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Non-State Armed Groups and the Power to Detain in Non-International Armed Conflict

Joshua Joseph Niyo[*]

The restriction of personal liberty is a critical feature in all conflicts, whether they are of an international character or not. With the increased prevalence of non-international armed conflict and the drastic proliferation of non-state armed groups, it is critical to explore whether such groups can legally detain or intern persons during conflict. This article proposes that there exists a power and a legal basis for armed groups to intern persons for imperative security reasons while engaged in armed conflict. It is suggested that this authorisation exists in the frameworks of both international humanitarian law and international human rights law, as it does for states engaged in such conflicts. It is proposed that such power and legal basis are particularly strong for armed groups in control of territory, and can be gleaned from certain customary law claims, treaty law, as well as some case law on international humanitarian law and human rights. Certain case law of the European Court of Human Rights on detention by de facto non-state entities conceivably reflects a change in traditional thinking on 'legal' detention by armed groups.

Keywords: detention, armed groups, authorisation, international humanitarian law, international human rights law

1. Introduction

It is generally conceded that the international humanitarian law (IHL) framework applicable in non-international armed conflict (NIAC) does not provide explicitly for the power or authorisation to detain with regard both to the state and to armed non-state parties to an armed conflict.[1] Indeed, unlike the framework applicable in international armed conflict (IAC), the treaty framework governing NIAC does not explicitly authorise either the internment of those who participate in the conflict or the detention, for imperative reasons of security, of persons who do not participate in the armed conflict.[2] Certainly, during a situation of NIAC, persons will be placed

[*] PhD Candidate, Graduate Institute of International and Development Studies; Teaching Assistant, Geneva Academy of International Humanitarian Law and Human Rights; Assistant Lecturer, Uganda Christian University; joshua.niyo@geneva-academy.ch. This article was first presented at the 13th Annual Minerva/ICRC Conference on International Humanitarian Law on Recent Developments in IHL and Detention Law and Practice at the Hebrew University of Jerusalem, 12–13 November 2018. It was also presented subsequently at the Geneva Academy Wednesdays (GAW) Doctoral Forum on 21 November 2018 at the Geneva Academy. The author is grateful to the participants at the Minerva Conference for their comments, to doctoral students at the GAW for their thoughts and suggestions, and to Professor Marco Sassòli, Director of the Geneva Academy, for his insights when he discussed the paper at the GAW Doctoral Forum. Thanks also go to Professor Andrew Clapham, my doctoral supervisor, for his constructive comments on an earlier draft. Special thanks also to the anonymous reviewers and editorial team at the *Israel Law Review*.

[1] Andrew Clapham, 'Detention by Armed Groups under International Law' (2017) 93 *International Law Studies* 1, 9.

[2] Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016) 66–76.

in detention for various reasons, ranging from purposes of security to discipline and criminal justice.[3]

International human rights law (IHRL), on the other hand, prohibits arbitrary detention, permitting states to detain persons only in limited circumstances, especially in the context of a proper criminal justice process.[4] This can include the detention of individuals from the armed non-state party to an ongoing NIAC, who are generally deemed to be criminally culpable for taking up arms against the state.[5] However, the non-state armed group (NSAG) in the conflict is generally not considered, under any circumstances, to have the power to detain any person,[6] especially in the context of the IHRL framework.

NSAGs therefore are generally considered not to have the power to detain under either IHL or IHRL. The challenge with this position is that it turns a blind eye to the reality of armed conflict – that is, that the restriction of personal liberty is a critical feature in all conflicts whether they are of an international character or not.[7] With the increased prevalence of NIACs, and the drastic proliferation of NSAGs,[8] such inertia to a progressive understanding of the law and practice regarding detention in NIACs seems divorced from reality.[9] Indeed, seeking to explore the basis for detention in NIACs for NSAGs can be considered a tool for the examination of this broader challenge. Certainly, for the law to be effective, states and NSAGs must know if they can legally conduct detention operations.[10]

This article focuses on detention outside the context of the criminal process: namely, internment or the detention of persons by NSAGs for imperative reasons of security in situations of NIAC.[11] It proposes that there exists a power for NSAGs to detain or intern persons while engaged in NIAC. It is suggested here that this power is an authorisation inherent in the frameworks of both IHL and IHRL, particularly as both regimes interplay in situations of NIAC. This

[3] Chairman's Commentary to The Copenhagen Process: Principles and Guidelines, 'The Copenhagen Process on the Handling of Detainees in International Military Operations', 2012, para 1.3; Knut Dörmann and others, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) 246 paras 717–18.

[4] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011) 253–54.

[5] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 71; Hill-Cawthorne (n 2) 76 (where he concludes that 'unlike in international armed conflicts, where IHL confers detention authority on states, in non-international conflicts, IHL presumes such powers already exist in domestic law and regulates them'). See also Clapham (n 1) 5, 1 (where he explains that the assumption by states that they could easily detain NSAGs for their activities under domestic law has been overtaken by the current international nature of NIACs).

[6] Ezequiel Heffes, 'Detention by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law' (2015) 20 *Journal of Conflict and Security Law* 229, 230; Andrew Clapham, 'Detention and Prosecution in the DoD Manual' in Michael A Newton (ed), *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge University Press 2019) 282–86.

[7] Dörmann and others (n 3) 246 para 717.

[8] International Committee of the Red Cross (ICRC), 'The Roots of Restraint in War', 18 June 2018, 13–14.

[9] Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 *Leiden Journal of International Law* 435, 436 (remarking that '[t]his is not an academic issue. Detention by armed groups is a routine activity in armed conflict, and often one of the first activities that an armed group engages in').

[10] ibid.

[11] Dörmann and others (n 3) 246 para 718 (where this form of detention is described).

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analysis focuses on classical territorial NSAGs, particularly those groups that have control over territory in a state. Indeed, it is difficult to imagine a group without any form of territorial control attempting to intern a person. This should be distinguished from guerrilla groups which have control over and move around with persons they have in their 'custody'. Detention in this sense presupposes, at the very least, the existence of some form of physical facility, which would require a modicum of territorial control.[12]

The article begins (in Section 2) with an assessment of the value of inquiring into the power to detain by NSAGs. After establishing the practical merit in looking at the power of an NSAG to detain or intern persons during NIAC, Section 3 engages with the existence of such a power in the IHL framework. This assessment includes discussion of the critiques against the existence of such a power, as well as whether there is a distinction between a 'legal basis' and an 'inherent power'. Section 4 transitions to an appraisal of such authorisation from the perspective of IHRL, and advances the centrality of the interplay between IHL and IHRL in determining the contours of the power to carry out legal internment by NSAGs. Further and by way of illustration, the jurisprudence of the European Court of Human Rights (ECtHR) under Article 5 of the European Convention on Human Rights (ECHR) is examined in respect of detention undertaken by armed non-state actors. It is submitted that these cases reflect a change in traditional thinking regarding the direct detention of persons by entities other than states, and provide an avenue for the consideration of the legality of security detention by NSAGs. Section 5 concludes the article, bearing out the main inferences from the thesis of this study.

2. THE VALUE OF AN INQUIRY INTO THE POWER OF AN NSAG TO DETAIN

This inquiry into the existence of authority for armed groups to detain during armed conflict raises critical questions of relevance. These questions can be grouped into two main strands of critique: (i) there is no need to engage in such an exercise as NSAGs are illegitimate and illegal, and therefore any attempt to discuss a legal basis for any aspect of such a group, including detention, lends legitimacy to these groups;[13] and (ii) the existing legal framework, particularly IHL, is intentionally silent on the matter of legal authorisation, with an emphasis on the treatment of persons whose liberty has been restricted, because it goes without saying that persons will definitely be detained or interned.[14] With regard to the latter point, it is considered that there is no utility in a discussion of legal authorisation because the actual treatment of persons who are inevitably detained is of more protective and practical relevance to those actually detained by the armed groups.

[12] Lindsay Moir, 'The Concept of Non-International Armed Conflict' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 391, 407 para 41 (where Moir correctly suggests that the ability to perform certain obligations under Common Article 3 of the 1949 Geneva Conventions could 'be difficult without a secure territorial base').
[13] Sivakumaran (n 5) 549; Clapham (n 1) 3.
[14] Hill-Cawthorne (n 2) 74; Clapham (n 1) 11–12.

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The first critique is the manifestation of the age-old state-centric perspective on international law, which views any discussion of other actors on the international plane as a threat to the predominance of states in international relations. The worst-case scenario from this perspective is the possibility that NSAGs – which are viewed as criminal enterprises at the domestic level – will be recognised and emboldened to continue activities that are perceived to undermine the sovereignty and territorial integrity of states.[15] This critique has been addressed frequently, with the rejoinder that such an apprehension conflates matters of the 'legitimacy' of these entities with the separate question of rights and obligations, as it is possible not to be recognised as a legitimate or legal entity and yet still be an addressee of the law with particular rights and obligations.[16] This approach is indeed at the substratum of the IHL legal framework regulating the operations of NSAGs. Common Article 3 of the 1949 Geneva Conventions (CA3), while laying down the rights and obligations of parties to a conflict (including NSAGs), indicates that 'the application of the [Article] shall not affect the legal status of the Parties to the conflict'.[17] This position not only addresses the concerns states have about these entities, but also provides NSAGs with sufficient legal personality to be subject to obligations and hold rights, imposed and conferred by the Geneva Conventions.[18]

Further, this differentiated nature of international legal personality also means that states maintain pre-eminence as the foundational subjects of international law.[19] A later section of this article will discuss the dichotomy between the (il)legality of an entity and the scrutiny of its activities with regard to its obligations under international law in examining the approach of the ECtHR towards unrecognised de facto entities. It suffices to mention at the outset that the ECtHR has not considered its examination of the activities of these so-called 'illegal' entities as an endorsement of or stamp of approval on the cause of such de facto entities.[20]

With regard to the second strand of concern – that of emphasising and giving importance to the treatment of persons detained rather than the legal authorisation of the detention itself – it is critical to re-assess the reality of the context in which NSAGs operate. Indeed, the inquiry into the power to detain, and not necessarily on what happens when detention occurs, may be criticised, perhaps with a view to disregarding the former as merely theoretical, in favour of the latter focus as being more practically relevant, to the reality of those detained in such situations. The following initial broad responses can be addressed to this aspect.

