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Detention by Armed Groups under International Law

Andrew Clapham

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CONTENTS

| | |
|---|----|
| I. Introduction | 2 |
| II. The Problem and the Context..... | 2 |
| III. International Humanitarian Law | 6 |
| A. Rights to Intern and Try in IHL?..... | 6 |
| B. Duties of the Armed Group in IHL..... | 12 |
| 1. Procedural Safeguards that Allow for Challenges to Detention | 15 |
| 2. Judicial Guarantees under Common Article 3 | 17 |
| IV. Human Rights Law | 21 |
| A. Challenging Arbitrary Detention and Some Proposed Procedural Safeguards..... | 25 |
| B. The Human Rights to Fair Trial in the Court of an Armed Group..... | 29 |
| V. State Responsibility and Individual Criminal Responsibility with Regard to Non-State Actor Detention in Violation of International Law | 34 |
| A. Attribution..... | 34 |
| B. Aid and Assistance by the State (State Complicity)..... | 35 |
| C. Individual Criminal Complicity | 37 |

* Professor of Public International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland. The author was an advisor to the legal team litigating on behalf of Serdar Mohammed before the UK Supreme Court and below in the Court of Appeal. The author would like to thank Ana Balcazar Moreno for help in identifying the key passages in the 2016 Colombia peace agreement. The author would also like to thank Professor Paola Gaeta, Dr Tilman Rodenhäuser, and Dr Lawrence Hill-Cawthorne for comments on an earlier draft. The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

D. Obligations under Common Article 1 of the 1949 Geneva Conventions 38

E. Positive Obligations under Human Rights Law and the Law on the Prevention of Genocide and Crimes against Humanity 40

VI. Final Remarks 43

I. INTRODUCTION

This article tackles the question of whether international law entitles armed groups to detain people, as well as the separate question of what international law obligations bind the armed group when persons are detained. The focus is on the obligations that relate to the right to challenge the basis for any such detention, although some attention is given to issues of fair trial and the question of punishment. The last part of the article briefly considers the legal framework governing responsibility for States and those that assist armed groups. State responsibility questions relating to attribution and assistance are considered, as are the separate rules which would determine the criminal responsibility of accomplices who could be prosecuted.

II. THE PROBLEM AND THE CONTEXT

In approaching the subject of detention by armed groups one has to be aware that assertions and assumptions one might wish to make will have knock-on effects with regard to the scope of States’ international obligations. For instance, the assertion that armed groups have the right to intern their captives quickly transits via the principle of equality of belligerents into an international right for States to intern those who pose an imperative risk to security. Similarly, a denial that armed groups have any such international right suggests that States too have no right under the law of armed conflict to intern in a non-international armed conflict (NIAC). Suggesting there is an asymmetry between the international rights of States and those of armed groups seems to threaten the idea that the laws of war provide for a “level playing field” with mutual rights and obligations.

Putting these rather abstract issues aside, an alternative argument runs as follows: if we want to incentivize armed groups to respect the laws of war then we have to accept that, even if such groups have been banned under national law, some things that they do will be allowed (or at least not

condemned), while other things will be illegal under international law. The next step is to suggest that if we want them to respect the dignity of their captives and the due process rights of those they try, we will have to refrain from calling all detention by armed groups illegal. To ram home the idea, 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.

A further variation of this reasoning suggests that because the parties in an armed conflict can kill combatants on the other side, we must then assume that they can similarly detain those they would otherwise kill. But this reasoning falls down on two fronts. First, States do not accept that armed groups have any right to kill members of its armed forces. And second, the issue of detention by armed groups extends beyond those who can be targeted (or even killed) without violating the laws of war. Armed groups (and governments) may feel the need to intern non-fighters who represent a security threat even if such detainees have not lost their immunity from attack because they could not be described as members of the opposing armed forces or as directly participating in hostilities.

It might seem strange that such a fundamental aspect of armed conflict could be considered so uncertain. How did we get to this state of affairs? I think a number of developments should be highlighted. In the past, a government had little occasion to inquire into the legality of detention by its armed opposition. There are multiple examples of governments dismissing the promulgation of laws and the conduct of criminal processes as illegitimate and rebellious.¹ Attempts to engage with these groups or even offer technical assistance have been met with warnings and even threats of prosecution by certain governments.² Such actions can even have a chilling effect on academics seeking out new ways of thinking about the laws of war in order to offer better protection to the victims of war. Why then invite more trouble and inquire further? I think that the following factors have forced us to take a serious look at how armed groups sit in the legal landscape concerning detention.

First, the prospect of international war crimes prosecutions against individuals belonging to armed groups is a very real one. In fact, the majority of prosecutions are likely to be against rebel commanders rather than former heads of State, government ministers or commanders of armed forces. In charging a rebel leader the prosecutor may wish to rely on principles of

1. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 549, 557–58 (2012).

2. *Id.* at 558.

command or superior responsibility. In turn that may raise questions as to the adequacy of the disciplinary procedures that the group has in place. The international community of States that develops the law of war crimes can hardly demand adequate disciplinary laws and procedures from armed groups, and, in the same breath, denounce any attempt to put in place rules for detention and prosecution as illegal and illegitimate. This is a relatively new development with international prosecutions for crimes committed in non-international armed conflicts being unknown before 1995. The prosecutions in the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Tribunal for Sierra Leone changed this.

The International Criminal Court (ICC) now looks set to focus on crimes committed, not only by non-State actors, but also through the prism of command responsibility. The conviction of Jean-Pierre Bemba Gomba is based on such responsibility, with the Trial Chamber finding that “effective control” requires that the commander have the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities.³ The Chamber goes on to explain that prevention and repression should involve disciplinary measures, as well as measures to ensure justice.⁴ It is wildly improbable that the international community of States and the ICC expect rebel commanders merely to hand over their transgressing subordinates to State authorities. Moreover, the Chamber states, “In the event the commander holds disciplinary power, he is required to exercise it, within the limits of his competence.”⁵ The present contribution suggests that there may be limits imposed by international law on how that disciplinary power is exercised.

Of course, an evaluation of the adequacy of a group’s preventive measures, procedures and punishment regime means taking into account the context. The rules applied to the commanders of the armed forces of a State may not simply be transposed in most cases onto rebel commanders, and so we already have to admit that the absolute equality of belligerents is not a strict rule. We will thus be looking for principles rather than detailed provisions.

Second, the concept of a civil war, such as that which formed the background to the writing of the Lieber Code during the U.S. Civil War, has

3. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment, ¶ 183 (Mar. 21, 2016).

4. *See id.* ¶¶ 188, 209.

5. *Id.* ¶ 207.

given way to conflicts not of an international character in States where there may be no effective functioning government. In such a situation, those entities, such as the United Nations (UN), charged with the protection of civilians and human rights more generally have had to simply address the various groups detaining people as if they were the holders of international obligations. In the absence of a government to protest that this legitimizes the behavior of these groups, the protective dimension takes over and we have the beginning of developed practice on how to name, shame and hold accountable armed groups for their detention policy. This can be seen perhaps most clearly in the 2016 report of the Office of the UN High Commissioner for Human Rights on Libya.⁶

Third, the engagement of non-governmental organizations and the UN with various armed groups has meant that standards have had to be developed that go beyond the elements of crimes being developed in the international criminal tribunals. In some situations, there will be no governmental opposition to such engagement. Indeed, in some circumstances, UN commissions of inquiries have called for armed groups to punish serious crimes stemming from human rights abuses and violations of international humanitarian law (IHL),⁷ or “ensure respect for and act in accordance with international human rights law.”⁸

Fourth, as long as NIACs were confined to the territory of the State fighting the armed group, the government had no need to rely on IHL in order to intern or detain those captured in the armed conflict or in counterterrorism operations. Over the last twenty years, however, the armed conflicts in Afghanistan and Iraq have led to challenges to the detention policies of the U.S. and UK governments. In response, there have been claims that IHL empowers States to detain, not only prisoners of war under Article 21 of the Third Geneva Convention and civilians under Articles 42 and 78 of the Fourth Geneva Convention, but also that there is a legal basis to detain those that pose an imperative security risk in the context of a NIAC.⁹ The arguments surrounding these claims and justifications turn in

6. See *infra* notes 44–46 and accompanying text.

7. See, e.g., Report of the International Commission of Inquiry on Darfur to the U.N. Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, ¶ 564 (Jan. 25, 2005).

8. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 113, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011).

9. Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INTERNATIONAL LAW STUDIES 60, 87–97 (2015).

part on whether or not the existence of such a right to intern must imply an equal right for the armed opposition to intern their own captives. Arguments about States' detention rights against non-State actors have knock-on effects.

III. INTERNATIONAL HUMANITARIAN LAW

A. *Rights to Intern and Try in IHL?*

Although Common Article 3 of the four 1949 Geneva Conventions and Part II of the second 1977 Additional Protocol (AP II) both refer to the need to treat detainees humanely and the need to pass sentences only consequent to a proper process, it is contested whether from these prohibitions one can infer a *power* or a *legal* basis to detain in a non-international armed conflict.¹⁰ This is in part because States have traditionally relied on their own law to justify detention. With the advent of extraterritorial NIACs, such as the conflict involving the United Kingdom and the United States in Afghanistan against the Taliban, the detaining States have been challenged to justify detention particularly with regard to their international human rights obligations. The United States has relied in part on the Authorization for Use of Military Force¹¹ and would probably not consider such detention to be in violation of any obligations under the International Covenant on Civil and Political Rights (ICCPR)¹² (either because it would not consider the Covenant applicable to these situations or because it would consider that any such detention was not unlawful or arbitrary under the terms of Article 9 or relevant customary international law). The United Kingdom, however, is additionally bound by a separate treaty, the European Convention on Human Rights (ECHR),¹³ and influenced by the at-

10. *See* in the Court of Appeal *Serdar Mohammed v. Secretary of State for Defence* [2015] EWCA (Civ) 843 (Eng.) [hereinafter *Mohammed* [2015]] and in the Supreme Court [2017] UKSC 2 [hereinafter *Mohammed* [2017]].

11. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also* Jeffrey Bovarnick & Jack Vrett, *Detention Operations at the Tactical and Operational Levels: A Procedural Approach*, in *U.S. MILITARY OPERATIONS: LAW, POLICY AND PRACTICE* 307, 313–4 (Geoffrey Corn et al. eds., 2015).

12. International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171.

13. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

tendant case law emanating from the European Court of Human Rights (ECtHR).

The question over whether IHL provides a legal basis to detain in NI-ACs has come to a head in two recent cases: *Hassan v. United Kingdom* and *Serdar Mohammed v. Ministry of Defence*. In the *Hassan* case,¹⁴ the ECtHR took the unprecedented step of essentially reading into ECHR Article 5 an implied ground for detention. The Court explained that “even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law.”¹⁵ It then continued:

By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.¹⁶

The judgment went on to find that there had therefore been no violation of Hassan’s rights with regard to his detention in Iraq from April 23 to May 2, 2003. The judgment held that the human rights grounds for detention had to be satisfied and that “[t]his means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness.”¹⁷

One reading of the judgment is that the Court was careful to limit its reasoning to international armed conflict and the overlapping regimes provided by the Third and Fourth Geneva Conventions: “It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.”¹⁸ The government has nevertheless argued before the UK appellate courts in the Serdar Mohammed litigation that the *Hassan* reasoning should apply to detention in NI-

14. *Hassan v. United Kingdom*, App. No. 29750/09 (2014) (EtCHR), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501>.

15. *Id.* ¶ 104.

16. *Id.*

17. *Id.* ¶ 105.

18. *Id.* ¶ 104.

ACs due to the authority of the relevant resolutions of the Security Council or the authority granted under IHL. Although both arguments were rejected by the Court of Appeal, the points were appealed to the Supreme Court where the majority accepted that the *Hassan* reasoning could be applied by analogy to a situation where a State had been authorized by the UN Security Council to detain in a non-international armed conflict. Lord Sumption put it as follows:

[T]he Resolutions served the same function in a non-international armed conflict as the authority to detain under article 21 of the Third Geneva Convention does in an international armed conflict. It conferred an authority in international law to detain in circumstances where this was necessary for imperative reasons of security.¹⁹

We will consider below the Supreme Court's approach to the question of detention authorized through IHL.

Why does this matter for the obligations of armed non-State actors? It matters because the argumentation is in part tied up with an apparent wish not to extend to non-State actors any right to intern in a NIAC. The Court of Appeal in *Serdar Mohammed* recognized this in stating:

One of the reasons why the States subscribing to what became Common Article 3 and APII did not make provision for a power to detain in a non-international armed conflict was that to do so would have enabled insurgents to claim that the principles of equality, equivalence and reciprocity (which would be usual in international humanitarian law) meant that they would also be entitled to detain captured members of the government's army.²⁰

Although the UK has argued that such a power need not be applied in a reciprocal way, the issue of equality of obligations under IHL continues to haunt this discussion. Stepping back from IHL for a moment, it is, of course, clear that there is no overall equality in law because detention by an opposition armed non-State actor will always be illegal under the national law of the territorial State.

19. *Mohammed* [2017], *supra* note 10, [44] (Lord Sumption SC); *see also id.* [65] (Lord Sumption SC); *Mohammed* [2015], *supra* note 10, [200]–[251].

20. *Mohammed* [2015], *supra* note 10, [178]; *see also Mohammed* [2017], *supra* note 10, [10], [127], [158], [263].

Though some assert that the principle of equality should lead to a right for armed groups to detain in a NIAC, such assertions are usually premised on the idea that States have such a right to detain.²¹ So far, a series of scholars have not found that IHL provides a legal basis to detain or intern in a NIAC.²² As long as the ECHR is being interpreted so as to preclude such a right for States, there is very little evidence that IHL grants armed groups any sort of right or license to detain anyone.

In the run-up to the 32nd International Conference of the Red Cross and Red Crescent, the International Committee of the Red Cross (ICRC) reported to delegates that “[t]he ICRC has understood from the consultations that States see a risk that regulation would imply the lawfulness of armed groups’ detention activities, or accord them a legal status under international law.”²³ The resulting relevant resolution of the conference opened with the following preambular paragraph:

[M]indful that 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 liberty²⁴

The paragraph is remarkable for only addressing the power of States, even though it is concerned with “all forms of armed conflict.”

21. See, e.g., Ezequiel Heffes, *Detention by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law*, 20 JOURNAL OF CONFLICT AND NATIONAL SECURITY LAW 229 (2015).

22. See, e.g., ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT (2013); LAWRENCE HILL-CAWTHORNE, DETENTION IN NON-INTERNATIONAL ARMED CONFLICT (2016); Laura M. Olson, *Security Detention: The International Legal Framework: 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*, 40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 437 (2009).

23. INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY: CONCLUDING REPORT 32 (2015), http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.

24. International Committee of the Red Cross, *Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty: Resolution* (2015), http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf.

The majority in the Supreme Court, having determined that a Security Council resolution could provide the necessary authority to detain, had no need to determine the possible authority to detain derived from IHL. Lord Reed, however, who dissented and was joined by Lord Kerr, disagreed that a Security Council resolution could provide such authority, and so was obliged to consider in detail the arguments concerning IHL and, in his words given the “importance of the issues, and the potential influence of this court’s decision . . . prepare a reasoned judgment.”²⁵ He concluded that neither treaty-based IHL nor customary IHL provided authority for detention in a non-international armed conflict.²⁶ Lord Sumption from the majority stated that “Common article 3 does not in terms confer a right of detention”²⁷ and that he was “inclined to agree with [Lord Reed]” that the detention of members of the opposing armed forces is not sanctioned by customary international law in a non-international armed conflict.²⁸ Nevertheless, Lord Sumption also stated that the “lack of international consensus really reflects differences among states about the appropriate limits of the right of detention, the conditions of its exercise and the extent to which special provision should be made for non-state actors.”²⁹

The ICRC position on this issue with regard to Common Article 3, as explained in its 2016 *Commentary* (published since the adoption of the Resolution), seems at first glance to build on the Resolution and adopt the idea that “both customary and international humanitarian treaty law contain an inherent power to detain in non-international armed conflict.”³⁰ The *Commentary* here references the preambular paragraph of the Resolution, but then continues, “However, additional authority related to the grounds and procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in keeping with the principle of legality.”³¹ We have then an apparent distinction between the inherent power to detain and the need for “additional authority” for the “grounds” for detention.

25. *Mohammed* [2017], *supra* note 10, [235] (Lord Reed SCJ).

26. *Id.* [234]–[276] (Lord Reed SCJ).

27. *Id.* [12] (Lord Sumption SCJ).

28. *Id.* [14] (Lord Sumption SCJ).

29. *Id.* [16] (Lord Sumption SCJ); *see also id.* [148], [158] (Lord Mance SCJ).

30. INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCE IN THE FIELD ¶ 728 (2d ed. 2016), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC> [hereinafter 2016 ICRC COMMENTARY].

31. *Id.*

The *Commentary* does not seem to limit this power to States. Indeed, when looking at the meaning of the phrase “regularly constituted court” which appears in Common Article 3, the ICRC addresses the dilemma head on:

Common Article 3 requires “a regularly constituted court.” If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in common Article 3 to “each Party to the conflict” would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted according to the “laws” of the armed group. Alternatively, armed groups could continue to operate existing courts applying existing legislation.³²

Article 6(2) of AP II uses a different wording precisely to capture the idea that armed non-State actors may be creating their own courts. It replaces the expression “regularly constituted court” with “a court offering the essential guarantees of independence and impartiality.”³³ The Elements of Crimes of the ICC build on this and explain that a court would not be regularly constituted court if it did not “afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.”³⁴

We can conclude that armed non-State actors that constitute parties to an armed conflict have international obligations under Common Article 3, AP II and the parallel customary international law obligations (perhaps most conveniently seen as reflected more or less in Article 75 of Additional Protocol I (AP I)) to abstain from sentencing anyone unless such action would be the result of a fair trial conducted by an independent and impartial court which afforded the indispensable guarantees recognized by international law.³⁵ While the parameters of these elements of the obligation will

32. *Id.* ¶ 692 (footnote omitted).

33. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

34. International Criminal Court, Elements of Crimes art. 8(2)(c)(iv) element 4, U.N. Doc. ICC-ASP/1/3 (Sept. 9. 2002), http://www.iccnw.org/documents/ElementsofCrimes_English.pdf.

