

Detention by armed groups: overcoming challenges to humanitarian action

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Abstract

Armed conflict and deprivation of liberty are inexorably linked. Deprivation of liberty by non-state armed groups is a consequence of the predominantly non-international character of contemporary armed conflicts. Regardless of the nature of the detaining authority or the overarching legality of its detention operations, deprivation of liberty may nonetheless have serious humanitarian implications for the individuals detained. Despite a need for humanitarian action, effective engagement is hampered by certain threshold obstacles, such as the perceived risk of the group's legitimization. Since the formative work of the International Committee of the Red Cross (ICRC)'s founder, Henry Dunant, the ICRC has sought to overcome these obstacles. In doing so it draws upon its experience of humanitarian action in state detention, adapting it to the exigencies of armed groups and the peculiarities of their detention practice. Although not without setbacks, the ICRC retains a unique role in this regard and strives to ameliorate the treatment and conditions of detention of persons deprived of liberty by armed groups.

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On the night of 21 June 2007, at Tazerzait in the Agadez region of northern Niger, the Mouvement des Nigériens pour la Justice (MNJ) attacked and overran an outpost of the Nigerian Armed Forces, killing fifteen¹ and capturing seventy-two.² The International Committee of the Red Cross (ICRC) initiated a humanitarian response, obtaining access to the detainees within a week, providing emergency medical care, and facilitating the release of thirty-four critically injured individuals.³ The ICRC subsequently visited the remaining detainees on two occasions, provided material assistance – such as blankets, clothing, hygiene items, and foodstuffs – as well as medical aid, and engaged in a confidential bilateral dialogue with the MNJ aimed at ensuring the humane treatment and conditions of detention of the persons deprived of their liberty.⁴

This article is a (necessarily incomprehensive) exploration of humanitarian engagement of non-state parties to non-international armed conflict (hereafter ‘armed groups’) in relation to their detention practice.⁵ In doing so, it aims to contribute to the broader reflection on the engagement of armed groups that is being carried out by humanitarian actors.⁶ As has been noted, holistic humanitarian engagement of armed groups should include ‘efforts to persuade [them] to respect humanitarian and human rights principles, including [*inter alia*, to] treat captured combatants and others hors de combat humanely, without discrimination and with respect for their rights’.⁷

To address this issue, this article is divided into three substantive sections, each with a different subject. The first considers armed groups. It describes the reality of detention by such groups in non-international armed conflict (NIAC) and its implications for the individuals detained. The second is concerned principally with humanitarian actors. It outlines some of the obstacles, legal and operational,

- 1 International Crisis Group, *Crisis Watch*, No. 47, 1 July 2007, p. 4, available at: <http://www.crisisgroup.org/~media/Files/CrisisWatch/2007/cw47.ashx> (last visited 15 February 2011).
- 2 BBC News, ‘Aid for captured Niger soldiers’, 26 June 2007, available at: <http://news.bbc.co.uk/2/hi/africa/6240846.stm> (last visited 15 February 2011).
- 3 ICRC, *Annual Report 2007*, May 2008, p. 157, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 9 February 2011), and ICRC, ‘Niger: detainees released under ICRC auspices’, News Release 08/19, 14 February 2008, available at: <http://www.icrc.org/eng/resources/documents/news-release/niger-news-040208.htm> (last visited 14 February 2011).
- 4 ICRC, News Release 08/19, above note 3. See also ICRC, *Annual Report 2008*, May 2009, p. 161, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 9 February 2011).
- 5 For the relevant applicable international humanitarian law in non-international armed conflict, see Article 3 common to the four 1949 Geneva Conventions (Common Article 3); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (AP II), Art. 1(I).
- 6 See Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*, OCHA, January 2006, p. 5, available at: <http://ochaonline.un.org/humanitariannegotiations/Documents/Manual.pdf> (last visited 21 January 2012); Claudia Hofmann, ‘Engaging non-state armed groups in humanitarian action’, in *International Peacekeeping*, Vol. 13, No. 3, 2006, p. 396; Lucia Withers, ‘Child-soldiers: how to engage in dialogue with non state armed groups’, in Coalition to Stop the Use of Child Soldiers, *Swiss Human Rights Book: Realizing the Rights of Children*, January 2007, available at: http://www.swisshumanrightsbook.com/SHRB/shrb_02_files/347_24%20withers.pdf (last visited 21 January 2012).
- 7 David Petrasek, ‘Vive la différence? Humanitarian and political approaches to engaging armed groups’, Conciliation Resources, 2005, available at: <http://www.c-r.org/our-work/accord/engaging-groups/vive-la-difference.php> (last visited 18 February 2011).

to humanitarian engagement of armed groups in relation to their detention practice. The third looks at the ICRC. It considers the humanitarian action of the ICRC, explaining for whom, and how, it works in response to deprivation of liberty by armed groups.

Deprivation of liberty by armed groups

Armed conflict and deprivation of liberty are inexorably linked, as demonstrated by the numerous provisions of the Geneva Conventions devoted to regulating various aspects of detention. In the six decades subsequent to the drafting of the Conventions, the implications of detention in NIACs, in contrast to those exclusively between states, have been subject to increased popular, academic, political, and humanitarian scrutiny. In the first years of the twenty-first century, armed conflicts have been predominantly non-international in character,⁸ each, by definition, involving at least one non-state armed group.⁹

Detention by armed groups is neither infrequent nor, necessarily, small-scale. In the first decade of the twenty-first century alone, and among many others, the Communist Party–Maoists (CPN-M) in Nepal, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Taliban in Afghanistan, the Forces Armées Force Nouvelles (FAFN) in Côte d'Ivoire, the Sudanese People's Liberation Army/Movement in Sudan, and the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejército de Liberación Nacional (ELN) in Colombia have all, and on multiple occasions, deprived people of liberty.

Characterized by diversity

Just as 'armed groups are characterised by their great diversity',¹⁰ so too are their dealings with detainees. The extent, frequency, and location of detention differ, as do the infrastructure, expertise, and financial resources available for the administration of detention. Some armed groups expressly recognize the humanitarian entitlements of detainees and regulate the conduct of their members accordingly, while others do not. It is evident, however, that detention by armed groups may not conform to the stereotype of its being ad hoc, small-scale, and rudimentary. For this, the FAFN offers one telling example. Following the outbreak of hostilities between it and the state, the FAFN secured territorial control of much of northern Côte d'Ivoire. Between 2002 and 2007, it established and maintained extensive, routine

8 Michelle Mack and Jelena Pejic, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflict*, ICRC, 2008, pp. 2 and 5, available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (last visited 14 February 2011). See also C. Hofmann, above note 6, p. 396.

9 Common Article 3; AP II, Art. 1(1).

10 Teresa Whitfield, *Engaging with Armed Groups: Dilemmas & Options for Mediators*, Centre for Humanitarian Dialogue, October 2010, p. 6, available at: www.hdcentre.org/files/HDC_MPS2_EN.pdf (last visited 7 February 2011). M. Mack and J. Pejic, above note 8, p. 11, also note that the 'parties [to NIAC] vary widely in character'.

detention operations, utilizing the detention infrastructure of the state. Under the auspices of the military and police, respectively, the FAFN generally segregated conflict-related detainees, such as members of the state armed forces, and common-law detainees, subjecting the latter to a nominal trial. Deprivation of liberty by the FAFN was, in sum, ostensibly ‘state-like’.

Of the varied characteristics of deprivation of liberty by armed groups, the overarching ‘objectives’ merit brief consideration. Armed groups deprive members of the opposing armed forces of their liberty to secure military advantage or otherwise safeguard their own security. The capture on 7 August 2005, in Khalikot district, Nepal, of sixty-two members of the Royal Nepalese Army by the CPN-M, is but one of many examples.¹¹ The result in such cases is *de facto* internment: that is, a deprivation of liberty to mitigate the serious security risk posed by the individuals, absent an intention to bring criminal charges against them. There is, however, little evidence of armed groups having expressly instituted an internment regime and ensured the requisite due process.¹² Rather, the ‘internees’ are simply held until their release is convenient, as determined by the security, and sometimes political, considerations of the group. By contrast, some armed groups ‘arrest’, ‘try’, and ‘sentence’ individuals for alleged criminal violations. That is, they use detention as a means to ensure law and order pursuant to a ‘criminal code’ in the territory under their control.¹³ In Sri Lanka, for example, the LTTE maintained a sophisticated judicial system – including ‘17 courts in a hierarchical structure’¹⁴ – that led to, among other sentences, imprisonment.¹⁵ Indeed, to separate these examples is misleading: both the CPN-M and the LTTE routinely deprived people of liberty for purposes related, and unrelated, to the armed conflict.