[15] Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 125.
[16] Rejoinder by Clapham against the legitimisation of violence argument in Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 46–53.
[17] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) (GC I), art 3, particularly the last paragraph.
[18] Gerald Irving Anthony Dare Draper, *The Red Cross Conventions* (Stevens and Sons 1958) 14, and particularly 17.
[19] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 178–80.
[20] See, eg, ECtHR, *Demopoulos and Others v Turkey*, App nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, 1 March 2010, para 96.

First, cases involving armed non-state actors[21] generally, brought before regional institutions such as the ECtHR, in practice repeatedly have applicants who challenge the legality of their detention, based on the view that such entities do not possess legal authority to detain them.[22] Secondly, armed non-state actors in general (and NSAGs in particular) need to have clarity as to whether such power exists so that, in their engagements, detention (rather than summary execution) is potentially considered a legitimate alternative, especially where it is in the best interests of the protection of the rights of persons under their control.[23] In this particular respect it has been asserted that legal detention by NSAGs bears well with the object and purpose of IHL: to gain military advantage parties to armed conflicts may intern persons in order to prevent them from continuing to bear arms.[24] Instead of seeking to attack government soldiers and kill them at all costs, NSAGs could *legally* arrest them and reduce the military power of the state (military advantage). Internment in this sense is more protective than killing, and fulfils the protective aspect of IHL, especially towards persons who are no longer participating in hostilities.[25] This raises the possibility that NSAGs could have internal mechanisms and 'legal' frameworks that ensure that a detention on grounds of security is not 'arbitrary', and is premised on proper grounds and processes (this aspect is explored in Section 4.4.1 below).

Thirdly, with regard to matters of international criminal liability, the question can be raised whether such detention indeed qualifies as an element of international crime and, if not, can it trigger a particular mode of liability. Incidentally, the war crime of hostage taking repeatedly comes to the fore in these discussions as potentially one of those crimes where detention of persons by an NSAG, considered initially to be unlawful, could be a critical element in triggering the investigation of the international crime.[26] Though it is quickly dismissed on the basis that the element of compelling a particular action is not present when NSAGs detain, in order for criminal liability to be a real possibility,[27] the present author insists that this counter-argument is somewhat removed from the reality of the treatment and perceptions of NSAGs in practice, and the breadth of scope of the crime, especially as it is articulated in the framework of the Rome Statute.[28] The presumed illegality of detention by NSAGs naturally invites the

[21] Here the term 'armed non-state actors' is used to refer to the broader category of which non-state armed groups (NSAGs) are a constituent. Entities with de facto governmental control may not just be referred to as NSAGs. This spectrum is explored later in the article. However, this distinction is not strict, as the terms 'armed non-state actor' and 'NSAG' may be used interchangeably by some.

[22] See, eg, ECtHR, *Mozer v Republic of Moldova and Russia*, App no 11138/10, 23 February 2016, paras 124–27.

[23] See Clapham (n 1) 3 (where he makes the point that 'one can argue that if all detention by armed groups is illegal then there will be no incentive to detain rather than kill their captives').

[24] Heffes (n 6) 246; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 *Journal of International Humanitarian Legal Studies* 5, 18–19.

[25] Heffes (n 6) 248.

[26] 'Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict: Chatham House and International Committee of the Red Cross, London, 22–23 September 2008' (2009) 91 *International Review of the Red Cross* 859, 865; Clapham (n 1) 12–13; Hill-Cawthorne (n 2) 46.

[27] Clapham (n 1) 13.

[28] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

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presumption of criminality,[29] and the proximity of the subjective element of seeking to compel particular action, with the usual motivations for detention by these groups in NIACs, could easily invite criminal liability in respect of the motivations.[30] For example, the detention by an NSAG of a member of the armed forces of the state, with the aim of compelling the cessation of armed activities on the part of the state as an implicit condition for release, would be considered criminal; yet it is at the heart of the ethos of the internment regime in IHL.[31] Naturally, the reference to 'hostage' will be invoked, whenever a person is taken by an NSAG, regardless of how such taking is carried out. If NSAG detentions are always illegal under both domestic and international law, Heffes observes that the only frame of characterisation available for such detentions would be the 'hostage-taking' paradigm.[32]

Concerning the triggering of liability modes, the evolution of the doctrine of command responsibility in recent jurisprudence of the International Criminal Court (ICC) is particularly instructive. Lately, the level of scrutiny given to what constitutes *necessary* and *reasonable* measures in the repression of crime render the exclusion of the option of legal detention impractical if a commander is to meet even the basic legal standard.[33] As this aspect of command responsibility does not directly affect internment for security purposes, it will not be examined here. However, it suffices to highlight that the possibility for a superior in the NSAG to legally detain subordinates for both disciplinary and criminal purposes, where there is clear indication of the commission of crimes and violations of IHL, is more than required for *responsible command*.[34]

In sum, it can be asserted safely that there is considerable practical merit in looking at the power of NSAGs to detain or intern persons during a NIAC, and not merely at what happens following the deprivation of personal liberty. Legality and authorisation are as important as the treatment of these persons when detained for imperative reasons of security.

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[29] This challenge is observed in Deborah Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 *International Review of the Red Cross* 743, 750 (where she also refers to the example of the Moro Islamic Liberation Front (MILF) seeking to differentiate between hostage-taking and other types of detention in its statement, 'Resolution to reiterate MILF policy of strongly and continuously condemning all kidnap for ransom activities in Mindanao and everywhere, and to take drastic action against the perpetrators of this heinous crime in all MILF areas', 26 February 2002).

[30] David Tuck, 'Taking of Hostages' in Clapham, Gaeta and Sassòli (n 12) 297, 309–10 (where he highlights the tension with criminality under hostage taking that could exist if all detentions by an NSAG were considered unlawful).

[31] International Criminal Court (ICC), *Elements of Crimes* (ICC 2011) 33 (art 8(2)(c)(iii). The 3rd Element states: 'The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons'. This is a broad definition of the subjective element, which can invite liability for any detention by an NSAG.

[32] Heffes (n 6) 246.

[33] ICC, *Prosecutor v Bemba Gombo*, Judgment on the Appeal of Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08 A, Appeals Chamber, 8 June 2018, [166]–[170]; see also Clapham (n 1) 14.

[34] For discussion of the relationship between 'command responsibility ' and 'responsible command' see ICTY, *Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, IT-01-47-AR72, Appeals Chamber, 16 July 2003, [21]–[23].

3. A LEGAL AUTHORISATION UNDER INTERNATIONAL HUMANITARIAN LAW?

3.1. A PURPOSIVE CONSTRUCTION OF NIAC TREATY LAW

Both CA3 and the 1977 Protocol Additional to the 1949 Geneva Conventions relating to NIACs (AP II)[35] do not explicitly address the matter of an authorisation to detain for security reasons, or other similar purposes, where there is no activation of a criminal justice system.[36] However, in the language of its first subparagraph, CA3 seems to recognise the fact that both internment for reasons related to the conflict and detention for purposes of criminal prosecution may subsist in the context of a NIAC; it therefore provides some safeguards in the event of their occurrence.

Notably, CA3 acknowledges that members of armed forces placed *hors de combat* by detention should be treated humanely. Interestingly in this instance there is no suggestion of any criminal justice process; members of the armed forces are merely *hors de combat* because they are detained. This denotes the fact that members of the armed forces captured in the context of a NIAC or in the hands of the adverse party as a result of participation in the conflict – and therefore because of such capture or detention are unable to continue hostilities – are to be accorded humane treatment by the party in whose hands they find themselves.[37] Somewhat mirroring the circumstances similar to those of prisoners of war, this implies that members of armed forces participating in a NIAC can be captured and detained, and accorded some kind of protection, for as long as they remain disengaged from the hostilities.[38] Further, with regard to criminal justice purposes, it can be pointed out here that CA3 arguably presupposes some form of deprivation of personal liberty. This is apparent where it emphasises the prohibition on passing sentence and carrying out executions without an earlier judgment by a regularly constituted court.[39] This provision refers to all persons who are not taking an active part in hostilities, including 'civilians'. Such a process – as implied in CA3 – would require some form of detention especially during the investigation process, as well as for the purposes of serving sentences for criminal liability.

AP II for its part – in Articles 5 and 6, which address restriction of liberty and penal prosecutions respectively – provides protection for persons 'interned or detained', which implies that persons could be either interned for security reasons or detained in the context of a criminal justice process.[40] This intentional split language between detention and internment indicates recognition of either incident

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II).
[36] Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Editions A Pedone and Hart 2013) 451.
[37] Tuck (n 30) 310 (where he makes a similar observation on the reading of CA3).
[38] See Dörmann and others (n 3) 188 para 539 (and footnote) (where it is explained (in the context of CA3) that at the Diplomatic Conference, the term 'detention' was preferred over 'captivity' because 'captivity' 'implied the status of a prisoner of war and was incompatible with the idea of civil war'. Inherent in this discomfort was the appreciation of the parallels between internment by both NSAGs and states).
[39] Tuck (n 30) 310 (where he makes a similar observation on the import of 'regularly constituted court').
[40] ibid; Laura M Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40 *Case Western Reserve Journal of International Law* 437, 440.

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being possible, and *perhaps permissible*, in the context of NIAC.[41] Importantly, AP II seems to move further than members of the armed forces by simply referring to 'persons' – thus, placing 'civilians' in the category of those who could be interned for reasons related to the conflict (imperative security considerations). Indeed, Article 5 of AP II speaks of internment covering '*all* detainees and persons whose liberty has been restricted for reasons related to the conflict'[42] while CA3, in invoking the internment paradigm, refers only to 'members of armed forces … placed "hors de combat" … by … detention'.[43] In the latter sense, such state and non-state members of the 'armed forces' cease participation in hostilities on account of an external factor – their detention – and not because they have surrendered.[44] This is in contradistinction to the criminal justice provision in CA3 mentioned above, which implies possible detention for *all* persons mentioned in sub-paragraph 1 of the Article.[45]

In view of the foregoing, therefore, it would appear to be incontestable in the IHL treaty framework that persons will be interned for imperative security reasons within the context of NIAC and, in that case, be entitled to some form of protection. There is palpable recognition of the unavoidable fact of the internment of persons, both in CA3 and AP II. Therefore, beyond *recognition* or *acknowledgement* of factual situations in NIAC, would it be reasonable to assert further that the treaties convey an indirect *permissibility* on the part of IHL for such detentions? Would such permissibility square well with the evidence of practice in NIACs?

