UNIVERSITY OF NAIROBI

SCHOOL OF LAW

DETENTION BY NON STATE ARMED GROUPS:

DEFINING THE APPLICABLE LAWS AND RULES

by

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G62/7078/2002

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF A DEGREE OF MASTERS OF LAW (LLM) OF THE UNIVERSITY OF NAIROBI

NAIROBI NOVEMBER 2015

DECLARATION

I, Abdalla Mohamed, do hereby declare that this is my original work and has not been submitted for a degree in any other university.

Signed: ....…….....……

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This dissertation is submitted with my approval as University Supervisor

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ABSTRACT

This thesis is about detention activities undertaken by non-state armed groups in situations of non-international armed conflicts. It focuses on the applicable laws and rules and ascertains the basis of non-state armed group's obligations towards detainees in internal conflicts.

The aim is to illuminate the international law fields which provide a basis and authority for NSAGs to carry out detention activities. Accordingly the thesis inquires into the specific procedures and rules relating to the various phases of detention; starting from identifying the valid reasons of arrest, the living conditions of detention, the treatment of detainees and the judicial guarantees during trial and sentencing.

The central question of the thesis is whether there is a basis in international humanitarian law for NSAGs to carry out detention and whether IHL and other international law fields have rules in place, which could rightly apply to NSAGs and sufficiently govern their detention activities. The thesis rests on a conclusion that Common Article 3 to the Geneva Conventions and Additional Protocol II are undisputed treaty laws with a solid basis for NSAGs obligations in situations of internal conflict, including specific obligations related to detention: humane treatment of detainees; regulating conditions of detention and minimum judicial standards. There is a gap to fill in terms of safeguarding detainees interests during interment.

Through a desk research, using primary and secondary sources, this thesis seeks to expand the protection scope for detainees and looks into the applicability of customary IHL and International human rights law to NSAGs and the content of relevant rules regulating detention activities. Apparently, both regimes supplement what is already contained in common Article 3 and Additional Protocol II.

ABBREVIATIONS / ACRONYMS

CPN-M	Communist Party–Maoists
ELN	Ejército de Liberación Nacional
FAFN	Forces Armées Force Nouvelles
FARC	Fuerzas Armadas Revolucionarias de Colombia
FMLN	Farabundo Marti National Liberation Front
FPLC	Force Patriotique pour la Libération du Congo
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Court Tribunal for Rwanda
ICTY	International Court Tribunal for Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
JEM	Justice and Equality Movement
LTTE	Liberation Tigers of Tamil Eelam
NSAG	Non State Armed Group
RPF	Rwanda Patriotic Front
SPLA	Sudanese People's Liberation Army
TPLF	Tigray People's Liberations Front
UN	United Nations
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs.
UNOSAL	United Nations Observer Mission in El Salvador
UPC	Union des Patriotes Congolais

GLOSSARY OF TERMS

In practice, there are some types of actions which, in the eyes of NSAGs look somewhat similar to deprivation of liberty, but they are not so. They are rather prohibited activities under domestic and international laws. As the delimiting line is quite faint, some NSAGs would not easily differentiate between detention and hostage taking or in terms of legal requirements, would not comprehend the difference between a detainee and a prisoner of war.

To set the record straight, I will determine here below, the different terminologies which will be used in this study and their intended meaning and the difference between one action and another.

1. **Detainees:** This terminology would apply to persons, either as members of armed forces who have been placed *hors de combat* by detention or civilians who are accused of crimes related to the conflict or under the criminal law. Under the Additional Protocol II, the law uses the term 'persons deprived of liberty', avoiding confusion and keeping distance from other concepts such as internment which is related to security detainees. Common Article 3 and provisions in Additional Protocol II calls for the humane treatment of detained persons.

2. **Prisoners of War:** This is a legal terminology with a specific meaning under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. This category of persons is specific to situations of international armed conflict. They include members of armed forces, among others. In non-international armed conflicts involving NSAGs, there are no prisoners of war; and captured soldiers or members of armed groups are either detainees or internees.

3. **Internment** is the deprivation of liberty of a person that has been ordered by the executive branch – not the judiciary – without criminal charges being brought against the interned person. Persons in this category are popularly known as security detainees. It is recognised both in the treaty law regulating international and non-international armed conflicts; but it is well regulated under the international armed conflicts, as will be seen later.

4. **Arbitrary Deprivation of Liberty** also known as unlawful confinement. In International conflict situations, this form of detention is the one which does not conform or is contrary to rules provided by the Geneva Conventions, which prohibit confinement of protected persons such as medical and religious personnel. In non-international armed conflict situations, the prohibition of arbitrary deprivation of liberty is established by state domestic legislations, as well as international human rights law.

5. **Taking of Hostages** is the seizure of detention of a person (the hostage), combined with threatening to kill, injure or to continue to detain the hostage, in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage. This is a common practice among NSAGs, mostly used to draw media attention or for political advantage.

LIST OF CASES

International Criminal Tribunal for the Former Yugoslavia.

International Criminal Tribunal for Rwanda

International Criminal Court

International Court of Justice

Inter-American Commission on Human Rights

LIST OF TREATIES AND INTERNATIONAL INSTRUMENTS

1949 Statute of the International Court of Justice

1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III)

1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV)

1966 International Covenant on Civil and Political Rights

1969 Vienna Convention on the Law of Treaties

1975 UN Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Res. 30/3451

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)

1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly Resolution 43/173

1995 Turku Declaration on Minimum Humanitarian Standards (adopted at a meeting of experts convened in Turku/Abo, Finland)

1998 Statute of the International Criminal Court

LIST OF DOMESTIC LAWS

- The Constitution of Kenya 2010, Revised Edition 2014 (2012)Laws of Kenya. 79, 80.
- The Penal Code, Chapter 63, Revised Edition 2014 (2012), Laws of Kenya. 80.

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ACKNOWLEDGEMENT

I take this opportunity to sincerely express my gratitude to all whose contribution, advice and support has made my work towards this thesis a success.

Initially, I appreciate my supervisor Mr. Yash Vyas, who committed his time to assist me think and work through the whole process. His advice, guidance and availability were remarkable.

I appreciate the support of the ICRC library staff in Geneva who made available the latest academic writings on the topic.

Finally, I appreciate the patience of my wife and children for their support throughout this long journey and accepted my frequent absence from home.

DEDICATION

This work is dedicated to the victims of internal conflicts, whose pain is rarely healed. May this work shed some light on your plight and enlighten parties to armed conflicts to recognize and provide for your protection.

'It is prohibited to order that there shall be no survivors'

Additional Protocol II, Article 4(1)

CHAPTER 1: INTRODUCTION

Background

According to the latest statistics by the Uppsala Conflict Data Program, until 2014, there were 27 non international armed conflicts compared to only one international armed conflict and 17 internationalised armed conflicts.[1] In the 1950s there were on average between six and seven international conflicts being fought around the world each year; in the new millennium the average has been less than one. The International armed conflicts are not only fewer, they have also become less and less deadly: in 1950s, average death toll was 21,000 people per year and in 1990s the average death toll was 5,000 and 3,000 in the new millennium.[2]

On the other hand, the world continues to witness a worrying proliferation of armed groups which are waging war against states for very long periods of time, running into decades. The Sudan People Liberation Army (SPLA), a non-state armed group (NSAG), initiated a military and a political struggle against the government of Sudan since 1983, for more than two decades, until 2005 when it entered into a peace agreement with Sudan. In July 2011, the military and political struggle of SPLA resulted in the birth of a new sovereign state, splitting from the Sudan.[3]

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[1] See details of data at the Uppsala Conflict Data Program at http://pcr.uu.se/research/UCDP/ (last checked 29 November 2015). The Uppsala Conflict Data Program is hosted by the University of Uppsala in Sweden. It is internationally recognized for its specialization past and present armed conflicts. For more information visit the website http://www.pcr.uu.se.

[2] See Human Security Report Project 2009/2010, Simor Fraser University, Canada 2011, p. 21, available at http://www.hsrgroup.org/docs/Publications/HSR20092010/20092010HumanSecurityReport-Part1-CausesOfPeace.pdf (last visited 20 March 2014).

[3] See https://en.wikipedia.org/wiki/Sudan_People%27s_Liberation_Movement (last visited 02 December 2015).

NSAGs are not uniform; there is a great variation from one group to another in their structure, size and extent of their authority on the ground. While some groups resemble *de facto* governments, exercising effective control on a vast territory, other groups are far inferior to the established government, operating in an opportunistic manner, without direct or permanent control over any territory.[4]

Even with limited control of territories, NSAGs, with sufficient military strength and organisational capacity, still resort to detaining persons of their interest in the areas under their military and administrative control. The law however, does confine NSAGs behaviour in this respect; for example, it prohibits the detention of protected persons which includes civilians in general and other categories of protected persons such as medical staff.

Detention by NSAGs is neither infrequent nor, necessarily, small-scale. In the first decade of the twenty-first century alone, NSAGs such as the Communist Party–Maoists (CPN-M) in Nepal, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Taliban in Afghanistan, the Forces Armées Force Nouvelles (FAFN) in Côte d'Ivoire, the Sudanese People's Liberation Army/Movement in Sudan, and the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejército de Liberación Nacional (ELN) in Colombia have all, and on multiple occasions, deprived people of liberty.[5]

This study will analyse the activity of detention by NSAGs in a non-international armed conflict situation. It will define the basis to which NSAGs are allowed to detain persons in relations to a conflict and the applicable rules of the International

[4] Zegveld, Liesbeth. *Accountability of Armed Groups in International Law,* Cambridge University Press, UK, (2002) p. 2.

[5] Tuck, David. "Detention by Armed Groups: Overcoming Challenges to Humanitarian Action." *International Review of the Red Cross.* Vol 93, Number 883, (September 2011), p. 3.