35. *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31;

be examined in the next section, it follows from this that armed non-State actors do indeed have international obligations under IHL towards those they detain. Even if armed groups may not necessarily be entitled or empowered under international law to detain or try anyone, once they do engage in these activities it seems incontrovertible that such groups have explicit and detailed obligations under international law. According to the ICRC, it is “undisputed that the substantive provisions of common Article 3 bind . . . armed groups when they are party to an armed conflict.”³⁶ Of course, the theory on how international law comes to bind such groups is still being articulated and remains to some extent contested.³⁷

B. Duties of the Armed Group in IHL

Our conclusion so far points to a lack of rights for armed groups to try and detain, yet suggests that there are relevant obligations on the armed groups once they engage in such activities. Such a conclusion is wide open to criticism. How, the critics might say, can we ask these groups to develop rules and procedures for the treatment of detainees if all detention is illegal? Taken to its logical conclusion, it could be argued: if there is no right to detain then detention *per se* is illegal and any detention could be seen as a war crime or a form of hostage-taking under international law. But this

Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3; AP II, *supra* note 33, art. 6(2). Article 75 can be seen as including rules that ought to be applied (whether or not they are customary international law) in non-international armed conflict. See John Bellinger, *Obama's Announcements on International Law*, LAWFARE (Mar. 8, 2011, 8:33 PM.), <https://www.lawfareblog.com/obamas-announcements-international-law> (“My assumption is that the Administration does plan to apply Article 75 to al Qaida and the Taliban and that it does not agree with (or overlooked) the Supreme Court’s conclusion that the conflict is a non-international armed conflict.”). Consider also the May 22, 1992 agreement between the parties to the conflict in Bosnia and Herzegovina which requires of the non-State parties that “All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I.” Agreement No. 1 ¶ 2.3.2, Bosn.-Herz., May 22, 1992, reprinted in 3 HOW DOES LAW PROTECT IN WAR? 117 (Marco Sassòli et al. eds., 3d ed. 2011).

36. 2016 ICRC COMMENTARY, *supra* note 30, ¶ 508.

37. DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS (2016); Katharine Fortin, *The Application of Human Rights Law to Everyday Civilian Life under Rebel Control*, 63 NETHERLANDS INTERNATIONAL LAW REVIEW 161 (2016); Sandesh Sivakumaran, *The Addresses of Common Article 3*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 415 (Andrew Clapham et al. eds., 2015).

argument represents an unacceptable jump in the logic. It is one thing to say that IHL does not authorize detention or internment; it is quite another to say that such behavior constitutes a war crime. The analogy might be that armed non-State actors do not enjoy combatant immunity and the right to participate in hostilities (unless the special conditions in Article 1(4) of AP I are met³⁸), but this does not mean that their (non-perfidious) attacks on the armed forces of a State in a combat situation can be prosecuted as an international war crime. The acts may constitute murder under national law, but such acts are not criminal under the international statutes adopted for the international criminal tribunals.

Detention by an armed group might constitute some sort of unlawful confinement or even hostage-taking under national law, but in order for this to become an offense under the International Convention on Hostage-Taking there would need to be the element that someone is being held in order to compel some other entity to do something.³⁹ If the detention was simply to avoid releasing the captive back on to the battlefield, or arguably with a view to an eventual prisoner exchange, then such detention would not fall under the international definitions of hostage-taking either as a war crime or under the Convention.⁴⁰ The distinction between hostage-taking and the detention of members of the armed forces taken in combat operations is highlighted in the 2016 Colombian peace agreement with the *Fuerzas Armadas Revolucionarias de Colombia* (FARC). While on the one hand persons who engaged in hostage-taking and other severe deprivations of physical liberty are considered to be ineligible for amnesty or pardon, on the other hand those involved in the apprehension of personnel from the military forces during military operations may be eligible for pardon or amnesty (as a crime related to the rebellion) on a case-by-case basis.⁴¹

38. 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,” and the authority representing such a people has undertaken to apply the 1949 Geneva Conventions and the Protocol by addressing a unilateral declaration to the depositary (the Swiss Federal Council) under Article 96(3).

39. International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

40. David Tuck, *Taking Hostages*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 37, at 297; Deborah Casalin, *Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 743 (2011).

41. See especially Part 5.1.2 of the Agreement paragraphs 37–40 and Article 22 paragraph, literal (a) of the Amnesty Law, where the following are ineligible for amnesty: “la

To the extent that armed groups commit not to engage in hostage-taking, one may need to inquire into the scope of such commitments. As Sivakumaran shows with regard to the *Ejército de Liberación Nacional* (ELN) of Colombia:

[I]t has defined the taking of hostages in such a manner as to allow certain actions that the law of armed conflict would consider to constitute the taking of hostages. Thus, the ELN has stated that it is “permissible to recover war taxes, and to detain persons who refuse to pay them as a form of pressure in order to obtain payment. These detentions cannot be considered ‘hostage-taking,’ because we never use these persons as shields during hostilities.”⁴²

Those engaging with armed groups might want to reflect that one man’s hostage-taker is another man’s tax collector.

So we can conclude that there are no criminal offenses in IHL related to the mere fact of detention by an armed group (even if all detention, including hostage-taking, is likely to be a violation of national law).

What then are the international duties that flow once someone is detained by an armed group in a NIAC? Let us now separate out the rights of those detained as something akin to “security detainees,” from those who are to be subjected to some sort of quasi-judicial process with a view to disciplinary action or conviction.

A detailed examination of all the obligations under Common Article 3, AP II (Articles 4, 5 and 6) and customary international law are beyond the scope of this article, which focuses on the due process rights rather than the conditions of detention.⁴³ Of course, any detainee must be treated hu-

toma de rehenes u otra privación grave de la libertad,” while the same Article 22 in its first part indicates that “La Sala de Amnistía e Indulto concederá las amnistías por los delitos políticos o conexos. En todo caso, se entienden conexos con el delito político los delitos que reúnan alguno de los siguientes criterios: . . . ‘la aprehensión de combatientes efectuada en operaciones militares.’”

42. Sandesh Sivakumaran, *Lessons for the Law of Armed Conflict from the Commitments of Armed Groups: Identification of Legitimate Targets of Prisoners of War*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 463, 474 (2011).

43. For more information on the law applicable to the conditions of detention, see LOUISE DOSWALD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM 194–250 (2011); Louise Doswald-Beck, *Judicial Guarantees under Common Article 3*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 37, at 469; *see also* SIVAKUMARAN, *supra* note 1, at 292–300; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW rr. 87–103

manely and must not be tortured or subjected to any sort of sexual violence. But our focus will be on the right to challenge the detention and the fair trial guarantees.

Whether or not one agrees with our conclusion that armed groups have no right to detain derived from international law, it seems clear that any detention in an armed conflict must be open to challenge. In some recent conflicts the dividing line between the State and non-State forces and their detention regimes has seemed flimsy, leading Office of the UN High Commissioner for Human Rights (OHCHR) investigators in Libya to apply the terms “detention” and “detention facilities” to deprivation of liberty by both the State and armed groups.⁴⁴ With regards to any justification of deprivation of liberty, the report states:

Under customary international law, any security related detention must be justified by the existence of a present, direct and imperative threat by the individual concerned, and is subject to strict procedural requirements including that the person may effectively challenge the lawfulness of the detention, that the detention does not last any longer than absolutely necessary, and that there be initial and periodic reviews by an independent body possessing the same attributes of independence and impartiality as the judiciary.⁴⁵

Elsewhere the report clarifies that even if legally sanctioned, detention will be arbitrary “if it is otherwise inappropriate, unjust, unreasonable, or unnecessary in the circumstances.”⁴⁶

1. Procedural Safeguards that Allow for Challenges to Detention

Little attention has been given to detailing what procedural safeguards apply to detainees challenging the lawfulness or arbitrariness of their detention by armed groups. To the extent that the ICRC’s procedural safeguards

(Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *CIHL*]; MURRAY, *supra* note 37.

44. Office of the United Nations High Commissioner for Human Rights on Libya, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, ¶ 130, U.N. Doc. A/HRC/31/CRP.3 (Feb. 15, 2016), http://www.ohchr.org/Documents/Countries/LY/A_HRC_31_CRP_3.pdf [hereinafter *Human Rights in Libya Report*].

45. *Id.* ¶ 128.

46. *Id.* ¶ 126.

and principles governing detention go beyond binding international law, it is suggested that they should be applied by armed groups “[w]here practically feasible.”⁴⁷ Others have tentatively suggested that where an armed group has stable control over territory and the population the law of belligerent occupation should be applied by analogy.⁴⁸

Without wishing to undermine the rather more extensive obligations that would apply to the State in any armed conflict, or indeed the additional rights that may apply under international human rights law (which we will discuss later), we might venture the following minimum guarantees that ought to apply to someone seeking to challenge detention by an armed group:

1. An effective right to challenge the arbitrariness of any detention before an impartial body capable of ordering release.
2. The right not be subject to prohibited discrimination with regard to the grounds for detention or during the process for challenging the detention.
3. That there be a reasonable necessity for the detention, such as the prevention of crime, the threat of serious prejudice to the security of the group, or the preparation of a criminal or disciplinary case.

These safeguards do not imply that there is any law that entitles an armed group to intern people based on status, it simply admits that, in fact, people are detained by armed groups and that those groups will be in breach of the international norm that prohibits arbitrary detention should they fail to respect these guarantees. There is a sort of parallelism here with the logic that states that even if armed groups are not entitled by international law to set up courts and try people, if they do have courts then they must pass sentence only where certain fundamental due process rights or “judicial guarantees” have been respected.

