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"Deprivation of liberty and armed conflicts: exploring realities and remedies"

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Which legal framework applies to deprivation of liberty by non-State armed groups and do they address the particular challenges when detention is conducted by non-State armed groups?

Katharine FORTIN
Assistant Professor of International Law and Human Rights Law, University of Utrecht

Introduction

Research indicates that armed groups regularly detain, especially in instances where they control territory. There have been reports that many of the armed groups active in Syria, of varying sizes and degrees of sophistication, have held detainees in make-shift prisons and detention centres across the country.1 In Libya, the Thuwar – the anti-Gadhafi forces – were reported to have routinely carried out mass arrests of former soldiers, police officers and those they saw to be Gadhafi loyalists when they overran cities.2 Equally, it is well-known that the FARC regularly detained individuals, including civilians, police officers and members of

[1] *Detention in the Syrian Arab Republic: A Way Forward*, Independent International Commission of Inquiry on the Syrian Arab Republic, March 2018, 4-6

[2] *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68, 28 January 2014, p. 9. See also Amnesty International, *The Battle for Libya: Killings, Disappearances and Torture*, 2011, pp. 74-78

the Colombian army.[3] Likewise, we know that individuals have been deprived of their liberty by the *Forces Nouvelles*[4], LTTE[5], the Communist Party-Maoists in Nepal[6], the Taliban[7], MILF[8], MLNA[9] and Ansar Dine[10]. Arrests and acts of detention by armed groups are worrying, not only because they may in themselves be arbitrary – and therefore unlawful – but also because the deprivation of an individual's liberty is all too often a prelude to harsher treatment, especially when the detention itself is arbitrary. Reports of arbitrary detention are often accompanied by reports of torture, deaths, sexual violence, ill-treatment in detention or enforced disappearances. Equally, it is common to hear of detainees dying or becoming sick through being held in inadequate conditions, with little access to medical care or sanitation.

It is against this backdrop, that it is important to address which legal framework applies to deprivation of liberty by armed groups and investigate whether these legal frameworks can address the particular challenges when detention is conducted by non-State armed groups. Before starting it is necessary to make a few clarifications regarding what is in and outside the paper's scope. The question 'which legal framework' holds the presumption there are more than one legal framework that *can apply* to armed groups engaging in detention, and the paper will consider international humanitarian law and international human rights law. The paper does not devote time to reviewing the important preliminary question of *whether* and *when* human rights law can be said to be binding upon armed groups. This is a question that is reviewed extensively elsewhere, in

[3] *Colombian FARC rebels release hostages after decade of jungle captivity*, The Guardian, 3 April 2012. See *Colombia's FARC rebels free eight hostages: ICRC*, Reuters, 25 July 2008.

[4] See *Rapport sur La Situation des Etablissements Pénitentiaires en Côte d'Ivoire*, United Nations Operation in Côte d'Ivoire, 2006 (UNOCI Côte d'Ivoire Report on Prisons)

[5] LTTE, *GSOL exchange detainees of war*, 28 September 2002, https://www.tamilnet.com/art.html?catid=13&artid=7555.

[6] *Human Rights Abuses by the CPN-M: Summary of Concerns*, United Nations Office of the High Commissioner of Human Rights in Nepal, September 2006, http://www.refworld.org/docid/477e3f130.html

[7] *Afghan Special Forces Free Scores from Taliban Prisons*, May 2018, *Afghan Forces free 59 prisoners from Taliban jail in south*, January 2016

[8] *A Closer Look Inside a MILF Detention Facility*, Manila Bulletin, August 2018, https://www.pressreader.com/philippines/manila-bulletin/20180823/281732680339073

[9] *Prisoners of Mali in Legal Limbo*, April 2013

[10] *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Mali*, January 2012, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-33_en.pdf

research that cannot easily be summarised.[11] So for the purposes of dealing with this point succinctly, the paper simply makes two introductory points. Firstly, there is a growing trend for international accountability mechanisms – the UN Security Council, UN General Assembly, Human Rights Council, Commissions of Inquiry, etc – to hold that armed groups bound by human rights law, especially where they control territory.[12] Secondly, there is a growing body of academic literature that has found legal authority to support this practice, particularly in instances where the armed group in question controls territory and exercises some of the functions of government.[13] It is against the backdrop of this practice and research – a growing apprehension that armed groups are indeed bound by both IHL and IHRL - that the paper addresses both international humanitarian law and international human rights law.

Secondly, the paper only addresses non-State armed groups operating in the context of situations of violence that amount to a non-international armed conflict under international humanitarian law. There has been discussion in recent years about whether armed groups operating below this threshold have human rights obligations too. For example, it has been argued that armed groups are also bound by human rights law in the early stages of armed conflict, before international humanitarian law applies.[14] Equally, it has been argued that several other types of armed non-State actors are bound by human rights law e.g. drug gangs, the mafia, human traffickers, criminal gangs. Yet on the basis that these sorts of armed non-State actors operate below the threshold of international humanitarian law, they will not be considered in this paper which chooses to interpret the question - 'which legal framework applies' – as relating only to situations where both legal frameworks *could* apply.[15] Moreover, the benefit of limiting the enquiry to non-State armed groups operating in the context of armed conflict is that the discussion can be limited to armed groups with a degree of organisation necessary to adhere to the basic norms of international law relating to humane treatment, for example, those norms found in common Article 3.

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[11] See K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP 2017), D. Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury 2016), A. Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2009), C. Ryngaert, *Human Rights Obligations of Armed Groups* (2008) 2 Revue belge de droit international 355.

[12] See Fortin, *Accountability of Armed Groups* (n11) 15-8.

[13] See Fortin, Murray and Clapham above (n11) above.

[14] T. Rodenhäuser, *Human Rights Obligations of Non-State Actors in Other Situations of Violence: The Syria Example* (2012) 2 International Humanitarian Legal Studies 263

[15] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life*, UN Doc A/HRC/38/44, 5 June 2018.