3.2. The ICRC and the Review of Treaty Law and Practice relating to NIAC

3.2.1. A Form of Implicit Power, an Inherent Authorisation

Various commentators have explored this possibility of a form of permissibility or authorisation in IHL[46] – especially through the prism of analogy with detention in IAC.[47] However, such examination has been taken a step further under the auspices of the International Committee of the Red Cross (ICRC), this organisation being an authoritative voice on the law and practice of parties in NIAC.[48] This inquiry by the ICRC into the existence of such permissibility in the language of

[41] Tuck (n 30) 310.
[42] Claude Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) para 4564 (emphasis added).
[43] GC I (n 17) art 3(1).
[44] Dörmann and others (n 3) 187 para 535.
[45] GC I (n 17) art 3(1)(d).
[46] Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 *American Journal of International Law* 48; Peter Rowe, 'Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?' (2012) 61 *International & Comparative Law Quarterly* 697; Ryan Goodman, 'Authorization versus Regulation of Detention in Non-International Armed Conflicts' (2015) 91 *International Law Studies* 155; Murray (n 9).
[47] See Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 65; Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 599, 623; Casalin (n 29) 752.
[48] Although the authority of the ICRC on the law and practice of IHL may be questioned, it remains the only international institution with a mandate in the main IHL documents that has undertaken considerable research and

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these treaties goes back for approximately a decade and, arguably, should not be considered entirely novel and inconceivable. In the Chatham House and ICRC Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict' (held in London, 22–23 September 2008) it was observed by consensus that:[49]

> On the one hand, … there was not so much a 'right' but rather an 'authorization' inherent in IHL to intern persons in NIAC … the 'power to intern' or … a 'qualified or conditional right to intern' rather than … a 'right to intern'.

Indeed, it is apparent that the experts were restrained from going as far as establishing a 'right' or some form of supreme entitlement to intern persons. The emphasis on the qualification of the 'right' resonates with the exceptional nature of such detention in the context of NIAC – and therefore cannot be dismissively seen as far-fetched or removed from the realities of these kinds of conflict. This was considered by the experts 'to be consistent with both the spirit of IHL and from an IHRL perspective'.[50] They agreed that:[51]

> [this position of the law flowed] from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat. Otherwise, the alternatives would be to either release or kill captured persons.

This position was restated in an ICRC Opinion Paper in 2014 in which it was clearly indicated 'that both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC'.[52] This interpretation of the law was finally reinforced in the ICRC 2016 Commentary on the First Geneva Convention, where it is indicated that in addition to the inherent power (in customary and treaty IHL) to detain in NIAC, 'authority related to the grounds and procedure' for detention must always be provided in order to remain within the confines of the principle of legality.[53]

Therefore, based on a purposive review of NIAC treaty law and the authoritative claims above concerning custom and practice in NIAC, it can be affirmed that there is an inherent power to detain or intern persons for imperative reasons of security. What is especially notable about this approach is the general transition in this discourse to a bolder claim about underpinning customary law, away from grounding the analysis in an analogous application of detention in IAC – as intimated above. This conclusion would not be fanciful or improbable, but is a

publication on the customary rules in IHL. It is also a depository of numerous manuals and other similar documentation from states.

[49] Expert Meeting on Procedural Safeguards (n 26) 863.

[50] ibid.

[51] ibid.

[52] ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', Opinion Paper, 2014, 7 (ICRC Opinion Paper).

[53] Dörmann and others (n 3) 248 para 728.

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reflection of the reality and logic of IHL in operation in the context of conflicts not of an international character.

3.2.2. FALSE CLAIMS? ADDRESSING THE CRITIQUES OF THE EXISTENCE OF THIS INHERENT AUTHORISATION

The idea of the existence of an inherent power comes with extensive controversy and critique, which can be grouped into four categories. The first is the argument that if indeed the IHL of NIAC provided for such authorisation, it would expressly state as much in the treaties, as it does (arguably) for IAC. Secondly, the mere fact that the IHL of NIAC regulates internment does not necessarily translate into the authorisation of such detention. The third is that the legal basis for authority to detain lies elsewhere, particularly in domestic law and other areas of international law, and not in the IHL framework of NIAC; and fourthly, the logic for legal authorisation under the IHL framework of NIAC does not make up for the lack of practice or explicit legal basis.

These are very strong objections to the notion of an inherent legal basis under IHL for internment in NIAC,[54] although they broadly reflect a strictly formalist approach to the law – and in that sense would be acceptable. However, in the reality of IHL, and international law for that matter, such an approach does not purely reflect the nature and trajectory of the law – even as it strives to portray a sense of legal objectivity.

With regard to the first concern – regarding the need for an express articulation of the authorisation to intern in NIAC – it is also argued that the absence of grounds or procedures for such detention bars any implicit legal basis for internment.[55] In response to this, the question could be asked whether in international law (or IHL) it is the case that rules that are applied are always to be found stipulated explicitly in treaties with the required detail for application. It is submitted here that this is not always the case. First, customary law is not always clearly written, and a response to claims under customary law cannot simply be that there is an absence of express legal stipulation.[56] More importantly, regarding the absence of grounds and procedures, it has been argued that 'the absence of detail is not uncommon in international law'.[57] It has been asserted further that because IHL does not provide detail on how to exercise a particular power, it does not necessarily mean that it does not recognise the existence of that power.[58] The example of the rule on direct participation in hostilities by civilians is cited as a rule that lacks detail in the 1977 Additional Protocols to the 1949 Geneva Conventions. It is observed

[54] *Mohammed v Ministry of Defence and Others* [2014] EWHC 1369 (QB) (UK), paras 241–48 (where Justice Leggatt discusses the thrust of these obstacles to the idea of an inherent authorisation to detain in NIAC).
[55] Lawrence Hill-Cawthorne and Dapo Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?', *EJIL: Talk!*, 7 May 2014, https://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts.
[56] For the nature of customary law, see Cassese (n 15) 153; Jan Klabbers, *International Law* (2nd edn, Cambridge University Press 2017) 29.
[57] Murray (n 9) 445.
[58] Aurel Sari and Sean Aughey, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence' (2015) 91 *International Law Studies* 60, 95–96.

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that such lack of detail does not preclude the use of lethal force against such civilians.[59] Therefore, it would not seem alien to the framework of IHL that an implicit legal authority to detain exists without the grounds and procedures being specified.[60]

With regard to the second concern, on regulation versus authorisation,[61] it would seem that the line between the two, though it exists, might not be as fine and pure as it is claimed to be. The example of regulation by IHL of the use of force in armed conflict has been suggested as an example of the distinction between regulation or recognition on the one hand, and authorisation and legality on the other – the latter being under the purview of *jus ad bellum*. This is stated to be 'at the heart of IHL as a legal regime'.[62] Be that as it may, one could quickly point out that this example would seem to overplay the purity of the distinction between *jus in bello* and *jus ad bellum*. Article 1(4) of the First Additional Protocol to the 1949 Geneva Conventions (AP I)[63] is an example of how that distinction may not be as pure as it is held out to be. By indicating that situations governed by IHL of IAC include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination', it could be argued that *jus in bello* crossed the threshold into the deliberation on the legality of these kinds of conflict.[64] It would not be unreasonable to say that the line may not also be as fine in looking at regulation and authorisation of internment in the NIAC IHL framework. Be that as it may, the controversy surrounding this provision in AP I is still considered not to depart from the principle of equality of parties.[65]

Concerning the third critique – that the legal basis for authority to detain lies elsewhere[66] – this is partly conceded here. The argument goes that the domestic law adopted, which should comply with applicable principles of IHRL, provides the actual basis for internment in NIAC.[67] The natural consequence, therefore, is that NSAGs would not be able to detain legally as they cannot enact legislation to that effect.[68] Naturally, this creates a problem for the effectiveness of the regime applicable in armed conflict (IHL), which presumes equality of the parties.[69] However, the current author partly concedes the present argument – to the extent that it

[59] ibid.
[60] Murray (n 9) 446.
[61] Debuf (n 36) 468.
[62] Hill-Cawthorne and Akande (n 55).
[63] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I).
[64] Hilaire McCoubrey, 'Jurisprudential Aspects of the Modern Law of Armed Conflicts' in Michael A Meyer (ed), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (British Institute of International and Comparative Law 1989) 41–43.
[65] Christopher Greenwood, 'The Relationship between Ius Ad Bellum and Ius in Bello' (1983) 9 *Review of International Studies* 221, 225.
[66] Hill-Cawthorne and Akande (n 55); Lawrence Hill-Cawthorne and Dapo Akande, 'Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari', *EJIL: Talk!*, 2 June 2014, https://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari.
[67] Debuf (n 36) 459–60.
[68] ibid 462
[69] Heffes (n 6) 238–41.

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points out that the source of legal authorisation can be found elsewhere. Certainly, states participating in a territorial NIAC do benefit from the requisite provisions of domestic law, although this does not mean that IHL itself is not also a source. Indeed, the findings of the ICRC indicate that it is not enough that there is an inherent power to detain, as the grounds and procedure for such detention must always be provided in order to remain within the confines of the principle of legality. Although the ICRC seems to restrict this to extraterritorial NIAC, it is maintained in this article (Section 3.3) that such a distinction is not necessarily representative of the law on NIAC. So, rather than argue that the IHL of NIAC does not provide the legal basis, it is asserted here that in a situation of NIAC, IHL provides a part (indeed a significant part) of the story. Indeed, as will be discussed later in the article, the interplay between IHL and IHRL is also a critical aspect of the authorisation to intern in NIAC.[70]

Broadly, it is inescapable that IHRL plays a role in the legality of detention in IHL, even in the case of IAC. The legality of detention in armed conflict cannot be said to be exclusively a matter of IHL, but also of IHRL. Under IHRL the prohibition of arbitrary deprivation of personal liberty is absolute.[71] Any deprivation must have a legal basis, and the IHL relating to IAC seeks to provide that legal basis. Thus, the legal basis provided under the IHL of IAC cannot be viewed in a vacuum; it seeks to uphold the prohibition against the arbitrary deprivation of personal liberty under IHRL.[72] The same applies to NIAC:[73] the authorisation of internment requires the involvement of both regimes – admittedly, more pertinently in this case than in IAC where the legal basis is more explicit. Detention by NSAGs (and states) in NIAC must have a legal basis, and this legal basis is implied in the NIAC IHL framework. The completeness of this legal basis is conveyed in the structure of IHRL and domestic law, and by extension the 'laws' by NSAGs, which must be consistent with IHRL standards. (This is explored in detail in Section 4.4.1 below).

