprudence of the ICTY and the SCL, and hence from ICL. Pillage is defined as the appropriation or obtaining of public or private property by an individual without the owner's consent, in violation of international humanitarian law.[96] In terms of scope, the prohibition is absolute, which means that no exception exists when the elements of this prohibition are met.[97] Pillage covers both individual acts of soldiers without the consent of the military authorities as well as organized pillage ordered or authorized by commanders or other high-ranking officials.[98] Finally, the prohibition of pillage leaves intact the right of requisition during occupation, the right to seizure of the enemy's property,[99] and the right to capture war booty.[100] As such, these other rules shed light on

[87] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (12 August 1949) 75 UNTS 287 ("Fourth Geneva Convention"), art. 33.
[88] *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts* (8 June 1977) 1125 UNTS 609 ("Additional Protocol II"), art. 4(2)(g).
[89] *Prosecutor v Moinina Fofana, Allieu Kondewa (Appeal Judgment)* [2008] Special Court for Sierra Leone SCSL-04-14-A ("*Fofana Appeal Judgment*"), para. 381.
[90] *Prosecutor v Jean-Pierre Bemba Gombo (Trial Judgement)* [2016] International Criminal Court (ICC) ICC-01/05-01/08-3343 ("*Bemba Trial Judgment*"), para. 114.
[91] *Prosecutor v Tihomir Blaškić (Appeal Judgement)* [2004] International Criminal Tribunal for the Former Yugoslavia (ICTY) IT-95-14-A, para. 148.
[92] CIHL Study, "Rule 52", 182-185.
[93] *Bemba Trial Judgement*, para. 114.
[94] Knut Dörmann and Louise Doswald-Beck, *Elements of war crimes under the Rome Statute of the International Criminal Court: sources and commentary* (Cambridge University Press 2003), 272-280.
[95] *Prosecutor v Goran Jelisic (Trial Judgement)* [1999] International Criminal Tribunal for the Former Yugoslavia IT-95-10-T, para. 48.
[96] International Committee Of The Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1st edn, Cambridge University Press 2016), 537; International Committee Of The Red Cross, *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* (Cambridge University Press 2017), 592-593.
[97] Pictet, Jean, *Commentary on the Fourth Geneva Convention: Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958), 226-227.
[98] ibid.
[99] ibid. 1907 Hague Convention IV, Regulations, arts. 23(g), 52, 53.
[100] ICRC 2016 (n 96), 538.

situations in which appropriations of property are lawful under IHL and are thus incompatible with pillage. However, not all of them are relevant in NIACs. The following subsection will address this point and show why pillage will be the only one always employed when legally assessing rebel taxation.

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3.1.2 Comparing the prohibition of pillage with other property-related rules

Out of the three rules mentioned before, which regulate the appropriation of property and are thus used to determine lawful appropriations under IHL, the capture of war booty and the right to requisition during occupation are only applicable in IACs. This leaves the prohibition of destruction or seizure of the enemy's property unless required by military necessity as the only rule other than the prohibition of pillage which could be relevant for determining the legality of rebel taxation. This rule is enshrined in article 23(g) of the 1907 Hague Regulations[101] and can also be found in the Lieber Code.[102] Furthermore, it is considered a grave breach to the Geneva Conventions when carried out against property specifically protected by each of them in an extensive, unlawful and wanton manner.[103] Additionally, a derivation of this rule is codified as an IAC war crime under article 8(2)(b)(xiii) of the Rome Statute.[104] While the ICRC indicated in its Study on CIHL that this rule applies to both IAC and NIAC,[105] when it comes to NIACs no international instrument exists applying this rule to this type of armed conflicts. However, the fact that the parties to the Rome Statute decided to also include a war crime in NIACs[106] equivalent to that of article 8(2)(b)(xiii) applicable in IACs, may show international consensus that it is also a rule in internal armed conflicts.

When it comes to its elements, three clarifications are relevant. First, and regarding the meaning of 'seizure', during the drafting of the Elements of Crimes of the Rome Statute, the delegations considered that seizure was the same as appropriation.[107] Secondly, 'enemy's property' is to be understood as all property belonging to the hostile party.[108] In the context of NIAC this has been said to cover all property belonging to the 'adversary,' considering enemy is not an appropriate term when all the participants of the armed conflict share nationality.[109] In this regard, some scholars have argued that identifying an 'adversary's property' in a NIAC would entail a two-tier test, requiring, first, determining who's the owner of the property under domestic law, and second, determining whether that owner is affiliated to a party to the conflict.[110] For the latter step, they argue that an adversary refers to 'any person, who is considered to belong to another party to the conflict, such as the government, insurgents, or any person belonging to an opposing

[101] 1907 Hague Convention IV, Regulations, art. 23(g).
[102] Lieber Code, arts. 15, 16.
[103] First Geneva Convention, art. 50; Second Geneva Convention, art. 51; Fourth Geneva Convention, art. 147.
[104] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 ("Rome Statute"), art. 8(2)(b)(xiii); Andreas Zimmermann, 'Article 8(2)(b)(xiii)' in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (2nd ed, Beck 2008), 395; Dörmann (n 94), 251.
[105] CIHL Study, "Rule 50", 1759-177.
[106] Rome Statute, art. 8(2)(e)(xii).
[107] Nuzban (n 10), 1254.
[108] Zimmermann (n 104), 397.
[109] Andreas Zimmermann, 'Article 8(2)(e)(xii)' in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (2nd ed, Beck 2008), 284.
[110] Van Den Herik and Dam-De Jong (n 9), 260-261.

organized group.'[111] Therefore, the property of civilians not obviously or necessarily affiliated to a party to the NIAC would be excluded from the scope of this provision.