47. See Jelena Pejić, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 375, 376 (2005).

48. MURRAY, *supra* note 37, at 233, 241; Casalin, *supra* note 40, at 754–56.

2. Judicial Guarantees under Common Article 3

The minimal safeguards proposed above relate only to the challenge to the legitimacy of detention and do not provide what are known as the “judicial guarantees” that are demanded by Common Article 3 to the Geneva Conventions in the context of actual sentences passed down by a court. To recall, this clause, which applies to all parties in a NIAC, prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” In turn, under international law, an individual may be prosecuted for the war crime of sentencing or execution without due process. Under the ICC Statute, such a war crime would apply to relevant individuals from the non-State party to a NIAC.⁴⁹ As we saw above, the Elements of Crimes adopted by the States parties explain that a “regularly constituted court” in this context means a court that affords the essential guarantees of “independence and impartiality.”⁵⁰ Commentators at this point turn to human rights law to flesh out what constitutes impartiality or independence.⁵¹ In the context of an armed conflict which has triggered the application of AP II, these guarantees are spelled out in Article 6(2). For completeness we might add that although Article 75 of AP I applies as a matter of treaty law to international armed conflicts, the guarantees that it contains are increasingly seen as customary and applicable in NIACs.⁵²

Most recently, the 2016 ICRC *Commentary* on Common Article 3 details the appropriate judicial guarantees. In doing so, its authors were conscious of the fact that these have to be adapted to apply to armed groups and that the list of guarantees in AP II may not be complete:

684. While common Article 3 does not list specific judicial guarantees, Article 6 of Additional Protocol II does, and the requirement of fair trial in common Article 3 today has to be interpreted in the light of these provisions and their customary equivalent. As follows from the phrase “in

49. Rome Statute of the International Criminal Court art. 8(2)(c)(iv), July 17, 1998, 2187 U.N.T.S. 90.

50. *See supra* note 34 and accompanying text.

51. KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 408–38 (2003).

52. Sandra L. Hodgkinson, *Detention Operations: A Strategic View*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 275, 282 (Geoffrey S. Corn et al. eds., 2016).

particular” in Article 6, this list is not exhaustive but spells out the minimum guarantees of fair trial that are generally recognized as indispensable under international law today. The judicial guarantees listed in Article 6 of Additional Protocol II are considered customary today.

685. Thus, judicial guarantees that are generally recognized as indispensable today include, as a minimum:

- the obligation to inform the accused without delay of the nature and cause of the offence alleged;
- the requirement that an accused have the necessary rights and means of defence;
- the right not to be convicted of an offence except on the basis of individual penal responsibility;
- the principle of *nullum crimen, nulla poena sine lege* (“no crime or punishment without a law”) and the prohibition of a heavier penalty than that provided for at the time of the offence;
- the right to be presumed innocent;
- the right to be tried in one’s own presence;
- the right not to be compelled to testify against oneself or to confess guilt;
- the right to be advised of one’s judicial and other remedies and of the time-limits within which they may be exercised.

....

686. A similar list is provided in Article 75 of Additional Protocol I, which has also been found to be relevant in this context. Both lists were inspired by the International Covenant on Civil and Political Rights. Article 75 lists three additional guarantees:

- the right to present and examine witnesses;
- the right to have the judgment pronounced publicly;
- the right not to be prosecuted or punished more than once by the same Party for the same act or on the same charge (*non bis in idem*).

687. The first two of these additional guarantees were not included in Additional Protocol II in response to the wish of some delegates to keep the list as short as possible. Arguably, however, they should apply in non-international armed conflict to the extent that they are essential to a fair trial and they appear in the main human rights instruments. The third guarantee, the principle of *non bis in idem*, was not included because “this principle could not apply between the courts of the government and the courts of the rebels.” It may thus be argued, *a contrario*, that it should apply as a prohibition of double jeopardy of prosecution or punishment by the same Party, in the same manner as this principle is formulated in Arti-

cle 75 of Additional Protocol I. A second trial by the same Party for the same act or on the same charge, after a final judgment acquitting or convicting the person concerned, should be deemed unfair.⁵³

These judicial guarantees rather presume that the accused is facing a criminal charge rather than being disciplined for a breach of internal rules, but in many cases the disciplinary charge may relate to facts which could constitute a war crime. Failure to mete out appropriate punishment for a war crime could indeed expose the commander or superior to prosecution in the ICC under Article 28(a)(ii) of the Statute for failure to act to “prevent or repress” the commission of those war crimes.⁵⁴ It would make sense for those engaging with armed groups to explain that setting up procedures for the investigation and punishment of war crimes is an expectation that needs to be fulfilled. This should be encouraged even if the doctrine claims that the “customary IHL obligation with regard to investigating and prosecuting serious violations of IHL committed in non-international armed conflict rests only with states.”⁵⁵

Not surprisingly international tribunals focus on situations where there have been inadequate or non-existent recourse to disciplinary measures rather than heralding appropriate investigations. Sivakumaran has summarized some of the characteristics of courts set up by armed groups in the Philippines, Nepal, Indonesia, Sierra Leone, El Salvador, Sri Lanka, Sudan, Nigeria, Democratic Republic of Congo, Kosovo, Ireland, India and Myanmar.⁵⁶ Bangerter has identified the various internal codes that have been applied by armed groups in Algeria, Côte d’Ivoire, Democratic Republic of the Congo, Liberia, Sierra Leone, Sudan and South Sudan, Uganda, Colombia, El Salvador, Mexico, Nicaragua, Peru, Afghanistan, China, India, Myanmar, Nepal, Philippines, Vietnam, Turkey and the United Kingdom.⁵⁷ The present author is not aware, however, of any detailed ongoing critical

53. 2016 ICRC COMMENTARY, *supra* note 30 (footnotes omitted).

54. Rome Statute, *supra* note 49, art. 28(a)(ii).

55. Olson, *supra* note 22, at 452.

56. SIVAKUMARAN, *supra* note 1, at 549–62; Sandesh Sivakumaran, *Courts of Armed Opposition: Fair Trials or Summary Justice?*, 7 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 489 (2009); see also Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 655 (2007).

57. OLIVER BANGERTER, INTERNAL CONTROL: CODES OF CONDUCT WITHIN INSURGENT GROUPS (2012), <http://www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP31-internal-control.pdf>.

reporting of the disciplinary measures actually taken by armed groups. The explanation for such a dearth of contemporary material is not hard to find. International organizations may be fearful of seeming to legitimize a group through monitoring its trials and courts where such a group is seeking to overthrow one of their member States. Additionally, as Sivakumaran highlights, those non-governmental organizations that do venture into this field risk being prosecuted under the relevant national law either as trainers, advisers or observers.⁵⁸

One specific criticism of an armed group providing inadequate judicial guarantees can be found in Philip Alston's 2008 report on the Philippines as the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. He concludes that a denial of due process by a group would constitute a violation of IHL.⁵⁹ Alston detailed that:

While the "Basic Rules of the New People's Army" includes a list of offences that are to be punished by expulsion and death when committed by members of the NPA—"treachery, capitulation, abandonment of post, espionage, sabotage, mutiny, inciting for rebellion, murder, theft, rape, arson and severe malversation of people's funds" . . . —neither this nor any other instrument cited actually defines the elements of any criminal offence.⁶⁰

In other contexts, UN reports have remained at a more general level, with, for example, the UN Commission of Inquiry on Syria concluding in 2016 that:

In instituting makeshift courts whose procedures fall far short of fair trial standards, the responsible groups violated due process principles, in violation of international humanitarian and human rights law. Executions ordered by these makeshift, unauthorised courts constitute killings or summary executions in violation of international humanitarian law and human rights law.⁶¹

58. SIVAKUMARAN, *supra* note 1, at 558.

59. Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Mission to the Philippines*, ¶ 32, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008).

60. *Id.* at 40 n.44.

61. U.N. Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, ¶ 101, U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf.

IV. HUMAN RIGHTS LAW

The resistance to including non-State actors as possible bearers of human rights obligations and therefore possible human rights violators continues in various fora and at a doctrinal level.⁶² Such resistance is not helpful to a protective agenda and can be explained on a couple of levels. It stems at one level from a legal analysis which focuses on the fact that human rights treaties are ratified by States and not by armed groups. From this it is presumed that human rights obligations are the business of States, perhaps in part due to a historical sense that human rights treaties reflect constitutional arrangements. And at another level it stems from a political reticence to allow a seeming “recognition” of armed groups by treating them as if they were States subject to international human rights obligations. The fact that such groups are said to be bound by IHL, rather than bolstering the case for human rights law to apply to armed groups, actually only exacerbates the controversy as this viewpoint is used as a reminder that the rationales of IHL and human rights are separate with distinct features, and that convergence in this area would undermine the complementarity and coherence of the regimes.⁶³

These debates in the end mask concerns about the place of non-State actors in international relations and the perceived need to patrol the frontiers of different branches or disciplines. They also reveal that there may be competing views on the concept of human rights.⁶⁴ In the context of detention by armed groups there is little point in dwelling on the question of whether these groups are bound as such by the relevant human rights treaties; the reality is that the treaty body mechanisms will probably not be

62. See, e.g., Nigel Rodley, *Non-State Actors and Human Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 523 (Scott Sheeran et al. eds., 2013); Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, in KRISENSICHERUNG UND HUMANITÄRER SCHUTZ – CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 573 (Horst Fischer et al. eds., 2004); LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW (2002); Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INTERNATIONAL LAW JOURNAL 21 (2013); Tilman Rodenhäuser, *International Legal Obligations of Armed Opposition Groups in Syria*, INTERNATIONAL REVIEW OF LAW (2015), <http://www.qscience.com/doi/pdf/10.5339/irl.2015.2>.