The fourth critique, that however strong the logic is for the availability of such legal authorisation to intern in NIAC, the fact is that it simply does not exist – period.[74] However, this should not be the end of the story, because the logic is quite strong; it cannot simply be wished away as not reflecting plausible legal argument. Murray makes a very strong legal argument for the logic of the system. From his perspective it would seem that if this critique were to be sustained, the logic of the system simply would not hold. The compelling crux of his argument is that if international law absolutely prohibits arbitrary detention, it cannot admit a legal edifice where it

[70] See Heller's assessment of the position of an ICRC Background Paper and Rule 99 of its Customary Law Study (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, *Vol I: Rules* (ICRC and Cambridge University Press 2005, revised 2009) (ICRC Study)), in which he observes that the ICRC relies on both IHL and IHRL for the substantive detention rules: Kevin Jon Heller, 'What Exactly Is the ICRC's Position on Detention in NIAC?', *Opinio Juris*, 6 February 2015, http://opiniojuris.org/2015/02/06/exactly-icrcs-position-detention-niac.

[71] Murray (n 9) 439.

[72] ibid; Hill-Cawthorne (n 2) 118; the prohibition is viewed as a universal rule underpinning legal frameworks that regulate detention in key treaties.

[73] Murray (n 9) 440.

[74] See Debuf (n 36) 465; Hill-Cawthorne and Akande (n 66).

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regulates such a practice.[75] For the logic of a legal system to make practical sense, IHL must be seen to establish an implicit authority to detain in NIAC so that the requirement for a legal basis is met. Otherwise, the absolute prohibition against detention without a legal basis would not be coherent with the notion of the regulation of that same detention.[76] Heller's critique of this thesis is not persuasive mainly because his argument addresses the idea that international law 'does not absolutely prohibit detention' – yet the real argument here is about an absolute prohibition on *arbitrary* detention. In that sense, his critique of Murray's thesis – which emphasises a distinction between *wrongful* detention and *inhumane* detention – does not address the fundamental prohibition of *arbitrary* detention, which in the opinion of the present author goes to the root of both.[77]

3.2.3. DISTINCTION BETWEEN AN 'INHERENT POWER' AND A 'LEGAL BASIS'?

With the above conclusion about the existence of an inherent power in treaty law, custom and practice to intern persons for imperative reasons of security in NIAC, there remains the question about what exactly this 'power' yields. This question is brought to the fore by the ICRC's conclusive statement quoted above from the 2016 Commentary, which seems to draw a distinction between 'inherent power' and 'authority related to the grounds and procedure for deprivation of liberty'.[78]

This can be interpreted to mean that the IHL framework for NIAC provides only for the implicit 'power', and that an actual 'legal basis' for the detention has to be provided additionally in order for the internment to be lawful. This would seem to square well with Resolution 1 of the 32nd International Conference of the Red Cross and Red Crescent on 'Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty', in which the first paragraph of the preamble indicates that:[79]

> deprivation of liberty is an ordinary and expected occurrence in armed conflict, and that under international humanitarian law (IHL) States have, *in all forms of armed conflict*, *both the power to detain, and the obligation to provide protection* and to respect applicable legal safeguards, *including against unlawful detention* for all persons deprived of their liberty.

What can be observed from this quote and the 2016 Commentary is that IHRL is invoked to define the apparent second element, which is said to be additional to the 'inherent power'. This is the idea that applicable legal safeguards against unlawful (arbitrary) detention have to be considered. Perhaps the perceived distinction between 'power' and 'legal basis', as two

[75] Murray (n 9) 446–49.
[76] ibid 448.
[77] Kevin Jon Heller, 'IHL Does Not Authorise Detention in NIAC: A Response to Murray', *Opinio Juris*, 22 March 2017, http://opiniojuris.org/2017/03/22/33037.
[78] Clapham (n 6) 287 (pointing out this 'apparent distinction').
[79] 'Resolution 1 of the 32nd International Conference of the Red Cross and Red Crescent – Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty' (2015) 97 *International Review of the Red Cross* 1390 (ICRC Resolution 1) (emphasis added).

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separate notions in understanding the legality of a security detention in NIAC, can be misleading. After all, the ICRC does acknowledge (as quoted above) that the 'inherent power' can be said to provide a 'legal basis'.[80] Therefore, what is suggested here is that 'power' and 'legal basis' be considered synonymous, and that the determination of the 'power' or 'legal basis' for NSAGs to detain persons in NIAC for imperative security reasons be construed as having two legs: one provided exclusively by IHL, and the second provided through the interplay with IHRL. In this case it can be concluded that the second leg of the assessment of the legality of the detention under IHL, which invokes IHRL, must be resolved effectively by looking into the IHRL framework. This seems somewhat consistent with Heller's initial opinion of the ICRC position on detention in NIAC.[81] Indeed, the ICRC position, although seemingly grounded exclusively in IHL, benefits from the interplay between IHL and IHRL. This bodes well with Heller's conclusion that the requirement for non-arbitrariness comes from IHRL.[82] (The issue Heller raises about extraterritorial NIAC is addressed in Section 3.3 below).

Therefore, the interplay between IHL and IHRL is critical in constructing the legal basis for detention in NIAC (as will be explored in Section 4.2 below). It suffices to conclude at this point that the notion of arbitrariness under IHRL places this second leg of the assessment in IHL on a strong footing, and provides a gateway into the IHRL framework where grounds and procedure can be effectively deduced in order to remain within the confines of legality. The complementarity approach to IHL and IHRL here is not a novel concept, and provides a basis for fulfilling the purpose of both branches of international law: to impose limits on violence and to protect the vulnerable.[83]

3.3. Application beyond States to Territorial Non-State Armed Groups

The next hurdle in this respect would be to ascertain whether this presumption of an inherent power ('qualified right') to detain does indeed apply to territorial NSAGs, as has already been claimed in this article. Premised on the political asymmetry inherent in the structure of CA3 and AP II, the conversation never seems to reach a clear and affirmative assertion of an armed group's power to detain.[84] The open nature of the affirmation that there is an inherent power for states to detain in NIAC usually folds and avoids the difficult discussion, thus affording states the hollow victory that they have the sole power to detain persons (including members of the armed group) for security reasons. Even the ICRC tends to be hesitant in making such a bold statement about armed groups, although the logic of its deductions about treaty and customary

[80] ICRC Opinion Paper 2014 (n 52) 7.
[81] Heller (n 70) (in which he argued that the ICRC position did 'rely on both IHL and IHRL for the substantive detention rules they endorse – and do not adequately disentangle the two legal strands').
[82] ibid.
[83] Andrew Clapham, 'The Complex Relationship between the Geneva Conventions and International Human Rights Law' in Clapham, Gaeta and Sassòli (n 12) 701, 734–35 para 87.
[84] See Clapham (n 1) 8.

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IHL on detention in NIAC would naturally lead to the conclusion that NSAGs have power to detain.[85]

Naturally, though, the logic of the application of IHL should render this further inquiry on armed groups and detention unnecessary for two main reasons: (i) armed groups are considered to be bound by the IHL applicable in NIAC (both customary and treaty rules),[86] which should intuitively mean (ii) that the principle of equality of parties inherent in the application of IHL places the same rights and obligations on all parties to the NIAC. All parties must comply with exactly the same rules; even if they are not equal in all respects, nevertheless, their rights and duties are.[87]

Certainly, with regard to the application of the law to NSAGs, extensive theories have been espoused to explain the binding nature of IHL (and international law for that matter) on armed groups.[88] The most persuasive position in this respect is that NSAGs are bound by IHL treaty law in light of the state ratification theory,[89] and by customary IHL through a form of international legal personality and the customary law theory.[90] Importantly, there is unanimity among states and scholars that treaty and customary IHL rules apply to NSAGs.[91] It is the movement to the latter that seems problematic. In other words, if a state has power to detain members of an armed group or other persons associated with the armed group for imperative security reasons related to the conflict, can the NSAG also be said to have power to detain members of the armed forces of the state, including other associated persons, for the same reasons? The true logic of the structure of IHL would mean that this question should be answered automatically in the affirmative.[92]

This should not be a shocking conclusion. It is inherent in the treaty framework and structure of IHL, and is reflective of the reality of what transpires during NIAC.[93] This assessment, based

[85] It could be tactical. It is observable that in the Expert Meeting in 2008, the position of NSAGs was clarified, based on the principle of equality of parties: Expert Meeting on Procedural Safeguards (n 26) 870. However, in its Opinion Paper the ICRC did not address equality of parties and its import: ICRC Opinion Paper 2014 (n 52) 7–8; nor did it do so in the Commentary: Dörmann and others (n 3) 249 para 728. This indicates hesitance in being clearly affirmative about the inherent power to detain applying to NSAGs. Furthermore, the quote above from the 32nd International Conference of the Red Cross and Red Crescent in 2015 (n 79) seems also to take a state-based stance, which would be opposed to the position taken at the Expert Meeting in 2008.

[86] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 194; Clapham (n 83) 733 para 83.

[87] Heffes (n 6) 238–39; Marco Sassòli, *International Humanitarian Law: Rules, Solutions to Problems Arising in Warfare and Controversies* (Edward Elgar 2019) 196 para 6.67.

[88] Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International & Comparative Law Quarterly* 369; Jann K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 *International Review of the Red Cross* 443; Sandesh Sivakumaran, 'The Addressees of Common Article 3' in Clapham, Gaeta and Sassòli (n 12) 415; Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20 *Journal of Conflict and Security Law* 101; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 177–208.

[89] Sivakumaran, 'The Addressees of Common Article 3' (n 88) 417 para 10.

[90] Fortin (n 88) 203–04.

[91] Moir (n 86) 52.

[92] Expert Meeting on Procedural Safeguards (n 26) 870.

[93] Casalin (n 29) 749–50.