The relationship between international humanitarian law and human rights law on detention

In order to address which legal framework applies to armed groups depriving individuals of liberty, it is necessary to go through a very similar analytical process as when mapping the application of the legal framework for States. As a result, it is helpful to start with some preliminary general observations regarding the relationship between international humanitarian law and international human rights law. The most important of these is that it is now widely accepted that human rights obligations continue to apply in times of armed conflict, unless the State in question has derogated from a provision.[16] In other words, in times of armed conflict, both IHL and IHRL apply to the territory experiencing armed conflict at the same time. Yet even though both bodies of law apply to the territory in armed conflict, it is important to remember that they will not necessarily both apply to every incident. In the words of the ICJ:

> Some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[17]

Indeed, it will be shown below that just as this statement is true when examining the two legal frameworks in a global sense, it is equally true for the regulation of detention in armed conflict. As a result, the question is not so much 'which' legal framework applies to deprivations of liberty by armed groups, but which aspects of detention by armed groups are regulated exclusively by international humanitarian law; which exclusively by human rights law; and which aspects are regulated by both these branches of international law.

[16] For a recent article on the state of law, see J-M, Henckaerts and E. Nohle, *Concurrent Application of International Humanitarian Law and International Human Rights Law Revisited* (2018) 12(1) Human Rights and International Legal Discourse, 23

[17] *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 136 (9 July 2004) 106

Some rights regarding deprivation of liberty by armed groups will be exclusively matters of IHRL or IHL

Acts without a nexus to an armed conflict governed solely by IHRL

Considering the fact that both IHL and IHRL apply together in times of armed conflict, there are two main ways that issues – or to use the words of the ICJ 'rights' - can end up being the exclusive domain of one body of law or the other. The most straight forward way is if one body of law – despite applying in a general sense to the territory – does not apply to the incident in question at all, leaving the other body of law to apply on its own i.e. exclusively. The most common circumstance that this happens is where a particular incident of detention falls outside the scope of international humanitarian law entirely. An incident of deprivation of liberty will fall outside the scope of international humanitarian law when it does not have a connection with the armed conflict. The fact that deprivations of liberty need to have a connection to the armed conflict to be regulated by international humanitarian law is evidenced by international humanitarian treaty law. Article 2(1) of Additional Protocol II indicates «this protocol shall be applied [...] to all persons *affected* by an armed conflict». Likewise, sub-paragraph 2 of that same article indicates that the protections contained in Articles 5 and 6 of Additional Protocol II relating to detention and fair trial, shall continue to apply to persons who have detained or have been interned 'for reasons related to the conflict' until they have been released. In a similar vein, Articles 5 and 6 of APII state that they apply to 'persons deprived of their liberty for reasons related to the armed conflict' and the 'prosecution of criminal offences related to the armed conflict'.

Research into the history of these provisions reveals that the drafters felt strongly that the Additional Protocols should only regulate issues connected to the armed conflict. There was an apprehension that situations of non-international armed conflict, even those reaching the threshold of Additional Protocol II, might only affect a relatively small part of the territory or a small proportion of the population. As a result, there was a discussion about whether the application of Additional Protocol II should be limited by geography, only applying to parts of the territory affected by the armed conflict. After consideration of this issue, it was concluded that it was more effective to limit the scope of the Protocol by 'criteria related to persons, and not to places'.[18] Here, it is relevant to note that when

[18] See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 December 1949* (Martinus Nijhoff, Geneva 1987) 1360 [4490] (hereafter ICRC, Commentary on the Additional Protocols). See also ICRC, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International*

providing guidance to the words 'affected by the armed conflict' which also appears in Article 75 of API, the commentary to Additional Protocol I indicates that those who contravene the normal laws of the State (ordinary criminals) and who are punished on these grounds, are not 'affected' within the meaning of the article. But if security measures are taken against certain individuals because of their attitude, whether true or alleged, with regard to the conflict, Article 75 will apply.[19] It is self-evident that this will be a particularly important qualification in instances where a country is experiencing armed conflict in its border regions, but the rest of the country remains unaffected. In this situation, ordinary prisoners detained for common crime in e.g. the capital city, will not fall under the regulation of international humanitarian law. Instead, they will fall under the exclusive domain of international human rights law.

The notion that violations of international humanitarian law need to have a nexus to the armed conflict has also been repeatedly confirmed by the jurisprudence of international criminal courts and tribunals on war crimes. In the *Akayesu* Appeals Judgment, the Appeals Chamber stated that 'common Article 3 requires a close nexus between violations and the armed conflict'.[20] Equally, in the early appeals jurisdiction decision in *Tadić*, there was a similar discussion about whether the application of international humanitarian law should be limited by geography.[21] This proposition was rejected, partly on the basis that a party might move protected persons to an area of the country that was – as a matter of geography - far away from the vicinity of the hostilities i.e. the capital city. To ensure these individuals would still enjoy the protection of international humanitarian law, the Appeals Chamber found it more sensible to limit the scope of international humanitarian law by persons, rather than by geography. In doing so, it confirmed that there needs to be a relationship between the conflict and the deprivation of liberty for a person's detention to be governed by

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Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977) Vol II, CDDH/SR.5.1/annex, 211 [43] where Mrs Bujard of the ICRC is recorded explaining that there had been a long discussion of whether the application of the Additional Protocol should be geographically limited at the Conference of Experts, but the experts had pointed out that in a large, federal State, for example, it might be better that the Protocol should apply to the persons affected by an armed conflict rather than to the territory where the armed conflict took place. To meet that wish, the ICRC did not include an article concerning the territorial scope of the Protocol in its draft.

[19] ICRC, *Commentary on the Protocols* (n18) 50. Recognising that to a certain extent «all those who find themselves in the territory of […] countries at war» are affected «in some way or another», it states that such an expansive definition of the term was probably not what was meant by the provision. Instead, it advocates that a narrow approach should be taken to the term.

[20] *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) [444]

[21] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [68-9] (Tadić Jurisdiction Decision)

international humanitarian law[22]. Since the *Tadić* decision, the idea that international humanitarian law will only apply to acts with a relationship to the armed conflict has been further developed in the case law of the international criminal tribunals in its consideration of jurisdiction. Indeed, case law on this issue has arisen out of a need for criminal courts to determine as a preliminary jurisdictional issue whether a particular incident is capable of being categorised as a 'war crime', i.e. a violation of international humanitarian law.

To facilitate the examination of this issue, courts deciding whether an incident falls under international humanitarian law have developed what has become known as the 'nexus requirement'. The nexus requirement requires a tribunal to evaluate whether there is a link between the incident under its consideration and the armed conflict. In 2002, the *Kunarac* Appeals Chamber[23] stated very clearly that, although war crimes can occur in circumstances temporally and geographically far from the actual fighting, they need to be 'closely related to hostilities occurring in other parts of the territories to be governed by IHL'[24]. More recently, in 2008, in the *Boskoski* case[25] the TC asserted that:

> The nexus requirement serves to distinguish war crimes from purely domestic crimes and also prevents purely random or isolated criminal occurrences from being characterised as war crimes.[26]

The appreciation that there needs to be a nexus with the armed conflict prompts reflection on what this means in practice.