63. See Olson, *supra* note 22.

64. See, e.g., Manfred Nowak & Karolina M. Januszewski, *Non-State Actors under International Humanitarian Law*, in NON-STATE ACTORS IN INTERNATIONAL LAW 113, 124–32 (Math Noortmann et al. eds., 2015); ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 124–49 (1993).

available to the victims of any violations. This is explained by Greenwood, who wrote:

The obligations created by international humanitarian law apply not just to states but to individuals and to non-state actors such as a rebel faction or secessionist movement in a civil war. The application to non-state actors of human rights treaties is more problematic and even if they may be regarded as applicable in principle, the enforcement machinery created by human rights treaties can normally be invoked only in proceedings against a state.⁶⁵

The human rights obligations of these groups nevertheless concern us because the UN human rights mechanisms, as well as certain regional mechanisms and non-governmental organizations, need to report on the human rights records of these groups, and these monitors are in need of a relevant legal framework. Human rights law rather than IHL may be crucial because either the group is not organized enough to constitute a party to an internal armed conflict and therefore there is no applicable binding IHL, or because the monitoring body may be confined to considering only human rights law. Moreover, as the scholarship by Katharine Fortin persuasively demonstrates, even during an armed conflict “life goes on” and there may be various instances of detention and trial by armed groups that are unrelated to the conflict.⁶⁶ In such cases there would be no nexus for the purposes of war crimes law; indeed one might even argue that IHL itself might not apply.⁶⁷

The authors of a report on Libya by OHCHR explain their rationale for applying human rights law to armed groups: “The present report adopts the approach that non-State actors who exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.”⁶⁸ In this detailed report on Libya OHCHR refers to de-

65. Christopher Greenwood, *The Application of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 76 (Dieter Fleck ed., 2007).

66. Fortin, *supra* note 37, at 167.

67. *Id.* at 170–79.

68. Human Rights in Libya Report, *supra* note 44, ¶ 29; *see also* Final Report of The International Commission of Inquiry on the Central African Republic, transmitted by Letter Dated 22 December 2014 from the Secretary-General Addressed to the President of the Security Council, ¶ 107, U.N. Doc. S/2014/928 (Dec. 22, 2014) (footnotes omitted) (“Debates that took place in the late part of the twentieth century as to whether such non-state actors are nevertheless bound by the standards of international human rights law,

tainees “arbitrarily detained” by “armed group members” and “denied their basic legal rights.”⁶⁹ While there are multiple references to “violations and abuses” in an obvious nod towards those who insist on the doctrinal distinction between human rights violations by the State and abuses committed by an armed group, in the end the report considers that either a State or a non-State actor can engage in arbitrary detention and deny basic legal rights.⁷⁰ There is no suggestion that “abuses” do not constitute denial of legal rights, and in the section on enforced disappearances the authors of the report reveal the arbitrariness of any such distinction due to the shifting alliances between the various groups and the government. In a footnote justifying the use of the expression “enforced disappearance” to cover the acts of non-State actors, they explain:

In the present report, the term “disappearance” refers to enforced disappearances committed by the State as well as disappearances committed by armed groups. It is intended to reflect both the various legal regimes applicable to enforced disappearances and the factual complexity in Libya vis-à-vis the status of armed groups, many of which were theoretically brought under State ministries⁷¹

In fact, human rights treaty law clearly encompasses disappearances by armed groups. Article 3 of the UN Convention on Enforced Disappearances demands that “[e]ach State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.”⁷² When the UN reports on such acts they address and name the groups as such and do not simply generically remind the States of their responsibilities. The fact that the groups do not report to the relevant treaty body is rather irrelevant in the process of defining the normative framework and detailing the incidents which have led to a “denial of legal rights.” It remains likely that individuals could face

have today been replaced by a general understanding that non-state groups that exercise de facto control over territory must respect human rights in their activities.”); Steven R. Ratner, *Accountability and the Sri Lankan Civil War*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 795, 801 (2012).

69. Human Rights in Libya Report, *supra* note 44, ¶ 138.

70. *See id.* ¶¶ 125, 296.

71. *Id.* ¶ 153 n.178.

72. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3.

prosecutions for the crime against humanity of enforced disappearance, whether or not they are State actors as long as this was pursuant to or in furtherance of an organizational policy to commit an attack directed against any civilian population.⁷³

For a more general look at the list of international human rights obligations attached to armed groups we might consider the UN human rights report on the conflict in South Sudan:

The most basic human rights obligations, in particular those emanating from peremptory international law (*ius cogens*) bind both the State and armed opposition groups in times of peace and during armed conflict. In particular, international human rights law requires States, armed groups and others to respect the prohibitions of extrajudicial killing, maiming, torture, cruel inhuman or degrading treatment or punishment, enforced disappearance, rape, other conflict related sexual violence, sexual and other forms of slavery, the recruitment and use of children in hostilities, arbitrary detention as well as of any violations that amount to war crimes, crimes against humanity, or genocide.⁷⁴

This, of course, raises the question what counts as arbitrary detention by an armed group. As we saw in the section on IHL, one could consider that all detention by an armed group is illegal as it is not authorized under the State's legal order. Perhaps the way forward is to separate out unlawful detention from arbitrary detention.

The UN Human Rights Committee explained in its General Comment 35:

The notion of “arbitrariness” is not to be equated with “against the law,” but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. . . . Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.⁷⁵

73. Rome Statute, *supra* note 49, art. 7(2)(a).

74. United Nations Mission in the Republic of South Sudan, *Conflict in South Sudan: A Human Rights Report*, ¶ 18 (May 8, 2014), https://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf.

75. U.N. Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), ¶ 12, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

While they were here addressing the obligations of States parties to the ICCPR, the UN bodies engaged in field monitoring, for example as we saw with Libya, are using a similar sense of what constitutes arbitrary detention when reporting on the denial of legal rights by armed groups.

With regard to fair trial, it is harder to pull out the applicable norms because, as already mentioned, monitors are fearful of justifying detention and trial by armed groups. But to the extent that UN reports, such as the one on Libya, assert that “non-State actors who exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control,”⁷⁶ let us flesh out the human rights norms that would apply in challenging arbitrary detention, and then look in a second section on rights related to fair trial.

A. Challenging Arbitrary Detention and Some Proposed Procedural Safeguards

With regard to the “periodic re-evaluation” mentioned by the UN Human Rights Committee, we might take some inspiration from the minimal rights suggested by the ECtHR in the context of the internment of security detainees in occupied territory. In *Hassan*, the Court suggested that

the “competent body” should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay.⁷⁷

While the armed group does not have the same right to intern certain individuals that a State will have in an international armed conflict, the idea that there should be an impartial body able to order release and to hear requests shortly after detention makes sense and could be adapted to an armed group depending on the context. In 2017, the UK Supreme Court in the *Serdar Mohammed* judgment considered the parameters of what the minimal procedural guarantees might be for a State in the context of a non-international armed conflict. The judgment of Lord Sumption offers the

76. Human Rights in Libya Report, *supra* note 44, ¶ 29.

77. *Hassan*, *supra* note 14, ¶ 106.

following prescription as to what he considered impartiality should mean for a State in these circumstances:

What is required is not just impartiality in fact, but the appearance of impartiality and the existence of sufficient institutional guarantees of impartiality. I would accept that it may be unrealistic to require military detention in a war zone to be reviewed by a body independent of the army or, more generally, of the executive, especially if reviews are to be conducted with the promptness and frequency required. But it is difficult to conceive that there can be sufficient institutional guarantees of impartiality if the reviewing authority is not independent of those responsible for authorising the detention under review, as it commonly is in the practice of other countries including the United States.⁷⁸

Lord Sumption also helpfully distilled the minimum conditions for fairness in this context:

There is no treaty and no consensus specifying what fairness involves as a matter of international humanitarian law. But some basic principles must be regarded as essential to any fair process of adjudication. In the present context, the minimum conditions for fairness were (i) that the internee should be told, so far as possible without compromising secret material, the gist of the facts which are said to make his detention necessary for imperative reasons of security; (ii) that the review procedure should be explained to him; (iii) that he should be allowed sufficient contact with the outside world to be able to obtain evidence of his own; and (iv) that he should be entitled to make representations, preferably in person but if that is impractical then in some other effective manner.⁷⁹

In the previous section we ventured three minimal obligations for an armed group detaining people in the context of an armed conflict.⁸⁰ These obligations were drawn from the practice and dynamics of IHL. Should we similarly venture some minimal “habeas corpus style” adapted rights in the context of human rights law? I would suggest that there is some purpose in such an exercise.

First, in today’s conflicts there is often uncertainty or political opposition to the application of IHL. This can be because the groups have not

78. *Mohammed* [2017], *supra* note 10, [105] (Lord Sumption SCJ).

79. *Id.* [107] (Lord Sumption SCJ); *see also id.* [209]–[219] (Lord Mance SCJ).

80. *See supra* Part III.

necessarily reached the level of organization to trigger the application of IHL (as we saw in Syria at the beginning of the unrest), or because the level of violence may not be such as to be considered intense or protracted enough to merit the application of IHL (as was seen at certain points with Boko Haram), or because the fighting has ceased yet the groups retain control over territory and parts of the population and are exercising judicial and law enforcement functions (as was seen in Nepal).⁸¹

Second, where a commission of inquiry has been established with a human rights mandate it will inevitably have to report on abuses by the armed group. Depending on the capacity and circumstances of the group it is unlikely that the full range of treaty obligations of the State can be transposed onto the non-State actor. Attempting to adapt a so-called “hard core” or set of non-derogable rights as applied to States seems to miss the point. The question is what can be expected of armed groups in such circumstances. I think one can reiterate the three basic minimum guarantees we presented in the section on IHL, worth repeating as there may be situations where IHL does not apply and the obligations stem entirely from human rights law:

1. An effective right to challenge the arbitrariness of any detention before an impartial body capable of ordering release.
2. The right not to be subject to prohibited discrimination with regard to the grounds for detention or during the process for challenging the detention.
3. That there be a reasonable necessity for the detention, such as the prevention of crime, the threat of serious prejudice to the security of the group, or the preparation of a criminal, or disciplinary case.