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on the principle of equality of parties in IHL, is premised on the position that NSAGs are bound by IHL and can be considered to have the power, like states, to detain persons for imperative reasons of security. It does not in any way equate NSAGs with states in the wider context of international law and relations.[94] Equality of parties does not imply equality in international legal personality; therefore, the fact that NSAGs may possess the inherent power to detain (especially for imperative reasons of security) should by no means be viewed as either legitimising NSAGs or granting them recognition on a par with that of statehood.[95] The inherent power in the IHL of NIAC for armed groups to detain is a reflection of the realities that are intrinsic in the structure of customary and treaty IHL, and reflect the reality of the practice of NSAGs in conflict situations.[96] In this regard, for example, the imperative security need for an NSAG to detain a member of the state armed forces would be the potential danger that the member poses to the ability of the NSAG to maintain and succeed in its war effort. Indeed, this requires a move away from a state-centric approach that roots the authority to detain for imperative security needs merely in state sovereignty.[97]

Finally on this point, the argument based on the principle of equality of parties should not be construed as excluding NSAGs that could be engaged in conflict between each other without the involvement of a state.[98] In such a case, it suffices to recall that both CA3 and customary IHL affirm the existence of this inherent power to detain or intern persons in NIACs. This implies that the law would apply to all or any parties involved in the NIAC, whether they are NSAGs or otherwise.

The other factor to address here is whether there is a difference in the legal framework between territorial and extraterritorial NIAC. If an NSAG is fighting against an external state, do the rules change when it is fighting against the territorial state? It is interesting to observe the evolution of the ICRC position. In the Expert Meeting in 2008 there was no preoccupation with extraterritoriality when the idea of an inherent basis was discussed.[99] However, in the 2014 Opinion Paper the distinction between extraterritorial and territorial NIAC is drawn out,[100] and this appears to be maintained in the 2016 Commentary.[101] In the Commentary the position set out with regard to the inherent power makes reference to the 2014 Opinion Paper. However, it also refers to Resolution 1 of the 32nd International Conference of the Red Cross and Red

[94] Jonathan Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 89 *International Review of the Red Cross* 655, 663.
[95] Heffes (n 6) 239; Somer (n 94) 663.
[96] Casalin (n 29) 750; see also Olivier Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not' (2011) 93 *International Review of the Red Cross* 353, 377–78, 379–380 (providing perspective on the reality of the practice of armed groups and the fact that equality of application of rules is critical for compliance).
[97] Clapham (n 6) 285.
[98] Heffes (n 6) 231, particularly fn 10.
[99] Expert Meeting on Procedural Safeguards (n 26) 863.
[100] ICRC Opinion Paper 2014 (n 52) 7.
[101] Dörmann and others (n 3) 249 paras 727–28.

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Crescent and *The Handbook of the International Law of Military Operations* (2015), both of which seem broader and make no distinction between territorial and extraterritorial NIAC.[102]

Indeed, the position taken in the present article is that the notion of an inherent authorisation for NSAGs to detain exists in traditional NIAC (without an extraterritorial element). It makes no sense that there be a distinction between the law governing extraterritorial and territorial NIAC – especially as the practice available on internment in NIAC does not draw that line.[103] The extraterritorial NIAC is a recent phenomenon, and thus as NIAC it naturally assumes the existing legal framework for (territorial) NIAC. Also, the fact that treaty law (CA3 and AP II) is also referred to as establishing this inherent authorisation makes it clearer that indeed traditional NIAC can be interpreted to absorb this notion naturally. The inherent power to detain is not just for extraterritorial NIAC. This is because until recently treaty law in NIAC has traditionally been applied territorially.[104] In this sense, Heller makes a particularly sound critique of the ICRC position in the 2014 Opinion Paper, insisting that it would make more sense, in line with the factors cited by the ICRC in expressing the position on an inherent power, for it to apply equally to traditional territorial NIAC.[105] This is logical only because it would be confusing 'how the conventional and customary IHL of NIAC could contain "an inherent power to intern" in extraterritorial NIAC but not in traditional NIAC'.[106]

4. LEGALITY UNDER THE INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK?

4.1. THE UTILITY OF AN INQUIRY INTO THE LEGALITY UNDER IHRL OF SECURITY DETENTION FOR NSAGS

The reflex response to a proposition to explore the legality of detention by NSAGs from the perspective of IHRL would be one of cautious hesitance, informed by three broad and related arguments: (i) at the very fundamental level, whereas NSAGs may be bound by IHL they cannot really be considered to be bound by IHRL;[107] (ii) the IHL framework is generally adequate to address matters regarding detention and armed groups, and therefore it may be less beneficial to make an IHRL inquiry;[108] and (iii) thus the interplay between IHL and IHRL obligations in the context of an armed conflict is a relevant assessment to make only when dealing with states

[102] ibid fn 671; ICRC Resolution 1 (n 79) para 1; Jann K Kleffner, 'Operational Detention and the Treatment of Detainees' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd edn, Oxford University Press 2015) para 26.03.
[103] ICRC Study (n 70) r 99.
[104] Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law', Program on Humanitarian Policy and Conflict Research, *Occasional Paper Series*, 2006, 6; Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *International Review of the Red Cross* 69, 89–90; Marko Milanovic, 'The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts' in Clapham, Gaeta and Sassòli (n 12) 27, 42 para 53.
[105] Heller (n 70).
[106] ibid.
[107] Moir (n 86) 194.
[108] Sassòli and Olson (n 47) 626–27.

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that have clear competing obligations.[109] In this regard, one could observe that there could be a willingness to embrace a progressive interpretation of the law on detention with regard to the IHL framework, but to introduce IHRL in the equation is perhaps considered an unnecessary step too far.[110]

The first argument above regarding the application of IHRL to NSAGs is a fundamental concern, on which there has been extensive commentary, as well as practice on the international plane, to somewhat reverse the perception.[111] The practice of both the United Nations Human Rights Council and the Office of the High Commissioner for Human Rights has been to condemn human rights abuses by NSAGs, thereby establishing an arbitrary distinction between human rights violations and human rights abuses – the former indicating the existence of IHRL obligations, the latter indicating (usually in the case of NSAGs) that there are minimum human rights standards to which NSAGs are expected to adhere.[112] Notably, though, the Special Procedures mandates seem to take a bolder route, by referring to violations even when speaking of acts by NSAGs.[113] This may not answer the first concern specifically, but it is step one: it is the acknowledgement that human rights have to be part of the discussion about the activities and operations of NSAGs.[114] This approach has been strengthened by the emergence of human rights treaty law which expressly addresses itself to NSAGs.[115] Further, there is a consensus that NSAGs that exercise de facto control of territory possess human rights obligations based on the principle of effectiveness and the need to avoid a vacuum in order to maintain the protection of human rights for territories and persons under their control.[116] In this case, it can be asserted plausibly that NSAGs do possess IHRL obligations in some situations.

This leads to the second concern – that whereas both IHL and IHRL could be binding on NSAGs, IHL is the relevant framework to deal with the legal basis for detention in the context of conflict. After all, the application of IHL is much clearer and less convoluted, and therefore the need for an exploration of the legality of detention in the context of human rights must be very compelling. In sum, the direct question would be: Of what value would an IHRL assessment of the legality of detention in a NIAC be to a situation where IHL is already well-suited to address the situation?

Whereas IHL can be considered to be applicable to understanding the legal basis for detention by NSAGs in NIAC, IHRL provides additional benefits for the detention discussion. In the first

[109] Moir (n 86) 193–94.
[110] Sassòli and Olson (n 47) 621–64; Clapham (n 16) 25.
[111] For extensive commentary on IHRL and NSAGs see Clapham (n 16); Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016); Fortin (n 88).
[112] Annyssa Bellal, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council', Academy In-Brief No 7, The Geneva Academy of International Humanitarian Law and Human Rights, December 2016, 9–10; Clapham (n 16) 49.
[113] Bellal (n 112) 10.
[114] Clapham (n 16) 286–89.
[115] The best example in this respect is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (entered into force 6 December 2012) (Kampala Convention), particularly arts 1(e), 1(n), 2(e) and 7(5).
[116] Fortin (n 88) 281–84; Murray (n 111) 151–54.

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instance (as will be explored later in this article) there are judicial and other monitoring institutions that are constrained to address such situations through the prism of human rights compliance and accountability. The ECtHR is a major example here, as it has had occasion to *indirectly* address the *direct* acts of armed non-state actors, and has had to do so within the confines of the ECHR.[117] The IHRL prism therefore provides avenues for accountability before human rights institutions for detention-related activities by NSAGs. Secondly, the utility of an exploration of the legality of detention by NSAGs from the IHRL prism is premised on the fact that human rights provides the avenue for persons whose liberty has been deprived to challenge the arbitrariness of their detention.[118] This is clearly critical where detention is primarily for imperative security reasons. However, even in other situations of detention (including for criminal justice purposes), in the context of NIAC human rights still provides that critical tool for challenging the legality of a detention.

In sum, it could be considered valuable to explore the IHRL perspective in view of the legality of detention by NSAGs. This position is premised essentially on the operability of the IHRL framework, which provides both the normative basis and the forum to interrogate the legal precision and integrity of the security detention or internment by the group. As alluded to earlier (and will be explored later in the article), these benefits of the IHRL framework have come to bear in the context of the ECHR at its Court, where the legality of detention under Article 5 ECHR by armed non-state actors has been scrutinised through the lens of human rights.[119]

4.2. THE INTERPLAY BETWEEN IHL AND IHRL AND THE LEGALITY OF SECURITY DETENTION IN IHRL

The final (third) concern mentioned above addresses the critical matter of the interplay between frameworks – namely, how then do the two regimes of international law operate with regard to the legality of detention by armed groups, especially since they are both applicable and particularly relevant? In addressing this practical question, regard needs to be given to how the interplay between IHL and IHRL has been handled in respect of the legality of detention. Specifically, the prism of the International Covenant on Civil and Political Rights (ICCPR)[120] is a more universal, and therefore useful, angle from which to understand how this interplay between IHL and IHRL has been addressed, particularly with regard to administrative or security detention, in the context of armed conflict. Indeed, although this frame of view is applicable to states (parties), it can provide guidance on how to deal with NSAGs confronted with similar issues concerning the interplay of both branches of law.