The *Kunarac* Appeals Judgement has provided the most detailed guidance on the nexus requirement – which was later repeated in Boskoski. The Appeals Chamber stated:

> The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the crime], his decision

[22] Here it was actually interpreting the word 'affected by the armed conflict' in Article 5 of APII. Tadić Jurisdiction Decision (n21) [69]

[23] Arose out of the conflict between Bosnian Serbs and Bosnian Muslims in the area of Foča. The applicants took part on the Bosnian Serb side.

[24] *Prosecutor v Kunarac et al.* (Appeals Judgment) IT-96-23-A, 23/1-A (12 June 2002) [57] (Kunarac Appeals Judgment)

[25] This case related to the conflict in the former Yugoslav Republic of Macedonia, between the Security Forces of that country on the one hand and the ethnic Albanian National Liberation Army on the other. The two accused were accused of committing crimes against ethnic Albanians.

[26] *Prosecutor v Boškoski and Tarčulovski* (Trial Judgment) IT-04-82-T (10 July 2008) [293] (Boškoski Trial Judgment)

> to commit [the crime], the manner in which it was committed or the purpose for which it was committed'. [27]

In other words, the nexus requirement would be satisfied if it could be proved that an individual acted under 'the guise of the armed conflict'.[28] Importantly, the AC then continued by identifying a number of factors which may indicate that a particular crime constitutes a war crime (rather than a domestic crime). These include:

> The fact that the perpetrator is a combatant: the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.[29]

These concrete factors suggest that in reality a more stringent relationship between the armed conflict and the act is required rather than the fact that the perpetrators merely took advantage of the enabling environment of the surrounding armed conflict. Without this more detailed guidance, this might have been concluded from the looser language 'acting under the guise of the armed conflict'.

Although when it comes to States, it can well be imagined that a part of the territory may be unaffected by the armed conflict, it is reasonable to question whether the same is true for territory under the control of an armed group. On this issue, the social science literature on rebel governance is illuminating, because it indicates that in instances where armed groups control territory for a protracted amount of time, they will often start to adopt behaviours that regulate everyday life. Equally, research indicates that for civilians living under armed group control, life will often carry on in a changed and obviously less secure environment. Children will carry on going to school, people will carry on pursuing their livelihoods and common crime will continue. In response to this phenomenon of daily life, research indicates that armed groups will often initiate rudimentary law enforcement mechanisms to provide a measure of security and control.[30] As part of these initiatives, they may enforce arrests and detain

[27] *Kunarac Appeals Judgment* (n24) [58]
[28] *Ibid*.
[29] *Ibid*, [59].
[30] See T. Kolomba Beck, *The Normality of Civil War: Armed Groups and Everyday Life in Angola* (Campus, Frankfurt 2012) 12-4), S. Kalyvas, *The Logic of Violence in Civil War* (CUP, Cambridge 2009), Z.C. Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Cornell University Press, Ithaca and London 2011) (here after Mampilly, Rebel Rulers), S.C. Lubkemann, *Culture in Chaos: A Social Anthropology of the Social*

people for common crimes. Equally, they may inherit a prison population when they take control of a portion of the territory. When one applies the *Kunarac* criteria set out above to these types of detention, one can see that it will not always be fulfilled, in instances where armed groups detain. Indeed, in territory where armed groups have protracted control of territory, an act of detention by an armed group will not always be defined by the fact that the perpetrator is a combatant, the detained individual is a non-combatant or a member of the opposing party. Equally, not all acts of detention by armed groups will be intended to serve the ultimate goal of a military campaign.

Two good country examples to illustrate this point are found in Sri Lanka and the Ivory Coast. In the Ivory Coast, the *Forces Nouvelles* were responsible for five places of detention in territory under their control for a period of about eight years. Some of this prison population was detained due to alleged allegiances with the government in the South, but some were detained in relation to common crime such as petty theft. Some detainees also pre-existed the armed conflict. Indeed, it seems clear that some of the individuals that the Forces Nouvelle detained were for reasons that did not have a nexus to the armed conflict.[31] Equally, the LTTE established a sophisticated law enforcement infrastructure that included courts and police stations. When asked about it, the group's lead negotiator in 2002, Mr. Anton Balasingham, stated that the infrastructure was a 'necessity' for a group responsible for such a large area. He stated:

> These courts and police stations have been functional for the last 12 years and.... the ground reality is that as a consequence of this war the LTTE has established control over 70 percent of the area in the northeast. There are huge populations here and we have to administer them and for the purpose of maintaining law and order, or rather social order and cohesion we need to have certain institutions.... these Police stations are necessary instruments to maintain law and order because we cannot allow anarchy and social disorder in areas controlled by us. [32]

Indeed, it is reported that the LTTE marketed its legal system as being incorruptible, more effective and cheaper than that in government-held areas. Mampilly, a political scientist, who conducted extensive field work in the area, recounts how Tamils in government-controlled areas sometimes chose to file complaints in the LTTE legal system, because they

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Condition of War (University of Chicago Press, Chicago 2010). For an analysis of this literature, see K. Fortin, *Accountability of Armed Groups* (n11) 39-47 and 53-9.

[31] See *Rapport sur La Situation des Etablissements Pénitentiaires en Côte d'Ivoire*, United Nations Operations in Côte d'Ivoire, 2006.

[32] *LTTE Police Stations « not a new phenomenon" – Balasinham*, TamilNet, 3 December 2002, https://www.tamilnet.com/art.html?catid=13&artid=7932

perceived it to be more efficient. The LTTE court would then issue a summons to the respondent in government-held territory, requesting the individual's attendance in the insurgent court. [33]

As yet, we do not have case law where the nexus requirement has been explicitly considered in these types of circumstances, so it is unclear how a criminal tribunal would approach it. Yet, these examples serve to show that when an armed group has controlled territory for any significant amount of time, there will likely be instances of detention for common crime in the territory where there will be a strong argument that the detention does not have a nexus to the armed conflict, in the *Kunarac* Appeals Chamber sense.[34] A possible instance where this may not be true is if the armed group carries out the arrest, detention and prosecution of the suspect in such a punitive manner, that its approach to ordinary law enforcement seems to be intimately connected to its military campaign. For example, the Islamic State frequently prosecuted 'common crime' (e.g. theft, pornography, witchcraft, adultery) in territory under its control with an appalling level of brutality that seemed designed to inflict terror on the civilian population.[35] There is currently a case in front of the ICC - *Al Hassan* - which may end up providing more guidance on this issue. The defendant – *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* – was a member of the police force of the armed non-State actor Ansar Dine, who prosecuted crime in Timbuktu, Mali. In deciding whether his actions fell under international humanitarian law, the Trial Chamber will have to consider whether his actions had a nexus to the armed conflict.