Humanitarian Law (IHL) as well as other international law instruments, especially the International Human Rights Law (IHRL) and Customary International Humanitarian Law (customary IHL).

2. Problem Statement

Situations of non-international armed conflicts where NSAGs are engaging states are more prevalent compared to situations of international armed conflict that is war between states. The nature, scope and parties to the 20th century conflicts have changed with NSAGs taking a bigger role in shaping the style of war fare. Unfortunately, the law regulating the conduct of war has been static.

Before the Geneva Conventions of 1949, any obligation to ensure a minimum standard of humane treatment for the victims of an internal conflict was never an issue of international discussion, but it was essentially a matter of exclusive domestic concern. It was only in 1949 that states adopted specific provisions in international treaties as contained in common Article 3 of the Geneva Conventions and later in the 1977 Additional Protocol II, where NSAGs were obliged to adhere to some fundamental principles. The treaties did not intend to confer any status on NSAGs, but just to consider them as parties to conflict, with specific obligations.

In reality however, the effects of a changing scope and nature of contemporary conflicts has brought about many challenges in the implementation of relevant IHL rules. These challenges start with the basis of NSAG's obligations under international law, and also include their capacity to carry out such obligations. State practice, moreover, has also contributed to the non-application of IHL rules in situations of internal conflict. This is because states resisted classification of internal unrest as non-

international armed conflict.[6] When states succeed in this, there is no recognition of the existence of NSAGs and IHL rules are not relevant in such situations. In this study this issue is sufficiently addressed.

In relation to the topic under study, NSAGs authority to detain during conflict situations is highly questioned. Although common Article 3 and Additional Protocol II, makes a mention of the protection of persons detained and provides some safeguards in terms of treatment of detainees and conditions of their detention; the law does not further define the legal and procedural framework necessary to guide states and non-state parties through the detention/internment process.[7] The relevant questions for consideration is whether there is a regulatory gap here, and could a proposed solution in this case be relevant and applicable to NSAGs?

On the other hand, the substantive rules and principles which give guidance to NSAGs management of the detention file needs to be identified from various sources: the IHL regime, the customary IHL and International human rights laws. In this sense also, the applicability of these categories of laws to NSAGs requires specific consideration.

Against this backdrop, this study seeks to determine the legality of NSAGs to conduct detention activities in armed conflicts and their obligations under IHL and other relevant international law instruments. This study will determine which normative

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[6] In some occasions, International Courts and Tribunals have been invited to define 'armed conflict' and determine whether certain situations of violence amount to non-international armed conflict. See for example: Prosecutor v. Tadic, Case No. IT-94-1-AR72, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para 70, available at http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (last visited 18 October 2013), (hereafter, Tadic Jurisdiction case).

[7] Pejic, J., "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, (2005) pp. 375-391.

framework will govern the treatment, conditions and judicial process for persons in the custody of an NSAG.

3. Justification of the Study

The findings of this study will help promote the protection for victims of non-international armed conflicts, in this case, detainees who are under the authority of an NSAG. Handling of detainees in situations of internal conflict is marred with reports of violations of human dignity and violence on persons and life. Through this kind of study, the dissemination among the general public on the obligations of NSAGs to detainees in its custody is realised. However, subject to a safe field access, the desire would be to have direct dissemination to NSAGs which in turn could have a positive effect on the life and dignity of the persons deprived of their freedom.

Since Kenya is participating in the Somali armed conflict against armed groups in the neighbouring Somalia, this study will promote the understanding of the Kenyan academics and government officials in situations where Kenyan civilians and or members of the armed forces are detained by armed groups in Somalia.

4. Research Questions

This study attempts to answer the following questions;

1. How and why are NSAGs bound by the rules/principles of international law and international humanitarian law?

2. On what basis are NSAGs allowed to carry out detention activities in armed conflicts? What are the applicable rules in this respect?

3. How are the IHL and or other rules of international law safeguarding the protection of detainees under the authority of NSAGs?

4. What are the specific obligations placed upon NSAGs in relation to their detention activities?

5. What are the sources of the international law rules which govern NSAGs detention activities?

5. Research Hypotheses

1. NSAGs as a party to internal conflicts are equally bound by the rules of IHL. It is in the interest of parties to the conflict and the victims as well, especially persons placed *hors de combat*.

2. Though not desirable to states, the international community and bodies are increasingly recognising the authority of NSAGs to carry out detention in areas under their control.

3. IHL rules places upon parties to internal conflicts specific obligations which aim at providing minimum standard protection for detainees under the authority of NSAGs.

4. NSAGs capacity to meet its obligations under international law is a challenge in the implementation of IHL protection regime.

5. Laws and rules regulating NSAGs detention are scattered among various categories of international law; and it is necessary to encourage applicability of such rules on NSAGs for the protection of detainees under its authority.

6. General Objectives of the Study

The purpose of this study is to analyse the status of NSAGs under international law and the basis of its actions in internal conflict, including the authority and obligations towards persons detained under their custody, as contained in various international instruments and practices.

Specific Objectives

The specific aim of this study could be summarised in the following points:

1. To recognise that NSAGs as a party to internal conflicts are equally and independently bound by the rules of IHL.

2. To reiterate the obligation of NSAGs to respect rules of IHL, IHRL and customary IHL in situations of internal armed conflicts.

3. To confirm the recognition of the international community practices vis a vis the IHL rules on the authority of NSAGs to carry out detention.

4. To analyse the various categories of rules which govern the material living conditions and treatment of detainees under the authority of NSAGs in non-international armed conflicts.

5. To single out and explain specific rules in each category of law: International humanitarian law, International human rights law and customary International humanitarian laws, which are related to the practice of detention by NSAGs and determine its scope and application.

7. Theoretical Framework

The topic under study is largely determined under the precincts of international humanitarian law or the law of war, which is a major division of the international law whose subjects are solely the sovereign states, according to the legal positivism theory. Pioneered by Alberto Gentili and Richard Zouche, this theory provides that international law is based on the consent of states in form of customs and treaties. As NSAGs are not states, therefore they could not be addressed by the rules of international law. So what is the relevant theory which establishes the applicability of international law norms on non-state entities?

Antonio Cassese choose to argue the status of NSAGs on the basis of treaty law by asking if the Additional Protocol II can produce legal effects on 'third parties' referring to NSAGs. He answers this by looking into Article 34-36 of Vienna Convention on Treaties which governs the effect of treaties on any third parties.[8] Cassese concludes that the intention of state parties, the objective of the draftsmen and the wording of the text of the Protocol are to the effect that NSAGs may derive duties and rights from the respective international instruments.[9] According to Cassese his view is more satisfactory than other theories which will be explained below.[10]

Legislative Jurisdiction

The doctrine of legislative jurisdiction is an outstanding theory which explains how and why NSAGs are equally bound to respect IHL norms. The doctrine provides that NSAGs are bound by IHL norms as a result of the parent State's acceptance of the

[8] Antonio Cassese, The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts, *International and Comparative Law Quartely,* Vol. 30, (1981), at p. 423.
[9] *Ibid.* p.428.
[10] *Ibid.* p. 429.

Convention, since upon ratification, the Conventions become binding on all of State's nationals, the legally constituted government having the capacity to legislate for all nationals, including the rebels.[11]

According to this theory, the capacity of a state to legislate for all its nationals entails its right also to impose upon them obligations that originate from international law, irrespective of what the nationals think. In this sense, the doctrine of legislative jurisdiction not only explains the binding nature of conventional IHL; the same line of reasoning could be employed to conceptualize the binding force of customary IHL on NSAGs.[12]

Lindsay Moir reported a broad acceptance of this theory by contemporary international law scholars such as Richard Baxter and others.[13]

The strength of the legislative jurisdiction theory is the fact that it supplies a reason why organized armed groups are bound by all rules of IHL consented by territorial state despite the fact that the NSAGs may not have consented to them.[14] It also provides the basis for full parity between rights and obligations under IHL that the state has accepted and those rights and obligations that are applicable to NSAGs. A further strength is that the construct is fully compatible with other areas of

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[11] Moir, Lindsay, *The Law of Internal Armed Conflict,* Cambridge Univ. Press, Cambridge (2002), p. 53-54.

[12] Kleffner, Jann K., The Applicability of International Humanitarian Law to Organised Armed Groups, *International Review of the Red Cross,* Vol. 93, No. 882 (June 2011) p. 445.

[13] Lindsay, M., *op. cit.,* at note 11, p. 54 (look at footnote 93). Other scholars include: D. Schindler, David A. Elder (see page 80 on Elder in this thesis) and Morris Greenspan. **Richard Reeve Baxter** (1921 - 1980) an American jurist, served as a judge of ICJ. Noted for consistently favoring enhanced protections afforded to persons *hors de combat.*

[14] Sandesh, Sivakumaran, Binding Armed Opposition Group, *International and Comparative Law Quartely,* Vol. 55, (2006), pp. 381-393.

international law, through which states grant rights to, or impose obligations on, individuals and other legal persons.[15]

Cassese argues strongly against the theory of legislative jurisdiction, as being based on a misconception of the relationship between international and domestic law and the central problem of domestic ratification. He argues that the theory fails to distinguish between the binding force of IHL on organized armed groups as a matter of international law and its binding force under domestic law.[16]

Another flaw of this theory is the apparent redundancy of consent. It submits that State governments can bind the people because they represent the people, and in reality, there are no people that feel less represented by the State than the NSAGs. The theory binds those groups with IHL without their consent, which in turn adversely affectstheir compliance with IHL.