In addition, some armed groups deprive people of liberty for the purpose of treating them as hostages. During a three-year period in Colombia in the 1990s, at the zenith of hostage-taking in that context, armed groups – principally the FARC and the ELN – accounted for approximately 1,490 of the 3,338 ‘kidnappings for ransom’, nearly ‘50% of *all* kidnappings for ransom . . . in the world’ at that time.¹⁶ Such hostage-taking inevitably has grave implications for both the hostage and his/her family and is strictly prohibited by humanitarian law.¹⁷ It is important to note,

11 ICRC, ‘Nepal: the long walk home – 62 armed forces and security personnel released under ICRC auspices’, New Release 05/51, 15 September 2005, available at: <http://www.icrc.org/eng/resources/documents/misc/6g9ghk.htm> (last visited 18 February 2011).

12 In international armed conflict, Articles 43 and 78 of the Fourth Geneva Convention (GC IV) require periodic review of the reasons for the continued internment of civilian internees. In NIAC, reference should be made to Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, ICRC and Cambridge University Press, Cambridge, 2009, pp. 347–352.

13 Sandesh Sivakumaran, ‘Courts of armed opposition groups: fair trials or summary justice?’, in *Journal of International Criminal Justice*, Vol. 7, 2009, pp. 490–495.

14 *Ibid.*, p. 494.

15 Kristian Stokke, ‘Building the Tamil Eelam state: emerging state institutions and forms of governance in LTTE-controlled areas in Sri Lanka’, in *Third World Quarterly*, Vol. 27, No. 6, 2006, p. 1027. See also Syed Rifaat Hussain, ‘Liberation Tigers of Tamil Eelam (LTTE): failed quest for a “homeland”’, in Klejda Mulaj (ed.), *Violent Non-state Actors in World Politics*, Hurst & Company, London, 2010, p. 384.

16 Arturo Carrillo-Suarez, ‘Issues in international humanitarian law as applied to internal armed conflict’, in *American University International Law Review*, Vol. 15, No. 1, 1999–2000, p. 25.

17 Common Article 3(1)(b); AP II, Art. 4(2)(c).

however, that, contrary to popular discourse, not every deprivation of liberty by an armed group equates to hostage-taking. Hostage-taking arises where the deprivation of liberty is accompanied by a threat against the life, integrity, or liberty of the individual in pursuance of concessions by a third party.¹⁸ In the absence of these elements, internment and detention as described in the preceding paragraph do not amount to hostage-taking, regardless of the legality of deprivation of liberty by armed groups, as is considered below.

Humanitarian implications

If the characteristics of detention by armed groups differ, one to another and in comparison to states, the *terminus a quo* for understanding the impact of their practices on detainees is paradoxically homogenous. That is, '[e]very detainee is in a situation of particular vulnerability [regardless of the character of the detaining authority], both vis-à-vis their captor and in relation to their environment'.¹⁹ Moreover, persons held by the opposing party to an armed conflict may be particularly vulnerable, both because of their allegiance to an enemy entity and, as is often the case, because of the breakdown of law and order.

This notwithstanding, characteristics peculiar or common to armed groups *per se* may increase the likelihood of the occurrence – or the consequences of – certain humanitarian concerns. Limited territorial control may restrict the availability of goods and services essential to the maintenance of humane conditions of detention. A horizontal structure, absent effective hierarchy, may impede the enforcement of norms intended to protect detainees. Inability to engage with external actors may limit the group's capacity to respond to acute humanitarian crises. Given the diversity of armed groups, neither a list of such variables, nor a summary of their impact upon the detainees can be comprehensively compiled. Not all attributes of armed groups are, however, inherently detrimental to detainees. An armed group's objectives, culture, or constituency – often recognized as fundamentally underpinning groups' identity and behaviour²⁰ – may equally be cause for humane treatment and conditions in detention.

In addition to the characteristics of armed groups *per se*, certain attributes common to detention by armed groups have implications for persons deprived of liberty. Among others, these include lack of judicial oversight, of detention

18 See ICRC, 'ICRC position on hostage taking', in *International Review of the Red Cross*, Vol. 84, No. 846, 2002, pp. 467–470; International Convention Against the Taking of Hostages, open for signature 17 December 1979, 1316 U.N.T.S. 205 (entered into force 3 June 1983), Art. 1; Elements of Crimes of the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Arts. 8(2)(a)(viii) and 8(2)(c) (iii), pp. 129 and 147.

19 Alain Aeschlimann, 'Protection of detainees: ICRC action behind bars', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 83.

20 G. McHugh and M. Bessler, above note 6, pp. 17–21, list '*motivations*, structure, principles of action, interests, *constituency*, needs, *ethno-cultural considerations* and control of population and territory' foremost among the characteristics of armed groups, which, if understood, 'can greatly assist negotiators in securing better outcomes' (emphasis added). This is also true for humanitarian actors.

management expertise, and of allocated financial resources.²¹ Perhaps most peculiar to armed groups is a tendency to detain persons in undisclosed, remote locales, without standard detention infrastructure.²² This is a logical consequence of waging war against better-resourced states, in which the armed group's survival is dependent upon clandestine operations. For the detainees, the implications are a dearth of essential items/services, an absence of family contact, frequent transfers, exposure to harsh climatic variables, and so forth.²³

Furthermore, the inherently clandestine nature of detention by armed groups risks exposing detainees to the effects of the hostilities.²⁴ In 2005, for example, the Sri Lankan air force allegedly – and unwittingly – killed a Sri Lankan army service member in an attack upon the LTTE.²⁵ Ironically, where the location of detention is disclosed, the lives and wellbeing of the detainees may be threatened by military operations to release them. This was the case in Afghanistan in August 2010, when a military raid upon a Taliban detention facility succeeded in liberating twenty-seven detainees, but inadvertently killed five.²⁶

Obstacles to humanitarian engagement

The existence of detention by armed groups and its potentially serious implications for persons deprived of liberty make a strong case for humanitarian engagement. For humanitarian actors,²⁷ however, there are serious obstacles to doing so, many of which have been considered in relation to the foundational question of whether, or

21 Even within relatively well-resourced armed groups, the persons immediately responsible for the care and custody of the detainees may not have access to essential finances, personnel, equipment, infrastructure, etc.

22 There are, however, many noteworthy exceptions, such as the detention operations of the FAFN, described above. Furthermore, some armed groups detain in populated, urban environments that are under the general control of the opposing party to the armed conflict. In such cases, the location of the detention operations is subject to the strictest secrecy.

23 Sjöberg notes that persons deprived of liberty by the ELN are 'held in the jungles under harsh conditions (lack of medicine, medical services, food, etc.). As a consequence, they sometimes get sick or even die'. Ann-Kristin Sjöberg, 'Challengers without responsibility? Exploring reasons for armed non-state actor use and restraint on the use of violence against civilians', PhD thesis, Graduate Institute of International and Development Studies, Geneva, September 2009, p. 170. For similar comments concerning the FARC, see p. 225.

24 In violation of AP II, Arts. 5(1)(b) and 5(2)(c). Sjöberg notes that persons held by the ELN in Colombia were at risk of exposure to hostilities. See *ibid.*, p. 170.

25 This incident has not, however, been confirmed by the Sri Lankan Air Force itself. See Now Public, 'SLAF airstrike targeted POW centre – Vanni Radio', 18 February 2009, available at: <http://www.nowpublic.com/world/slaf-airstrike-targeted-pow-centre-vanni-radio> (last visited 25 February 2011); Siber News, 'SLA's detained soldier in custody as POW killed in SLAF airstrike', 19 February 2009, available at: <http://sibernews.com/200902192058.html> (last visited 25 February 2011).