[117] See, for example, ECtHR, *Foka v Turkey*, App no 28940/95, 24 June 2008; *Mozer v Moldova and Russia* (n 22), which will be addressed later in the article.
[118] *Foka v Turkey* (n 117) para 114.
[119] ibid paras 85–89; *Mozer v Moldova and Russia* (n 22) paras 145, 150.
[120] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

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Article 9 of the ICCPR prohibits the arbitrary deprivation of personal liberty. It further requires that no person be deprived of his or her liberty except on clear grounds and in accordance with procedures established by law. Relatedly, the ICCPR General Comment 35 clearly indicates that security detention may be permitted under the Covenant if other effective measures are unavailable.[121] Indeed, the General Comment is clear that such detention is acceptable in extremely exceptional circumstances, and the burden on the state to prove the present, direct and imperative threat increases with the length of the detention. Critically in this regard, the General Comment insists that procedural guarantees should be available to the detainee, including habeas corpus by a competent court.[122]

Crucially, however, the General Comment goes on to indicate that Article 9 applies also in situations of armed conflict to which IHL rules are applicable. The UN Human Rights Committee agrees that while rules of international humanitarian law may be relevant for the purposes of the interpretation of Article 9, both spheres of law are complementary, not mutually exclusive. The Committee affirms that 'security detention *authorized* and regulated by and complying with international humanitarian law in principle is not arbitrary'.[123]

This would suggest that IHRL would inherently consider security detention as lawful and not arbitrary if it is authorised under IHL. This bears well with the requirement that any form of detention be clearly prescribed by law. In this sense the legality under IHRL of security detention in armed conflict would be premised on the legal basis for such detention under IHL. Notably in this regard, no distinction is made between IAC and NIAC, and therefore the standard can be concluded to apply equally in both circumstances.

It could appear that there is a circularity in this argument – that IHL draws on IHRL for the second leg, as intimated above, and yet now IHRL seems to draw on IHL. It is pivotal to note here that IHRL provides an absolute prohibition on arbitrary detention. IHL therefore provides the legal framework that addresses the issue of arbitrariness. In addressing arbitrariness, IHL draws on IHRL for detail, but in order for this to happen the IHRL framework has to countenance the IHL framework as properly providing for protection against arbitrariness.

Consequently, it can reasonably be asserted that detention in NIAC for imperative security reasons (and other reasons not related to a criminal justice process) is not always arbitrary under IHRL. Therefore, such detention – if carried out by an armed group – equally is not always arbitrary, especially where it adheres to the NIAC-IHL framework. The IHL position in this regard would be that under treaty and customary law there is an inherent power for NSAGs (and states) to detain; such inherent power is not inconsistent with the position under IHRL, and is therefore not illegal or arbitrary. Relatedly, the following was observed at the ICRC and Chatham House Expert Meeting:[124]

[121] Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Person) (7–31 October 2014), UN Doc CCPR/C/GC/35 (General Comment 35), para 15.
[122] ibid.
[123] ibid para 64 (emphasis added).
[124] Expert Meeting on Procedural Safeguards (n 26) 863 (emphasis added).

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> Moreover, even IHRL does not prohibit internment *per se*. What is prohibited, at all times, is the *arbitrary* deprivation of liberty. The definition of arbitrary deprivation of liberty in the context of an armed conflict is to be considered through the prism of IHL based on the *lex specialis* principle that governs the relationship between the two bodies of law.

Although the present author does not agree fully with the reference to *lex specialis* by the Expert Meeting, the idea is recognised that a mutually enforcing paradigm (between IHL and IHRL) is important in concretely defining arbitrary deprivation of liberty in armed conflict.[125] In NIAC it is for the benefit of both the state and the NSAG to know if the security detention is arbitrary, especially as this would be considered a qualified right and applicable only in exceptional situations. IHL avails the human rights framework with a pivotal component of the legal basis, and IHRL endorses this by also introducing the legal safeguards that come with the notion of arbitrariness.

4.3. A STEP TOO FAR? ADDITIONAL AUTHORITY FOR GROUNDS FOR INTERNMENT IN IHRL

It would indeed be a step too far simply to stop at establishing that the legality of security detention for NSAGs under IHRL is premised on the inherent authorisation provided for under the IHL of NIAC. The grounds for internment within the IHRL framework need to be clear as well. This requirement is premised on the exceptional nature of this kind of detention and the earlier stated need to remain within the confines of the fundamental human rights principle of legality.[126] It would be necessary in the circumstances for NSAGs to have within their structure and organisation an ascertainable legal framework specifying the grounds and process for internment. This is a standard considered to be pivotal for states seeking to adhere to their IHRL obligations in dealing with security detentions; it is a basic standard that should be applicable also to NSAGs in order to protect the sanctity of the human right to personal liberty.

The developments in regional human rights mechanisms are critical in seeking to understand the legality and existence of mechanisms within NSAGs that have been adjudged to be consistent with human rights standards. Indeed, is it possible that an armed group could have an internal mechanism and legal framework that ensures that a security detention is not arbitrary under IHRL, and is premised on grounds and process? Regional mechanisms are chosen based on two reasons: (i) regional mechanisms tend to have actual adjudication on human rights matters where decisions have binding force and are not merely recommendatory in nature; and (ii) particular regional mechanisms have had the opportunity of dealing with – in some concrete way – the activities of armed non-state entities on matters of human rights. Notably, the ECtHR has had occasion to address direct acts of detention by armed non-state entities.

[125] Clapham (n 83) 731 para 76.
[126] General Comment 35 (n 121) para 15; Expert Meeting on Procedural Safeguards (n 26) 863; ICRC Opinion Paper 2014 (n 52) 8; Dörmann and others (n 3) 249 para 728.

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Before delving into the ECHR framework, it is noted here that the approach is different from the ICCPR framework. As Webber observes correctly, the ECHR requires armed conflict security detention to be in compliance with Article 5 ECHR, whereas under the ICCPR framework it is assumed in principle (by the Human Rights Committee) that armed conflict security detention conforms with Article 9 ICCPR.[127] This means that:[128]

> parties to the European Convention are required to be satisfied that armed conflict detention is not arbitrary, whereas parties to the ICCPR are not required to take that extra step. States that are parties to both Conventions might be advised to ensure that security detentions in armed conflict comply with the more stringent requirements enumerated by the ECHR.

The approach could be slightly different, but the requirements are the same. Deprivation of personal liberty in the context of an armed conflict has to be clearly prescribed by law. Arbitrariness will revolve around the intersection between the respective IHRL frameworks and IHL. In both it is critical that the grounds for internment are clear, as well as the processes for protecting personal liberty. Therefore, in the context of NSAGs it is critical in all situations that internally they possess clear grounds and processes in order to protect against the arbitrary deprivation of personal liberty.

Thus, a somewhat novel perspective is explored below to inquire into the possibility that NSAGs could be considered to have internal structures and mechanisms on detention that adhere to IHRL requirements of grounds and process. Here (below) is a consideration of the legal developments from the ECtHR on the treatment of unrecognised de facto entities, particularly the approach of the ECtHR in applying the other grounds under Article 5 ECHR to armed non-state actors. This could provide guidance on how the Court's dynamic interpretation of the application of Article 5 to security detention could possibly apply also to NSAGs. It is critical to note at the outset that this study of ECtHR case law makes no claim with regard to customary international law at all; rather, it is an indication of a modification in traditional reflection on the power of NSAGs to *legally* detain during armed conflict.

4.4. The European Human Rights Framework and Non-State Entities

4.4.1. Article 5 ECHR and Detentions by Unrecognised De Facto Entities

More generally, with regard to IAC, progress has been made recently within the European human rights framework to construe IHRL as permitting detention for security purposes outside the context of the enforcement of criminal jurisdiction. The *Hassan* case (2014) was pivotal in espousing this position, interpreting Article 5(1) ECHR in light of IHL standards.[129] This brought the

[127] Diane Webber, 'Hassan v. United Kingdom: A New Approach to Security Detention in Armed Conflict?', *American Society of International Law*, 2 April 2015, https://www.asil.org/insights/volume/19/issue/7/hassan-v-united-kingdom-new-approach-security-detention-armed-conflict.
[128] ibid.
[129] ECtHR, *Hassan v United Kingdom*, App no 29750/09, 16 September 2014, para 104.

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European standard closer to the position under the ICCPR as seen above, notwithstanding the current restrictive and exhaustive grounds under Article 5 ECHR. Moreover, the case of *Serdar Mohammed* (2017) in the United Kingdom (UK) Supreme Court has taken the conversation even further, espousing the existence of such authorisation to detain in the context of IHRL in NIAC where there is a United Nations Security Council resolution authorising such action.[130] Although the UK Supreme Court did (or will) not go as far as confirming the existence of such authorisation for NSAGs involved in the same conflict,[131] this is nevertheless an opening for consideration of what it would like from the perspective of an armed group.

This open door to consideration of the NIAC perspective, despite the restrictive and IAC-focused interpretation in *Hassan* by the ECtHR, is further supported by the Court's openness to reviewing de facto non-state entities. Suffice it to say here that the rigid interpretation in *Hassan* would not fit with the broader and authoritative consideration of customary and treaty IHL, and security detention in NIAC, as espoused above. While *Hassan* is pivotal in expanding the grounds in Article 5 ECHR, its restrictive approach, informed by a constrained interpretation of security detention in armed conflict, would need to be realigned in light of the application by the ECtHR of other grounds in Article 5 ECHR to armed non-state actors.

The European human rights system has had several occasions on which to consider the position of armed non-state actors and the legality of their activities, including detention. Arguably and at the outset, a trend can be ascertained in the jurisprudence of the ECtHR that considers unrecognised de facto entities as being permitted to detain persons legally. Although this jurisprudence points mainly to detention in the context of criminal justice or law enforcement processes, it gives clear pointers to the critical matter of capacity – that is, the assessment of internal mechanisms within these entities to address the requirements espoused above of grounds and processes for detention.

In *Hassan* and *Serdar Mohammed* the pivotal requirement of the clarity of grounds for internment and the existence of clear processes for safeguarding the right to personal liberty, as espoused above, are echoed consistently as fundamental pillars in demonstrating the legality of a security detention or internment.[132] This is extremely critical in order to protect against arbitrariness.[133] With regard to armed non-state actors, therefore, some cases before the ECtHR have been important in exhibiting the possibility for non-state entities to fulfil these requirements and avoid arbitrarily detaining persons during conflict.

A starting point in reviewing this approach of the European human rights system is to reflect on a foundational position espoused in the case of *Cyprus v Turkey* (2001). Here the ECtHR – in establishing whether the remedies provided by the 'judicial' system of the Turkish Republic of Northern Cyprus (TRNC) were to be regarded as domestic remedies required to be exhausted before approaching the Court – stated:[134]

[130] *Al-Waheed v Ministry of Defence, Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, [44], [61].
[131] Clapham (n 1) 8.
[132] *Hassan v United Kingdom* (n 129) para 106; *Serdar Mohammed v Ministry of Defence* (n 130) [67], [108].
[133] *Serdar Mohammed v Ministry of Defence* (n 130) [164].
[134] ECtHR, *Cyprus v Turkey*, App no 25781/94, 10 May 2001, para 96.