Alternative doctrines[17] which attempt to argue the basis of binding NSAGs in international law include: individual responsibility of members of NSAGs,[18] NSAGs assuming de facto state authority and territory control;[19] and binding force on the basis of customary IH;[20] and on the basis of pure consent of NSAGs.[21]

The second important element in this thesis is to determine the applicable rules regulating detention activities by NSAGs. Beyond IHL rules, this study will look into other field of international law, especially the International Human Rights Law. Using the doctrine of *lex specialis*; we will determine the relationship between these two branches of international law.

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[15] Kleffner, J., *op. cit.,* at note 12 p. 445.
[16] Cassese, A., Status of Rebels, *op. cit.* at note 8, p. 429.
[17] See discussion on the basis of binding force for NSAGs in Chapter 2 of this thesis, p. 35-45.
[18] Kleffner, J., *op. cit.* at note 12, p. 449 – 451.
[19] *Ibid.,* pp. 451 – 454.
[20] *Ibid.*, pp. 454 – 456.
[21] *Ibid.,* pp. 456 – 460.

Lex specialis

Lex specialis derogat generali is a relatively new doctrine in the international law arena, the term entered common parlance only after the ICJ's 1996 Nuclear Weapons advisory opinion, when the Court itself first used the term.[22] In 2001, the General Assembly requested the International Law Commission (ILC) to give further consideration to the topic fragmentation of international law, studying the scope of the *lex specialis* rule and the question of self-contained regimes of international law.[23]

Conflicts between rules are a phenomenon in every legal order. The principles of *lex specialis* or lex posterior are known to domestic and international legal order.[24] In international law, this principle suggests that if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former.[25]

Lex specialis is understood more narrowly to cover the case where two legal provisions are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts. In such a case, *lex specialis* appears as a conflict-solution technique. Priority then falls on the provision which is 'special', that is, the rule with a more precisely delimited scope of

[22] Milanovic, Marko, The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', *Theoretical Boundaries of Armed Conflict and Human Rights,* Jens David Ohlin ed., Cambridge University Press, (2014) at p. 5, available at http://ssrn.com/abstract=2463957 (last visited 29 November 2015).
[23] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission,* UN Doc. A/CN.4/L.682 (Apr. 13, 2006), p. 8. (hereafter ILC Fragmentation Report)
[24] *Ibid.,* at para. 26, page 20.
[25] *Ibid.,* at para. 56, page 35.

application.[26] This rationale is well expressed by Grotius: 'special provisions are ordinary more effective than those that are general'. [27]

Lex specialis is generally accepted as a valid maxim of interpretation or conflict-solution technique in public international law.[28]

Detention by NSAGs is best understood when compared with the concept of prisoners of war, articulated under the Third Geneva Convention which applies to international armed conflict situations.[29] Such rules do not apply to situation of internal conflict, and as NSAGs do not have an international personality, they cannot be addressed by the provision of the Convention. For internal conflicts, only Common article 3 and Protocol II applies, with less protection coverage for detainees and no real IHL implementation mechanisms.[30]

In this case, the general tendency is to bring the law of non-international armed conflict closer to that of international armed conflicts; to the effect that questions not answered by the law of non-international armed conflict must be dealt with by analogy to the law of international armed conflict, except otherwise expressed in cases under non-international armed conflicts, such as the combatant immunity.[31]

The International Criminal Tribunal for the former Yugoslavia (ICTY) argues on the same line, stating that the practical nature of modern armed conflict has almost

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[26] *Ibid.,* at para. 57, page 35.
[27] *Ibid.,* at para. 59, page 36.
[28] *Ibid.,* at para. 62, page 38.
[29] See Geneva Convention Relative to the Treatment of Prisoner of War of 1949.

[30] Junod, Sylvie. "Additional Protocol II: History and Scope", *American University Law Review*, Vol. 33, (1983) p. 39.

[31] Sassoli, M. and Olson, L. M. 'The Relationship between International Humanitarian Law and International Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflict.' *International Review of the Red Cross*, Vol. 90 No. 871, (Sept 2008) p. 608.

rendered irrelevant the legal distinction between types of armed conflict, citing the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) which is gaining firm foothold in the international community.[32]

In this study, we will employ the theory of legal positivism, legislative jurisdiction to determine the general status of NSAGs in international law and how does that status influence the question of NSAGs detention activities in situations of non-international armed conflicts. We will analyse and where necessary resolve conflicts between IHL, IHRL and other international law fields, guided by the principle of *lex specialis*.

8. Research Methodology

This will be a desktop research study which will focus on answering a number of research questions and testing the hypothesis identified in this proposal. The study will make use of the treaty law: mostly the four Geneva Conventions of 1949 and its Additional Protocols of 1979, as well as the International Human Rights laws. It will also use specialised academic writing from books; journal articles published in respected law journals; research reports; as well as annual operation reports from relevant organisations such as the ICRC.

There is a general lack of specific data on the conduct and operations of NSAGs in detention. However, the little available written materials will give a sufficient and a good example to satisfy the discussions presented throughout the study; sufficient to be able to draw valuable study conclusions.

[32] Tadic Jurisdiction case, *op. cit.* at note 6, at para. 97.

9. Scope and Limitation of Study

Academic writings on the topic of NSAGs in non-international armed conflict acknowledge that the topic of detention is not well developed. NSAGs are regarded to be diverse in all senses, something which makes it difficult to draw a conclusion on the basis of one group's practice in one context. Differences between NSAGs may be extreme, right from its objectives, structure, to its day to day conduct. Thus, conclusions drawn from this study may not be necessarily applicable to all NSAGs or situations of internal conflict.

Given the scarcity of specific data on NSAGs detention, the scope of this study will be limited to a general discourse on NSAGs, and giving some examples of detention by NSAGs reported in the media to support the theoretical explanations. It would have been useful to engage with NSAGs in a discussion on how they understand their obligations under international law when carrying out detention activities, however due to security constraints and field access difficulties this study will rely on media reports to fill this gap.

10. Literature Review

Much has been written on the general discourses regarding the status of NSAGs under international law; the applicability of IHL and IHRL on NSAGs and the accountability of NSAGs in international law.[33] But there is little written about detention, this specific warfare activity practiced equally by NSAGs just like states.

[33] See for example the work of Zegveld, L., *op. cit.* at note 4; and Moir, L., *op. cit.* at note 11.

It could be summarised that the issues related to detention by NSAGs are deeply rooted in the central argument about the existence and recognition of NSAGs in the international law. That is why the focus is more about discussing the core issue which is the status of NSAGs themselves, rather than the nature of their conduct.

Pilloud Claude, in the ICRC commentary on the Additional Protocols to the Geneva Conventions noted that the recognition of NSAGs as parties in internal conflicts was fiercely contested by states. During the diplomatic conferences, delegates of states made sure that every mention of 'parties to the conflict' was deleted in Additional Protocol II to the Geneva Conventions. States had the opinion that a mere mention of parties to the conflict in the text of the Protocol could have implied a semblance of recognition of an insurgent party. Nevertheless the deletion of all mentions of 'parties to the conflict' did not change its structure from a legal point of view, meaning that the rules establishes same duties on state and an insurgent party, on a purely humanitarian character.[34] However, as a rule, international law addresses sovereign states parties only; and NSAGs do not have the capacity to become parties and have never agreed to the conventions.

Cassese confirms the binding nature of Common Article 3 on NSAGs and develops his argument on the basis of the *travaux preparatoires,* looking into the wording of the draft text and states intention to create duties for NSAGs. He rightly employs the provisions of Vienna Convention which support the notion that state parties can impose rights and obligations on third parties.[35] In addition to the treaty argument, there are also legal theories which explain the basis of NSAGs obligations under international law.

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[34] Pilloud, Claude, et al., eds. *Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949,* Martinus Nijhoff Publishers, (1987) pp.1344-1345 (hereafter referred to as Commentary Additional Protocols).

[35] Cassese, A., Status of Rebels, *op. cit.,* at note 8, p. 423

Lindsay[36] and more extensively **Kleffner**[37], both expounded on the legal theories which define the basis of IHL binding force on NSAGs. Kleffner examined five explanations including the theory of legislative jurisdiction which provide that NSAGs are bound via the state on whose territory they operate. In theory, NSAGs status in international law is not fully settled, and to promote a position where NSAGs are obliged under IHL, it's necessary to rely on more than one explanation.

In her book, **Lindsay** provides a good legal framework on non-international armed conflict. She provides the needed insight with regard to the Common Article 3 and Additional Protocol II and their application and binding nature on NSAGs. The book provides an invaluable example of non-international conflict situations such as Algeria, Congo, Nigeria etc.; and discusses the application of the IHL to the given situations.[38] This study will draw some of the examples in this book to demonstrate the reality of detention with NSAGs.

On detention in situations of non-international armed conflicts, **John Bellinger**,[39] a former US legal adviser to the USA Department of State, explains the inadequacy of Geneva Conventions to address the issue of detaining members of NSAGs in non-international armed conflicts. He argues that the existing provisions: Common Article 3 of the Geneva Conventions, Article 75 of the Additional Protocol I and Additional Protocol II fails to provide adequate guidance to States that are engaged in detention operations in conflicts with NSAGs. Bellinger addressed four main questions: which individuals are subject to detention; what is the legal process for detainees;

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[36] Lindsay, M., *op. cit.* at note 11, pp. 52-58.
[37] Kleffner, J., *op. cit.* at note 12 from page 445 – 460.
[38] Lindsay, M., *op. cit.* at note 11, pp. 67-83.

[39] Bellinger III, John and Vija M. Phadmanabhan. "Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions." *American Journal of International Law*, Vol. 105 No. 2 (April 2011) pp. 202 – 213.

termination of the state's right to detain; and the obligations to repatriate detainees after end of detention.

Bellinger as well as **Ryan Goodman**,[40] focused on the Guantanamo detainees versus the US domestic policy in relation to Al Qaeda militants. This is one form of detention in non-international armed conflicts, where the detaining authority is a sovereign state. Our thesis will focus on another form of detention where the detaining authority is a non-state armed group.