26 'NATO forces raid secret Taliban prison', in *Sydney Morning Herald (AFP)*, 18 August 2010, available at: <http://news.smh.com.au/breaking-news-world/nato-forces-raid-secret-taliban-prison-20100818-12fay.html> (last visited 18 February 2011).

27 For present purposes, 'humanitarian actors' include local government and non-governmental organizations (NGOs), the United Nations, the ICRC, and international NGOs.

not, to engage armed groups.²⁸ For present purposes, it is necessary only to explore those obstacles, both legal and operational, that have a particular or acute bearing upon humanitarian action in favour of persons deprived of liberty.

Authority to detain

A threshold obstacle to the engagement of armed groups vis-à-vis detention is identifying the existence, and defining the limits, of a legal authority for groups to deprive people of liberty. Domestic law vests this authority exclusively in the state and the implications of international law are open to interpretation. By one reading, humanitarian law regulates the treatment and conditions of deprivation of liberty in connection with NIAC, but does not establish its legality. That is, in the absence of an express authority and so as not to create a dichotomous result vis-à-vis domestic law, humanitarian law, at best, simply *does not prohibit* deprivation of liberty. As detention by armed groups, by this reasoning, lacks a legal basis, some humanitarian actors may be precluded from even attempting engagement.

In the alternative, international humanitarian law (IHL) can be understood implicitly to confer an authority to deprive people of liberty upon parties to NIAC. Indeed, reference to ‘persons, *hors de combat* by... detention’ and ‘regularly constituted courts’ in Common Article 3, and to persons ‘interned’ in the Second Additional Protocol, Articles 5 and 6, are superfluous if not understood to be accompanied by an authority to detain or intern respectively.²⁹ That this authority would extend to armed groups is, furthermore, secured by the principle of the ‘equality of belligerents’, by which humanitarian law sets equal parameters for each party to the conflict, regardless of the overarching (il)legality of the conflict or the nature of the parties.³⁰

If these ‘authorities’ are accepted, each elicits further complex considerations, thorough appraisal of which is beyond the scope of this article. In brief, an authority to detain begs questions as to whether non-state actors have the capacity to enact ‘law’, whether armed groups’ courts are ‘regularly constituted’,³¹ and to what extent they are capable of ensuring the necessary judicial guarantees.³²

28 See, among others, T. Whitfield, above note 10, and Ann-Kristin Sjöberg, ‘Dealing with the devil? Humanitarian engagement with armed non-state actors: the case of the National Liberation Army, Colombia’, paper delivered at International Studies Association annual meeting, San Francisco, 26–29 March 2008, available at: www.humansecuritygateway.com/documents/ISA_dealingwiththediabol.pdf (last visited 15 February 2011).

29 ‘In the ICRC’s view, both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC.’ Jelena Pejic, ‘The protective scope of Common Article 3: more than meets the eye’, in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 207.

30 Equality before humanitarian law may be fundamental to armed groups’ acceptance of, and adherence to, it. In other words, armed groups prohibited from depriving people of liberty, and thus unable to pursue their military objectives efficiently, may consider humanitarian law inherently biased in favour of their enemy. On the ‘equality of belligerents’ in NIAC, see generally Jonathan Somer, ‘Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict’, in *International Review of the Red Cross*, Vol. 89, No. 867, 2007, pp. 681–682.

31 Within the meaning of Common Article 3. See *ibid.*, pp. 671–676.

32 See Common Article 3(d) and AP II, Art. 6; see also S. Sivakumaran, above note 13, esp. pp. 498–509.

Similarly, an authority to intern raises questions as to whether armed groups can establish a legal basis for internment,³³ whether the grounds for internment should mirror those foreseen by the humanitarian law of international armed conflict³⁴ and to what extent groups are capable of ensuring procedural safeguards, including an independent and impartial body to review the case of each internee.³⁵

More pressing is the fact that even if these ‘authorities’ were to be accepted, it is inherent in the character of humanitarian law that they would extend only to deprivation of liberty with a nexus to the conflict.³⁶ International law fails to provide even an implicit legal basis for deprivation of liberty unrelated to the conflict.³⁷ The FAFN, CPN-M, and LTTE, among others, would thus have been ‘permitted’ to hold members of the opposing armed forces and to ‘prosecute’ and ‘try’ persons for violations of the laws of war but not to administer criminal justice – that is, enforce common law crimes – in the territory under their control. Humanitarian engagement in response to this type of detention therefore remains inherently controversial.

Normative frameworks

If the absence of an express authority to detain is not an insurmountable obstacle, a subsequent challenge lies in determining which normative frameworks govern the treatment, conditions and due process of persons in the custody of armed groups. The applicability of human rights law, which details comprehensive protections for detainees³⁸ and which some armed groups indicate would be an acceptable basis for

33 See J. Pejic, above note 29. See also Marco Sassòli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 17–18.

34 The subsequent question is whether the internment regime during NIAC should mirror that of the Third or Fourth Geneva Convention (GC III or GC IV). See Marco Sassòli and Laura M. Olsen, ‘The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 616–627.

35 See Jelena Pejic, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’, in *International Review of the Red Cross*, Vol. 87, No. 858, 2005. This article was published as an Annex to the ICRC’s Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts presented to the 2007 International Conference of the Red Cross and Red Crescent, and expresses the ICRC’s institutional position.

36 For detention, this is evidenced by the AP II, Art. 6, which affords judicial guarantees to persons prosecuted and punished for ‘criminal offences *related to the armed conflict*’ (emphasis added).

37 Note that analogy to the law of occupation may resolve this conundrum. Zegveld suggests that GC IV, Art. 64, applied by analogy to NIAC, would balance ‘the principle of the continuity of the national legal system and the reality of a plurality of authorities’. Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 71.

38 See, for example, International Covenant on Civil and Political Rights (ICCPR), entered into force 23 March 1976, Arts. 6, 7, 9, 14, and 15; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987; Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, adopted 9 December 1988.

humanitarian dialogue,³⁹ is particularly problematic. Although the applicability of human rights law during armed conflict is beyond dispute,⁴⁰ it is generally considered to bind only states parties to the concerned international instruments – an interpretation based on the text of the conventions themselves,⁴¹ and underpinned by the understanding that ‘human rights law purports to govern the relations between the government representing the state and the governed’.⁴² Although the emerging counter-contention represents an important development towards the full accountability of some armed groups, it does not yet enjoy universal acceptance.⁴³ Indeed, as the counter-contention stands – favouring the applicability of human rights only for armed groups that exercise administrative control of territory⁴⁴ – relatively few groups may ultimately be bound.

Humanitarian law, by contrast, categorically binds armed groups.⁴⁵ Common Article 3 and the Second Additional Protocol oblige all parties to NIAC to ensure certain fundamental protections for persons deprived of liberty. Even here, however, effective humanitarian engagement is challenged by a lack of comprehensive regulation of detention. In contrast to the law of international armed conflict, rules governing conditions of detention, transfers, procedural safeguards for internment, and other issues, are either absent or lacking specificity in the treaty law of NIAC.⁴⁶

In addition, engagement on the basis of norms that are otherwise applicable and relevant may yet be impeded by a lack of willingness of the concerned armed group to accept that international law governs its operations. Armed groups may reject international law, which, after all, ‘is mainly made by states . . . is mainly addressed to states [and] its implementation mechanisms are even more state-centered’.⁴⁷ Rejection of the full corpus of international law on political or

39 See, for example, The Sudan Justice and Equality Movement (JEM), Establishment of a JEM Committee for Human Rights, Decree No. 71, 2010, available at: <http://www.sudanjem.com/2010/10/establishment-of-a-jem-committee-for-human-rights/> (last visited 14 April 2011).

40 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, para 106.

41 ICCPR, Art. 2, for example, imposes obligations upon ‘each state party’.

42 Andrew Clapham, *The Human Rights Obligations of Non-state Actors*, Oxford University Press, New York, 2006, p. 36.

43 For more detail, see David Petrasek, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, 2000, pp. 60–61, available at: http://www.ichrp.org/files/reports/6/105_report_en.pdf (last visited 9 February 2011).