81. Frederick Rawski, *Engaging with Armed Groups: A Human Rights Field Perspective from Nepal*, 6 INTERNATIONAL ORGANIZATIONS LAW REVIEW 601 (2009). Some IHL guarantees may continue even in the absence of the threshold criteria for the application of IHL in a NIAC, and where there is no acceptance that armed groups have human rights obligations there may be policy reasons which favor an extension of the application of IHL beyond what is normally understood as the conflict. See Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 163, 181 (2014). The ICRC suggests that the conflict is at an end when there is “a lasting cessation of armed confrontations without real risk of resumption.” 2016 ICRC COMMENTARY, *supra* note 30, ¶ 491.

And we can perhaps add some more.

In his scholarly book-length treatment, *Detention in Non-International Armed Conflict*, Hill-Cawthorne concludes that the customary international law concerning procedural guarantees is minimal and inadequate.⁸² He proposes to build on that law without necessarily suggesting that the additional guarantees represented binding international law in 2016. His proposed regime (which is primarily aimed at States) would nevertheless address armed non-State actors in control of territory and would add to the general minimal guarantees identified above various procedural protections. For our purposes, I would highlight three which seem to derive mainly from international human rights norms:

1. An emphasis on the requirement of a legal basis for detention;⁸³
2. The need for reasons to be given for detention;⁸⁴ and
3. Prolonged or indefinite detention should lead to a change in the level of proof demanded of those seeking to justify continued detention.⁸⁵

The need for a legal basis for detention has bedeviled the thinking on this topic. No State will accept that the armed group it is fighting can develop its own laws for detention, yet such laws are developed and at one level they have to be encouraged to give those engaged with armed groups the chance to introduce some modicum of fairness and right of review.

Interestingly, the UK *Manual of the Law of Armed Conflict* quotes Article 6(2)(c) of AP II as one of the requirements for a fair trial: “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law at the time when it was committed.”⁸⁶ The *Manual* then, having referred to the fact that the French text uses the expression *le droit national ou international*, continues, “[t]he bare word ‘law’ must be taken to include both national and international law. It

82. HILL-CAWTHORNE, *supra* note 22, at 226.

83. *Id.* at 237–38.

84. *Id.* at 238.

85. *Id.* at 131–32, 242.

86. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.42c (2004).

could also be wide enough to cover ‘laws’ passed by an insurgent authority.”⁸⁷ If “law” can be read to include laws promulgated by armed groups for the purposes of criminal trials, similar laws ought to be relevant for the purposes of determining whether the armed group is engaging in arbitrary detention and, as Hill-Cawthorne suggests, “they might offer sufficient notice . . . of the kind of activity . . . which could lead to internment.”⁸⁸ It therefore seems appropriate to encourage such groups to state the basis on which people will be detained and to offer individuals explanations as to why they fall into the category resulting in their detention. This need to address issues of legality need not be seen as appertaining only to human rights law but is inherent to the meaningful operations of the minimum guarantees outlined in the section on IHL.

B. The Human Rights to Fair Trial in the Court of an Armed Group

So far we have been discussing the right to challenge detention by an armed group. What then of the more extensive guarantees to a fair trial? In an early study Theodor Meron sought to list the customary law of fair trial. In addition to the right to an independent and impartial tribunal established by law, Meron included the following:

- The prohibition on retroactive penal measures;
- The right to the presumption of innocence;
- The right not to be compelled to testify against oneself or confess guilt;
- The right to be tried in one’s presence and to be represented;
- The right to examine witnesses against you; and
- The right to have a sentence or conviction reviewed by a higher tribunal according to law.⁸⁹

The separate customary human rights law origins of this list means that one could apply most of these rights to trials by armed groups even outside the context of an armed conflict.⁹⁰ Of course, they may have to be adjusted

87. *Id.* ¶ 15.42c n.94.

88. HILL-CAWTHORNE, *supra* note 22, at 238.

89. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 96 (1989).

90. UN commissions of inquiry have sometimes chosen to turn to customary human rights law when seeking to outline the obligations binding on armed groups. *See, e.g.*, Re-

depending on the capacity of the group in the particular context to provide an appeal instance and appropriate representation, but the general principles have been applied by human rights organizations in judging the fairness of the justice systems of armed groups.⁹¹

Daragh Murray in his scholarly study *Human Rights Obligations of Non-State Armed Groups* has sought to detail how the principal guarantees might be interpreted in the context of regulating courts of armed groups. We might here summarize some of his key points.

First, although there may be a trend in human rights law to prohibit the trial of civilians in military courts in situations outside armed conflict, such a principle may not be appropriate for the courts of armed groups where an alternative judicial system may not exist and could not reasonably be expected.⁹²

Second, in order to generate independence and impartiality among the group's judicial branch it may be appropriate to encourage the creation of a unit outside the armed group's chain of command.⁹³

Third, the human rights requirement of a *public* trial may have to be adjusted in the context of trials by the courts of armed groups, although Murray suggests that "when an armed group exerts stable territorial control it is difficult to envisage justifications for not holding public trials."⁹⁴

Fourth, bearing in mind that the imposition of the death penalty in violation of fair trial guarantees can constitute a violation of the right to life, (and we might add could constitute inhuman treatment), Murray suggests an absolute prohibition on the issuance of death sentences by armed groups, in particular where such groups operate in States which have abol-

port of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 85, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) (referring to "customary legal principles"); *see also* report by Thomas Hammarberg, Report on Human Rights in the Transnistrian Region of the Republic of Moldova 4 (Feb. 14, 2013), http://www.undp.org/content/dam/moldova/docs/Publications/UN_MD_Senior_Expert_Hammarberg_Report_TN_Human_Rights.pdf (regarding *de facto* authorities); Daniel Bethlehem, *The Methodological Framework of the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3, 8 (Elizabeth Wilmshurst & Susan Breau eds., 2001) ("[C]ustom may be opposable beyond States, not only to armed opposition groups but also to other non-State actors and individuals.").

91. Andrew Clapham, *Focusing on Armed Non-State Actors*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 803 (Andrew Clapham & Paola Gaeta eds., 2014).

92. MURRAY, *supra* note 37, at 211.

93. *Id.* at 213.

94. *Id.* at 219.

ished the death penalty.⁹⁵ I would go further and suggest that because, outside combat situations, the human right to life only allows for intentional deprivations of life in situations related to the necessity of saving a life or preventing serious injury,⁹⁶ any use of the death penalty by an armed group would be a violation of human rights law. To the extent international law permits States to impose the death penalty (as evidenced by, for example, ICCPR Article 6), that exceptional power can be presumed to be reserved to States.

Of course, where the armed group is a party to an armed conflict and there is a necessary link to the conflict, the judicial guarantees referred to in Common Article 3, as elaborated in the 2016 ICRC *Commentary*, and the substance of the obligations in Article 75 of AP I, would apply to the armed group.⁹⁷ Furthermore, the provisions of AP II would also apply directly to the armed group in situations where that treaty is applicable. These minimal human rights to fair trial or due process rights could also form a useful platform on which to build in contexts where the application of the law of armed conflict cannot apply or needs to be complemented.

Building on the catalogue developed by Meron, we have seen the adoption by a group of experts of the 1990 Turku Declaration of Minimum Humanitarian Standards. The Declaration (revised in 1994) is clear that it applies to all situations (and not only armed conflicts)⁹⁸ and that “[t]hese standards shall be respected by, and applied to all persons, groups and au-

95. *Id.* at 220.

96. See, for example, the draft general comment on the right to life prepared by the UN Human Rights Committee which states with regard to self-defense: “and the threat responded to must be extreme, involving imminent death or serious injury.” The comment then continues:

The deliberate use of lethal force for law enforcement purposes which is intended to address less extreme threats, such as protecting private property or preventing the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others, cannot be regarded as a proportionate use of force.

U.N. Human Rights Committee, Draft General Comment No. 36: Article 6 (Right to Life), U.N. Doc. CCPR/C/GC/R.36/Rev.2, ¶ 18 (Sept. 2, 2015).

97. See *supra* Part III.B.2.

98. U.N. Secretary-General, *Report Prepared Pursuant to Commission Resolution 1995/29*, U.N. Doc. E/CN.4/1996/80, annex, art. 1 (Nov. 28, 1995).

thorities, irrespective of their legal status and without any adverse discrimination.”⁹⁹

The standards include the following articles:

Article 4

1. All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.
2. All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.
3. The right to an effective remedy, including habeas corpus, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.
4. All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions.

Article 9

No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations. In particular:

- a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her, shall provide for a trial within a reasonable time, and shall afford the accused before and during his or her trial all necessary rights and means of defence;

99. *Id.* art. 2.

- b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
- c) anyone charged with an offence is presumed innocent until proved guilty according to law;
- d) anyone charged with an offence shall have the right to be tried in his or her presence;
- e) no one shall be compelled to testify against himself or herself or to confess guilt;
- f) no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure;
- g) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed.

Article 11

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.