David Tuck[41] recognises the reality of detention in non-international armed conflicts under the authority of NSAGS. He gave a perfect example of the FAFN (Forces Armees Force Nouvelles) in Ivory Coast, where, between 2002 and 2007, the group secured territorial control of much of northern Ivory Coast and established and maintained extensive, routine detention operations; utilizing the detention infrastructure of the state. Tuck concludes that deprivation of liberty by the FAFN was, in sum, ostensibly 'state-like'.[42]

Tuck determines the question of NSAGs authority/legality to detain combatants, persons *hors de combat* and civilians in internal conflicts, noting that IHL regulates the treatment and conditions of deprivation of liberty in connection with NIAC but does not establish its legality. He clarifies that reference to 'persons *hors de combat*', 'regularly constituted courts' in Common Article 3 and to persons 'interned' in

[40] Goodman, Ryan. "The Detention of Civilians in Armed Conflicts." *American Journal of International Law*, Vol. 103 No. 1 (Jan. 2009) pp. 48-74.

[41] Tuck, D., *op. cit.* at note 5, pp. 3-7.

[42] *Ibid.* p. 4.

Additional Protocol II, are superfluous if not understood to be accompanied by an authority to detain or intern respectively.[43]

Sivakumaran[44] gives further practical examples of detention by NSAGs, which clearly illustrates the level of sophistication which some NSAGs have reached in terms of carrying out detention operations. May be this is just one good side of NSAGs, showing its capacity to engage in detention activities to a desirable humanitarian standards.

Tuck and Sivakumaran did not tackle directly the substantive rules which define the obligations of NSAGs as a detaining authority. Tuck's work is very important as it demonstrates the reality of NSAGs detention and argues the legality such activity under IHL. However, his article does not tackle the specific treaty and customary obligations for NSAGs to observe and ensure the protection of persons deprived of freedom.

An expert meeting[45] at the **Chatham House** tackled the basis of NSAGs authority to detain. The meeting concluded that there was an inherent authorization in IHL for NSAGs to intern. The experts qualified detention by NSAGs for 'imperative reasons of security' and not just for 'convenience' or intelligence purposes.

Jelena Pejic, a legal advisor at the ICRC, developed an institutional position on the minimum procedural rules that should be applied in all situations of internment in

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[43] *Ibid*. p. 7.

[44] Sivakumaran, Sandesh. "Courts of Armed Opposition Groups Fair Trials or Summary Justice." *Journal of International Criminal Justice*, Vol. 7 (2009), at p. 489 and pp. 495-496.

[45] Els, Debuf. "Expert meeting on procedural safeguards for security detention in non-international armed conflict Chatham House and International Committee of the Red Cross, London 22-23 September 2008." *International Review of the Red Cross.* Vol. 91 Number 876 (2009), pp. 860-861.

armed conflicts: international and non-international.[46] The ICRC study recognises that although detention in international conflict is regulated by Four Geneva Conventions and Additional Protocol I, the treaties do not sufficiently elaborate on the procedural rights of internees. The study further acknowledges that the clarity on the topic of detention is less in non-international armed conflict.[47]

In another effort to fill the normative gap on NSAGs detention in internal conflicts, **Sassoli and Olson**[48] explore what is already provided for under Common Article 3 of Geneva Conventions and Additional Protocol II. They further analyse other avenues such as the rules of customary humanitarian law, human rights law and concludes that the correct solution would be to apply 'the humanitarian law of international armed conflict to non-international armed conflict by analogy'.

Sassoli's work concentrates more on comparing the two legal regimes: international and non-international conflicts and attempts to fill the regulatory gaps in the internal conflicts regime. We intend to analyse the detention regime during internal conflicts in some depth, thus serving the objective of disseminating and confirming the applicable rules.

Deborah argues on the reality of applying the prohibition of arbitrary deprivation of liberty on NSAGs. She asserts that the IHL prohibition of arbitrary deprivation of liberty as applied to states cannot be applied in the same way to NSAGs in a realistic manner, as this had the tendency to totally preclude NSAGs from detaining

[46] Pejic, J., *op. cit.,* at note 7, pp. 375-391.

[47] *Ibid.,* p. 377.

[48] Sassoli, M. *et. al.,* "The Relationship." *op. cit.*, at note 31, pp. 616-624.

individuals from the states side in a legal manner and ultimately, military wise, denying NSAGs any possibility of weakening the enemy.[49]

This thesis will not enter into a philosophical discussion on the basis of NSAGs under human rights law, but it will look into ways where humanitarian and human rights law and other categories of laws and rules such as the customary humanitarian law; complement one another to shape and guide detention practices by NSAGs in such a way that detainees are provided with a better protection framework during internal conflicts.

It is my submission that the topic of detention under the authority of NSAGs is still in the formation stages and its growth is largely affected by the denial of its very existence within sovereign states circles, something which is well understood to be promoted solely by political purposes and the supremacy of state sovereignty over other forms of community struggles. On the other hand the international society and most importantly humanitarian organisations such as the ICRC have gone a long way to define and demarcate the boundaries of NSAGs detention.

Detention by NSAGs is a topic which is normally tackled as part of the general discussion on the rules governing conduct of hostilities; Common Article 3 and Additional Protocol II. Despite its importance and serious humanitarian implications, it has not been addressed as a distinct and single issue in the academic discourse. Lindsay writings on non-international armed conflict would touch on detention when talking about the scope of the law regulating the conflict, without addressing the substance of the topic.

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[49] Casalin, Deborah. "Taking Prisoners: Reviewing the International Humanitarian Law Ground for Deprivation of Liberty by Armed Opposition Groups." *International Review of the Red Cross,* Vol. 93, No. 883, (Sept 2011) pp. 4-8.

Academic articles also have contributed largely on detention by NSAGs but addressing some specific issues of the topic. Tuck discusses a lot on the legality of NSAGs detention; Deborah argues on the arbitrary deprivation of liberty; Sivakumaran looks into the constitution of NSAGs courts; etc. I did not find an academic writing which defines the content of NSAGs detention according to the treaty and other sources of international law.

This study will discuss the authority for NSAGs to detain; outlining the legal framework of the activity, and giving much focus on identifying the rules that forms the substance of regulations which would govern the practice of detention by any given NSAG. It's a treatise that aims at informing NSAGs about their obligations towards persons deprived of freedom and their accountability in case of violations.

11. Chapter Breakdown

This thesis consists of five chapters, including the introduction. The thesis examines the applicable rules of international humanitarian and human rights laws and rules of customary law for the protection of detainees under the authority of non-state armed groups in situations of internal conflicts.

Chapter one provides background information on the topic, describing the problem and outlining the objective of the study, hypothesis to be tested and questions to be answered.

Chapter two defines the concept of NSAGs and determines its legal status in international law. The study establishes the status of NSAGs under various fields of international law: IHL, IHRL and Customary international law; and the underlying theories determining the status of NSAGs.

Chapter three deals with the concept of detention in armed conflict in general. It discusses detention in International and non-international armed conflicts where NSAGs are directly involved. As one form of detention during conflicts, the concept of prisoners of war; civilian detainees will be explained to show how deprivation of liberty is well regulated under the Four Geneva Conventions. In this chapter, detention by NSAGs is introduced and elaborated with examples to illustrate its ground reality.

Chapter four presents the rules regulating detention activities by NSAGs under IHL, customary IHL and human rights law. It will mention treaty provisions which stipulate detention rules and obligations of NSAGs towards detainees. It will also analyse detention rules contained human rights law and customary IHL and identify the perceived gaps in the Geneva Conventions and its Additional Protocols, in regulating NSAGs detention.

Finally, in **Chapter five**, the thesis studies the enforcement of IHL rules on NSAGs and how to deal with violations of detention rules. The chapter will close with an extensive summary of the main issues discussed in the thesis and the recommendations.

CHAPTER 2: STATUS OF NSAGs IN INTERNATIONAL LAW

Introduction

The treaty of Westphalia in 1648 marked the beginning of the modern international law, with the concept of state sovereignty as its cornerstone. International law was to be found in the relations between independent sovereign states, them being the only subjects of the legal system. Insurgents had no place in the international law, until during the nineteenth century when first attempts were made to make laws of war applicable to relations between states and armed groups fighting it.

A situation of belligerency was introduced in the international practice mainly as an act of a sovereign state, both unilateral and discretionary. The institution of recognition of belligerency faced certain challenges relater to practical applications. Nevertheless, it was an important step which brought about the regulation of non-international armed conflict situation, initially under common Article 3 and later Additional Protocol II.

The Red Cross Movement had a particular concern on internal conflicts, owing to the increasing cases of such conflicts and rising number of victims. But state reservations and suspicious attitude made the road to common Article 3 and Additional Protocol II, a long and painful one.[50]

This chapter will analyse the nature of NSAGs, its definition and most importantly it will look into the IHL, IHRL and Customary International law to determine the place of NSAGs and their basis in those fields of international law.

[50] See Commentary Additional Protocols, *op. cit.,* at note 34, pp. 1320-1323.

Definition of NSAGs

So far, there is no treaty definition for NSAGs and at the academic level, there is still no agreed definition of what is a non-state armed group. Hoffman[51] alludes that the vast number of NSAGs and the fluid nature of their membership composition or structure and the rapidly changing goals makes it difficult to agree on a useful definition. With the absence of a treaty definition and the intense political interests in NSAGs intensifies disagreements among scholars.

Let us examine three definitions presented by some humanitarian organisations:[52]

1. According to the International Council on Human Rights Policy: 'NSAGs are groups that are armed and use force to achieve their objectives and are not under state control.'[53]

2. Geneva Call defines NSAGs as those involved in situations of armed conflict that operate outside effective State control and are primarily motivated by political goals.