44 Christian Tomuschat, ‘The applicability of human rights law to insurgent movements’, in H. Fischer *et al.* (eds), *Krisensicherung und Humanitärer Schutz: Festschrift für Dieter Fleck (Crisis Management and Humanitarian Protection)*, Berliner Wissenschafts-Verlag, Berlin, 2004, p. 586. See also A. Clapham, above note 42, pp. 283–284; Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, ‘International law and armed non-state actors in Afghanistan’, in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 18–28.

45 See Common Article 3 and AP II, Art. 1. See also J. Somer, above note 30, pp. 660–663; S. Sivakumaran, above note 13, pp. 496–497. Although note that ‘[d]ifferent legal constructions exist to explain why armed groups are . . . bound by certain IHL rules’ (M. Sassòli, above note 33, pp. 12–13). See also A. Clapham, above note 44, p. 280, and A. Bellal *et al.*, above note 44, pp. 9–10.

46 J. Pejic, above note 29, pp. 206–207, 215.

47 Marco Sassòli, ‘The implementation of international humanitarian law: current and inherent challenges’, in *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 63.

ideological grounds is not, however, the norm among armed groups. In fact, there are many examples of groups having accepted international law expressly⁴⁸ or indicated commitment to comparable standards. In 1988, for example, and prior to making a commitment to the Geneva Conventions and Additional Protocols as such, the Melito Glor Command of the New People's Army in the Philippines issued a policy on 'the Proper Treatment of POWs [*sic*]'.⁴⁹ Although brief, this policy describes several essential rights and protections of persons deprived of liberty that mirror provisions of the law applicable during international armed conflict.⁵⁰ More common than wholesale rejection of the entirety of international law is the rejection of certain specific norms. Often, these norms are those perceived by the armed group as detrimental to its war effort and those for which adherence would incur a substantial financial, logistical, or other burden. For humanitarian actors therefore, the identification and invocation of normative frameworks that are applicable, relevant, comprehensive and accepted, may present an obstacle to effective engagement of armed groups.

The risk of legitimization

Concurrently with these principally legal challenges, all humanitarian engagement is further threatened by a perceived risk of armed groups' undue 'legitimization':⁵¹ an apprehension by states that engagement will bolster the group's claim to be the legitimate authority of certain territory, suggest its humanitarian credentials or otherwise contribute to its being perceived favourably. The Supreme Court of the United States, upholding the constitutionality of the prohibition of 'knowingly provid[ing] material support or resources to a foreign terrorist organization',⁵² has given expression to this view by stating that:

Material support meant to 'promot[e] peaceable, lawful conduct' . . . can further terrorism by foreign groups in multiple ways . . . [I]mportantly [, it] helps lend legitimacy to foreign terrorist groups⁵³ – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.⁵⁴

48 The Revolutionary People's Front in India, as one of many examples, made a declaration during the 49th Session of the Human Rights Sub-Commission, 1997, of its 'unequivocal intention to comply with Article 3 common of the Geneva Conventions'. Human Rights Watch, *These Fellows Must be Eliminated: Relentless Violence and Impunity in Manipur*, 15 September 2008, p. 19, note 33, available at: <http://www.hrw.org/en/node/75175/section/1> (last visited 20 November 2010).

49 'Memo of Melito Glor Command on Policy Towards Prisoners of War, 18 June 1988', in NDFP Human Rights Monitoring Committee, *NDFP Adherence to International Humanitarian Law: On Prisoners of War*, revised edition, Utrecht, 2009, p. 92. In fact, in NIAC the concept of prisoners of war does not exist. It is possible that some groups employ the language of international armed conflict when describing their humanitarian obligations to imply their own state-like status.

50 *Ibid.*, pp. 92–93.

51 T. Whitfield, above note 10, p. 11.

52 18 U.S.C. §2339B(a)(1).

53 Including those party to an NIAC, such as the LTTE prior to 2009.

54 *Holder, Attorney General, et al. v. Humanitarian Law Project et al.*, 561 U.S. 25, 21 June 2010.

Pursuant to this reasoning, the risk of legitimization is not exclusively a consequence of political discourse, but may result from humanitarian engagement and its associated activities, such as training and the provision of ‘expert advice and assistance’.⁵⁵ Thus, whether or not a causal link actually exists between humanitarian engagement, legitimization and ‘more terrorist attacks’,⁵⁶ the US Supreme Court succinctly articulates a position held by some states – a position, it is submitted, that could effectively preclude humanitarian action as such and is contrary to the letter and spirit of IHL.

The perceived risk of legitimization is particularly acute for action vis-à-vis judicial guarantees. The prerogative to arrest, try and sentence persons is vested exclusively in the judiciary of a state. As the Chief Justice of Sri Lanka noted:

Judicial power is part of the sovereignty of the people and it cannot be exercised by any other persons than those who are vested with it. . . . The LTTE can have a conciliation mechanism if they want . . . [b]ut they have no judicial authority.⁵⁷

For the development of a humanitarian response to purported criminal detention, however, the treatment and conditions of detention of persons deprived of liberty cannot be isolated from due process considerations. An absence of effective judicial guarantees has both direct humanitarian consequences, such as wrongful ‘conviction’ or indeterminate deprivations of liberty, and indirect implications, such as overcrowding and its consequences. For humanitarian actors it is therefore imperative – but difficult, given the legal, political, and practical constraints – to safeguard the detainees’ interest in ‘fair’ parameters for otherwise arbitrary detention under domestic law.⁵⁸

Operational obstacles

At the operational level, impediments to access and constructive dialogue also challenge effective humanitarian action for the benefit of persons deprived of liberty. The main obstacle – which merits brief consideration despite being true of engagement other than that related to detention – is to establishing effective contact with the concerned group:

Governments have embassies and representatives abroad who can be contacted. In most cases, contacts can be made openly and transparently. In contrast, speaking to the leadership of an armed group can be fraught with difficulties. . . . it is not always clear who actually represents the armed group – leaders in prison, leaders abroad or ‘commanders’ ‘in the hills’.⁵⁹

55 18 U.S.C. §2339A(b)(1–3).

56 The decision of the Supreme Court in *Holder, Attorney General, et al. v. Humanitarian Law Project et al.* has been subject to criticism. See, for example, Christopher Thornton, ‘Darfur and the flaws of *Holder v. HLP*’, in *Forced Migration Review*, No. 37, 2011, pp. 39–40.

57 S. Sivakumaran, above note 13, p. 507, citing Laila Nasry, ‘Interview with Chief Justice Sarath N de Silva: LTTE has no judicial authority – CJ’, in *Sunday Times*, Sri Lanka, 14 November 2004, available at: <http://sundaytimes.lk/021208/news/courts.html> (last visited 22 February 2011).

58 See Common Article 3; AP II, Art. 6.

59 D. Petrasek, above note 43, pp. 46–47.

Where the necessary contacts are forthcoming, effective engagement is further threatened by humanitarian actors' inability to identify and understand each group's attributes and appreciate them within the particular context. Humanitarian actors suffer from the same problems as mediators, who, as Whitfield notes, 'embark upon engagement with armed groups with large gaps in their knowledge of them [and it is] not surprising that, on occasion, their engagement has unforeseen and undesirable impacts'.⁶⁰ The reclusive nature of many armed groups, coupled with the complexity inherent in their infinite variety, often makes this threshold assessment particularly difficult.

Accessing and understanding the detention

In the context of an established relationship with the concerned armed group, challenges still arise regarding accessing and understanding their dealings with detainees. Unlike the procedure with states, agreement to visit persons deprived of liberty is rarely secured by means of a single commitment by one representative of the group. Rather, it may be necessary for humanitarian actors to establish contact with multiple, often elusive, individuals within a group – such as both senior and regional commanders – depending on its structure and the efficiency of its internal communications and hierarchy. Even once substantive dialogue has commenced, it is possible that the individual with whom humanitarian actors have most regular contact is not best positioned to influence the situation of the detainees themselves. This is often the case where the armed group restricts its external contact to select 'liaison officers' and results inevitably in the reduced effectiveness of humanitarian engagement.

Access to persons deprived of liberty by armed groups may, moreover, be jeopardized by the remote, clandestine, and/or transient nature of the detention. Some armed groups keep detainees with mobile, operational military units and/or reject contact with humanitarian actors on the basis of the perceived threat that it would pose to the group's security. Paradoxically, even where the armed group itself has expressly consented to humanitarian action, a prevailing situation of lawlessness and banditry may also preclude its commission without excessive risk accruing to humanitarian personnel.