Inevitably, some will be quick to point out that this is not treaty law. But a moment's reflection must lead to the conclusion that States are unlikely to write a treaty setting out the procedural guarantees that "terrorists" must respect when detaining, prosecuting or punishing their captives. In the absence of treaty law, or some internationally agreed text, the UN's Independent International Commission of Inquiry on the Syrian Arab Republic will likely have increasing recourse to these quite detailed guarantees, which have never really been formally questioned by States at least insofar as they should apply to armed groups. Already the Commission of Inquiry has recommended that "[a]rmed groups, in particular the FSA and its local groups, should: (a) Adopt and publicly announce rules of conduct that are in accordance with international human rights law and other applicable international standards, including those reflected in the Declaration of Minimum Humanitarian Standards."¹⁰⁰

100. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 133(a), U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

V. STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY
WITH REGARD TO NON-STATE ACTOR DETENTION IN VIOLATION
OF INTERNATIONAL LAW

The focus of this article has been on the obligations of armed groups as such. But during my presentation at Harvard University at the 2016 workshop “Global Battlefields: The Future of U.S. Detention under International Law,” it became clear that the key interest in this area is on the implications for States of these non-State actor obligations. I therefore propose very briefly to outline the different legal routes by which the State or its agents might be liable for a breach of international law in this context. This is a thumbnail sketch; going into the nuances would undermine the point of the present contribution which is to highlight the need to develop the detailed international obligations which attach to armed non-State actors. There has been some confusion over the levels of knowledge and control that trigger State responsibility. I therefore propose that we break down this topic along the following lines: attribution, aid and assistance by the State leading to State responsibility for the contribution (State complicity), individual criminal complicity, obligations under Common Article 1 to the Geneva Conventions and obligations under human rights law, including obligations of prevention under the Genocide Convention and any future convention on crimes against humanity.

A. Attribution

Where the group is actually acting as an organ of the State, or is being effectively controlled by the State, the acts of the group can be attributed to that State and the consequences under the law of State responsibility will apply. The issue was touched on by the International Court of Justice (ICJ) in the *Bosnian Genocide* judgment where it concluded that the customary international law rule in all contexts is that there will be State responsibility if the constitutive acts of the “[State’s] organs or persons other than the State’s own agents were carried out, wholly or in part, on the *instructions or directions* of the State, or under its *effective control*.”¹⁰¹ Importantly, the Court concluded that the massacres constituting genocide were neither commit-

101. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 401 (Feb. 26) (emphasis added) [hereinafter *Bosnian Genocide*].

ted on the instructions or under the direction of the State nor that the State “exercised effective control *over the operations* in the course of which those massacres . . . were perpetrated.”¹⁰²

The ICJ also held that non-State actor acts will be attributable to a State where the acts are carried out “by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of *complete dependence* on the State.”¹⁰³ One might think of this as attribution through *de facto* organs of the state, but the ICJ considers this an “exceptional” situation which requires a “particularly great degree of State control”.¹⁰⁴ On the facts it was held there was no such dependence with regard to the Republika Srpska, the Army of the Republika Srpska or the Scorpi- ons. In an earlier case the Court similarly found that there was no requisite complete dependence between the *contras* in Nicaragua and the United States.¹⁰⁵

Both these rules of attribution (control over operations and complete dependence) would apply to States in such a relationship with an armed group that is violating the international obligations incumbent on non-State actors with regard to detention. In addition, the acts of the armed group will be attributed to a State where the group is acting as a *de facto* organ of the State.

B. *Aid and Assistance by the State (State Complicity)*

The test for State complicity in the international wrongs of armed non-State actors was also tackled by the ICJ in the *Bosnian Genocide* judgment. Simply stated, a State will be responsible for its contribution to the international wrong when it knowingly made a substantial contribution to the wrongful act. The case is complicated by the fact that the crime of genocide includes a specific intention and the Court chose not to find that the assisting State had knowledge of that intention at the material time. One could also get distracted by ideas that there could be State responsibility for inciting genocide, as opposed to directing it. But with regard to the international wrongs connected to detention by armed groups the situation is

102. *Id.* ¶ 413 (emphasis added).

103. *Id.* ¶ 406 (emphasis added).

104. *Id.* ¶ 393.

105. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 109–10. (June 27) [hereinafter *Nicaragua*].

much simpler. The rule on State assistance is reflected in Article 16 of the International Law Commission's Articles on State Responsibility.¹⁰⁶ The ICJ felt comfortable applying these principles to determining responsibility for a State assisting a non-State actor.¹⁰⁷ Controversy surrounds the question of whether the assisting State need have actual knowledge, imputed knowledge, constructive knowledge or presumed knowledge of the use to which the assistance would be put.¹⁰⁸ Stated another way, should the State be responsible where it was negligent, reckless or willfully blind to the consequences of its assistance?

We cannot resolve these questions here, not least because there is a dearth of relevant State practice. What is clear from the *Bosnian Genocide* judgment is that the assisting State must be aware of the circumstances surrounding the unlawful acts and aware that the assistance facilitated those acts by the non-State actor.¹⁰⁹ In the present context, where human rights reports concerning violations by armed non-State actors are regularly sent to States, one can assume that the requisite knowledge is likely to be imputed to the State.

106. International Law Commission, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 43, 47 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

107. *Bosnian Genocide*, *supra* note 101, ¶ 420.

108. See Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, *Texas Law Review*, 95 TEXAS LAW REVIEW (forthcoming 2017); JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 405 (2014); Robin Geiß, *The Obligation to Respect and to Ensure Respect for the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 37, at 111; MILES JACKSON, COMPLICITY IN INTERNATIONAL LAW 159 (2015); VLADYSLAV LANOVY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY 218–50 (2016). Brian Finucane's conclusion on State responsibility is of some relevance here: "For example, if an assisting State continued to provide assistance to its partner with knowledge of systemic deficiencies in its partner's targeting or detention practices that render LOAC violations more likely, there is a risk that the intent by the assisting State to facilitate LOAC violations could be inferred." Brian Finucane, *Partners and Legal Pitfalls*, 92 INTERNATIONAL LEGAL STUDIES 407, 417 (2016) (He is here referring to assistance to a State partner, but similar inferences could be drawn when assisting an armed group.) A recent study carried out at Chatham House concluded that Article 16 of the Articles on State Responsibility had been applied by analogy to assistance to armed groups. See HARRIET MOYNIHAN, AIDING AND ASSISTING: CHALLENGES IN ARMED CONFLICT AND COUNTERTERRORISM, 23–4 (2016), <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>.

109. *Bosnian Genocide*, *supra* note 101, ¶ 432.

C. Individual Criminal Complicity

The war crime of “unlawful confinement” of a protected person as listed in Article 8(2)(a)(vii) of the ICC Statute is a grave breach of the Geneva Conventions and therefore would only apply to an inter-State conflict. It is of course possible that an armed group could be under the control of a State engaged in an armed conflict with another State or acting as the occupier of another State.¹¹⁰ In such a case an individual providing assistance to the armed group unlawfully detaining a protected person, either in occupied territory or in the controlling State’s own territory, could be prosecuted for complicity in this war crime (also a grave breach of Geneva Convention IV). Unlawful confinement would include, first, holding someone where the decision had been taken on a collective rather than an individual basis that the person concerned actually represented a threat to security, and second, holding someone whose initial internment may have been lawful, but whose confinement became unlawful due to the failure to respect the basic procedural rights of the detainee.¹¹¹ Although the war crime of unlawful confinement is not listed in the ICC Statute for non-international armed conflicts, the ICRC customary IHL study has highlighted that national legislation and various military manuals use terminology which varies from “unlawful/illegal confinement and unlawful/illegal detention to arbitrary or unnecessary detention,” often applied to non-international armed conflicts. This indicates that the prohibition on arbitrary deprivation of liberty indeed applies in non-international armed conflicts.¹¹²

We have already touched on the other war crime of sentencing or execution without due process, as found in ICC Statute Article 8(2)(c)(iv) and Common Article 3. Here there would be no need to find a nexus to an international armed conflict. Individuals who assist in the commission of the ICC crimes defined in 8(2)(c)(iv) or the grave breach defined in Article

110. A 2012 ICRC report concluded that there was agreement among the invited experts that “a State may be considered an occupying power for the purposes of IHL when it enforces overall control over *de facto* local authorities or other organized groups that have effective control over a territory or part thereof.” INTERNATIONAL COMMITTEE OF THE RED CROSS, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 10 (2012).

111. DÖRMANN ET AL., *supra* note 51, at 112–23; *see also* Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, ¶¶ 576–82 (Int’l Crim. Trib. for the former Yugoslavia Nov. 16, 1998); and on appeal, Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 320 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001).

112. CIHL, *supra* note 43, at 347.

8(2)(a)(vii) will be liable to be found responsible as accomplices under international criminal law in line with the modes of liability found in Article 25 of the ICC Statute, or if prosecuted elsewhere under customary international law on accomplice liability, which may arguably be a little wider.¹¹³ To the extent that States have made this war crime triable in their own courts, some would consider this a crime of universal jurisdiction in the sense that a State may not need to show any jurisdictional link with the crime or the defendant.¹¹⁴ Similar individual responsibility could arise for complicity in genocide or crimes against humanity (although some debate still surrounds the extent to which an armed group needs some State-like qualities in order to commit crimes against humanity).¹¹⁵

D. Obligations under Common Article 1 of the 1949 Geneva Conventions

Common Article 1 of the Geneva Conventions reads: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” The customary equivalent of this obligation was part of the reasoning of the ICJ in the case brought by Nicaragua against the United States. Most pertinently, the United States was accused of encouraging the *contras* to violate the provision in Common Article 3 relating to sentencing or execution without a judgment from a court providing effective fair trial guarantees. In the particular circumstances the Court was examining a training manual which they found had been supplied by “an agency of the United States” to the armed opposition in Nicaragua (*Fuerza Democrática Nicaragüense*)¹¹⁶ and it concluded:

113. See Brief of David J. Scheffer as Amicus Curiae In Support of the Issuance of a Writ of Certiorari, *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 562 U.S. 946 (2010) (No. 09-1262) (writ of certiorari denied).