3. In the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) manual[54] NSAGs is defined as a 'groups that have the potential to

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[51] Claudia, Hofmann, 'Engaging Non-State Armed Groups in Humanitarian Action', *International Peacekeeping*, Vol. 13, No. 3, (September 2006), p. 396, available at http://www.die-gdi.de (last visited June 2013).

[52] The organisations providing definition of an NSAG which are referred above are a competent source in this matter. The International Council on Human Rights Policy is a non-governmental organisation that provides research on human right issues and the Geneva Call is an organisation based in Geneva, Switzerland, which is specifically engaging with NSAGs to promote compliance of IHL.

[53] International Council on Human Rights Policy, Trends and Means: Human Rights Approaches to Armed Groups, (2000), p. 5, available at http://www.ichrp.org/files/reports/6/105_report_en.pdf (last visited May 2013).

[54] See Gerard McHugh and Manuel Bessler, 'Humanitarian Negotiations with Armed Groups: A Manual for Practitioners', OCHA, United Nations, (January 2006), available at http://www.docs.unochaorg/sites/dms/Documents/HumanitarianNegotiationswArmedGroupsManual.pdf (last visited July 2013), p. 6.

> employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structure of States, State-alliances or intergovernmental organisations; and are not under the control of the State(s) in which they operate'.

In these three definitions, there are clearly three main elements: lack of state control, use of force and a political agenda. By this, the terminology excludes criminal organisations, such as mafia and drug cartels, private security companies and mercenaries.

Under the treaty law, Article 1 (1) of Protocol II defines the scope of the treaty application to include armed conflicts involving '… other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations …'.

Although failing short of providing an exclusive definition, but by using words such as 'organised armed groups' 'responsible command' and 'control over a part of territory', the Additional Protocol II describes the main characteristics of an NSAG, which is a party to a non-international conflict. These characteristics also exclude groups such as: criminal gangs, private security companies and mercenaries, out of the NSAG category.

In practical use, the term NSAG would refer to armed groups that do not pursue a private agenda but rather political or economic objectives. It includes rebel groups, liberation movements and de facto governments. This terminology is nevertheless controversial, compounded by the highly political nature of the activity and the groups themselves due to their diverse character either in terms of their organisational capacity, territorial control and also clarity of their objectives. Their diversity has invited their opponents (States) to label them in different ways. Some

NSAGs are called 'terrorists' or 'criminals' by some and 'liberation fighters' or 'revolutionaries' by others.[55]

For this thesis, NSAGs will be defined in the manner characterised by the Protocol II; where there are no conditional requirement that such groups should have a political, religious or other specific objectives to qualify its organisation and armed struggle against states.

The requirement that NSAG should have a political goal is quite subjective and this would mean different things to different people and the determination of objectives of an armed group will ultimately defeat the IHL objective to regulate conduct of hostilities and humane treatment of persons placed hors de combat. States would also exploit the ambiguity of what constitutes a valid political goal, victimising NSAGs as criminals and may be use the famous 'terrorists' terminology on armed groups. This in effect would heighten the challenges of humanitarian organisations to engage with NSAGs in its effort to promote respect for the laws of war and provide relief services.

The definition suggested by the International Council on Human Rights serves the legal and humanitarian considerations. It is closer to the laid down legal qualifications stipulated by the Geneva Conventions as to what should constitute an armed group: i.e. organised armed group; responsible command; and territory control.

[55] See Orla Marie Buckley, *Unregulated Armed Conflict: Non State armed Groups, International Humanitarian Law, and Violence in Western Sahara,* North Carolina Journal of International Law and Commercial Regulation, Vol. 37 (Spring 2012) p. 797, available at http://www.law.uncedu/components/handlers/document.ashx?category=24&subcategory=52&cid=1065 (last visited 23 July 2013).

2.1 The Concept of Subjects of International Law

The question of the status of NSAGs in international law is greatly affected with the way its opponent, a state, thinks fit. NSAGs complication with international law came with the 1648 peace settlement in Westphalia, during the formation of the modern international law, which developed with time, to establish a principle that sovereign States are the sole authority and the only subjects of the international legal system.[56] A subject of international law is defined as "a body or entity which is recognised or accepted as capable of possessing and exercising rights and duties under international law".[57]

States are thus considered to possess the 'international personality', qualifying them to enact rules of international law either in express agreements and conventions or in the form of long established customs. These exclusive rights are not extended to a non-state party, either civil or armed groups or international organisations. An alteration in the concept of 'international personality' is not subject to change without the express consent of sovereign states.

The positive philosophy of international law firmly insist on the centrality of states as the sole principal subject of the international law, and crucially also possessing a set of fundamental rights that must be protected at all times, including the right of survival or self-preservation.[58] In this sense, any force which attempts to challenge the authority of a State is immediately outlawed under the domestic law and rarely will its cause be 'recognised' by the international community, unless such recognition

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[56] See Anotino Cassesse, *International Law,* Oxford University Press, New York, 2nd Ed., (2005), p. 24; and Neff, Stephen C., *A Short History of International Law,* Oxford University Press, Oxford, UK (2006) p. 15.

[57] Dixon, M., *Textbook on International Law,* Blackstore Press Limited, 3rd edition (1996), pp. 97-98.

[58] See Neff, S. C., *op. cit.* at note 56, p. 15.

serves the interests of another state. This is why NSAGs finds themselves out of place and their status in the international law is in perpetual dispute.

Because of the state-central nature of international law, some scholars have argued that international law is nothing more than an instrument in the pursuit of state interests. It is said to be an instrument which lacked substantive impact on state behaviour and doesn't have any independent status from states.[59]

If we consider the concept of subjects of international law as being a tool used by state to further their interests, either political or military ones, then NSAGs will not be granted any status in international law; instead the international law will be utilised to condemn the existence of NSAGs. States have since contended against any form of status for NSAGs under the IHL as will be seen below.

2.2 Status of NSAGs under IHL

Reacting to the harsh realities of armed conflict and the expanding space for internal conflicts between states and organised armed groups within its borders, the ICRC attempted to influence states into developing a treaty regime that will regulate non-international conflicts under the umbrella of the IHL.[60]

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[59] Andreopoulos, Georges J., 'The International Legal Framework and Armed Groups.' *Human Rights Review,* 11.2 (2010), p. 226.

[60] In 1912, during a state party's conference to the 1864 Geneva Convention, the ICRC introduced a draft treaty on its role in internal conflict which was not even discussed. But remarkably in 1921 a Red Cross Conference adopted a first resolution to provide humanitarian protection and aid to victims of internal disturbances and civil wars; serving as a basis for ICRC activities during the Spanish civil war. Efforts in this direction continued until the 1948 Diplomatic Conference in Stockholm when a proposal was extensively discussed and adopted in 1949 as part of the reviewed Geneva Conventions. Later in the years, the ICRC effort materialised in the adoption of Additional Protocol I and II in 1977, to regulate further internal conflicts where NSAGs are engaging State authorities.
See Commentary Additional Protocols, *op. cit.,* at note 34, pp. 1323 – 1324 and pp. 1327 – 1330.

IHL is a branch of international law which seeks to limit the effects of armed conflicts by protecting persons who are not or no longer participating in hostilities, by limiting the rights of parties to a conflict to use methods and means of warfare of their choice. The laws regulating rules of IHL are the Four Geneva Conventions of 1949 and their Additional Protocols of 1977, the Hague Conventions of 1899 and 1907 and other specialised conventions: such as the Mine Ban Treaty, Convention on Cluster Munitions; and the customary international law.

The Geneva Conventions have undergone a thorough revision process and a major one happened during the Diplomatic Conference in 1949 which saw the introduction of Article 03 which is common in all the Geneva Conventions specifically and for the first time regulating armed conflicts which are not of international character.

Common Article 3

The Common Article 3 is popularly known as the 'mini-convention'. It constitutes the first real legal instrument for the protection of victims of non-international armed conflict. It provides that:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) 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.
>
> (2) The wounded and sick shall be collected and cared for.
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[61]

The article provides for protection of militants placed *hors de combat* and prohibits torture, hostage taking, inhumane treatment, executions and demands for judicial guarantees. These are, in the words of the International Court of Justice, 'elementary

[61] Common Article 3 to the Four Geneva Conventions, 12 August 1949, available at https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (last visited 10 December 2013), (hereafter referred to Geneva Conventions 1949).

considerations of humanity'[62] and a minimum yardstick to apply in situations of international and non-international armed conflicts.

Reading through the *travaux preparatoires* of the common Article 3, the concerns of states with regard to the provisions of common Article 3 revolved around a number of issues: including the fear that NSAGs will be given a higher status equal to that of states; that NSAGs will attain a certain degree of legal recognition; that states risk losing their legitimate protection; the risk of encouraging ordinary criminal gangs to organise themselves to benefit from the provisions of the Convention; and hampering states in its legitimate measure of repression.[63]

To dispel fear and concern of states on the perceived NSAGs status enhancement, and to counter a call for the application of the whole Conventions to internal conflicts; states settled on the application of a set of 'minimum humanitarian standards' to all conflicts either internal and international conflicts. It appears that limiting the applicable rules could assuage the concerns of states with respect to the status of NSAGs, as not being regulated as a High Contracting Party (state). Additionally, a clarification on the status of NSAGs was provided by a caveat at the end of the Article, indicating that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.[64]

This statement serves as a clear message to NSAGs that common Article 3 has a purely humanitarian purpose and its implementation does not constitute recognition of a party to the conflict. It is interesting to note that so far, no party to a conflict has used

[62] See Nicaragua v. USA (Judgement of 27 June 1986) ICJ Rep. 114, para. 218, available at http://www.icj-cij.org/docket/files/70/6503.pdf (last visited 10 October 2013), (hereafter Nicaragua case).
[63] Pictet, Jean, ed. The Geneva Conventions of 12 August 1949. Vol. IV, (1952), International Committee of the Red Cross, pp. 30-32.
[64] Geneva Conventions 1949, Common Article 3 (2).

common Article 3 for the purpose of claiming recognition or to further their political course.[65]

Another controversy accompanying the internal conflict issue is the related to the question of what constitutes an 'armed conflict'. The definition of this terminology is the deciding factor to determine the qualification of common Article 3 on a given conflict situation. The intention of the drafters of Geneva Convention is evidently suggesting that the definition of the word 'armed conflict' was avoided on purpose, because providing such a definition could have limited the treaty's field of application. Internal unrest is commonplace in the world and happens at a diverse degree and design, making it difficult to propose one definition to suit all types of internal strives. On its side, states will always resist the classification of internal unrest as armed conflict, avoiding the application of IHL in what they regard as internal domestic matters.[66]

In the *Tadic* case[67] before the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia, the court determined at length the existence and nature of the armed conflict in Bosnia-Herzegovinia. The court defined what is an 'armed conflict' and confirmed the application of IHL law to such conflicts. The appeal chambers held that:

> '... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within

[65] See Commentary Additional Protocols, *op. cit.,* at note 34, p. 1345.