Lastly and regarding the element of 'military necessity', the ICC has asserted that in the context of this rule its definition can be extracted from article 14 Lieber Code. Moreover, the ICC has signaled that military necessity does not permit actions which are prohibited by IHL, rather, it only amounts to a justification of destruction or seizure when the laws of armed conflict provide for it.[112] This was also signaled by the International Military Tribunal at Nuremberg in the *Hostages case*, where it asserted that military necessity could not justify a violation of articles 46, 47, and 50 of the Hague Regulations, as these provisions did not allow for such an exception.[113] Consequently, military necessity serves as a justification only for rules that expressly incorporate it,[114] such as article 54(5) Additional Protocol I or 51 Second Geneva Convention.[115] In the case of Hague Regulation 23(g), where this justification is also specified, it has been interpreted as applicable in exceptional circumstances[116] and solely to actions undertaken in the course of military operations.[117]

Considering the above, it can be said that among the two applicable rules in NIACs, namely, seizure required by military necessity and the prohibition of pillage, the latter encompasses a broader range of appropriations compared to the former. While seizure refers only to appropriations of the adversary's property, pillage covers all property, regardless of the owner. This is not to suggest that seizure is irrelevant in assessing the legality of rebel taxation; in fact, it will be addressed in the following chapter too. However, the wider scope of pillage implies that any appropriation during armed conflict has the potential to fall under its purview, making it a mandatory consideration when evaluating the legality of appropriations. This holds particularly true for NIACs, where no specific regulations exist concerning taxation by armed groups.

3.2 The constitutive elements of pillage

Having defined pillage and explained the reasons why it was chosen for evaluating rebel taxation, this section will dig into its constitutive elements with a view to applying them in the next chapter. As explained before, pillage means appropriation or obtaining of public or private property by an individual without the owner's consent, in violation of international humanitarian law. This definition entails a number of elements which must be identified in a specific act which may amount to pillage: first, a nexus to the armed

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[111] ibid.

[112] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the confirmation of charges)* [2008] International Criminal Court ICC-01/04-01/07 ("*Katanga Confirmation of Charges*"), para. 318; Hans Boddens Hosang, 'Article 8 (2)(b)(xiii) - Destroying or Seizing the Enemy's Property' in Roy S (Roy SK) Lee, *The International Criminal Court: elements of crimes and rules of procedure and evidence* (Transnational Publishers 2001), 171.

[113] *United States v Wilhelm List et al (Trial Judgment)* [1948] International Military Tribunal at Nuremberg, Case No 7, 1256.

[114] Dörmann (n 94), 250.

[115] *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (8 June 1977) 1125 UNTS 3 ("Additional Protocol I"), art. 54(5); Second Geneva Convention, art. 51.

[116] *United States of America v. Alfried Krupp, et al. (Trial Judgment)* [1948] International Military Tribunal at Nuremberg, Trials of War Criminals Before the Nuremberg Military Tribunals, Vol. IX, 1343.

[117] *Trial of Franz Holstein and twenty-three others* [1949] International Military Tribunal at Dijon (Judicial Summary) United Nations War Crimes Commission "Law reports of trials of war criminals", Vol. VIII, 30.

conflict which is necessary for the applicability of any IHL rule, second, that the relevant act consisted in an appropriation, third, that such appropriation was without the owner's consent, and fourth, that it was not lawful under IHL. The following subsections will thus develop on these elements and will lastly explore a potential final requirement which is found in the Elements of Crime of the Rome Statute and still contested, namely, that pillage must be 'for private or personal use'.

3.2.1 Nexus to the armed conflict

Moving on to the constitutive elements of pillage, the first requirement is that there is a nexus between the relevant act and the armed conflict. This element has thus two dimensions: the existence of an armed conflict and the nexus between the act and that conflict.[118] Considering the prohibition of pillage is a norm in both IAC and NIAC, the existence of either of both would suffice to apply it, however the focus of this thesis is on NSAGs and their activities thus only the case of NIACs will be addressed.

For a NIAC to exist two requirements must be met, namely, sufficient organization of the armed group and a certain level of intensity of the hostilities.[119] A variety of factors can help identify whether the threshold for each requirement is met.[120] Besides the existence of a NIAC, there must also be a link between the relevant activity and the armed conflict for it to be regulated by the prohibition of pillage. According to the commentary to Common Article 3, the applicability of humanitarian law to a specific act always requires a certain nexus between that act and the non-international armed conflict: if no such connection existed, the act would be exclusively regulated by domestic law.[121] The ICRC, whose position relies on the findings of the ICTY in the *Kunarac* case, explains that the nexus requirement entails that the ability, decision and objective of a person engaging in a certain conduct covered by IHL must be significantly shaped or facilitated by the existence of the armed conflict.[122] This is not to say that a causality link must exist between the armed conflict and the conduct, but that the armed conflict must have played an essential role without which such conduct would have been impossible.[123] Some factors listed by the ICTY to identify the nexus are the fact that the perpetrator is a combatant, that the victim is a non-combatant and that the act may be said to serve the ultimate goal of a military campaign.[124]

Although it is established that such nexus must exist, there is still debate in legal scholarship as to what the threshold for this nexus is. While the ICRC submits that any act carried out by a NSAG in a territory under their *de facto* control is linked to the armed

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[118] ICRC 2016 (n 96), 165-166.
[119] ICRC 2016 (n 96), 153; *Prosecutor v Duško Tadić (Trial Judgment)* [1997] International Criminal Tribunal for the Former Yugoslavia (ICTY) IT-94-1-T ("*Tadić Trial Judgment*"), para. 562.
[120] *Prosecutor v Haradinaj et al (Trial Judgment)* [2008] International Criminal Tribunal for the Former Yugoslavia IT-04-84-T, para. 60; *Prosecutor v Boškoski and Tarčulovski (Trial Judgement)* [2008] International Criminal Tribunal for the former Yugoslavia IT-04-82-T, para. 177.
[121] ICRC 2016 (n 96), 166.
[122] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2019) available at <https://www.icrc.org/sites/default/files/document/file_list/challenges-report_ihl-and-non-state-armed-groups.pdf >, 53.
[123] *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)* [2002] International Criminal Tribunal for the Former Yugoslavia IT 96 23 & 23/1 ("*Kunarac Appeal Judgment*"), para. 58.
[124] Ibid, para. 59.

conflict,[125] there are other positions which highlight the existence of NSAGs' practices in territories under their control that are not connected to the armed conflict and thus should fall outside the scope of IHL and be regulated by other fields of law.[126] This will be addressed in the next chapter when applying the nexus requirement to rebel taxation.