114. See CIHL, *supra* note 43, r. 157.

115. See KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW* ch. 10 (forthcoming 2017); WILLIAM SCHABAS, *UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AND THE WAR CRIMES TRIBUNALS* 125–52 (2012); Tilman Rodenhäuser, *Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law: What Degree of Organization is Required?* pt. III (2016) (unpublished Ph.D. dissertation, Graduate Institute of International and Development Studies, Geneva, Switzerland) (on file with the Graduate Institute of International and Development Studies Library).

116. *Nicaragua*, *supra* note 105, ¶ 122.

The Court takes note of the advice given in the manual on psychological operations to “neutralize” certain “carefully selected and planned targets,” including judges, police officers, State Security officials, etc., after the local population have been gathered in order to “take part in the act and formulate accusations against the oppressor.” In the view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants, of

“the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”

and probably also of the prohibition of “violence to life and person, in particular murder to all kinds, . . .”.¹¹⁷

In the following paragraph the Court uses an awareness test and concludes that “at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behavior of the *contras* in the field was not consistent with humanitarian law.”¹¹⁸ The publication and dissemination of the manual was held to be “encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.”¹¹⁹ The Court seems to be saying that the encouragement was in violation of the principle to respect and ensure respect for IHL as the relevant acts of the *contras* were violations of IHL.

Hathaway and her fellow authors have highlighted these passages and suggested that one can take this reasoning a step further and, based on a reading of the 2016 ICRC *Commentary*, determine that there is a positive obligation on States to prevent violations of Common Article 3 by non-State actors.¹²⁰ This argument that the Geneva Conventions contain some sort of due diligence obligation on States warrants close attention, but would take us beyond the focus of this contribution. For ease of reference here are the key paragraphs from the *Commentary*:

117. *Id.* ¶ 255.

118. *Id.* ¶ 256.

119. *Id.*

120. Hathaway et al., *supra* note 108.

The duty to ensure respect covers not only the armed forces and other persons or groups acting on behalf of the High Contracting Parties but extends to the whole of the population over which they exercise authority, i.e. also to private persons whose conduct is not attributable to the State. This constitutes a general duty of due diligence to prevent and repress breaches of the Conventions by private persons over which a State exercises authority, including persons in occupied territory. This is an obligation of means, whose content depends on the specific circumstances, in particular the foreseeability of the violations and the State's knowledge thereof, the gravity of the breach, the means reasonably available to the State and the degree of influence it exercises over the private persons.¹²¹

The duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation, even more so as this case is closely related to the negative duty neither to encourage nor to aid or assist in violations of the Conventions. The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a unique position to influence the behaviour of those forces, and thus to ensure respect for the Conventions.¹²²

E. Positive Obligations under Human Rights Law and the Law on the Prevention of Genocide and Crimes against Humanity

Human rights treaty law has developed an impressive jurisprudence with regard to what are known as “positive obligations.” These would include an obligation to protect people from infringements of their rights by armed non-State actors. The subject is complex and dependent in part on the specific treaty being considered, the ambition of the treaty monitoring body or court, and the vexing question of the extent of extraterritorial human rights treaty obligations. The general principle can be best seen at work in General Comment 31 of the UN Human Rights Committee:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts

121. 2016 ICRC COMMENTARY, *supra* note 30, ¶ 150, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD> (footnotes omitted).

122. *Id.* ¶ 167.

committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹²³

At the regional level, the ECtHR, Inter-American Court of Human Rights and African Commission on Human and Peoples' Rights have on several occasions found States in violation of their human rights obligations where they have failed to prevent, prosecute or punish violations committed by non-State actors.¹²⁴ Such obligations are also sometimes known as duties to protect. They obviously apply as a matter of international law to the States parties to the treaties. The extent to which it makes sense to speak about positive obligations under human rights law for armed groups is only now being explored.¹²⁵ At this point the focus should perhaps be less on law and more on what makes sense in terms of engaging with those groups that are seeking to present themselves as governments in waiting with a full understanding of what good governance entails.¹²⁶

With respect to the Genocide Convention,¹²⁷ it is not hard to imagine that some sorts of detention or prosecution policies by armed groups could amount to genocide. Suffice it to mention Article 2(d) which includes as genocide "[i]mposing measures intended to prevent births within the

123. U.N. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

124. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATION OF NON-STATE ACTORS ch. 9 (2006); ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004). In some cases this positive obligation is said to be mixed with attribution of the acts of the non-State actor to the State. See JACKSON, *supra* note 108, ch. 8.

125. See GENEVA CALL, POSITIVE OBLIGATIONS OF ARMED NON-STATE ACTORS: LEGAL AND POLICY ISSUES (2016), http://www.genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf.

126. FORTIN, *supra* note 115, at 3–7; REBEL GOVERNANCE IN CIVIL WAR (Ana Arjona et al. eds., 2015); JEREMY M. WEINSTEIN, INSIDE REBELLION: THE POLITICS OF INSURGENT VIOLENCE (2007).

127. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

group.” The question arises when would a State be held responsible for failure to prevent such acts by an armed group. As we saw above, the ICJ in the *Bosnian Genocide* judgment has set out the rules for attribution to the State and for State complicity in the acts of the armed group. A separate test relates to the positive obligations incumbent on the State. The Court spelled out the relevant criteria before going on to find that Serbia had failed to take the appropriate action and was therefore responsible for failing in its duty to prevent genocide by the relevant armed group:

A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of “due diligence,” which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State’s capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.¹²⁸

Although a proposed convention on crimes against humanity has yet to be drafted and adopted, the early work by the International Law Commission suggests that an analogous provision on the duty to prevent crimes against humanity is likely to be included. In this way a State party that failed to exert its influence over an armed group engaged in enforced disappearances as a crime against humanity could find itself in violation of its treaty obligations due to the detention policies of an armed group. Such a duty to “employ the means at its disposal to prevent persons or groups not directly under its authority from committing crimes against humanity” has been

128. *Bosnian Genocide*, *supra* note 101, ¶ 430.

foreseen in the draft articles by the members of the International Law Commission.¹²⁹

VI. FINAL REMARKS

The international community has proven to be incredibly coy about discussing the obligations of armed groups with regard to detention. When it comes to discussing who may be detained and the procedures for challenging such detention there is a weird sort of silence. This is, of course, understandable as there are knock-on effects in any such discussion. If there is no right to detain fighters from the other side or dangerous civilians, what does that tell us about the State's own rights under international law? If one starts to set out procedures and prohibitions, will that not legitimize the behavior of those that comply? The problems are exacerbated for international organizations whose members do not want to see such potentially legitimizing behavior towards those who would seek to overthrow them. Non-governmental organizations similarly have to tread carefully for fear of being charged with material assistance to terrorism.

Nevertheless, I have argued that we should bite the bullet and seek to set out some of the principles that are already being applied to armed groups and engage with them to ensure that those who come under their control are treated with respect for their dignity in a fair and predictable way. I have sought to avoid doctrinal discussion about which branch of international law represents the best fit for these groups. The truth is that they may often be operating outside the strict definition of what constitutes an armed conflict, yet there is a need to monitor their behavior and ensure some sort of protection to the individuals detained by such groups.

Of course, in designing any engagement one would have to take into account the very different contexts that operate in this realm. The rationale and incentives for armed groups will differ depending on whether they are seeking to take over the State, form a new State or are simply out to enrich themselves. Their justice arrangements may also be influenced by whether they are protecting the population from State-counterinsurgency violence

129. Mathias Forteau, Chairman of the Drafting Committee, Statement during the Sixty-seventh Session of the International Law Commission: Crimes against Humanity at 8 (June 5, 2015), http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_crimes_against_humanity.pdf&lang=EF.

or whether they are themselves primarily responsible for the oppression.¹³⁰ In turn, such categories, or others which highlight ideology, religion, grievance or greed, should not determine whether or not one should engage, or whether or not the armed groups have obligations; they can only help to shape the form of engagement. Social science research reveals how even those groups that are primarily about enrichment might still pretend to develop forms of justice to satisfy foreign investors and to court international legitimacy.¹³¹ Where the economy of the group depends on local support the dynamic will be different as local justice procedures may need to satisfy noncombatants on whom the group depends. Moreover, the nature and characteristics of a group can change over time. In many contexts detention may not be a considered option, for some groups governance may rely “on a last resort threat of imposing capital punishment or exile on people who did not obey.”¹³²

Whether or not we are able to engage with the armed groups themselves, the last part of this article showed how a theory of obligations for armed groups is essential to understanding the secondary obligations of States in this context. Although litigation beyond war crimes prosecutions is unlikely to be pursued against armed groups, there are more and more opportunities for States to be held accountable for directing or assisting armed groups in their violations of international law, and, of course, in the context of genocide and crimes against humanity the State would be wise to exercise due diligence in any situation where it is in a position to exercise influence over armed groups that are likely to commit such acts.

We need to talk about detention by armed groups, and we need to fashion a more protective regime. We should banish any nightmares about the bogeyman of legitimacy and take responsibility for elaborating clear rules and procedures to be followed by those armed groups who are detaining our fellow human beings.

130. Nelson Kasfir, *Rebel Governance—Constructing a Field of Inquiry: Definitions, Scope, Patterns, Order, Causes*, in *REBEL GOVERNANCE IN CIVIL WAR*, *supra* note 126, at 21.

131. William Reno, *Predatory Rebellions and Governance: The National Patriotic Front of Liberia, 1989–1993*, in *id.* at 265.

132. Francisco Gutiérrez-Sanin, *Organization and Governance: The Evolution of Urban Militias in Medellín, Columbia*, in *id.* at 246, 263.