Of course, there will be some situations of detention by armed groups which clearly do have a nexus to the armed conflict. Probably the clearest examples of deprivations of liberty with a nexus to the armed conflict are instances where armed groups detain members of the armed forces or members of opposing armed groups. We know that the FARC held members of the Colombian military and members of the police force in captivity.[36] Likewise, the LTTE held Sri Lankan army and navy personnel for years prior to 2002 and later exchanged them in part of a high profile prisoner exchange.[37] Similarly there are reports of armed groups in Mali,

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[33] Mampilly, *Rebel Rulers* (n**Error! Bookmark not defined.**) 188-9.

[34] See also D. Tuck, *Detention by Armed Groups: Overcoming Challenges to Humanitarian Action 93*, (2011) International Review of the Red Cross, 759, 766 (hereafter, Tuck, Detention by Armed Groups).

[35] Fortin, Katharine, *The Application of Human Rights Law to everyday Civilian Life under Rebel Control*, Netherlands International Law Review (2016) 63, 161, 179.

[36] See note 3.

[37] LTTE, *Government of Sri Lanka (GOSL) exchange detainees of war*, September 2002, https://www.tamilnet.com/art.html?catid=13&artid=7555. LTTE, Govt. exchange prisoners, September 2002, https://www.thehindu.com/2002/09/29/stories/2002092904110900.htm

holding Malian soldiers in captivity.[38] Equally in March 2017, it was reported the Sudan People's Liberation Movement – North (SPLM-North) released one hundred and thirty-two members of the Sudanese army.[39] We have heard reports of ISIS and other armed groups in Syria detaining captured government soldiers or members of other armed groups, with many other reports of soldiers being tortured or killed.[40] In August 2014, over 200 government soldiers were captured by ISIS, marched into the desert and killed.[41] When an armed group detains members of the opposing side for the sole reason that they are a member of the opposing side, this is a clear instance of a deprivation of liberty that has a nexus to the armed conflict. The purpose of the detention is to remove that individual from combat, to neutralise the dangers he or she presents, to punish them, or to hold them prior to a judicial process. Equally, when an armed group detains civilians because they are alleged to be affiliated with the government or opposing armed group – or because it is alleged that they have committed a politically-motivated crime against the armed group e.g. sabotage of military equipment – there will be a strong case that the deprivations of liberty will be deemed to have a nexus with the armed conflict. In the *Haradinaj* case, the ICTY found the nexus requirement to have been satisfied through the fact that the Kosovo Liberation Army (KLA) detained the civilians in question due to a view that they were 'traitors'.[42] If the deprivation of liberty does have a nexus to the armed conflict, then IHL will apply to it - alongside IHRL.

Some matters governed by only one body of law

Importantly, even when both bodies of law apply at the same time to an individual act of detention, there may be some issues related to the detention which are regulated solely by international humanitarian law and other issues which are regulated solely by international human rights law.

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[38] *Prisoners of Mali in Legal Limbo*, April 2013, https://www.aljazeera.com/blogs/africa/2013/04/69481.html

[39] *Sudan's SPLM-N rebels release 123 POWs in goodwill gesture*, March 2017, https://www.dabangasudan.org/en/all-news/article/sudan-rebels-release-132-pows-in-goodwill-gesture

[40] See *Detention in the Syrian Arab Republic* (n1) which reports at para 17 that during the course of operations in Ar-Raqqah and Dayr al-Zawr in 2017, Syrian Democratic Forces claimed to have detained 1,397 "terrorist" fighters, the majority of whom are or were ISIL members, including hundreds of foreign fighters from as many as 30 countries.

[41] https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf

[42] *Prosecutor v Haradinaj, Balaj and Brahimaji*, IT-04-84bis-T, 29 November 2012 [610].

This will occur for example where the two bodies of law contain different but complementary rules to each other, for example, if an obligation exists in one body of law that is entirely absent from the other. For example, international humanitarian law contains very detailed rules relating to the conditions in which people are detained or interned in times of armed conflict, that are not explicitly found in human rights law. Additional Protocol II contains special rules that take into account the security environment in which conflict-related detention may take place. For example, it contains a requirement that places of detention shall not be located close to the combat zone. It also contains an obligation that individuals whose liberty has been deprived are evacuated, if their places of detention become exposed to the dangers of armed conflict. It also contains provisions regarding the accommodation of families and women, provisions regarding food and water, individual and collective relief, the ability to send letters and cards and work. Many of these rules have been found to amount to customary humanitarian law in non-international armed conflicts.[43] While many of these details could probably be read into the right to an adequate standard of living, prohibition of torture, right to family life, etc – there is very clear additional value in the specificity of the fully articulated provisions in international humanitarian law on this issue.

This example serves to demonstrate that at times different 'rights' – or different aspects relevant to an individual's detention – may be governed exclusively by one body of law or the other, even when both bodies of law apply – because only one body of law contains certain provisions. In these circumstances, the two bodies of law are normatively additive, and complementary to each other. Each body of law contains separate jigsaw pieces that join together to form an interlocking carpet of complementary regulation. This goes to show that when it comes to examining the obligations binding upon armed groups – or States for that matter – on the issue of the deprivation of liberty, the question will not always be 'which legal framework should be applied?' but will more often be: 'how should and can both legal frameworks be applied concurrently?'. While it has been shown above that the idea that the two legal frameworks can provide straightforwardly complementary detention is easy to demonstrate when looking at the way in which the two frameworks regulate *conditions of detention*, it will be shown below that the way in which they regulate the prohibition of arbitrary detention is more complicated. When the

[43] See J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP, 2005) (ICRC, Customary Study). See in particular the analysis contained in Rule 118-121 and 125 and 127

underlying act of detention has a nexus to the armed conflict, this is an example of an issue that is governed by both human rights law and international humanitarian law concurrently.