3.2.2 Appropriation

After determining that the relevant act has a nexus to the armed conflict, it is necessary to determine whether it amounted to an appropriation as encompassed by pillage. This aspect was addressed by the ICC in the *Bemba* case, which amongst other issues dealt with pillaging by soldiers of the Movement for the Liberation of the Congo (MLC) acting under the command responsibility of the accused, who appropriated belongings of civilians, such as their livestock, vehicles, televisions, furniture and money. The Trial Chamber, in determining the existence of pillage, relied on the Black's Law Dictionary to define appropriation,[127] which states that to appropriate is "to exercise control over a property; to take possession of".[128] In a same vein, the ICC Pre-Trial Chamber also noted in the *Katanga* case that, in contrast with the war crime of destruction of property, which can take place before the destroyed property falls into the hands of the party to the conflict to which the perpetrator belongs, the war crime of pillage always requires first that such property has come under the control of the perpetrator; only then can he or she appropriate it.[129]

3.2.3 Consent

If established that the act has a nexus to the armed conflict and it amounted to an appropriation, the following requirement is that it was done without the consent of the owner. In this regard, the ICC has stated that lack of consent can be inferred from the absence of the rightful owner at the moment the property was taken or the fact that such owner was hiding.[130] This implies that resort to violence is not necessary to prove lack of consent. Furthermore, the ICTY has signaled that a context of coercion can also prove lack of consent,[131] and the International Military Tribunal at Nuremberg has provided further details into factors that can help identify a context of coercion, listing threats, intimidation and exploitation of the position of power as some examples.[132] Yulia Nuzban, reviewing the lack of consent element in pillage as well as in other crimes under the Rome Statute, has asserted that other indicative factors are the use or threat of force,

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[125] ICRC (n 122), 53.
[126] Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control' (2016) 63 Netherlands International Law Review 161, 176-179; Elvina Pothelet, 'Life in Rebel Territory: Is Everything War?' (*Armed Groups and International Law*, 20 May 2020) <https://www.armedgroups-internationallaw.org/2020/05/20/life-in-rebel-territory-is-everything-war/> accessed 30 May 2023.
[127] *Bemba Trial Judgement*, para. 115.
[128] Bryan A Garner (ed), *Black's Law Dictionary* (8th edition, Thomson West 2004), 315.
[129] *Katanga Confirmation of Charges*, para. 330.
[130] *Bemba Trial Judgement*, para. 116; *Prosecutor v Germain Katanga (Trial Judgement)* [2014] International Criminal Court ICC-01/04-01/07, para. 954.
[131] *Prosecutor v Momcilo Krajisnik (Trial Judgement)* [2006] International Criminal Tribunal for the Former Yugoslavia IT-00-39-T, para. 821.
[132] *The IG Farben Trial, The United States of America vs Carl Krauch et al (Judgment)* [1948] International Military Tribunal at Nuremberg, 1135-1136.

deception and verbal and non-verbal statements of the owner.[133] Briefly, lack of consent is established relying on the particular circumstances of each case by the identification of various indicative factors such as threat of force or a context of coercion.

3.2.4 Lawful appropriations

The fourth element of pillage requires that the unconsented appropriation was unlawful under IHL, therefore it implies identifying which are lawful appropriations. When the ICRC or international criminal tribunals refer to lawful appropriations under IHL they mean measures permissible under the rules mentioned in section 3.1.2 of this chapter.[134] Therefore, an act of pillage would be any act of appropriation of public or private property, without the owner's consent, which is not a war booty capture, a seizure required by military necessity, or a measure taken by an OP following the regulations of the law of occupation. As explained above, out of these three categories, only one could possibly be applicable to NIACs, namely, seizure required by military necessity. This means that, in a NIAC, this can be the only rule precluding the wrongfulness of an appropriation under IHL.

3.2.5 'For private or personal use'?

Following the definition initially presented, the prior four elements would suffice to determine the existence of pillage. However, the addition of another requirement to the elements of the crime of pillage under the Rome Statute has casted significant doubts on such assumption. More specifically, intending to use the appropriated property for 'private or personal' purposes was introduced in the ICC Elements of Crime by the Assembly of State parties to the Rome Statute.[135] By employing the terms private or personal use, this provision refers to both the personal use by the appropriator or by third persons or entities to which the appropriator may grant the pillaged property.[136]

The ICC and legal scholars have noted that this requirement facilitates the differentiation of pillage from the otherwise similar crime of destroying or seizing the enemy's property.[137] This is in accordance with the footnote included in the Elements of Crime for this specific requirement, stating that appropriations justified by military necessity cannot constitute the crime of pillaging.[138] When it comes to the legal authority of this requirement, however, the ICC itself has noted that it does not conceive it as part of customary or conventional IHL and that it only follows it due to its explicit presence in the elements of the war crime of pillaging.[139] Besides, the ICTY has signaled that plunder not only covers acts of looting committed by individual soldiers for their private gain, but also "organized seizure of property undertaken within the framework of a systematic

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[133] Nuzban (n 10), 1260-1261.
[134] ICRC 2016 (n 96), 538; *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (Trial Judgement)* [1998] International Criminal Tribunal for the Former Yugoslavia (ICTY) IT-96-21-T ("*Delalic Trial Judgment"*), para. 587; *Bemba Trial Judgement*, paras. 120-123.
[135] International Criminal Court (ICC), *Elements of Crimes* (ICC 2011) <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> ("ICC Elements of Crime"), 25.
[136] *Bemba Trial Judgement*, para. 120; Nuzban (n 10), 1262.
[137] *BembaTrial Judgement*, para.120; Hans Boddens Hosang, "Pillaging", in Roy Lee, *International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), 176-177.
[138] ICC Elements of Crime, 25.
[139] *Bemba Trial Judgement*, para. 120.

economic exploitation of occupied territory."[140] This has been read as a form of looting which serves the purpose of furthering the war effort while constituting pillage, which contravenes the requirement that the appropriation shall pursue personal or private purposes.[141]

Nonetheless, the ICRC has mentioned this requirement in its definition of Rule 52 of the CIHL Study and has subsequently noted that it makes the prohibition of pillage a specific application in armed conflict of the general principle of law prohibiting theft.[142] This could be interpreted as an acceptance of this requirement. Additionally, the SCSL Appeals Chamber in the *Fofana* case embraced the ICC Elements of Crime, and particularly the 'for private or personal use' requirement, as an "indication of the *opinio juris* of States" and further agreed with the ICRC's consideration of pillage as a specific application of the principle prohibiting theft.[143] This implicitly supports the legal authority of this requirement. Briefly, there are solid grounds to assert that the 'for private or personal use' is another constitutive element of pillage, considering the Assembly of state parties to the Rome Statute, the SCSL and ICRC have all embraced it. However, the reluctance of the ICC to consider it part of customary international law still casts doubt on the status of this element.