In addition to an understanding of the group itself and acts and omissions *intra muros*, a thorough comprehension of the situation of persons deprived of liberty by armed groups involves extensive assessment of the situation *extra muros*. The humanitarian implications of detention may be heavily influenced by the environment beyond the place of captivity. To give but one example, the influence of the group's constituency, its requirements and values, always need to be comprehensively understood: often, armed groups deprive people of liberty at the behest of their constituency and treat detainees according to their dictates. To respond effectively, humanitarian actors must therefore assess and analyse, among other things, complex cultural, social, political, economic, or historical factors.

60 T. Whitfield, above note 10, p. 26.

Maintaining a constructive, effective dialogue

Maintaining a mutually coherent dialogue for the benefit of persons deprived of liberty that is adapted to the peculiarities of each armed group – including the education and expertise of its members – presents a common challenge. Dialogue is often facilitated with relatively ‘sophisticated’ armed groups. Indeed, some groups – for example, the LTTE until 2009⁶¹ – have lawyers and other relevant professionals, such as doctors and engineers. It is less common, however, for armed groups to have personnel who are trained and experienced in prison management and operations and humanitarian actors must adjust their dialogue accordingly to increase the likelihood of achieving the most favourable outcomes.

Assuming the acceptance of all or some of the relevant international legal standards, humanitarian actors must still present them in an adapted, contextualized manner. How, for example, should the right of persons deprived of liberty to send and receive letters be presented to a transient armed group that objects to the transfer of any information on the basis of veracious security concerns?⁶² How might an armed group ensure that its courts are regularly constituted and that it affords ‘all the guarantees which are recognised as indispensable by civilised people’, as required by Common Article 3? Despite the difficulty, failure to present such standards so as to make them achievable for the particular armed group will inevitably lead to them being rejected as a basis for dialogue.

Finally, in practice, the most difficult dialogue to maintain is that in which an armed group engages selectively, taking the services offered by external actors but avoiding substantive dialogue toward better humanitarian protections. In such cases, humanitarian actors may face a complex dilemma: to discontinue engagement to the detriment of the intended beneficiaries or to persist with an armed group that is unwilling to make its own substantive commitment toward improved treatment and conditions of detention.

The action of the International Committee of the Red Cross

In 1871, the founder of the ICRC, Henry Dunant, is reputed to have made the first – and particularly bold – humanitarian interventions for the benefit of persons deprived of liberty, in this case by the Commune, the non-state authority then in control of Paris.⁶³ Since then, the ICRC has refined its approach and has routinely employed dialogue and activities in similar contexts toward similar

61 S. Sivakumaran, above note 13, p. 494.

62 In fact, as described by the AP II, Art. 5(2)(b), this particular obligation affords parties to conflict a certain margin for fulfilment; obliging them only ‘within the limits of their capabilities’. The Commentary to the AP II describes Article 5(2) as ‘only compulsory as far as the means are available, [but] nevertheless important’. Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers/ICRC, Geneva, 1987, p. 1389, para 4580.

63 Pierre Bossier, *History of the International Committee of the Red Cross: from Solferino to Tsushima*, English translation of French original, Henry Dunant Institute, Geneva, 1985, p. 262.

humanitarian objectives. In Hungary in 1956, for example, the ICRC Delegate Herbert Beckh:

made contact with the insurgents [and] spoke for over an hour with [their commander], who formally undertook to order his troops to afford humane treatment to any adversaries who fell into their hands, in accordance with the principles of the Geneva Conventions. As a result, the insurgents were persuaded not to execute about 300 prisoners they were holding... Before returning to Vienna, Beckh went to the border town of Sopron where... he visited 29 prisoners still being held by the insurgents...⁶⁴

In the twenty-first century, the ICRC continues to engage non-state detaining 'authorities' in this manner in many of the contexts in which it works.⁶⁵ Recently it has, for example, visited persons deprived of liberty by the (then) 'armed opposition' in Libya.⁶⁶

Who the ICRC works for

This humanitarian engagement is premised upon the ICRC's treaty authorization – foreseen by Common Article 3 – to act on the basis of an offer of services to the parties to NIACs.⁶⁷ More specifically, its engagement of armed groups is rooted in the inescapable reality that the action or inaction of non-state parties has a significant bearing upon the humanitarian consequences of armed conflict. As a neutral, independent, and impartial organization, the ICRC works to ensure that all parties understand, accept, and adhere to their obligations, including those with respect to persons deprived of liberty. The considerations vis-à-vis the legality of detention by armed groups, noted above, do not, therefore, preclude the ICRC from responding to existing deprivations of liberty. In fact, there is a credible contention that, in some cases, deprivation of liberty itself has an inherently humanitarian value. As Sassòli notes, armed groups that

cannot legally intern members of government forces [are] left with no option but to release the captured enemy fighters or to kill them. The former is unrealistic, because it obliges the group to increase the military potential of its enemies, the latter is a war crime.⁶⁸

Similar reasoning may apply – albeit in less stark terms – to criminal detention unrelated to the conflict; that is, where an armed group maintains effective

64 Françoise Perret, 'ICRC operations in Hungary and the Middle East in 1956', in *International Review of the Red Cross*, No. 313, 1996, available at: <http://www.icrc.org/eng/resources/documents/misc/57jn8c.htm> (last visited 29 April 2011). See also Isabelle Vonèche Cardia, *L'Octobre Hongrois: Entre Croix Rouge et Drapeau Rouge*, Bruylant, Bruxelles, 1996, p. 39.

65 See, for example, A. Aeschlimann, above note 19, p. 90, esp. note 22.

66 ICRC, 'Libya: ICRC visits 50 detainees in Benghazi', News Release 11/74 25 March 2011, available at: <http://www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-03-25.htm> (last visited 6 April 2011).

67 See also the Statutes of the International Committee of the Red Cross, Art. 4(1)(d).

68 M. Sassòli, above note 33, p. 19.

territorial control for extended periods, such as in Sri Lanka and Côte d'Ivoire, and the local population requires it to provide protection from criminality, imprisonment accompanied by adequate treatment and conditions may best ensure the dignity and humanity of 'sentenced' persons.⁶⁹ This contention is not, however, without limits. Regardless of the standards *intra muros*, fundamentally arbitrary detention is not a humanitarian outcome for the individual(s) deprived of liberty under any circumstances. Although sometimes difficult to apply, parameters equivalent to those governing deprivation of liberty by states, such as the principles of individual liability⁷⁰ and *nullem crimen sine lege*,⁷¹ must therefore also curb the 'authority' of armed groups to deprive people of liberty during NIAC.

In international armed conflict, the Geneva Conventions explicitly mandate the ICRC to work in favour of certain categories of persons deprived of liberty, principally prisoners of war⁷² and civilians.⁷³ In NIAC, the ICRC prioritizes work in favour of persons in analogous situations:

In determining the detainees for whom its activities are deployed in internal armed conflicts, the ICRC draws in practice partly on concepts applicable to international armed conflicts. It accordingly seeks to have access first and foremost to persons who have taken a direct part in the hostilities (members of government armed forces or rebel forces in enemy hands) and to civilians arrested by the government or the rebels on account of their support, whether real or presumed, for the opposing forces.⁷⁴

In addition, 'the ICRC is often led by extension to concern itself' with persons deprived of liberty for reasons unrelated to the conflict, including for 'ordinary penal offences'.⁷⁵ As Aeschlimann notes, such persons may 'have identical, or sometimes even greater, humanitarian needs'.⁷⁶ All persons held by armed groups, generally absent the accountability mechanisms, oversight and infrastructure of a state are inherently vulnerable. Moreover, criminal detention is necessarily accompanied by judicial guarantees – without which the detention is arbitrary⁷⁷ – that few armed groups have the capacity to ensure. It is in this context that the ICRC has

69 Imprisonment is certainly the more humane outcome where the alternative is mob or popular justice. Note, however, that in contrast to the internment of enemy forces or persons posing a serious risk to armed groups' security, there may in some cases be practical, humane alternatives to detention, such as fines or community service.