Some rights may be governed by both IHL and IHRL

In instances when both international humanitarian law and international human rights law address the same issue concurrently, the uncomfortable prospect is raised that a party to an armed conflict may violate one body of law, by complying with the other – or vice versa. To return to the analogy of the jigsaw, in such a case the two bodies of law do not provide complementary jigsaw pieces that can be laid side by side, but competing jigsaw pieces – that both theoretically fit in the same hole – but cannot both easily fit in at the same time. In some instances where both bodies of law regulate the same issue, it has been suggested by the ICJ that the body of law that is more general, can be interpreted through the body of law that is more specific – with the result that any normative difference between them is ironed out. For example, it is well known that the ICJ indicated that the question of whether someone had been arbitrarily deprived of their life in human rights law can – in a battlefield situation - be interpreted through international humanitarian law rules, as the word 'arbitrarily' holds enough interpretative scope for its compliance to be evaluated with reference to the international humanitarian law rules on the conduct of hostilities.[44] Indeed, to take such approach could also be justified on the basis of Article 31(3)(c) of the Vienna Convention which indicates that treaties should not only be interpreted on the basis of their text, preamble and annexes, but also on the basis of any other relevant rules of international law applicable in the relations between the parties.[45]

When it comes to detention, the situation is a bit more complicated because Article 9 of the ICCPR on detention is quite detailed, and its procedural provisions cannot easily be ironed away. Indeed, Article 9 does not merely specify that no one should be subjected to arbitrary arrest or detention, it also articulates a number of substantive and procedural grounds that need to be fulfilled to prevent 'arbitrariness'. In terms of substance, the article requires that detention be based on grounds established by law. In terms of procedure, the article requires that detention be carried out according to procedures established by law. Consequently –

[44] *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ [25].

[45] The European Court of Human Rights relied, in part, upon Article 31(3)(c) of the Vienna Convention in *Hassan v United Kingdom*, App No. 29750/09, Judgment (Grand Chamber), 16 September 2014 at [102].

according to the article - anyone who is arrested on criminal charges shall be informed of those charges and brought promptly before a judge and entitled to trial within reasonable time. Equally, anyone who is deprived of their liberty by means of arrest or detention shall be entitled to a proceeding before a court, so that the court can decide without delay on the lawfulness of his detention and order his release, if the detention is not lawful. It also clear that administrative or security detention can only be effected as a matter of last resort in the 'most exceptional circumstances'[46]. It is the existence of these detailed rules giving colour to the prohibition of arbitrary detention in human rights law that has prompted a debate about how the two bodies of law on detention should co-exist, in instances where they may be in conflict. For in international armed conflict, international humanitarian law rules on detention are equally – if not more detailed than human rights law – on both the substantive grounds on which detention or internment is permitted and on the procedural guarantees that must be afforded to detainees - and the two sets of rules do not always say the same thing.

In non-international armed conflict, a different problem has arisen regarding how international humanitarian law and international human rights law should apply together. While in international armed conflicts, problems arise from the fact that both bodies of law have *detailed* rules on arbitrary detention that do not always match, in non-international armed conflicts, a problem has arisen from international humanitarian law's lack of rules. For while it seems to be broadly recognised that there is a prohibition of arbitrary detention in customary IHL that applies in non-international armed conflict– there are few treaty or customary rules available to determine how this standard of arbitrariness should be measured.[47] Certainly international humanitarian treaty law – in the form of common Article 3 and Additional Protocol II - provides no guidance on the circumstances in which detention or internment are permissible in non-international armed conflicts and contains almost no rules on procedural guarantees. As a result, scholars looking to give substance to the prohibition of arbitrary detention in international humanitarian law have relied upon the obligation of humane treatment in common Article 3, to discern a prohibition of detaining individuals for any time more than necessary, due to the circumstances of the conflict.[48] Perhaps because this

[46] *General Comment No. 35*, Article 9 (Liberty and security of person), UN Doc CCPR/C/GC/35, 16 December 2004, para 16.

[47] *Customary Study*, ICRC (n 43) 344

[48] L. Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016), 78-82 (hereafter Detention in Non-International Armed Conflict). Here, Hill-Cawthorne finds good reason to argue that common Article 3 prohibits any deprivation that is not 'necessary as a result of the war'. While the detention of State forces would be unlikely to violate this

rule is so hard to identify in the text of common Article 3, there is also a tendency for the customary prohibition of arbitrary detention in IHL in non-international armed conflicts to be articulated with reference to IHRL rules.[49] These require a ground of detention and the existence of the procedural guarantees mentioned above, and only allow security detention in the 'most exceptional circumstances'.[50] In practice, this means that very often recourse will be had to the same procedural rules to determine whether a deprivation of liberty is arbitrary, no matter whether the deprivation falls under IHL or IHRL. As a result, it is seen that when a State or armed group's behaviour is measured against IHL, it will also often be measured – implicitly or explicitly – also against IHRL rules as well. As a result, when it comes to determining whether a particular instance of deprivation of liberty is 'arbitrary' - it is again not as simple as asking which body of law applies, because the prohibition of arbitrary detention is an issue on which the two bodies of law are often tightly woven together.

That being said, it remains important to know whether a particular instance of deprivation of liberty falls within the conceptual scope of international humanitarian law (as opposed to being the exclusive domain of international human rights law) in a foundational sense. Firstly, as the jurisdiction decisions referred to above show, it will be determinative of whether the persons responsible for the detention can be prosecuted for war crimes under international criminal law. At this juncture, it is important to be clear that while in many countries, national legislation states that

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rule, it is likely that the detention of civilians on the basis of a security risk might fall foul of it.

[49] *Customary Study*, ICRC (n43) 347-52.

[50] It is noteworthy in this regard that human rights bodies do not prohibit administrative or security detention but consider it to present «severe risks of arbitrary deprivation of liberty». Indeed, human rights law will generally regard security detention as arbitrary, if other measures were available to address the threat, including criminal prosecution. However, the Human Rights Committee has made clear in its General Comment No. 35 on detention that «if, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of the proof lies on the States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that the burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by Article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken», *General Comment No. 35*, Article 9 (Liberty and security of person), UN Doc CCPR/C/GC/35, 16 December 2004, para 16.

arbitrary unlawful detention is a war crime in both IAC and NIAC, arbitrary detention is not an explicitly enumerated war crime in the Rome Statute[51]. However, it has been argued that arbitrary detention could be prosecuted as cruel treatment and/ or torture and there are signs that a criminal tribunal might be open to this argument.[52] Certainly, in the *Haradinaj* case, the Trial Chamber was ready to find the forced abduction of two individuals by the KLA to amount to cruel treatment or torture.[53] However, it is important to qualify this statement with of the fact that in reaching this decision, the Trial Chamber took note of the fact that the individuals had been removed from their villages by force and kicked and beaten on the way to their eventual place of detention. This makes it unclear whether an 'arrest' or deprivation of liberty carried out without accompanying violence would meet the required threshold of cruel treatment or torture. However, irrespective of whether arbitrary detention amounts to a war crime in and of itself, the question of whether a particular deprivation of liberty falls under the scope of IHL, will likely also be determinative of whether any mistreatment, killings or torture that takes place during that detention can be prosecuted as a war crime.