3.3 What can we learn from the *Congo v Uganda* case?

After discussing the elements of pillage, this section will explore the *Congo v Uganda case,* where the ICJ applied this rule to a state. Its aim is to examine whether the previously discussed legal framework aligns with the Court's position. One core issue in this case was the exploitation of Congolese natural resources by the armed forces of Uganda, which the ICJ considered a form of pillage in violation of articles 47 of the Hague Regulations and 33 of the Fourth Geneva Convention.[144] Although the Court found Uganda to be in violation of these rules, it did not delve into the specifics of how the breach occurred, simply acknowledging the occurrence of pillage. Consequently, no definition of pillage or its elements can be found in the Court's ruling. However, one of the reports on which the Court relied to decide may still shed some light on what the Court considered pillage. This is a report of the United Nations Panel of Experts, created *ad hoc* to investigate the characteristics of the conflict in Congo.[145]

The Panel Report revealed that the occupying Ugandan armed forces engaged in a two-phase process of mass looting.[146] In the initial phase, the occupied zones were "drained of existing stockpiles", including minerals, agricultural products, and livestock.[147] The report explained that the armed forces would visit farmers, banks and factories and

[140] *Delalic Trial Judgement*, para. 590.
[141] Eve La Haye, 'The Prohibition of Pillage in International Humanitarian Law' in Nina HB Jørgensen (ed), *The International Criminal Responsibility of War's Funders and Profiteers* (1st edn, Cambridge University Press 2020), 193.
[142] CIHL Study, "Rule 52", 182-185.
[143] *Fofana Appeal Judgment*, paras. 403-404.
[144] *Armed Activities in the Congo case*, para. 245.
[145] Ibid, para. 237.
[146] United Nations Secretary-General, Letter to the President of the Security Council containing the *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* (12 April 2001), S/2001/357, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/323/54/IMG/N0132354.pdf?OpenElement>.
[147] Ibid, 8-9.

demand the opening of the storages. Subsequently, they would remove all contents and load them into vehicles for future transportation. After this, the second phase would begin according to the report, which involved the direct extraction of the resources in a variety of manners: by individual soldiers for their own benefit, by locals organized by the Ugandan commanders or by foreign nationals for the army or commanders' benefit.[148] One example provided in the report focused on the mining sector, detailing how the Ugandan forces would put local Congolese and, after their death, their own soldiers to extract gold from the Gorumbwa mine galleries. In some cases, individual soldiers would keep a part for their own benefit, and in others they would hand the gold in to their commanders.[149] Besides these two forms of natural resource mass-looting, the report also pointed out other forms of illegal exploitation, such as the enactment of a system of taxation by rebel groups with their established Ugandan counterparts.[150] According to the report, the rebel groups Congolese Rally for Democracy (RCD) and the MLC would collect taxes and send them to Uganda's capital, but also within Congo, individual Ugandan colonels would claim these taxes from the groups. Ultimately, the report highlighted the fact that this process of systemic exploitation was aimed at enriching a variety of actors taking advantage of the conflict.[151]

Despite the superficial application by the ICJ of the prohibition of pillage to the case, the findings of this report contribute to better understand the Court's reasoning. In accordance with the elements described in the previous section, the actions described as looting in the report seem to fulfil each of them. In connection with an ongoing armed conflict in the DRC, the armed forces of Uganda took possession (appropriated) of a variety of properties, including minerals, crops and money; without doing so under permitted categories of appropriation under IHL. Not only is impossible to justify this mass looting as 'war booty' (due to the nature of the captured properties) but also none of these acts carried out by Ugandan forces fall under lawful requisitions during occupation nor under seizure required by military necessity: the extraction of resources was not used for the needs of the army of occupation nor was it limited to weaken the enemy and achieve victory. Furthermore, the threat and use of violence is ubiquitous in these actions, as civilians were forced by the military to open warehouses and even to work on extraction until death; this exposes the lack of consent by the properties' owners. Finally, the fact that this mass looting was perpetrated with the aim of enriching a variety of actors, including soldiers, colonels and politicians even supports the 'for a private or personal use' requirement. Therefore, a close reading of the *Congo v Uganda* case seems to confirm the five elements of pillage described above.

3.3.1 Would the application of this rule vary if we are talking about armed groups?

Considering the prohibition of pillage is a rule in both IACs and NIACs, it would be logical to conceive that no variations would exist in the application of this prohibition to armed groups with respect to how it is applied to states. Further reasons support this argument. Firstly, the commentary to Additional Protocol II, specifically, to article 4(2)(g) expresses that this provision, which contains the prohibition of pillage, was plainly based on article 33 of the Fourth Geneva Convention, which was applied by the

[148] Ibid, 10-14.
[149] Ibid.
[150] Ibid, 13.
[151] Ibid, 30-31, 42.

ICJ to Ugandan armed forces.[152] And secondly, the codification of the war crime of pillage under the Rome Statute, which as was mentioned above is used to inform the prohibition of pillage, employs the same terms for the crime in the context of an IAC and the one in NIACs.[153] Moreover, the Elements of Crime also provide the same elements for both crimes.[154] To conclude, it is likely that the application of the prohibition of pillage entails the same elements and assessment notwithstanding whether the relevant subject is a state or a NSAG. Taking this into consideration, the next chapter will apply each element of pillage to taxation by NSAGs for the purpose of funding rebel governance.

[152] Claude Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), 1376.
[153] Rome Statute, arts. 8(2)(b)(xvi), 8(2)(e)(v).
[154] ICC Elements of Crime, 17, 25.