[66] See Derek Jinks, The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts, p.2 available at http://www.hpcrresearch.org/sites/default/fles/publications/Sessions3.pdf (last visited Aug 2013). This was a background paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of IHL at Cambridge, January 2013.

[67] Tadic Jurisdiction case, *op. cit.* at note 6, para. 70.

> a State. IHL applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, IHL continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there'.

The status of NSAGs under IHL has also been confirmed by the International Court of Justice in the Nicaragua case. The ICJ observed that the acts of the Contras, fighting against the Nicaraguan government, were governed by the law applicable to a non-international armed conflict, i.e. common Article 3.[68] Similar or rather resolute sentiments by the Inter-American Commission on Human Rights resonated in the *Tablada* case[69] where the court considered common Article 3's mandatory provisions expressly binding and applying to both parties to internal conflict, i.e. government and NSAGs; in an absolute manner for both parties and independent of the obligation of the other. Both NSAGs and state forces have the same duties under humanitarian law.[70]

The words 'each Party' in the common Article 3 mark a great progress in the development of international law; the article places a specific duty to a non-state entity to observe during conflicts with a state party. This development was

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[68] Nicaragua Case, *op. cit.,* at note 62, para. 119.

[69] The *Tablada* case concerns an attack launched by 42 armed persons on Argentinean armed forces in 1989 at La Tablada. The battle, which lasted 30 hours, resulted in the death of 29 armed persons and several state forces. The surviving attackers filed a complaint with the Inter-American Commission on Human Rights alleging violations by State Agents of the American Convention on Human Rights and rules of IHL, a question which was answered by the court in the affirmative.

[70] Inter-American Commission on Human Rights, Report No. 55/97, Case No 11.137 (Argentina), OEA/Ser/L/V/II.97, Doc. 38, (30 October 1997), para. 174, available at https://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm (last visited October 2013). Hereafter Tablada Case.

unthinkable in International law for a treaty between states to create rules which are binding on a non-signatory Party.[71]

The minimum standards stipulated in common Article 3 were enhanced further and supplemented in Additional Protocol II of 1977 to the Geneva Conventions.

Additional Protocol II

Protocol II furthers the concept of non-international armed conflict initiated by the common Article 3 of the Geneva Conventions. It does this without modifying the existing conditions of application stipulated under common Article 3. [72] In essence, the Protocol provides the first definition of the concept of non-international armed conflict as that which takes place between State armed forces and dissident armed forces or other organised armed groups under responsible command and exercise control over parts of its territory.[73]

The definition of internal conflict in Article 1 is considered as the 'keystone' of the Protocol. As noted above, Article 3 did not contain a definition of armed conflict and this gave rise to a variety of interpretation and court battles where qualification for non-international conflict was frequently disputed. On the other hand, the applicability of the Article 3 in practice was often denied, at the discretion of governments.[74]

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[71] See '1949 Conventions and Additional Protocols, and their Commentaries', available at http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (last visited October 2013).
[72] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1351.
[73] See Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of International Armed Conflict (Protocol I) of 8 June 1977 (hereafter Additional Protocol I).
[74] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1349.

Indeed, states are free to interpret their rights and duties in international law and on this premise, during the drafting of Protocol II, states emphasized their sole right to determine whether the conditions for the applicability of the Protocol were fulfilled. However, competent courts and tribunals, as well as UN Security Council acting on Chapter VII would override the states discretion and make legally binding declarations, determining the nature of a conflict and applicability of relevant rules. This was actually the issue in the Nicaragua case where ICJ determined that the non-international nature of the conflict on going then in Nicaragua, in defiance of the position of the Government of Nicaragua.[75]

The effort by states to contain recognition of NSAGs persisted during the drafting of Protocol II. Direct recognition of NSAGs as a 'party to the conflict' contained in common Article 3 was not entertained in Protocol II despite the ICRC attempt to use it in the draft. As a result, every mention of 'parties to the conflict' terminology was deleted from the text, for the same state concern, that this could be interpreted as recognition of the insurgent party.[76] However, the deletion of the text 'parties to the conflict' does not affect the rights and duties imposed on each party: governments and NSAGs; by respective provisions of a purely humanitarian nature.[77]

State concerns with regard to the status of NSAGs under IHL cannot be ignored, and international bodies acknowledge the relevance of state's views especially the territorial integrity. However, their concerns should not be at the expense of disapproving the obligations of NSAGs to some of the essential humanitarian rules such as the requirement for humane treatment to victims of conflict. Furthermore, nothing in the Conventions suggests that applying IHL would grant some form of legitimacy to NSAGs. In the words of Jean Pictet, common Article 3 does not in any

[75] Zegveld, L., *op. cit.,* at note 4, p 12-13.
[76] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1339.
[77] *Ibid.,* p. 1346.

way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party.[78]

2.3 The Basis of Treaty Obligation on NSAGs

As seen above, one of the basic tenets of the international law is that treaty obligations cannot be undertaken by any entity other than sovereign states. As such NSAGs have never and shall not ratify or accede to international treaties including the Geneva Conventions and Additional Protocol II. In both cases the words 'High Contracting Parties, refer to states only.[79] There were attempts by some NSAGs to adhere to the 1949 Geneva Conventions, which were challenged by state parties and also Switzerland, the depository of the Conventions.

There is another basic tenet of the international law which provides that treaties can impose rights and obligations upon third parties. Look at Articles 34-36 of the Vienna Convention on the Law of Treaties which provides that third parties (non-state parties, such as NSAGs) can have obligations if states had intended to place obligations on others entities and if third parties assent to such rights and obligations.[80] Cassese argues that there was a clear intention by states to place specific obligations on NSAGs on the basis of IHL conventions and such an intention suffices to establish a binding force of IHL rules on NSAGs.

The invalid capacity of NSAGs to assume the status of party to the Geneva Conventions, does not deny the fact that their rights and obligations under Article 3

[78] See Pictet, Jean, ed. *op. cit.,* at note 63, p.36.
[79] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1339; See also in Zegveld, L., *op. cit.,* at note 4, p. 14.
[80] See Lindsay, M., *op. cit.* at note 11, p. 52-53.

and Protocol II are established through the ratification of the state in whose territory NSAGs operate. This is elaborated well by the doctrine of legislative jurisdiction.[81]

In 1949 states committed themselves to apply the provisions to the government and any established authorities and private individuals within the national territory of that State. This argument, though questioned with regard to individual's obligation within states, but it has never been contested on the validity of the obligations imposed on NSAGs.[82]

Other theories explaining the basis of NSAGs treaty obligations suggest that NSAGs are bound because they are de facto authorities in the territory under their control; or because the NSAGs are inhabitants of the state party to the relevant conventions.[83] The reasoning here is weak and cannot sustain the ferocity behind the making of international law rules. Having authority over territories is not enough to qualify to a level of a state or to automatically become a party to an international agreement; there are specific steps which need to be taken to accede to treaties.

NSAGs could also take initiative to bring about a basis of its obligation under IHL. This can be through its voluntary consent to the applicability of international norms through declarations. NSAGs consent has been noted in some instances. In the case of Akayesu, the International Criminal Tribunal for Rwanda noted that the RPF[84] (an NSAG) had stated to the International Committee of the Red Cross that it was bound

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[81] See legislative framework in Chapter One, page 20-22.
The doctrine of legislative jurisdiction provides that upon states acceptance of an international convention, it becomes binding on all of a state's nationals. The legally constituted government have the capacity to legislate for all nationals.

[82] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1346; see also Lindsay, M., *op. cit.,* at note 11, pp. 53-54; and Kleffner, J., *op. cit.,* at note 12, pp. 445-449.

[83] Zegveld, L., *op. cit.,* at note 4, p. 15-16.

[84] The Rwandan Patriotic Front, was a rebel group created in 1987 by the Tutsi diaspora in Uganda. Through its armed wing, Rwandan Patriotic Army, it initiated attach against the government and in 1994 RPF took control of Rwanda.

by the rules of IHL.[85] Though illustrative of a commitment, I find this example not so significant to warrant recognition by the Tribunal.

NSAGs initiative could also take the forms of a special agreements concluded between states and NSAGs specifying its consent to treaty obligations. A deed of commitment or special agreements is a better example to promote the NSAGs independent manner of confirming it adherence to international treaties.

Such a statement of commitment from NSAGs could be regarded as a factor to demonstrate the level of awareness, organisation and capacity of a respective armed group to fulfil its obligations as required by the relevant international norms.