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> [T]he obligation to disregard acts of *de facto* entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.

This approach to the acts of unrecognised de facto entities is informed by the desire to avoid a vacuum in the system of human rights protection, particularly where the ECHR would otherwise be applicable.[135] Critically, this stance by the ECtHR was informed by the approach of the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, in which the ICJ indicated that the non-recognition of South Africa's administration of Namibia would not result in depriving the Namibian people of benefits derived from international cooperation – especially where official acts performed by the government of South Africa on behalf of or concerning Namibia after termination of the Mandate were illegal and invalid.[136] The ICJ insisted that this invalidity could not be extended to some acts – such as registration of births, marriages and deaths – which would be to the detriment only of the inhabitants of Namibian territory.[137] In rehashing this position, the ECtHR sought to rebut a presumption of illegality with regard to some activities carried out by entities that were considered generally to be illegal by their very existence.

This standpoint by the ECtHR was arguably partly deviated from in *Ilaşcu and Others v Moldova and Russia* (2004) when the Court refused to recognise the 'courts' of the Moldovan Republic of Transnistria (MRT) as lawful. Accordingly, the ECtHR considered the MRT as 'an entity which is illegal under international law and has not been recognised by the international community'.[138] This was the position while making an assessment of a violation of Article 3 ECHR. However, and strangely, in dealing with Article 5(1)(a) ECHR in the same case, the Court – while recalling *Cyprus v Turkey* – observed that:[139]

> [i]n certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal 'established by law' provided that it forms part of a judicial system operating on a *'constitutional and legal basis'* reflecting a judicial tradition *compatible with the Convention*, in order to enable individuals to enjoy the Convention guarantees.

In the foregoing situation, the applicants alleged that their detention was unlawful and that the court that had convicted them (the 'Supreme Court of the MRT') was not a competent

[135] ibid para 91.
[136] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16 [125].
[137] ibid.
[138] ECtHR, *Ilaşcu and Others v Moldova and Russia*, App no 48787/99, 8 July 2004, para 436.
[139] ibid para 460 (emphasis added).

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court.[140] This practice by the ECtHR of assessing the legality of detention by an armed non-state actor in spite of its apparent 'illegality' has continued to permeate its jurisprudence. The Court developed the dual standard of 'constitutional legal basis' and 'compatibility with the Convention' as the benchmark against which the legality and lawfulness of a detention by the unrecognised de facto entity would be measured.[141] In *Mozer v Moldova and Russia* (2016) the ECtHR sought to make an assessment of a possible violation of Article 5(1)(c) of the ECHR by the 'courts' of the MRT, where the prolonged detention of the applicant for an unspecified period of time pursuant to a 'criminal justice process' was in question. The applicant complained that his detention had been unlawful in respect of the requirement of lawfulness, referring primarily to the observance of domestic law. Thus, as the MRT 'courts' had ordered the applicant's detention – 'courts' created in breach of the relevant Moldovan legislation – it could not be considered 'lawful' within the meaning of Article 5(1) of the ECHR.[142] In applying the dual standard, the ECtHR established that the MRT 'courts' were based on the former Soviet system and lacked independence and impartiality. The division of the Moldovan and MRT judicial systems took place in 1990 before Moldova joined the Council of Europe in 1995, thereby adjusting its systems to ECHR standards and eventually ratifying the ECHR in 1997.[143] In light of the foregoing, coupled with the nature of the applicant's arrest and length of detention, the ECtHR concluded that the MRT 'courts' were part of a system that reflected a judicial tradition that was incompatible with Convention principles and that, therefore, neither the MRT 'courts' nor any MRT 'authority' could order the applicant's lawful arrest or detention within the meaning of Article 5(1)(c) ECHR.[144]

With regard to acts of detention by the TRNC, in *Foka v Turkey* (2008) the applicant and the third-party intervener argued that as the TRNC was neither a valid nor a recognised state under international law, no deprivation of liberty enforced by its agents could be considered 'lawful' within the meaning of the Convention.[145] In recalling its above-stated dictum in *Cyprus v Turkey*, the ECtHR observed that the acts of the TRNC authorities were in compliance with laws in force within the territory of Northern Cyprus; therefore, the acts 'should in principle be regarded as having a legal basis in domestic law for the purposes of the Convention'.[146] The applicant in this case had been brought to a 'police station' from the Ledra Palace checkpoint. This measure had been necessary to search her bag, which she had refused to show to the 'authorities'. Once at the 'police' headquarters, the search of the bag and a body search had taken place. Items were confiscated and a fine was imposed on the applicant. Although the precise overall duration of the applicant's stay at the 'police station' is not known, it could

[140] ibid paras 400–01.
[141] The principles were in their nascent stages in *Cyprus v Turkey* (n 134) paras 231, 236–37; and were distilled clearly in *Ilaşcu v Moldova and Russia* (n 138) paras 436, 460.
[142] *Mozer v Moldova and Russia* (n 22) paras 124–27.
[143] ibid paras 146–48.
[144] ibid paras 149–50.
[145] *Foka v Turkey* (n 117) para 81.
[146] ibid paras 82, 84.

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not have exceeded a few hours. Following the searches, the applicant was accompanied by a TRNC official to the bus, which eventually took her to her initial destination. It was not shown that the applicant was compelled to stay at the 'headquarters' for a time in excess of what was strictly necessary to carry out the searches and comply with the relevant administrative formalities.[147] The ECtHR held that 'the applicant was deprived of her liberty in accordance with a procedure prescribed by law' within the parameters of Article 5(1)(b) of the ECHR. This approval by the Court of a detention by the TRNC was made in recognition of the fact that the deprivation did not exceed the necessary timelines and had no appearance of arbitrariness.[148]

An analysis of the approach of the ECtHR to detention by armed non-state actors, especially unrecognised de facto entities, shows its emphasis on establishing the lawfulness and lack of arbitrariness of the detention. This is determined through the dual prism of expressions of legality ('constitutional and legal basis'); and due process (compatibility with the Convention) – somewhat synonymous with the grounds and process standards against arbitrariness espoused in *Hassan* (2014) and *Serdar Mohammed* (2017). The Court seems to look at whether the Convention grounds exist, and whether a proper process has been followed in effecting the detention.

It is therefore not difficult to see how such an approach would not be applied to the current interpretation of Article 5 of the ECHR which permits detention for security reasons in times of armed conflict. If the ECtHR has been open to admitting security detention under Article 5 for states in IAC and has been open to conceding that armed non-state actor entities can legally detain under the same Article, it is proposed that an admission of security detention for armed non-state actors would not be entirely inconsistent. It would be important that, in order for the new interpretation of Article 5 of the ECHR to apply to the armed non-state actors, (i) the actor's internal institutions must be established on a system that reflects a clear constitutional and legal basis; (ii) this constitutional and legal basis must reflect the values inherent in the ECHR; and (iii) the grounds and processes for detention must be compatible with the ECHR. Accordingly, an armed non-state actor should be able to detain for security purposes where it has clear grounds and processes as required by IHRL, in keeping with the principle of legality and avoiding arbitrariness.

4.4.2. What about Effective Control by a State?

The matter of establishing jurisdiction under Article 1 of the ECHR is a critical part of all the cases before the ECtHR,[149] even those involving acts by unrecognised de facto entities.[150] The sound critique, therefore, against the construction of the ECtHR's jurisprudence as being permissive of the application of Article 5 of the ECHR to these entities, is that ultimately the Court is

[147] ibid paras 76–77.
[148] ibid paras 86–87.
[149] ECtHR, *Banković and Others v Belgium and Others*, App no 52207/99, 12 December 2001, paras 59–61.
[150] *Cyprus v Turkey* (n 134) paras 69–81.

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not dealing with the responsibility of the unrecognised de facto entity but rather with the responsibility of the state with effective control over the non-state actor.

Thus, in considering whether there is a violation of Article 5 of the ECHR where the MRT and TRNC are concerned, it is ultimately about establishing whether Russia or Turkey (respectively) are responsible within the meaning of Article 1 of the ECHR on jurisdiction. Indeed, in all these instances the ECtHR positively affirmed that Russia (in the case of the MRT) and Turkey (in the case of the TRNC) controlled the areas under the de facto entities through their control over these entities.[151] It is noteworthy that the Court uses the words 'effective' and 'overall' control interchangeably, without necessarily placing any normative distinction between the nature of control over the different entities by the different states.[152] This approach also maintains the relevance of positive obligations with regard to the state the territory of which is purportedly under the control of another state – the latter state being considered as controlling the de facto entity.[153]

This critique would probably culminate in two alternative conclusions: on the one hand, the jurisprudence simply confirms the fact that it is all about the states and not the unrecognised de facto entities; or if one were to accept that this jurisprudence is ultimately about the de facto entities, it would apply only to those entities under clear overall or effective control of another state. The latter conclusion would mean that entities without discernible external overhead state control would not be covered; therefore, the utility of such an exploration of the jurisprudence of the ECtHR would collapse.

The response to this would be a call to review the jurisprudence of the Court with perhaps a more practical and effective prism, which is sensitive to the realities in areas under the control of the de facto entities.[154] It would also be necessary to understand the structural constraints in the system of the ECtHR, particularly with regard to its established purpose of focusing on the obligations of state parties.[155] A further consideration could be the need to recall the Court's efforts in fostering the effectiveness of the ECHR in protecting the rights of every person covered by the Convention, even in places where there is a contestation of authority and power where there would otherwise be a vacuum in the protection.[156] In the end, the real question to answer would be: Whose direct acts of detention are actually scrutinised by the ECtHR; those of the state, or the acts of the de facto entity?