4. Is rebel taxation a form of pillage?

The existence of rebel taxation poses a challenge to the current framework of IHL due to the lack of specific rules addressing this practice by armed groups. This is an issue that must be read in the broader context of state-centrism that characterizes international law, in which States fear granting NSAGs a status they do not wish to confer by extending new features to these entities.[155] Taxation, amongst such features, has historically been a prerogative of the State and as such, it is hardly imaginable that States would include in international treaties a permission to collect taxes for NSAGs to the same extent they did for occupying powers in 1907. In this context, this chapter will depart from a positivist approach and seek to apply the elements of pillage to taxation for the purpose of funding rebel governance, which will also be referred to as rebel taxation.[156] The sections below will thus discuss the application of the elements presented in Chapter 3, namely, (i) the nexus of rebel taxation to the armed conflict (if any at all), (ii) whether it amounts to a form of appropriation as covered by pillage, (iii) whether and when lack of consent exists in the collection of taxes by NSAGs, (iv) whether it can fall under the scope of lawful appropriations under IHL and finally, (v) whether the 'private or personal use' requirement may exclude this practice from the scope of pillage. Afterwards, (vi) a summary of findings will be provided.

4.1 The nexus requirement

To begin with, for rebel taxation to fall under the scope of the prohibition of pillage it must first present a nexus to the armed conflict. As explained in Chapter 3, this requires, on the one hand, that the relevant rebel group is a party to a NIAC and thus qualifies as a NSAG, and on the other, determining whether the collection of taxes meets the nexus threshold. Regarding the first requirement, it is well established under international law that only sufficiently organized armed groups which reach a certain level of violence against the state will have their acts regulated by IHL.[157] Therefore, only rebel groups who meet these criteria and therefore become a NSAG for the purpose of IHL will qualify for this evaluation. Otherwise, national law will be the only relevant legal framework for rebel groups who are not parties to a NIAC.

After establishing that the rebel group is a party to a NIAC, it is necessary to determine whether taxation for the purpose of funding rebel governance meets the nexus to the armed conflict explained in the previous chapter. Two main perspectives exist in legal scholarship as to the threshold of this nexus. Under the first position, supported by the ICRC, any act of a group exercising *de facto* control over a territory and its population has a nexus to the armed conflict. In the words of the ICRC, "the way in which non-State armed groups exercise control over, and interact with, persons living in territory under

[155] *See* Zakaria Daboné, 'International Law: Armed Groups in a State-Centric System' (2011) 93 International Review of the Red Cross 395.
[156] It is worth noting that rebel taxation as defined in the first chapter does not necessarily entail that the funds are used to fund rebel governance. However, as also explained therein, financing the governance apparatus is often the end to which taxation funds are often directed. For this reason and for more practicality, rebel taxation in this chapter will be employed to refer to taxation by armed groups for the purpose of funding of rebel governance.
[157] *Tadić Trial Judgment*, para. 565.

their de facto control is inherently linked to the conflict in question".[158] The nexus threshold under this position is thus extremely low. As such, considering rebel governance necessarily entails control over a territory and the organization of social interactions therein, it is logical to assume that taxation enacted in that context would always present a nexus to the armed conflict under this perspective.

Following the second current of thought, however, the application of pillage is not as straightforward. This perspective submits that not every act in rebel-held territory should be considered linked to the armed conflict as this would undermine the principle of equality of belligerents,[159] dilute the specificity of IHL[160] and possibly be against articles 5 and 6 of Additional Protocol II,[161] amongst other consequences. Therefore, pursuant to this position, the nexus requirement should be analyzed on a case-by-case basis according to the form rebel taxation adopts. Following the narrower interpretation of the criteria set by ICTY for the determination of the nexus requirement,[162] defenders of this position may look at various factors to define the nexus requirement of rebel taxation. This would involve the evaluation of factors such as: who is the actor collecting the taxes (whether it is a member of the NSAG or civilians who cooperate with the armed group,[163] for instance), who are the tax-payers (all civilians, civilians and members of the NSAG too, only civilians "affiliated" to the adverse party to the conflict, amongst other categories), what the purpose of taxation is (serving the ultimate goal of the military campaign, provision of public goods, funding rebel governance, amongst others), and whether the taxes are collected as part of the collector's official duties or rather an unrelated activity. As a consequence, those rebel taxation mechanisms which are employed to further the military campaign, which target civilians "affiliated" to the adverse party to the conflict,[164] and which employ members of the NSAG as tax collectors, may have more chances to fulfill the nexus requirement under this perspective, since the links to the armed conflict are *prima facie* much stronger than a case where rebel taxation is enacted only for the financing of a few public services and collected from the whole population, including fighters of the NSAG (which implies that it is not a means of weakening the adversary).

Due to the uniqueness of each rebel governance apparatus as well as the taxation systems enacted therein, it is submitted here that the second approach is more accurate in determining the real link between rebel taxation and the armed conflict. The main but not only reason is that this approach tailors the analysis and determination of the nexus to the specific circumstances at hand.[165] For instance, as mentioned by Pothelet, a NSAG may

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[158] ICRC (n 122), 53.
[159] William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' (2017) 49 Case Western Reserve Journal of International Law 75.
[160] Fortin (n 126), 176-179.
[161] Pothelet (n 126).
[162] *Kunarac Appeal Judgment*, para. 59.
[163] In the case of the Free Aceh Movement (GAM) in Indonesia, for instance, Islamic leaders and students collected taxes in benefit of the armed group. *See in this regard* Shane Barter, 'The Rebel State in Society: Governance and Accommodation in Aceh, Indonesia' in Ana Arjona, Nelson Kasfir and Zachariah Mampilly, *Rebel Governance in Civil War* (ProQuest Ebook Central Edition, Cambridge University Press 2015).
[164] An example is the LTTE in Sri Lanka, who taxes employees of the government living in territory under their control.
[165] Other reasons why the ICRC's approach is not preferred were briefly mentioned before: it undermines the principle of equality of belligerents, dilutes the specificity of IHL and possibly is against articles 5 and 6 of Additional Protocol II.

have achieved control over territory and established rebel governance during an old conflict or in areas abandoned by the state,[166] and it may even have enacted rebel taxation at that time too. As such, it would be mistaken to assert that rebel taxation in that scenario was significantly facilitated by the eruption of an armed conflict, presenting thus a nexus to it, considering taxation was set temporally before.