What are the challenges when detention is conducted by non-State armed groups and do the legal frameworks address those challenges?

Having addressed which body of law applies to deprivations of liberty by armed groups and mentioned several reasons why this is important, now it becomes necessary to consider whether these legal frameworks address the particular challenges when detention is conducted by non-State armed groups. In addressing this question, it helpful to divide the analysis into two parts. The first part, will consider the challenges for armed groups in adhering to the rules on humane treatment in detention and the second part will address the challenges in armed groups adhering to the prohibition on arbitrary detention. Finally, the article will address the political challenges that sit at the heart of the legal framework regulating arbitrary detention.

[51] Unlawful confinement only applies in IAC. Some people have argued that detention amounts to cruel treatment or torture but we don't have a clear position on this. In the Haradinaj case, the TJ found itself prepared to find the forced abduction of two individuals by the KLA amounted to cruel treatment or torture, but in doing so – they seemed to be mainly swayed by the fact that they were removed by force and kicked and beaten on the way.

[52] J. Dingwall, *Unlawful Confinement as a War Crime: The jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts*, Journal of Conflict and Security Law 9 (2004) 133, 152-5.

[53] *Prosecutor v Haradinaj, Balaj and Brahimaji*, IT-04-84bis-T, 29 November 2012 [610].

Practical challenges

When it comes to considering how armed groups are positioned to implement rules on conditions of detention set out in human rights law and international humanitarian law, there is a real need to step out of the text of the Conventions and treaty law and consider real life. This shows us that in many instances armed groups do not use places of detention, in the same way as States. There are many reasons for this. It may be because they do not control territory, and therefore cannot detain. For example, it may be because the armed group does not have the infrastructure needed to detain. For example, in many cases, prisons may have been destroyed during the fighting or be positioned outside the territory controlled by the armed group.[54] Equally a desire to operate clandestinely may lead armed groups to detain in structures that are temporary and makeshift, such as offices, factories schools or houses.[55] Some armed groups may not even keep detainees inside, but rather cordon off a particular area outside which can be easily guarded. The fact that armed groups use non-official places of detention either through necessity or strategy raises challenges for compliance, because it removes some of the institutional protections that prevent detainees from being abused. If a place of detention is unofficial and its location is undisclosed, it is less likely that prisoners will have access to visits offered by humanitarian agencies and more likely that armed groups can get away with abuse.[56] It may also make detainees more vulnerable to being caught up, in military operations by the government.[57]

Another key challenge arises from the fact that armed groups will often not have monetary resources or if they do, will not put them into running places of detention.[58] This means that prisoners held by armed groups may often fall victim to, or be subjected to, overcrowding, unhygienic conditions, non-provision of sanitary facilities and inadequacy of diet. Equally, prisoners may be kept in buildings which are dilapidated, not suitable for human habitation or lacking in material resources.[59] These sorts of conditions put prisoners in the hands of armed groups at the risk of illness, death, starvation or violence in detention. Also of concern is the fact that members of armed groups in charge of places of detention – or civilian administrators – will often not be trained to be in charge of prison

[54] UNOCI *Côte d'Ivoire Report on Prisons* (n4) 95.

[55] Tuck, *Detention by Armed Groups* (n34) 764. See also Balint-Kurti, *Côte d'Ivoire's Forces Nouvelles*, Chatham House, 2007 (on file with author) 29

[56] Tuck, *Detention by Armed Groups* (n34) 770

[57] Tuck, *Detention by Armed Groups* (n34) 764

[58] *Ibid*. See also UNOCI *Côte d'Ivoire Report on Prisons* (n4) 89-90

[59] UNOCI *Côte d'Ivoire Report on Prisons* (n4)90

populations.[60] This means that they may not keep good documentation of detainees and will not know how to take care of vulnerable detainees such as the elderly, the sick, minors. They may also be poorly informed about prisoners' rights – either under human rights law or international humanitarian law – and even if they do know about them, they may not care very much about them having had no role in the creation of such rules. Of course, this is not always the case. There have been examples of armed groups both now and in history declaring themselves willing to adhere to the much more detailed provisions found in Geneva Convention III, rather than only common Article 3 and Additional Protocol II, if it applies.[61] But there have also been examples of armed groups rejecting human rights law and/or international humanitarian law as Western constructions that have nothing to do with them.[62] Indeed, the high profile abuse and killings of detainees by ISIS in Syria – sometimes through public beheadings or even burnings – seem to be intended to be a visual and violent non-verbal rejection of any norms of humanity, by the group. The adoption of shameless terror tactics such as these vis-a-vis protected persons in their custody, poses a real challenge for the effective working of the legal framework, which in part relies on good faith and positive reciprocity.

It is hard to say whether the legal frameworks of international humanitarian law and international human rights law relating to humane treatment address these challenges of capacity or attitude as much as they could. Certainly, both bodies of law contain obligations that require the parties to the conflict to keep people within their custody or care safe, healthy and alive. In addition, international humanitarian law contains specific and detailed provisions regarding the location of places of detention, the provision of food and drinking water and the implementation of safeguards as regards health and hygiene. It also, importantly, gives recognition to the fact that armed groups may not be able to fulfil all of the obligations regarding detention. It does this by introducing the notion that those responsible for the internment or detention of persons deprived of their liberty for reasons related to the armed conflict shall follow the provisions contained in Article 5(2) "within the limits of their capacities". Clearly, much work remains to be done on how human rights law can and should be tailored to match an armed group's normative capacity. The idea that human rights law obligations be implemented along a spectrum is not new for human rights law scholars. Case law from the European Court of

[60] UNOCI *Côte d'Ivoire Report on Prisons* (n4)90

[61] Tuck, *Detention by Armed Groups* (n34), 777. See also F.Siordet, *Les Conventions de Genève et La Guerres Civiles, Revue Internationale de la Croix-Rouge* (1950) 81 Bulletin International des Sociétés de la Croix-Rouge. See also *Free Syrian Army Announce that They will Apply Geneva Conventions and Welcome ICRC Visits*, July 2012.