70 Individual liability is a principle relevant to both detention and internment. On the latter, see Ryan Goodman, 'Rationales for detention: security threats and intelligence value', in Michael Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, International Law Studies, Vol. 85, 2009, p. 378; and J. Pejic, above note 29, p. 209.

71 The capacity of armed groups to satisfy the principle of *nullem crimen sine lege* – also known as the 'principle of legality' – is particularly contentious.

72 GC III, Art. 126.

73 GC IV, Art. 143.

74 A. Aeschlimann, above note 19, p. 88.

75 *Ibid.*

76 *Ibid.*

77 Common Article 3; AP II, Art. 6; J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 344, 347–352.

‘made regular visits [in Sri Lanka] to police stations and some prisons where detainees were held by the LTTE for *common crimes*’.⁷⁸

In all cases, the situation of the individual is of paramount importance. To address his or her concerns, the ICRC uses those tools that it has routinely employed to improve conditions and treatment in state detention. That is, the standard methods of ICRC action, founded in almost a century of work in favour of persons deprived of liberty,⁷⁹ are observed, regardless of the fundamentally different character of, and between, armed groups. In essence, therefore, the ICRC engages in confidential, bilateral dialogue with armed groups to ameliorate humanitarian problems such as ill-treatment, inadequate conditions of detention, disrupted family links, disappearances, and lack of due process guarantees. Of these, the last has generally been addressed in response to purported criminal detention by particularly sophisticated armed groups, such as the FAFN, which had both extensive territorial and administrative control of northern Côte d’Ivoire. The ICRC’s Annual Report 2005 notes that:

In *Forces Nouvelles*-controlled areas, the ICRC was concerned about detention conditions, the absence of a functioning judicial system and the consequent lack of judicial guarantees. It raised these issues on several occasions with the detaining authorities and the *Forces Nouvelles*’ leadership.⁸⁰

How the ICRC works

At the outset of engagement with an armed group – in relation to detention or otherwise – the ICRC utilizes all available resources, including its staff, its local interlocutors, archived records, and open-source information, to better understand the group itself. It assesses, *inter alia*, the group’s hierarchy, structure, motivations, normative framework, constituency, and territorial control – all characteristics that, potentially, have implications for persons deprived of liberty and the means adopted to ameliorate their situation. The results of such assessments, which are repeated throughout the ICRC’s relationship with the group, facilitate the development of a strategy for the humanitarian response best adapted to the armed group and most likely to achieve positive outcomes for the persons deprived of liberty.

Detention visits

If the first tier of a comprehensive assessment is concerned with the armed group *per se*, the second is necessarily focused upon the treatment and conditions to which it subjects persons deprived of liberty. As with state detention, visits enable the ICRC to identify or anticipate humanitarian concerns and understand them within

78 ICRC, *Annual Report 2005*, May 2006, p. 188 (emphasis added), available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 9 February 2011).

79 The ICRC’s first formal detention visits were made in 1915 with the agreement of the parties to World War I.

80 ICRC, *Annual Report 2005*, above note 78, p. 128.

their particular context, including the constraints upon the detention administration. Ultimately, the content of its confidential, bilateral dialogue and the objective of its recommendations and other *démarches* are based on what the ICRC learns and observes about treatment and conditions of detention during its visits.

For each detention visit, the ICRC relies upon the detention visit modalities that buttress the same activity in state detention.⁸¹ The possibility to speak freely and in private with the detainees of the ICRC's choice, for example, enables the ICRC to identify and understand both the concerns common to the detainee population and those specific to each individual. This modality is thus valuable regardless of the detaining authority's character as either state or non-state. Given the circumstances of particular armed groups, however, the ICRC has been prepared to adapt one or more of its modalities to enable it to address humanitarian concerns. It may, for example, visit persons outside of their usual place of detention, and thus not conduct a full tour of the premises, where the armed group's security dictates and the objectives of that tour can be otherwise achieved. The ICRC only adapts its modalities for a specific visit and only with the armed group's acceptance, in principle, of the modalities in full. That is, the modalities remain available to use, as and when the ICRC deems appropriate.

Detention visits are naturally premised upon access to the armed group and their detainees. To be best positioned to establish access, the ICRC creates and maintains a relationship of trust with armed groups.⁸² Generally, this relationship is developed over time in the context of a range of activities, including those related to health and sanitation. Impartial treatment of the war wounded, for example, often familiarizes armed groups with the ICRC.⁸³ Indeed, it is the norm for the ICRC to have had contact with each armed group prior to pursuing a substantive, detention-oriented dialogue. To the greatest extent possible, the ICRC also engages with third parties who have the potential to inhibit access, and is organized to overcome physical or logistical obstacles, such as those resulting from the remote location of detention. In some contexts, such as Nepal, this requires being prepared for long, sometimes physically demanding, operations and maintaining various transport options. The ICRC's *Annual Report* for 2005 notes that, in Nepal, the 'CPN-M released a total of 99 people, and the ICRC mediated their handover to the government and ensured their safe passage home in long journeys by foot, car and/or aircraft'.⁸⁴ Even meticulous preparation cannot, however, anticipate all eventualities. In Afghanistan in 2007, an 'ICRC team was seized [by an armed opposition group] as they were returning from a failed mission to facilitate the release of a [kidnapped]

81 The modalities are: access to all detainees within the field of the ICRC's interest; access to all premises used by and for detainees; authorization to repeat visits; possibility to speak freely and in private with the detainees of the ICRC's choice; and the assurance that the authorities will give the ICRC a list of the detainees within its field of interest or authorize it to compile such a list during the visit.

82 T. Whitfield, above note 10, p. 21, notes that 'winning the trust of an armed group may be a slow and difficult process'.

83 The ICRC treats the war wounded in many contexts, such as Chad. See ICRC, *Annual Report 2006*, May 2007, pp. 83–84, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 8 April 2011).

84 ICRC, *Annual Report 2005*, above note 78, pp. 175–176.

German engineer'.⁸⁵ Although, in that case, the individuals were released – having been treated well – within days of their capture, the incident indicates the considerable risks inherent in such operations.

More specifically, the ICRC seeks to demonstrate the value of a confidential humanitarian dialogue, founded upon detention visits, with due consideration for the circumstances of the armed group, including the risks related to its security. This may be facilitated by the ICRC's detention visits to groups' members deprived of liberty by the state, which effectively familiarizes them with the ICRC's role, mandate, and action. Present in Afghanistan for more than two decades, for example,⁸⁶ the ICRC has had contact with individuals in their successive roles as the state-detaining authority, detainees of the state, and, more recently, administrators of non-state detention.⁸⁷

Confidential, bilateral dialogue

On the basis of its detention visits, the ICRC uses confidential,⁸⁸ bilateral dialogue to 'persuade the responsible authorities to respect the fundamental rights of individuals'.⁸⁹ Despite some overlap, this dialogue is distinguishable from that which advocates adherence to international standards in general terms. The latter includes dissemination of the principal legal frameworks governing detention, and facilitation of the integration of that law into armed group's codes of conduct, unilateral declarations,⁹⁰ and/or bilateral agreements.⁹¹ Although an important, principally preventative, humanitarian tool, which also remains available to the ICRC at all times,⁹² such generic engagement is not adapted to the exigencies of

85 John Hemming, 'Taliban free 4 ICRC staff kidnapped in Afghanistan', in *Reuters*, 29 September 2007, available at: <http://www.reuters.com/article/2007/09/29/us-afghan-kidnap-idUSISL27248020070929> (last visited 8 April 2011).

86 ICRC, 'Afghanistan: 20 years there and much left to do', News Release, 12 June 2007, available at: <http://www.icrc.org/eng/resources/documents/news-release/afghanistan-regional-news-120607.htm> (last visited 17 February 2011).

87 ICRC, 'Afghanistan: first ICRC visit to detainees in Taliban custody', News Release 09/251, 15 December 2009, available at: <http://www.icrc.org/eng/resources/documents/news-release/afghanistan-news-151209.htm> (last visited 14 February 2011).

88 As in response to state detention, the ICRC reserves the right to publicize its findings in relation to detention by armed groups where 'the following conditions are met: (1) the violations are major and repeated or likely to be repeated; (2) delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources; (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations; (4) such publicity is in the interest of the persons or populations affected or threatened'. See ICRC, 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', in *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 397.