4.2 Is rebel taxation a form of appropriation?

After determining the nexus between rebel taxation and the armed conflict, the next element to be evaluated is whether this practice amounts to 'appropriation of public or private property'. As discussed above, to appropriate means 'to take possession of'. Therefore, to the extent that the armed group takes possession of and puts under its control a part of civilians' property, such as money or crops, it would be logical to regard such practice as appropriation. Besides, whether carried out directly by members of the NSAG, or civilians either in cooperation or forced by the armed group, it would still amount to appropriation for the purpose of pillage if the rest of the elements are also met.[167]

Nonetheless, it is still interesting to analyze whether in the context of an occupation, taxation by an OP is also regarded as appropriation. This is relevant because an OP, just like a NSAG enacting rebel governance, provides order over a territory on which is not the recognized sovereign under international law. However, as will be shown below, in the case of occupation taxation is in general not conceived as a form of appropriation when done in accordance with Hague Regulations 48, 49 and 51.

4.2.1 Are taxation and levying of money contributions by an Occupying Power considered a form of appropriation?

A series of factors seem to imply that taxation by an OP is not conceived as a form of appropriation. When referring to the only lawful appropriations under IHL which cannot constitute pillage, the commentaries to the First, Second and Fourth Geneva Conventions, only mention the rights to war booty, to seizure or to requisition in the context of occupation, therefore excluding from the list taxation and levying of money contributions, which are also legal under IHL.[168] Moreover, when dealing with Rule 51 of the CIHL Study and specifically with the appropriation of private property by an OP, the ICRC has highlighted that Hague Regulation 46 prohibits the confiscation of private property and pointed out that it does not affect the right to requisition enshrined in Hague Regulations 52 and 53.[169] No reference to taxation or levying of money contributions is made therein, which further supports the argument that these two practices when done in accordance with IHL are not regarded as a form of appropriation. Furthermore, the Lieber Code also makes a distinction between taxing people or their property and appropriating property in the context of occupation.[170]

This differentiated conception between taxation and levying of money contributions and appropriation may be explained by the particular purpose each practice has. Legal scholars explain that the rationale behind Hague Regulation 49 is to avoid the

[166] Pothelet (n 126).
[167] *Prosecutor v Blagoje Simic et al (Trial Judgement)* [2003] ICTY IT-95-9-T, paras. 850, 851 and 873.
[168] ICRC 2016 (n 96), 537; ICRC 2017 (n 96), 592-593; Pictet (n 97), 226-227.
[169] CIHL Study, "Rule 51", 179-182.
[170] Lieber Code, art. 37.

disproportionate burden that requisition poses upon an individual and spread the cost of the administration and needs of the army amongst the whole population.[171] This is reinforced by the requirement that levying of money contributions must be enacted on the whole population and not upon specific groups or sectors.[172] In strong contrast with this, requisitions seem to have a more specific character, targeting the direct owner of the property.[173]

On the contrary, when carried out not in accordance with IHL, taxation and levying of other money contributions have been regarded as pillage. James Garner, writing in 1917 on the German occupation of France during the Franco-German war and of Belgium during the First World War, already signaled that the contributions levied by the Germans "did not differ from pillage except in name."[174] This was because, for instance, the amount of revenues collected was significantly superior to the necessary for the administration of the occupied territories compared to peacetime, and was conducted as a form of enrichment of the OP and sanction of the enemy's nationals.[175]

To sum up, although it is not settled whether taxation by an OP amounts to appropriation or not, it seems that when done in accordance with the Hague Regulations the collection of taxes and other money contributions is not regarded as a lawful appropriation but as a separate issue. Appropriations, on the contrary, seem to cover targeted seizures of property such as requisitions or war booties.

4.2.2 Implications for NSAGs and rebel taxation

While the law of occupation contains specific rules which, if followed, may exclude taxation from the category of appropriation, the law of NIACs does not count with an analogous regulation. Therefore, it can be assumed that taxation by rebels is always appropriation. When looking at the reasons behind this different approach, it is evident that sovereignty cannot explain the variance: neither an OP nor a NSAG are under international law the recognized sovereign over the territory under their control. On the contrary, it is possible that such difference is due to the different nature of each entity, namely, a state and an armed group. This is interesting to the extent that it uncovers some implications of the state centrism that characterizes international law, a feature which can sometimes hinder the objective of IHL. If the legal assessment of taxation is only based on the nature of the actor rather than on the actual end of the activity and its implications for the population, then the protection of civilians amidst armed conflict is not the actual primary objective in the assessment. Unfortunately, this is a discussion that goes beyond the scope of this thesis.

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[171] 'Chapter 6: Regulations of the Economy in Occupied Territory', in Yutaka Arai, *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law* (Martinus Nijhoff Publishers 2009), 174; 'Legislation by the Occupying Power', in Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019), 138.
[172] Ibid.
[173] Ibid. *See also* "Seizure and Requisition of Property in Occupied Territories", in Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019)
[174] James W Garner, 'Contributions, Requisitions, and Compulsory Service in Occupied Territory' (1917) 11 The American Journal of International Law 74, 76.
[175] Ibid, 74-84.

4.3 Exploring civilian consent (or lack thereof) in rebel taxation

After determining rebel taxation is a form of appropriation and if proven that it has a nexus to the armed conflict, the next element to be assessed is whether the appropriation was done without the owner's consent. As explained in the previous chapter, such lack of consent is established on a case-by-case basis by identifying some indicative factors, such as the use or threat of force, the physical absence of the owners or a context of coercion. Therefore, it is not possible to ascertain that rebel taxation is always done with or without consent of the owners. Such characteristic can vary according to the form of the taxation system. For instance, the collection of taxes by rebels in Burundi during the Burundian Civil War consisted, amongst other forms, in members of the armed group stopping vehicles entering territory under their control and charging a fee in money or kind to the passengers, occasionally imprisoning or executing those who were not willing or able to pay.[176] Although it is inaccurate to include the practices of Burundian rebels under the category of rebel taxation, due to its substantive unpredictability for civilians,[177] it is clear that the collection of payments was practiced through the threat or use of force, which is a prime indicator of lack of consent.