[62] Tuck, *Detention by Armed Groups* (n34) 766-7.

Human Rights on extraterritorial jurisdiction has introduced the notion that when a State's capacities are reduced because it is acting territorially, its obligations will likewise be reduced. Equally, the human rights framework relating to economic, social and cultural rights is already based on the notion of progressive realisation. This means that there is precedent for the idea that different duty bearers will have different capacities. This raises the possibility of giving further focused reflection to how human rights norms relating to living conditions, health, family life, non-discrimination, dignity and physical integrity can be applied by armed groups in a manner that matches their normative capacity.

Legal challenges

When it comes to procedural guarantees relating to the prohibition of arbitrary detention, the problems that armed groups face are mainly legal in nature, and relate to the need for detentions by armed groups to have a legal basis. By this, it is meant that it needs to be based on a law that sets out the grounds on which it is justifiable and the procedures that need to be followed for it to be carried out in a non-arbitrary fashion. It has been pointed out that the requirement that detention has a legal basis holds potential to be particularly problematic for armed groups. Unlike States, armed groups are not able to point to a provision of national law allowing them to detain or setting out the circumstances in which they can detain. On the contrary, any time an armed group does detain a civilian or member of a State armed forces, it is likely to be committing several domestic crimes e.g. abduction, unlawful detention, etc. Equally, armed groups are not able to rely on the text of a Security Council resolution, to justify their detention practices.[63] If either human rights law or international humanitarian law set out a legal basis for armed groups to detain themselves, this provision could be the basis on which armed groups could rely upon to prevent being accused of arbitrary detention – but it is hard to find such a provision in non-international armed conflict.[64] Based on this reasoning, it might be

[63] This is referring to the jurisprudence in which it has been argued by governments that Security Council resolutions provide an authorization to detain. See for example *Mohammed and Others* (respondents) *v Ministry of Defence* (Appellant) Supreme Court [2017] UKSC 2 [44] (Lord Sumption SCJ).

[64] Even if it is accepted that international humanitarian law contains an inherent power to detain, this is not sufficient to prevent an instance of detention being arbitrary. In order not to be arbitrary, the specific legal basis and procedures must be set out in national or international law. Indeed, the ICRC also seems to take this position, for although stating that customary and international humanitarian law contains an inherent power to detain in non-international armed conflict, "additional authority related to the grounds and procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in

tempting to conclude that armed groups can never detain lawfully under international humanitarian law or human rights law.

To say that armed groups can never detain in a manner that does not constitute an arbitrary deprivation of liberty would have the effect of suggesting that rather than there being a prohibition of arbitrary detention, there is in fact a prohibition of detention for armed groups. If this is the case, a risk is run that the legal framework on detention is reduced to an irrelevance, because it becomes divorced from the reality that armed groups often detain.[65] Furthermore, if all instances of detention by armed groups are unlawful, it becomes impossible for humanitarian or international organisations to address the mechanisms that armed groups do have in place to determine when people can be imprisoned and for how long, because these details are made legally irrelevant by a blanket unlawfulness. Equally, such a position has a destabilising effect on the legal framework because it elevates the inequality that exists at the level of domestic law (i.e. States can kill, armed groups can't, States can detain, armed groups can't), up into the level of international law, meaning that there are some provisions of international law that can only be adhered to by States. This is problematic because it means that States and armed groups are treated unequally by the legal framework, but it also entertains the possibility of there being a bizarre situation where international law provides regulation of an act that is in its very essence contrary to international law.[66] Saying that detention by armed groups is per se unlawful by being arbitrary, but then providing rules to regulate it, is as illogical as declaring a certain weapon to be unlawful in every instance under international law and then setting out rules of international law to govern its use. Equally - on a pragmatic note - it has been pointed out by successive authors that if a group is institutionally incapable of complying with international law on a particular issue, there is a risk that its motivation to comply with international law on other issues will significantly diminish, as it will fail at the first hurdle.[67] The *de facto* illegality of detention by armed groups may

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keeping with the principle of legality'. ICRC, Commentary to the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Force in the Field (2016) [728] (Commentary to Geneva Convention I, 2016). See Hill-Cawthorne, *Detention in Non-International Armed Conflict* (n48)74 for his conclusion that international humanitarian law does not provide a basis to detain in non-international armed conflict.

[65] N. van Amstel, *In Search of Legal Grounds to Detain for armed Groups*, International Humanitarian Legal Studies (2012, 160, 162

[66] This is different to the idea that jus in bello is agnostic to the lawfulness of armed conflict under ad bellum rules, because at least ad bellum rules hold the possibility that armed conflict can sometimes be lawful under international law.

[67] D. Casalin, *Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups* (2011) 93 International

also stand as an obstacle to humanitarian actors, who would otherwise be willing to help improve places of detention or provide food or services to detainees.[68]

In fact, there are good reasons to suggest that a State does not have the monopoly on recourse to its own domestic law or law-making in situations of armed conflict, reaching the threshold of international humanitarian law. It is interesting to note that in adjudicating the cases relating to the Salò Republic in Italy after the Second World War, the claims tribunal was willing to treat the insurgent law as part of the law of Italy, indicating that an armed group's law may in some cases even be treated as a part of a State's legal system.[69] Moreover, there is no reason of law why an armed group could not rely upon its own law to provide a legal basis for detentions under international humanitarian law or international human rights law to defend itself against an allegation of arbitrariness. The question of the extent to which this is possible is not new of course and nor is it limited to detention. It raises its head also when it comes to the provisions in common Article 3 and APII regarding fair trial. Here it has been important to determine whether an armed group can conduct a fair trial, and whether and how can it adhere to the principle of *non crimen sine lege*. Does it have to apply the State's own criminal code to do this or can it rely on its own criminal laws?[70] Indeed, as Sivakumaran has pointed out:

> To read references to law [in international legal obligations] as including the 'law' of the armed group is simply to interpret the wording of the specific provision in light of the particular setting in which it is applied. This is by no means revolutionary[71].

Of course, there would be a need for any law to be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. Equally, the content of the law must accord to some standards of appropriateness, predictability, as well as reasonableness, necessity and proportionality.[72]

Review of the Red Cross, 743, 750. Clapham, *Detention by Armed Groups under International Law* (n64) 3

[68] Tuck, *Detention by Armed Groups* (n34) 765.