A good example of an extended special agreement between NSAGs and governments is the agreement between the Afghan Resistance Movement and the International Committee of the Red Cross, where the Movement expressed its intention to respect the spirit of the provisions of the Geneva Convention relative to the treatment of the Prisoners of War. [86]

According to Zegveld, agreements and declarations remedy NSAGs failure to ratify treaty rules and do serve two purposes: (1) they make NSAGs express their will and capacity to adhere and most importantly; (2) they induce state to accept applicability of relevant norms. [87]

Special agreements are recognised and encouraged by Common Article 3, which states as follows:

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[85] The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T available at http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf (last visited 20 July 2013), Para 627 p. 157.

[86] See Report on the Situation of Human Rights in Afghanistan, UN Commission of Human Rights, 44 Session, E/CN.4/1985/21 dated 19 February 1985, para 104, p. 29 available at http://www.refworld.org/pdfid/482994662.pdf (last visited 29 Sept 2013)

[87] Zegveld, L., *op. cit.,* at note 4, p.17

> "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".

Nevertheless, the international practice gives much recognition to the ratification of the territorial state and considers it a sufficient legal basis for NSAGs obligation. This is the doctrine of legislative jurisdiction, which enjoys a broad acceptance among scholars as the basis of NSAGs obligations under relevant treaties.[88]

NSAGs Obligations under Human Rights Law

The human rights law system is made up of international and regional covenants and protocols, with standing committees of expert to monitor the implementation of treaty provisions by state parties and a court system to determine human right violations, e.g. the European Court of Human Rights. The human rights law is water tight, it is state centric and does not recognise NSAGs or create human rights obligations on them.[89]

The basis of NSAGs obligations under human rights law is more complex and controversial due to the positivist approach to international law. However, the modern positivist assert that law in not independent of its context; emphasising the proximity of positivism to political reality. [90] The argument is that international law has the capacity to place direct horizontal duties on all private actors not to violate

[88] Lindsay, M., *op. cit.* at note 11, p. 54.

[89] Human rights academicians are increasingly applying the principle of individual responsibility on human rights laws, but have not risen to the level of holding NSAG as an entity bound by such rules as a matter of law. The challenge is in identifying the basis on which IHRL regime binds non state entities. The current political reality and the states protective attitude to their sovereignty would not allow extending a personality status to NSAGs similar to theirs in the realm of international law.

[90] Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', *American Journal of International Law*, Vol. 93 (1999), p. 308.

one another's human rights. What it lacks is the practical and political capacity to enforce those duties. [91]

The horizontal human rights regime addresses private duties in four ways: duty of states to restrict private individuals interference with enjoyment of rights; human rights specifies duties for states to be imposed on private individuals; human rights direct duties on individuals at domestic level for states to enforce and finally, human rights enforces private duties at international level.[92] The last form of individual responsibility is best demonstrated by the individual criminal responsibility under the Convention of Genocide which allows for trials of suspected persons at both the national and international courts such as the International Criminal Court. Some scholars argue that if a duty exists at international level it can be enforced there.[93]

The Rome Statute articulates the jurisdiction of international court for individual criminal responsibility. Article 25 (2) reads: 'A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.[94]

The underlying problem in applying human rights law on NSAGs is the traditional argument on the overall applicability of this field of law to situations of armed conflict. The doctrine of *lex specialis* is employed in this case to remove the conflict between international humanitarian and human rights law and also to define the complementarity between these two distinct fields of international law.

At the onset, human rights treaties specifically impose obligations on state parties. Article 2 of the International Covenant on Civil and Political Rights states as follows:

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[91] John Knox, 'Horizontal Human Rights Law', *American Journal of International Law*, Vol. 102 (2008) p.19.
[92] *Ibid.,* p.18.
[93] *Ibid.,* p 30 and also Bruno et. al., *op. cit.,* at note 90, p. 308.
[94] See in Chapter Five case law based on individual criminal responsibility.

> 'Each State party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind …' [95]

In other circumstances, the human rights law places responsibility on other categories of persons. In the preambles[96] of Universal Declaration of Human Rights and two International Covenants, all have recognised what is called 'duties' on individuals to 'strive for the promotion and observance of human rights'. *The duty here is for individuals in their independent capacity and not groups or non-state entities.* In his 1998 report, the UN Secretary General cautiously pointed out that the call for individual strive does not include the 'legal obligations' for human rights violations.[97]

Second, that applying human rights in armed conflict involves striking a balance between the universality of human rights on the one hand and considerations of effectiveness on the other, just like IHL itself embodies a balance between humanitarianism and military necessity. In particular, the corpus of human rights law, developed over decades by courts and treaty bodies primarily in times of normalcy, must be adjusted and applied more flexibly in extraordinary situations in order to avoid imposing excessive, unrealistic burdens on states. As argued above, the really difficult question is how far normal tools of interpretation allow us to go in order to achieve this flexibility. The watering down of human rights during armed

[95] Article 2 of the International Covenant on Civil and Political Rights of 1967.
[96] In the Universal Declaration it reads: Now, Therefore the General Assembly proclaims this universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.
[97] Report of the Commission on Human Rights, Minimum Humanitarian Standards, Analytical Report of the Secretary General, E/CN.4/1998/87 (1998), para.62 – 66, available at http://daccess-ods.un.org/TMP/9157172.44148254.html (last visited on 10 Sept 2013).

conflict certainly must not go too far, so as to render them completely ineffectual or to compromise the integrity of the regime as a whole.[98]

Practically, the position of international institutions with regard to the application of human rights treaties to NSAGs does not provide a clear stand. Reports of the Inter American Commission on Human Rights and the UN Commission of Human Rights found that applicability of human right treaties to NSAGs is not desirable. The principle reason being that human rights treaties are accepted by state parties to regulate relationship between a government and the governed[99] and that individual rights are those recognised in the constitution of states which has the duty to protect its citizens.[100] But where written agreements have been entered, the consent of parties may extend to oblige themselves to human rights in addition to the humanitarian obligations.[101]

Other practical examples also show some reluctance to oblige NSAGs on human rights law. In the wording of special rapporteurs, human rights violations committed by NSAGs were mentioned as 'abuses' not 'violations', the latter being a terminology reserved for use on state parties only.[102] However, on other occasions international institutions have applied human rights treaties on NSAGs.[103] The UN Security Council

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[98] M. Milanovic, *op. cit.,* at note 22, p. 36.
[99] See Zegveld, L., *op. cit.,* at note 4, p. 40.
[100] *Ibid,* p. 40, see also Inter American Yearbook on Human Rights (1990) p. 356 – 358
[101] Example of this is the San Jose Agreement on Human Rights, between El Salvador and the Frente Farabundo Marti para la Liberacion Nacional (FMLN). See the text here online: http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/pa_es_07261990_hr.pdf
[102] See for example the report of the UN Commission on Human Rights, E/CN.4/1994/48, Special Rapporteur for Sudan, Gaspar Biro, 1 February 1994, para. 121, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G94/105/01/PDF/G9410501.pdf?OpenElement (last visited 8 December 2015). See also Zegveld, L., *op. cit.,* at note 4, p. 42.
[103] See for example, the Inter American Commission on Human Rights report of 1992-1993 referring to 'violations of internationally guaranteed human rights by armed groups'. Likewise the UN Commission on Human Rights resolutions on human rights and terrorism expressed concerns on the 'violations of

resolution 1193 of 1998 came out clear urging the Afghan factions, in particular the Taliban, to put an end to violations of human rights as well as violations of IHL … and to adhere to the internationally accepted norms and standards.[104]

Applicability of IHRL on NSAGs is an issue which is still developing within the corridors of international institutions practice. There have been attempts to promote the application of IHL and IHRL rules on NSAGs in times of peace and war. The idea was to adequately provide extended protection platforms to all actors: state and non-state entities; in times of peace and war. International experts initiated a process and developed the Turku Declaration in 1994 to regulate the conduct of NSAGs, drawing on both humanitarian and human rights laws. However, this process is stagnant, as the declaration is yet to be adopted by states. In recent years, Turku Declaration is considered as a pedagogical/instructional tool in respect of armed groups and non-state actors.[105]

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human rights perpetrated by terrorist group' and in another case the Rapporteurs called upon the 'parties to the conflict to comply with international humanitarian and human right standards'.
For more examples see Zegveld, L., *op. cit.,* at note 4, pp. 47 – 48 and Clapham, Andrew. "*Human* Rights Obligations of Non-State Actors in Conflict Situations." *International Review of the Red Cross*, Vol. 88, Number 863 (2006) pp. 505 – 508.

[104] See UN Sec Council Res 1193 (1998) para. 14, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1193(1998) (last visited 14 Sept 2013). See also Zegveld, L., Liesbeth. *Ibid.* p. 48.
See also UN Sec Council Res 1216 (1998) where the resolution called 'upon all concerned, including the Government and the Self Proclaimed Military Junta, to respect strictly relevant provisions of international law, including humanitarian and human rights law … para 5.

[105] The Turku Declaration origins can be traced back to the adoption of two Additional Protocols of 1977, an event which coincided with the entry into force of the International Covenant on Civil and Political Rights in 1976. Upon comparison, it was noted that there was a protection gap for situations of internal strive, something which ignited parallel and overlapping processes to address this situations. In December 1990, an expert meeting was convened at the Abo Akademi University Institute for Human Rights and adopted the Turku Declaration, but was not adopted by the United Nations. Another expert meeting was held in 1994 at the Norwegian Institute of Human Rights, and a revised version was submitted to the Commission on Human Rights by Norway and Finland. The stagnation of Turku Declaration is related to the reluctance of governments to adopt new human rights instruments in issues that are considered sensitive.