Through this latter prism on the jurisprudence and cases coming out of the ECtHR concerning unrecognised de facto entities, it can be concluded that the Article 1 ECHR evaluation made by the ECtHR on jurisdiction in these cases is broadly a formality, a requirement generally relevant for establishing the Court's ability to examine the far-reaching acts of powerful non-state entities. With this effective tool under Article 1 of attribution through control, the ECtHR cultivates a

[151] *Ilaşcu v Moldova and Russia* (n 138) paras 314–16, 382; *Cyprus v Turkey* (n 134) para 77.
[152] *Foka v Turkey* (n 117) para 83; *Demopoulos v Turkey* (n 20) para 95; *Mozer v Moldova and Russia* (n 22) para 110.
[153] *Ilaşcu v Moldova and Russia* (n 138) paras 332–52; *Mozer v Moldova and Russia* (n 22) para 100.
[154] For insight into the notion of the everyday life of a civilian under the control of an armed non-state actor see Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life under Rebel Control' (2016) 63 *Netherlands International Law Review* 161.
[155] *Banković v Belgium* (n 149) paras 59, 67, 74, 82 (read together).
[156] Fortin (n 88) 261–62.

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gateway into a review of acts of entities which it would otherwise not have the jurisdiction to address. Informed by the need for the ECHR system to be effective in human rights protection[157] and avoid a vacuum where rights of persons are at stake, this provides an avenue for the Court to directly address the legality and processes of detention by these entities. These non-state actors cannot, in effect, hide their acts behind states as they are named specifically and put on notice that the Court can evaluate their acts. In this regard, therefore, it should be irrelevant whether there is external control by a state on the non-state actor. What is ultimately under scrutiny are the direct acts of detention by the unrecognised de facto entity.

Further, the other critique could be that these cases addressed here by the ECtHR are concerned with typical IAC situations and not classic NIAC. This is because the situations quoted present armed non-state actors, which are controlled by states – the classic cases of the internationalisation of the situation. This critique unfortunately takes it for granted that such a classification has been made. This is not so, because – as indicated earlier – the ECtHR uses the standards of control (overall and effective) interchangeably without ascribing any particular normative value. What seems to be most clear is that there is a non-state entity that detains people, based on rudimentary internal rules and structures. It is therefore possible that a classification could yield either NIAC or IAC. If it is NIAC, as under a proper IHL classification scheme, then the above assessment relating to detention for security purposes by armed non-state actors would apply.

However, additionally, as Sassòli observes:[158]

> [T]he internationalization of an armed conflict through State control conforms to legal logic, it does not correspond to State practice and it is not easy to apply in the field. Except for Georgia's fighting against South Ossetia in 2008, States have never considered that the IHL of IACs governs their fighting against a rebellious armed group, even when they denounced those rebels as mere agents of foreign powers. To require an armed group to comply with IHL of IACs simply due to the fact that it is subject to overall control by an outside State is also nearly impossible to imagine from a political point of view because the group or the foreign State will always deny such control.

Even if it is taken for granted that the cases referred to herein are situations of IAC, there may still be the need to assess the capacity of the armed non-state actor itself in order to establish its capacity to adhere to the required obligations. In the present case, it is arguable that the capacity of the armed group to carry out a 'legal' security detention, which is not arbitrary during the armed conflict, would need to be proven.

4.4.3. A Spectrum of Armed Non-State Actors: Unrecognised De Facto Entities and Other Groups

The potential apprehension caused by the conclusions reached above with regard to (security) detention by NSAGs cannot be ignored. At its simplest level, the fear basically is that rebels

[157] *Cyprus v Turkey* (n 134) para 78.
[158] Sassòli (n 87) 176 para 6.20 (footnotes omitted).

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can now go around detaining persons under the legal cover of the IHRL framework, which is meant to protect the liberty of the very same persons. However, this is not the position espoused here; this analysis does not leave the door open for any gang or group of lawless citizens to run around with a licence to detain people without reason. It should be recalled that the groups referred to here would be involved in NIAC and therefore must reach the requisite level of organisation for IHL to apply to them.

However, not every organised armed group will be considered – particularly under IHRL – to have the power to detain persons legally on the basis of imperative reasons of security. As has been noted above, the interplay between IHL and IHRL will require the detention to comply with the IHL of NIAC in order for it to be potentially legal under IHRL. Additionally, under IHRL, as such detention is extremely exceptional, the requirements of clear grounds and due process remain critical for any security detention to be legal and not arbitrary. This, therefore, goes to the heart of the capacity of the armed non-state actor. Indeed, what is therefore under scrutiny is its level of internal structure, organisation and ability to operate a 'judicial' and 'law enforcement' system which meets fundamental IHRL standards.

The above examples of case law of the ECtHR show a particular kind of armed non-state actor – an unrecognised de facto entity.[159] It can be definitely asserted that these groups lie at the higher end of a spectrum of armed non-state actors of hugely varied levels of capacity and organisation. One can perceive a continuum from highly organised and state-like armed non-state actors (such as unrecognised de facto entities) all the way to guerrilla armed groups with limited (if any) control of territory or persons at the other end of the spectrum.[160] Arguably, only groups with a similar quality or level of organisation, close to that of these unrecognised de facto entities, would be considered to be able to detain persons for security reasons, even within the context of IHRL.[161]

What is suggested here is careful use of analogy, transposing legal standards for the unrecognised de facto entities to NSAGs with effective control of territory in a state.[162] As one moves further down the scale towards less organised groups with minimal to non-existent control of territory, the IHRL facet of security detention becomes less compelling and marginally applicable, with a subsequent emphasis on the IHL outlook on such detention. However, as observed above, it is difficult to imagine a group without any form of territorial control attempting to detain

[159] Peter G Thompson, *Armed Groups: The 21st Century Threat* (Rowman & Littlefield 2014) 4–6, 53–69 (for an attempt at defining NSAGs). See also Bellal (n 112) 7–8, 26–28 (for attempts at a typology of armed groups). Also, de facto entities are defined herein as armed non-state actors or entities with effective authority over territory.
[160] See an instructive classification of these groups by the ICRC in ICRC (n 8) 23–24 (drawing a distinction between centralised NSAGs, decentralised NSAGs and community-embedded armed groups).
[161] See Geneva Call, 'Administration of Justice by Armed Non-State Actors: Report from the 2017 Garance Talks', *The Garance Series*, Issue 2, 10–13 (in a meeting and engagement with the Sudan People's Liberation Movement – North (SPLM-N), the Fuerzas Armadas Revolucionarias de Colombia – Ejército de Pueblo (FARC-EP), and the Southern Front in Syria – groups that at any one point enjoyed territorial control – revealed that all three groups had 'court' systems and processes for the administration of justice, and could detain persons on clear grounds, and not randomly or arbitrarily).
[162] See the connections drawn between de facto non-state authorities and armed non-state actors that exercise territorial control in Bellal (n 112) 28–30.

a person. This should be distinguished from guerrilla groups having control over persons, and perhaps moving around with persons in some form of mobile custody. Detention presupposes, at the very least, the existence of some form of physical facility, which naturally would envisage a measure of territorial control.[163]

However, even for those NSAGs that detain in conflicts covered only by CA3 (below the AP II threshold) some minimal form of control would be needed to effectively detain persons rendered *hors de combat* by that very detention.[164] An argument for the application of IHRL on security detention in CA3 situations perhaps could still be made. This argument would be consistent in theory, for example, with the jurisprudence of the ECtHR on personal control, which has been well developed in the discussion of the extraterritorial application of IHRL.[165]

Indeed, it would be noteworthy to mention that the very notion of personal control developed around the detention of persons in situations of the exceptional application of the ECHR. Generally, the difference in application of IHRL between groups with superior control and those with minimal to none would be the same dichotomous approach in dealing with spatial (territorial) and personal control by states with regard to the extraterritorial application of human rights. It would seem plausible, therefore, not to rule out IHRL on security detentions from all CA3 situations, especially where actual deprivation of liberty takes place.

5. CONCLUSION

The main objective of this analysis was to establish whether NSAGs – particularly those in control of territory – can be considered to have, under IHL and IHRL, the power to detain or intern persons during a situation of NIAC, for imperative reasons of security. The article has delved into an analysis of IHL treaty law and customary law claims, as well as the ICCPR framework and case law of the ECtHR. It has also addressed some of the critiques of the need to explore the power to detain by NSAGs through the prisms of both IHL and IHRL.

It has been established that NSAGs can be considered to have the power to detain or intern persons within the framework of IHL. This position is based primarily on the consensus viewpoint that NSAGs are bound by IHL, and that therefore, based on the principle of equality of parties in IHL, they can be considered to have the power, like states, to detain persons for imperative reasons of security, among other reasons. The general claim here, of the inherent power to detain in the context of NIAC, is founded on the authoritative assertion that both treaty and customary IHL affirm the existence of such an inherent power. Furthermore, the critiques in favour of this assertion have been examined, particularly in light of their strictly formalist approach.

[163] Sivakumaran (n 5) 186–87.
[164] Moir (n 12) 406–07 paras 40–41; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Justice* 489, 494.
[165] ECtHR, *Ramirez v France*, App no 28780/95, 24 June 1996; ECtHR, *Issa and Others v Turkey*, App no 31821/96, 16 November 2004; ECtHR, *Öcalan v Turkey*, App no 46221/99, 15 May 2005; ECtHR, *Medvedyev and Others v France*, App no 3394/03, 29 March 2010.

Additionally, it has been argued and acknowledged that the structure of IHRL can accommodate the legality and non-arbitrariness of detention by an NSAG – security internment or otherwise – as long as the NSAG portrays the capacity to do so effectively, with clear grounds and processes, in keeping with the principle of legality and the fundamental protection of the right to personal liberty. This position is also premised on and supported by the established notion in the interplay between IHL and IHRL, that any security detention or internment consistent with IHL rules is, in principle, not arbitrary under IHRL.

The operability of the legality of security detention by NSAGs in IHRL has been reviewed in the approach of the ECtHR to cases under Article 5 of the ECHR relating to unrecognised de facto entities. It has been established that the structure and practices of these entities regarding varied forms of detention can be instructive in the assessment of their capacity to carry out security detention during armed conflict. This ECHR perspective has provided a plausible frame of reference for the broader understanding of security or administrative detention by NSAGs within the ambit of IHRL. Indeed, the structure of IHRL can accommodate and regulate the legality of detention by NSAGs.

The clarity of the law with regard to the power of NSAGs to detain in armed conflict will protect persons captured or encountered by these groups from summary execution and other heinous acts, as detention or internment will be considered a legal option available to such groups. Such clarity will also ensure that persons interned or detained by NSAGs have recourse to systems and forums within which they can challenge their detention. Finally, the clarity of the law should ultimately provide greater legal certainty and protection for those deprived of their liberty, for various reasons, by these groups.