[69] Fortin, *Accountability of Armed Groups* (n11) 264-7.

[70] See S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 561 where he reviews the drafting history of Article 6(2) of Additional Protocol II and indicates that the term 'national' was omitted in favour of the simple 'law', in order to ensure it was wide enough to cover the law of the insurgent group.

[71] Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice?* 7(3) (2009) 489, 508. See also *Commentary to Geneva Convention I* (2016) [692].

[72] *General Comment No. 35*, Article 9 (Liberty and security of person), UN Doc CCPR/C/GC/35, 16 December 2004, para. 12.

Equally, at the level of theory, there seems little reason why an armed group could not satisfy the requirement of a legal basis by referring to the national criminal code in territory under its control, and use this as a legal basis capable of preventing arbitrariness. The main obstacle to this being a satisfactory solution to address this challenge, is the fact that generally armed groups are reluctant to have anything to do with the law of the State against which they are fighting. Indeed, practice shows that armed groups will very quickly declare the State's laws as null and void, and pass their own laws.[73] However, the notion that national law may provide the legal basis necessary to justify an armed group's detention may not always be so far-fetched. For example, it may be the case that an armed group inherits a prison population –and becomes responsible for their detention. In which case – unless the detainees are political prisoners in which case the armed group will probably immediately release them - it is quite foreseeable that an armed group would implicitly rely on the national law, to justify the detainees continuing detention.[74] Furthermore, it is foreseeable that armed groups might be able to have recourse to a regional law to fulfil this requirement. Practice emerging out of Syria indicates that alliances of armed groups in some parts of the country have chosen to rely upon and enforce the Unified Arab Code, rather than writing their own laws or relying upon the national Syrian code.[75]

The fact that armed groups may have law at their disposal to rely on when justifying a detention or the manner in which a detention is carried out, does not negate the fact that some of the core concepts related to these procedural requirements may have to be interpreted 'differently' for armed groups than for States. While legal precedent and authority can be found to justify the tailoring of international humanitarian law and international human rights law to match the capacities of the parties, there is a very real imperative to ensure that during the process of the tailoring process the sanctity of the norms governing arbitrary detention are not too eroded.[76] This will involve identifying bottom lines regarding what is acceptable and what is not acceptable when it comes to what constitutes "law" and what constitutes a "court", for armed groups. While on the one hand it seems that populations can benefit if law and order is maintained, if an armed group

[73] Story about a Guardian journalist conducting an interview with the rebel chief in eastern Ukraine. Led to the bathroom, he noted that the Ukrainian legal code was being used as toilet paper with half its pages ripped out, *An audience with Ukraine rebel chief, Igor Bezler the Demon of Donetsk*, The Guardian, 29 July 2014, http://www.theguardian.com/world/2014/jul/29/-sp-ukraine-rebel-igor-bezler-interview-demon See ILAC Rule of Law Assessment Report, Syria 2017, 76-8.

[74] See UNOCI *Côte d'Ivoire Report on Prisons* (n4). The implication in this report is that partly the prison population pre-existed the control of the Forces Nouvelles.

[75] ILAC *Rule of Law Report Syria* (n73) 77-8.

[76] Sivakumaran, *Courts of Armed Opposition Groups* (n71), 506.

does not have a legal system or a court system, it makes better sense to find alternative ways for this to be achieved. For example, it might be possible to encourage a group not to detain, as its detentions will certainly be arbitrary. As an alternative, it might decide to grant amnesties[77] or instigate a system of fines to deal with minor crimes, in order to reduce the circumstances in which it is necessary to detain individuals.[78]

Political challenges

The above discussion of legal challenges identifies a crucial further challenge that sits at the heart of the legal framework regulating arbitrary detention that has not yet been identified. This is the notion that it remains extremely difficult for States to contemplate the idea that acts by armed groups – which threaten the very existence of the State and are of the highest degree of illegality at national level – can be lawful under international law. As a result, the idea that armed groups are encouraged to carry out these acts 'better' – i.e. to detain more efficiently and more transparently – is seen as an affront to the State-based system of international law. This is particularly the case for detention and the carrying out of trials, as the enforcement of law is a key prerogative of the State. [79] The makers of the legal framework dealt with this challenge by inserting a clause into common Article 3 insisting that the conferral of obligations upon armed groups do not affect their legal status under international law. Equally, by not conferring a combatant privilege in non-international armed conflicts, the legal framework allows States to retain the ability to fight insurgencies not only with military means, but also with law. States retain the ability to punish insurgent activities under national law, as murder, treason, sedition, abduction, etc. Yet, despite these measures, there is no doubt that States remain extremely cautious about fleshing out the circumstances in which armed groups can lawfully detain or conduct prosecutions. This political dynamic remains a key challenge for policy makers in this area, even at times having a chilling effect on humanitarian action.[80]

[77] See UNOCI *Côte d'Ivoire Report on Prisons* (n4) 88, 93. See Balint-Kurti (n55) 29 regarding the 'rough guidelines' employed to determine how long people were detained for common crimes such as petty theft and rape. See Sivakumaran (n70) 559.

[78] See UNOCI *Côte d'Ivoire Report on Prisons* (n4) 9.

[79] Tuck, *Detention by Armed Groups* (n34) 769.

[80] See Sivakumaran (n70) 557-8 for examples of States refusing to acknowledge the institution of judicial proceedings by armed groups.

Conclusions

The purpose of this paper was to assess which legal framework applies to deprivations of liberty by non-State armed groups and to evaluate whether and how they address the particular challenges when detention is conducted by non-State armed groups. The paper has shown that although there may be instances in which human rights law will apply to armed groups exclusively, generally the two legal frameworks of international humanitarian law and international human rights law apply *together* to provide a complementary framework of protection for individuals detained for reasons connected to the armed conflict. They each bring different added value. International humanitarian law brings more specifically articulated conflict-orientated norms on conditions of detention. International human rights law contains more detail on the prohibition of arbitrary detention. The paper concludes that when it comes to conditions of detention, both legal frameworks are able to address the particular challenges when detention is conducted by non-State armed groups. That being said, more work is clearly needed in the field of compliance, in order to boost armed groups' (i) capacity to adhere to international norms and (ii) desire to adhere to international norms. However, when it comes to the prohibition of arbitrary detention, the paper has found that considerable problems with the legal framework remain. The most pressing of these is the need for more consideration to be given by all actors involved in this discussion – including States - to how and when armed groups can detain in a non-arbitrary fashion under international humanitarian law and human rights law.