In stark contrast with the case of Burundi and as explained in Chapter 2, scholars studying the case of NSCN (IM) in India have asserted that 'civilians did not appear to be coerced' into the payment of taxes to the NSAG, since although lamenting it, they supported the cause and regarded the payment of taxes as a form of contributing to the struggle.[178] This could thus be read as an indicator of consent from the taxpayers which would exclude this practice from the scope of pillage. However, even in this case the fact that NSCN (IM) as any other armed group enacting rebel governance, operates in a context of constant threat of violence after taking control of a territory by force,[179] could still imply a degree of coercion: as the new rulers, they are able to use force when they deem it necessary, such as when individuals do not follow the rules enacted by them.

Nonetheless, if one takes such an environment of coercion as the determinant for lack of consent, then it could be argued that almost every taxation system is unconsented. In the context of state taxation, a tax has been defined as a "financial charge made by a state upon an entity (e.g., individual or corporation) for the support of state operations and programs and subject to forcible extraction and perhaps penalty if not paid."[180] This definition necessarily entails coercion, which is unsurprising: a state is by nature the bearer of the legitimate monopoly over the use of force over a territory and population, which it employs to enforce the laws, including those regarding taxation, when individuals decide not to respect them.[181] It is also true, though, that the construction of such state entails an agreement between the civilian population and the state, which grants legitimacy to its monopoly over the use of force[182] and which could thus amount to

[176] Rachel Sabates-Wheeler and Philip Verwimp, 'Extortion with Protection: Understanding the Effect of Rebel Taxation on Civilian Welfare in Burundi' (2014) 58 The Journal of Conflict Resolution 1474, 1482.
[177] ibid.
[178] Suykens (n 78), 151.
[179] See Chapter 2, section 2.1.
[180] Martin O'Neill and Shepley Orr (eds), *Taxation: Philosophical Perspectives* (1st edn, Oxford University Press 2018), 98-99.
[181] Edmore Ntini and Methembe Mdlalose, 'Conceptualisations of State and State Sovereignty as Ingredients of State Violence and Repression.' (2021) 18 African Renaissance 11, 13.
[182] Ibid.

consent to the collection of taxes. Usually but not always, such an agreement implies participation of the population in the government of that state.[183]

Therefore, if the same logic was applied to rebel taxation, it could be argued that rebel governance structures comprehending civilian participation[184] may bear less chances of being regarded as coercive in the collection of taxes, because such participation may constitute an agreement and thus a form of consent.[185] It is maintained here that such an approach would give a better account of reality and thus of consent by taxpayers, because it takes into account how civilians interact with the rebel regime and regard the payment of taxes instead of merely considering the monopoly over the use of force held by the NSAG.

Briefly, the lack of consent in the context of pillage is generally determined on a case-by-case basis, by the identification of some indicative factors. Considering all armed groups establishing rebel governance have achieved control over a territory through violence, it could be said that any form of taxation enacted by them entails an environment of coercion and thus lack of consent by civilians. However, if accepted that civilian participation in rebel governance structures implies an agreement by which civilians accept the rule upon them, then it would be harder to prove lack of consent.

4.4 Can rebel taxation amount to a lawful appropriation under IHL?

If it is established that rebel taxation has a nexus to the conflict, is a form of appropriation and does not count with consent by the taxpayers, it is still necessary to assess whether it amounts to an appropriation in accordance with IHL to determine whether it constitutes pillage or not. Amongst other property-related which could render an appropriation lawful under IHL, only the seizure of enemy's property required by military necessity is applicable to NIACs as explained in Chapter 3. However, such rule only covers the property of individuals affiliated to the adverse party to the conflict. This certainly limits the scope of permissible rebel taxation under this rule since civilians paying taxes may not be affiliated to the adversary of the NSAG. There may exist cases, such as the NSCN (IM) in India, in which the NSAG has imposed an 'employee tax' on employees of the government living in territory under their control.[186] However, not only it is not settled whether such a link (mere employment) would suffice to claim affiliation with the adversary, but also this rule would still not cover the rest of the taxes enacted by the NSAG, which may reach other sectors or the whole population.

Even if considering that all civilians are affiliated to the adversary, this rule would still fail to render rebel taxation an appropriation in accordance with IHL. This is because seizure requires that the appropriation was done for military necessity, a requirement rebel taxation can hardly fulfil. As shown in Chapter 2, the role of taxation in rebel governance involves political, organizational and economic dimensions. Additionally, it is characterized by the systematization and institutionalization of the payments collection.

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[183] Ibid.

[184] For a detailed account on civilian participation in rebel governance *see* Weinstein (n 17), Chapter 5: "*Governance*".

[185] Given that such participation is voluntary as opposed to coerced.

[186] 'Naga Insurgents Slash Percentage of Tax Collected from Government Employees' (*The New Indian Express*) <https://www.newindianexpress.com/nation/2017/apr/22/naga-insurgents-slash-percentage-of-tax-collected-from-government-employees-1596600.html> accessed 4 June 2023.

This contradicts the principle of military necessity, which requires that the act occurs in exceptional circumstances and serves the purpose of achieving a specific military advantage or directly weakening the enemy's military capacity.[187]

Briefly, the rule allowing the seizure of the enemy's property when required by military necessity would not render rebel taxation a lawful appropriation under IHL incompatible with pillage. First, because it does not cover the property of the whole civilian population or groups which are not necessarily affiliated to an adversary of the NSAG, which is often the target of rebel taxation. And second, because even if it did, it is a rule thought for exceptional circumstances amidst the conduct of a military operation,[188] and as such would not cover a systematic practice as rebel taxation. This does not mean, however, that rebel taxation is automatically unlawful under IHL. As will be seen in the following section, the requirement that the appropriation was 'for personal or private use' may still exclude rebel taxation from illegality under pillage.

4.5 'For private or personal use': the safe-conduct for rebel taxation?

As discussed in the second chapter, the ICC Elements of Crimes include, for the war crime of pillage during NIACs, that the appropriation was done 'for private or personal use'. This means that the intention of the perpetrator must be either to dispose personally of the property or for other private purposes, such as selling or giving it to third people or entities. As shown in the previous chapter, it is disputed whether such requirement of the ICL rule is part of its counterpart under IHL or even of customary international law, however, the fact that it was approved by all parties to the Rome Statute, accepted by the ICRC and by the SCSL, grants it substantive authority to be considered another element of pillage in this thesis.