89 A. Aeschlimann, above note 19, p. 94.

90 The NGO Geneva Call, for example, engages armed groups to make a 'Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' that contains far-reaching obligations vis-à-vis anti-personnel mines: see Geneva Call, 'Anti-personnel mines and armed non-state actors', 2009, available at: <http://www.genevacall.org/Themes/Landmines/landmines.htm> (last visited 4 March 2011).

91 Common Article 3(2).

92 M. Mack and J. Pejic, above note 8, p. 22.

armed groups, their detention operations, and the concerns of the detainees whom they hold.⁹³

The objectives of the ICRC's confidential dialogue are determined at all times by international legal norms, foremost among which is IHL.⁹⁴ Although primacy is given to the law directly applicable, that of NIAC, the ICRC also considers other bodies of law, including human rights law in the case of highly sophisticated groups that perform government-like functions, and the law of international armed conflict by analogy.⁹⁵ In all cases, the express invocation of any international legal norms is facilitated where the group has committed to their adherence. The ICRC holds armed groups to their own commitments, regardless of the context in which they were made or the group's motivation – humanitarian, political, or otherwise – for having made them. Even where the ICRC is able to invoke international law, however, it does so in an adapted, contextualized manner:

Although [international law] should always be presented accurately and without compromising existing provisions, presentations of the law should not be theoretical or 'academic'. The law should be discussed in terms that are concrete and operational. Discussions of the law should also be persuasive and relevant to the circumstances. It is especially important to bear in mind the motivation and the perceptions of the parties to a conflict.⁹⁶

In addition to emphasizing the legal standards that are applicable, *stricto sensu*, or those to which the group has committed, the ICRC selects and invokes other, or alternative, norms that are accepted by the concerned group and relevant to their detention operations. The International Council on Human Rights Policy rightly recognizes that:

some armed groups challenge the legitimacy of international law. . . . Groups whose aims or ideology will not accommodate a world of sovereign states, or who claim divine (religious) authority, might question the legitimacy of international norms. In such cases, one might usefully look for rules in traditional or religious codes that are *similar to prohibitions in international law*.⁹⁷

In all cases, the ICRC first determines that such norms, and the framework in which they exist, will hold armed groups to standards at least equivalent to those required by international law. Globally, the ICRC thus has a keen interest in

93 '[T]he best [humanitarian] response or responses have to be defined, based on an analysis of the situation as a whole and adapted to the problems identified and their causes'. A. Aeschlimann, above note 19, p. 94.

94 Sassòli, noting the complexity inherent in attempting to establish a dialogue with armed groups on the basis of domestic law, states that 'the only possibility to engage [armed groups] is to engage them by international law and by mechanisms of international law'. M. Sassòli, above note 47, p. 63. There have, however, been some situations in which an armed group has been willing to apply domestic law.

95 There are, however, certain fundamental differences between the two legal regimes – such as 'protected person status' in international armed conflict – that cannot readily be used by analogy. See Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War*, 2nd edition, ICRC, Geneva, 2006, Vol. I, p. 253.

96 M. Mack and J. Pejic, above note 8, p. 13.

97 D. Petrasek, above note 43, pp. 59–60 (emphasis added).

acquiring a comprehensive understanding of alternative normative frameworks and comparing them with international law: it has, for example, convened and facilitated comparative dialogue on Islamic law and IHL.⁹⁸ Second, the ICRC establishes whether the particular armed group would be willing to accept invocation of the identified norms, considering, *inter alia*, the strength of its relationship with the group and the availability of relevant expertise. In some contexts, the ICRC considers that the norms enshrined in specific ideological or cultural frameworks are insufficiently understood, or would not be productively invoked by external actors, such that reliance upon them would be counter-productive.

Finally, beyond normative frameworks, the ICRC employs other *argumentaires* to persuade armed groups to improve treatment and conditions of detention.⁹⁹ Of these, the principal argument is fundamentally humanitarian: that is, the ICRC presents sub-standard treatment and conditions in terms of their impact upon the individual. Overcrowding, for example, is thus described not as a ratio of persons per square metre relative to an international standard but in terms of the physical and psychological impact upon the detainees. Alleged ill-treatment is, likewise, often articulated as a direct quote of the person who has been subject to it.

Using these norms and *argumentaires*, the ICRC makes recommendations to armed groups for the improved treatment and conditions of detainees. In ensuring that these recommendations are achievable, given the sometimes limited resources and infrastructure available for the administration of the detention, the ICRC emphasizes the humanitarian intent, or purpose, of the relevant norms. To set its recommendations so as to be both realistic and to attain the *most* humanitarian outcome, the ICRC often uses the living conditions of the group's own members as indicative of its capacity to accommodate detainees.¹⁰⁰ The expectation of the ICRC is that all armed groups, regardless of their sophistication, are capable of ensuring humane treatment and conditions of detention, and it works progressively toward that objective.¹⁰¹ As such, the ICRC generally does not advise armed groups not to detain or recommend release except in response to hostage-taking and pressing humanitarian concerns, such as a threat to the life or wellbeing of the detainee(s) on account of ill-health or injury that the armed group is unable to address. In some cases, too, a dialogue toward the realization of due process guarantees may

98 ICRC, 'Afghanistan: conference on Islam and humanitarian law', News Release 06/55, 21 September 2006, available at: <http://www.icrc.org/eng/resources/documents/news-release/afghanistan-news-210906.htm> (last visited 14 April 2011).

99 These are akin to those often used to secure adherence to international standards generally. Humanitarian actors may – subject to a comprehensive understanding of the concerned group – use Bangerter's 'reasons why armed groups choose to respect international humanitarian law' to argue in favour of the protection of detainees in accordance with international standards. Olivier Bangerter, 'Reasons why armed groups choose to respect international humanitarian law or not', in *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 353–384.

100 In international armed conflict, a similar standard applies vis-à-vis the conditions of prisoners of war: see GC III, Art. 25.

101 Note, too, that non-state parties to NIAC have at least a minimum level of organization. See International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Jurisdiction (Appeals Chamber), 2 October 1995, para 70.

constitute an implicit recommendation that certain individuals should be released: where, for example, they are held absent alleged personal wrongdoing or do not themselves pose a risk to the security of the armed group.

Assistance

Although persuasion through dialogue is the ICRC's preferred mode of action,¹⁰² the ICRC also provides assistance to ameliorate particular concerns in non-state detention. Assistance is often a contribution of small but essential items, such as 'medicines, clothes, blankets and jerrycans',¹⁰³ or the exchange of personal messages between the detainee and his or her family. In exceptional circumstances, it may extend to the provision of more extensive supplies and services, including the facilitation of family visits¹⁰⁴ or financial support for detainees' nourishment.¹⁰⁵ Such assistance to armed groups has been recognized to be central to ensuring their compliance with international norms, subject to certain important limitations:

Compliance with certain norms . . . may need external assistance to help build their capacity. . . . Technical assistance to an armed non-state actor, for example on protection issues or respect for due process and fair trial, merits further consideration. Care will, though, have to be taken to ensure that those promoting better compliance with norms do not become complicit in any future criminal behaviour by an armed non-state actor or become engaged in developing military strategy.¹⁰⁶

Bearing in mind these considerations, before assisting the ICRC cautiously balances the humanitarian need and the capacity of the armed group itself to respond. It considers, among other things, to what extent the issue to be addressed is the result of the incapacity, as opposed to intentionality, of the person(s) administering the detention, favouring assistance only in response to the former. Under no circumstances does assistance provided by the ICRC enable an armed group to detain. Rather, it is directed toward the amelioration of specific, identified humanitarian concerns. Moreover, as each armed group is singularly responsible for ensuring humane treatment and conditions of detention, assistance is only provided in the context of a dialogue toward the assumption of all of its responsibilities.

Of the ICRC's actions, its interventions as a neutral intermediary also merit consideration because they constitute a common part of the response to deprivation of liberty by armed groups. In particular, in this role the ICRC frequently facilitates

102 The modes of action common to all of the ICRC's protection action are persuasion, support, mobilization, substitution, and denunciation.