In this light, the existence of this requirement may be determinant for the permissibility under the prohibition of pillage of armed groups' taxation when employed to fund rebel governance. This is because, as seen in the first chapter, rebel governance entails the provision, by the NSAG, of order and organization of social interactions with and within the civilian population inhabiting the territory under its control. What is more, rebel governance inherently includes the provision of public goods: at a minimum, it involves the provision of security and, generally, the administration of justice, whereas in more developed governance structures it can also comprehend health care, education, road maintenance and even electricity and public services. This means that rebel governance, by definition, serves a public purpose and not a private one, which implies that if taxation is employed to fund it, it would not amount to an appropriation for private or personal use but for a public one.

Mara Revkin, in her study on taxation by the Islamic State in Syrian districts, has already made this point.[189] She has briefly asserted that what differentiates taxation from looting is precisely the public grounds on which taxation is justified by rebels. In her words, while looting is "arbitrary and unpredictable", the taxes imposed by rebel groups are often

[187] Lieber Code, art. 14; *See also* Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 4.
[188] See Chapter 3, section 1.2.
[189] Revkin (n 5), Appendix, 1.

accompanied by a public policy justification that can include "financing public goods provision, paying the costs of war or redistributing assets from the rich to the poor."[190]

A statement of the spokesperson of the Communist Party of India (Maoist), a NSAG with presence in various states of India, also illustrates this point:

> We have rules and norms around how we tax people. For instance, large schemes and operations are taxed more than smaller ones. We don't tax the building of schools, hospitals, small tanks, tube wells etc. We also have rules and norms around how we use the fund collected. So we are not simply collecting money for private gain: that would be corruption. We are collecting money for the service of our toiling masses.[191]

Regardless of how controversial this may be for states, namely, that a NSAG can perform public functions and even collect money for financing them, in strict legal terms under the prohibition of pillage, taxation by NSAGs for funding rebel governance would not be prohibited as long as it is required that the appropriation was for private or personal use.

4.6 Summary of findings

Gathering the findings of the previous sections together, it can be concluded that taxation for the purpose of funding rebel governance would not constitute pillage. This is primarily because rebel governance inherently serves a public purpose, which contradicts the requirement that pillage is carried out 'for private or personal use.' Besides, even if this requirement were disregarded, it could still be argued that such practice does not fall under the definition of pillage. This holds true in two scenarios. Firstly, when a nexus between this practice and the armed conflict does not exist. As seen above, this can occur when control over territory and subsequent taxation were established before the respective armed conflicted erupted. Additionally, it can arise when other characteristics of the taxation system do not meet the narrower interpretation of the criteria set by the ICTY to determine the nexus, which was descripted before. Secondly, this would also be the case when the relevant rebel governance structure involves civilian participation in the decision-making process. This is because such feature could prove consent by the property owners (taxpayers) to the respective appropriation, by means of an agreement (either formal or informal) reflected by their participation in the governance of the territory. In other words, if civilians who pay taxes also willingly participate in the administration to which the taxes are paid, consent could be inferred from such participation which would preclude the payment of taxes from pillage. On the contrary, if none of these two scenarios take place and the 'for private or personal use' requirement is disregarded, the chances of this practice to fall under pillage are thus higher.

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[190] Ibid.

[191] Alpa Shah, 'Interview with Gopalji, Spokesperson of the Special Area Committee of the Communist Party of India (Maoist) in a Forest in Jharkhand, Eastern India' (*MR Online*, 13 May 2010) <https://mronline.org/2010/05/13/interview-with-gopalji-spokesperson-of-the-special-area-committee-of-the-communist-party-of-india-maoist-in-a-forest-in-jharkhand-eastern-india/> accessed 6 June 2023.

5. Conclusion

This thesis has sought to assess the legality of taxation by armed groups for funding rebel governance taking into consideration the prohibition of pillage under IHL. The key finding in this regard was that the requirement of pillage being 'for private or personal use' excludes rebel taxation from pillaging, considering it is a practice inherently tied to public affairs. Moreover, this conclusion was built upon earlier findings presented in the first two chapters, including the understanding that rebel governance seeks to establish order for the civilian population in territories under rebel control, that the idea of rebel taxation merely serving the enrichment of the rebels is a reductionist and simplistic view, and that pillage necessitates various elements to exist, namely, a connection between the act and the armed conflict, the appropriation of property, lack of consent from the property owners, unlawfulness of the appropriation under IHL, and appropriation for private or personal use.

Achieving these findings posed a considerable challenge, particularly due to the complex nature of rebel taxation as a practice and the fact that the prohibition of pillage was not designed to address its regulation, but rather served a broader purpose. In this context, applying the elements of pillage to this practice has uncovered a series of issues which may be worth exploration in further studies. One such issue pertains to understanding why IHL regulates taxation by an OP but not by a NSAG, despite neither of them being the sovereign entity over the relevant territory. In this regard, it would also be interesting to explore whether IHRL could fill this gap in the regulation of this practice, considering the right to property present in the African, Inter-American and European human rights systems contemplates certain restrictions when done in the public interest. Another issue involves determining whether the participation of civilians in rebel governance structures may amount to a form of consent to the administration’s actions, including the collection of taxes, which would thus exclude this practice from pillage. Furthermore, and regarding IHL rules in general, it was found that the right to seize the enemy's property as required by military necessity, may need clarification within the context of NIACs. Specifically, questions arise about who qualifies as an "enemy" or "adversary" in this type of armed conflicts. A final issue relates to the content of some IHL rules and the implications of resorting to ICL to inform those rules, considering these fields of law have different purposes and apply to distinct legal subjects. This is particularly the case when the definition of the IHL rule cannot be found in its sources and must thus be built upon ICL conventional and case law.

In conclusion, it is maintained here that the positivist approach adopted in this thesis to evaluate the legality of rebel taxation has yielded two significant results. Firstly, it has provided insights into how the current legal framework can be applied to a practice for which it was not originally designed. And secondly, it has exposed the limitations of that framework in effectively regulating emerging and evolving practices, which is possibly linked to the state centrism that characterizes international law. In this regard it is hoped that the interests of states can still be accommodated to the needs of the people living in rebel-held territory. Only then will IHL truly honor the humanitarian values it embodies.

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