103 ICRC, *Annual Report 2008*, above note 4, p. 161.

104 ICRC, *Annual Report 2005*, above note 78, p. 188.

105 ICRC, *Annual Report 2006*, above note 83, p. 146.

106 Geneva Academy of International Humanitarian Law and Human Rights, 'Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts', summary of initial research and discussions during an expert workshop in Geneva in March 2010, available at: <http://www.adh-geneva.ch/news/armed-non-state-actors-international-norms> (last visited 11 February 2011).

the release of detainees.¹⁰⁷ As noted above, the ICRC generally does not ‘require’ release. Rather, it acts to ensure the safe repatriation of those detainees whom the armed group has, of its own accord, decided to release. This distinction, which is important for the ICRC (as a strictly neutral, independent humanitarian organization) in all circumstances, is critical in instances of hostage-taking. The ICRC does not involve itself in substantive negotiations (such as the exchange of demands or ransoms) that are fundamentally contrary to the absolute character of the prohibition of hostage-taking.

Transparent humanitarian action

Throughout its action – protection and assistance – in response to deprivation of liberty by armed groups, the ICRC maintains a transparent dialogue with opposing parties to the armed conflict.¹⁰⁸ Specifically, without breaching the confidentiality owed to the armed group, the ICRC informs the state with which the armed group is in conflict of the existence and objectives of its engagement with the group. Under no circumstances does the ICRC’s engagement confer legitimacy upon armed groups. In law, this is established by Common Article 3, paragraph 2, which expressly states that the ICRC’s offer of services to parties to NIAC does ‘not affect [their] legal status’.¹⁰⁹ Indeed, the intent of this Article is mirrored in practice: the action of the ICRC is not understood by other states, the United Nations, or any other actor as affirming the status that an armed group purports to obtain.

Above all, in most cases, parties to armed conflict recognize that the work of the ICRC directly benefits their personnel – such as members of the state’s armed forces – who have been deprived of liberty. Put simply, parties rightly understand the ICRC to be a neutral, impartial, and independent humanitarian organization working to ensure the humane treatment and conditions of detention of detainees until their unconditional release by other means.

Conclusion

Deprivation of liberty is a reality during armed conflict. The regular occurrence of detention by armed groups reflects the current prevalence of NIACs, including, on occasion, those in which armed groups are *de facto* administrators of the territory under their control. In turn, it is not surprising, given the inherent vulnerability of persons deprived of liberty, that such detention has humanitarian implications, which may be exacerbated by the particularities of armed groups *per se* and of their

107 P. J. C. Schimmelpenninck van der Oije, ‘International humanitarian law from a field perspective’, in *Yearbook of International Humanitarian Law*, Vol. 9, 2006, pp. 408–409. Of the ICRC’s many press releases in this regard, see for example ICRC ‘Sudan: ICRC facilitates another handover of released detainees’, Release 10/101, 9 June 2010, available at: <http://www.icrc.org/eng/resources/documents/news-release/sudan-news-090610.htm> (last visited 7 April 2011).

108 Note that a NIAC may arise exclusively between two armed groups: see Common Article 3.

109 Common Article 3(2).

detention practice. This fact alone – regarding detention and its consequences – necessitates humanitarian engagement of armed groups in order to ensure the humane treatment and adequate conditions of detention for persons deprived of liberty.

In attempting to do so effectively, however, humanitarian actors are confronted by a range of obstacles. In addition to the challenges common to any engagement of armed groups, these include the facts that: the legal basis for detention is absent in domestic law and human rights law and only implicit in IHL; the obligations incumbent upon armed groups for the respect of detainees, where not also of disputed applicability by the group, are either not always comprehensive or lack specificity; engagement in relation to detention, particularly for judicial guarantees, risks legitimization, perceived or real, of armed groups; and, finally, establishing and maintaining a dialogue and access to armed groups and their detention operations is often inherently difficult. As a result, humanitarian actors may be precluded from addressing this particular issue.

The ICRC endeavours to overcome these obstacles and to work for the benefit of persons deprived of liberty by armed groups. In doing so, its humanitarian action is fundamentally the same as that which it routinely utilizes in response to detention by states. The ICRC employs confidential, bilateral dialogue – informed by access to detainees, the place of detention, and the individual(s) administering the detention – as its principal tool to humanitarian ends. This dialogue is guided by IHL and is often enhanced by other *argumentaires*. It results in adapted, contextualized recommendations to the armed group for the improved treatment and conditions of detention of persons deprived of liberty. This dialogue is supplemented, subject to careful consideration, by assistance that is directed not at enabling the detention practice but at improving the situation of the detainees. This is done with full transparency with all opposing parties to the armed conflict.

Although the strength of this approach has its foundation in the ICRC's extensive experience, it would be erroneous to suggest that the ICRC's best endeavours have unfailingly achieved humanitarian outcomes for each person deprived of liberty by an armed group. For the ICRC, as for other humanitarian actors, access to armed groups and their detainees 'can sometimes be difficult to obtain'.¹¹⁰ In the case of Staff Sergeant Gilad Shalit, for example, the ICRC has acknowledged that its humanitarian action is fundamentally obstructed by lack of access.¹¹¹ Moreover, even with access, the ICRC has, on occasion, been unable to persuade armed groups to adopt or abandon practices – particularly those that the group considers fundamental to the effective waging of an asymmetric war – so as to adhere to international norms for the benefit of persons deprived of liberty. The

110 A. Aeschlimann, above note 19, p. 90, paraphrased.

111 ICRC, 'Gaza: ICRC urges Hamas to allow captured Israeli soldier Gilad Shalit regular contact with his family', News Release 09/1224, 18 June 2009, available at: <http://www.icrc.org/eng/resources/documents/news-release/palestine-news-180609.htm> (last visited 18 February 2011); ICRC, 'Gaza: ICRC remains determined to help Gilad Shalit', Interview with Béatrice Mégevand-Roggo, 23 June 2010, available at: <http://www.icrc.org/eng/resources/documents/interview/israel-shalit-interview-230610.htm> (last visited 21 February 2011).

stark reality is that in Colombia – where the ICRC has had a strong field presence since 1991,¹¹² and has routinely engaged in dialogue with the principal armed groups – hostage-taking continues to occur,¹¹³ reduced in frequency and scale primarily by the prevailing circumstances of the decades-long conflict.

That the ICRC is unable to achieve the most humanitarian outcome in each and every situation of deprivation of liberty by armed groups compels it to reconsider its approach but does not undermine its dogged persistence. The value of its humanitarian action resides largely in its unique role in response to deprivation of liberty by armed groups. Few, if any, other humanitarian actors work exclusively for the benefit of persons deprived of liberty in terms of treatment and conditions of detention absent involvement in the inherently political considerations associated with their release. This strictly neutral, independent, and impartial action contributes to the humane treatment and conditions of detention of the individuals affected. Ultimately, however, this contribution is best assessed by the individuals whom it purports to benefit. Commodore Ajith Boyagoda (rtd.) of the Sri Lankan Navy, deprived of liberty by the LTTE for eight years, described the ICRC's regular visits as 'a kind of insurance policy against ill-treatment' and stated:

We basically survived because of the ICRC – not only because of the things they provided such as food, medicines and the Red Cross Messages, but also because we could bring our grievances to them as a neutral party. . . . This was a huge consolation to us.¹¹⁴

112 Jenatsch notes that '[t]he ICRC began its work in Colombia in 1969 with prison visits, and in 1980 a permanent delegation was established in Bogotá. The actual fieldwork, however, did not begin until 1991, when local offices were opened in Bucaramanga and Villavicencio'. Thomas Jenatsch, 'The ICRC as a humanitarian mediator in the Colombian conflict: possibilities and limits', in *International Review of the Red Cross*, No. 323, 1998, available at <http://www.icrc.org/eng/resources/documents/misc/57jpch.htm> (last visited 4 April 2011).

113 See, for example, 'Colombian troops rescue 22 kidnapped oil workers', in *Guardian Online*, 8 March 2011, available at: <http://www.guardian.co.uk/world/2011/mar/08/colombian-troops-rescue-oil-workers> (last visited 6 April 2011).

114 ICRC, 'A lifeline to the outside world', Feature, 5 June 2008, available at: <http://www.icrc.org/eng/resources/documents/feature/sri-lanka-feature-naval-commande-050608.htm> (last visited 15 February 2011).