Finally, if we apply the strict sense of the positivist theory of international law, NSAGs, as an entity and party to internal conflicts, should have no obligations under human rights law. But this conclusion can be modified to accommodate the emerging convincing literature for a horizontal human rights regime which places responsibility on private individuals for violations in international law. However for the sake of borrowing common and internationally regulated rules to guide the conduct of NSAGs and or even non state parties on specific issues such as detention, the applicability of relevant provisions under IHRL will further promote the protection of civilians in situations of armed conflict and also enhance the sense of responsibility among serious NSAGs.

NSAGs Obligations under Customary International Law

International customs is one source of International law. It is typically defined as the collection of international behavioural regularities that nations over time come to view as binding on them as a matter of law. Article 38 of the Statute of the International Court of Justice defines an International custom as evidence of a general practice accepted as law'.[106] Based on this definition, the formation of a custom requires two elements: state practice and a belief that such practice is required (*opinio juris*).

See a paper by Martin Scheinin, Turu Abo Declaration of Minimum Humanitarian Standards (1990), *International Council on Human Rights Policy*, available at http://www. ichrp.org/files/papers/91/120B_-_Turku-Abo_Declaration_of_Humanitarian_Standards_Scheinin__Martin__2005.pdf (last visited November 2013)

[106] Article 38 of the ICJ reads: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) ..... , (b) international custom, as evidence of a general practice accepted as law.

The material sources of custom which evidence a practice diplomatic correspondence, policy statements, press releases, opinion of legal advisers, official manuals, manuals of military law, executive decisions and practices etc. The value of these sources varies and depends on circumstances. [107]

What constitutes a state practice is already a controversial question. The debate is over whether to consider what states do as a practice or what states say represents the law.[108] This controversy at the level of state does not help an argument to promote the practices of NSAGs to qualify as customs of international law. It goes without saying that the practice of NSAGs either in form of codes of conducts or deed of commitment made to observe certain IHL rules would not qualify as constituting as nothing close to state practice.

However, NSAGs conduct or practice may contain evidence as an accepted practice in non-international conflict, but the legal significance of such practice was not clear. As such NSAGs practices were not relied upon as existing customary norms; however, they were listed under other practices in the ICRC study on Customary IHL.[109]

There are disagreements as to the value of a customary system in international law. Some writers deny its significance as a source of law today because of its clumsy and slow to accommodate the evolution of international law while others see it as a dynamic process of law creation and more important than treaties given its universal application.[110]

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[107] Brownlie, Ian, *Principles of International Law,* Oxford University Press, London, (2008), p. 5
[108] Thirlway, H., *International Customary Law and its Codification,* A. W. Sijthoff, Leiden (1972), p. 58.
[109] Henckaerts, Jean-Marie and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, USA, (2009), p. xlii. (hereafter referred as Customary IHL)
See also Hanckaerts, Jean-Marie, "Study on Customary International Humanitarian Law." *International Review of the Red Cross,* Vol. 87, No. 857 (March 2005) p. 179-180.
[110] Shaw, Malcolm N., *International Law*, Cambridge University Press, 7th Edition, Cambridge, (2014), p. 52.

Customs may not be the best instrument to regulate complex issues, but it meets perfectly with the contingencies of the modern life.[111] Customs are essential in filling the gaps left by the treaty regime; limiting power of states to avoid treaty obligations; and promoting compliance with treaty norms which have customary status.[112]

Until recently, there was limited international precedent dealing with the application of customary IHL to internal conflicts. However this changed since the establishment of the Yugoslavia and Rwanda Tribunals as will be seen in the following paragraphs.

The position of IHL customary laws changed forever with the 1995 ICRC project to prepare a study report on customary rules of IHL applicable in international and non-international armed conflicts. The purpose of this study was to overcome two major impediments to the implementation of IHL treaties. First, treaties apply to states that have ratified them only, so the study identified which rules of IHL would form part of customary laws, such that they are applicable to all parties to conflict. Second, IHL does not sufficiently regulate internal conflicts, so the study was to determine if there are more detailed regulations in customary laws for internal conflicts.[113]

After ten years of research, in 2005, the ICRC published its study which identified a number of customary rules relevant for application in international and internal armed conflicts. The customary nature of these rules provides a wider acceptance among all parties of a conflict. However, the obligation of a state under customary rules is deeply engrained by its consent, something which brings about a lot of controversy owing to the changing political interests.

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[111] *Ibid.,* p. 52.

[112] Theodor, Meron, The Continuing Role of Custom in the Formation of International Humanitarian Law, *American Journal of International Law*, Vol. 90 (1996), p. 247.

[113] See Customary IHL, *op. cit.,* at note 109, pp. xxxiii – xxxiv.

There is ample evidence of international bodies accepting the applicability of treaty law as customary law. In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice (ICJ) confirmed that the fundamental rules of Geneva Conventions are principles of customary law: '… these fundamental rules are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.[114]

In the case of *Prosecutor v. Dusko Tadic* the Tribunal observed that treaty and customary law have crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other, such that some treaty rules have gradually become part of the customary law.[115]

In an attempt to elaborate the ICTY position, Zegveld outline some treaty norms which would be considered Customary: Common Article 3 of the Geneva Conventions; Article 4(2) which provides fundamental guarantees to persons not taking active part in hostilities; Articles 5 and 6; and Article 13(2) of Additional Protocol II to the Geneva Conventions.[116]

NSAGs have not been clearly mentioned as being obliged by the customary rules, but the Yugoslavia and Rwanda Tribunal have addressed the issues of customary humanitarian law with a liberal approach, avoiding the state practice and concentrating on the *opinio juris*. [117] Thus with this liberal approach, it is reasonable to assume the applicability of customary rules to all parties to an internal conflict; includes NSAGs.

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[114] Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ (Advisory Opinion of 8 July 1996), para. 79 (1996), available at http://www.icj-cij.org/docket/files/95/7495.pdf (last visited 29 November 2015).
[115] Tadic Jurisdiction case, para. 98
[116] Zegveld, L., *op. cit.,* at note 4, p. 20-21,
[117] *Ibid.,* p. 22

Conclusion

Social and political status has a particular influence on the way a person or a group conducts itself before the outside world and NSAGs are not an exception. There has been no status created for them under the IHL, but its mere mention in the IHL instruments was in terms of recognising a reality and promoting a sense of responsibility and discipline among its leadership and its members. Where the rules are known to a group, and their obligation to comply with such rules is communicated and understood, respect for the relevant rules can be achieved. On the other hand, if the obligation of NSAGs to respect the rules is denied, then the violation of existing rules intensifies.

Scholarly discourse on the basis of NSAGs obligation to the rules of IHL is encouraging the inclusion of NSAGs in the international law system. It is either that organized armed groups are bound via the state on whose territory they operate; or that organized armed groups are bound because their members are bound by IHL as individuals; or that norms of IHL are binding on organized armed groups by virtue of the fact that they exercise de facto governmental functions; or that customary IHL is applicable to organized armed groups because of the (limited) international legal personality that they possess; and that organized armed groups are bound by IHL because they have consented thereto.

The scope of application of IHL regulations should be refined to include NSAGs; and in this way, extending the scale of protection of persons not participating in conflict or those who cease to participate. This is not equivalent to granting legal status to NSAGs. Rather, it is an attempt to build a robust protection framework in conflict situations where the application of domestic law is disputed by NSAGs. IHL rules are not legislating in favour of NSAGs, but rather binding NSAGs to some form of

discipline when engaging in violent methods of protest and when depriving people of their liberty in areas under their control.

The focus should be on the conduct of parties and their respect for the rules of human dignity and humane treatment. This means that NSAGs as entity as well as individual members will be expected to show the same respect for the standards set in the law in a similar manner just as states.

CHAPTER THREE: DETENTION IN ARMED CONFLICTS

Introduction

The distinction between international and internal armed conflicts is entrenched in the key instruments of IHL. For international armed conflicts, Common Article 2 of the 1949 Geneva conventions specifies that the treaty provisions apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. For non-international armed conflicts, Additional Protocol II specifies that the application of the treaty shall apply to all armed conflicts which are not covered by Article 1 of Additional Protocol I, and which take place in the territory of a High Contracting Parties between its armed forces and dissident armed forces of other organised group. [118]

Now, with the changing nature of armed conflicts, the distinction between international and internal conflict is said to be artificial, arbitrary and worse of all, it frustrates the humanitarian purpose of the laws of war,[119] which is to reduce the sufferings of war victims and protection of civilian populations. In both situations, parties to a conflict use the same kind of weapons which has the same effect on people and property; and employs almost similar war tactics including restricting movement of people and depriving the freedom of others.

Persons deprived of their freedom are the major victims of the distinction between armed conflicts. The component of detention is adequately regulated for in situations of international conflicts (prisoners of war), but it has very limited regulatory regime

[118] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, Article 1 (1). (hereafter Additional Protocol II).

[119] Rogier Bartels, 'Timelines, Borderline and Conflict.' *International Review of the Red Cross,* Vol. 91 Number 873 (2005) p. 38-44.

for situations of internal conflicts, despite the fact that situations of the latter being on the increase compared to the former.

Further complicating the situation is the fact that emerging trends of armed conflicts are difficult to categorise as entirely international or non-international armed conflicts,[120] prompting scholars to suggest a new category of conflicts known as 'internationalised conflict'. Instances of states detaining members of an armed group (Guantanamo detainees) as well as NSAGs carrying out detention activities in areas under its control are among the complex issues of humanitarian law in recent times.

In the lines below, this study shall examine the status, types and regulations relating to instances of detention during internal conflicts.

3.1 Detention in International Armed Conflicts

International armed conflict is one which is waged between sovereign states and is mainly regulated by the Four Geneva Conventions of 12 August 1949:

I – Geneva Conventions for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field;

II - Geneva Conventions for the Amelioration of the Conditions of the Wounded Sick and Shipwrecked Members of Armed Forces at Sea;

III – Geneva Convention relative to the Treatment of Prisoners of War; and

IV – Geneva Conventions relative to the Protection of Civilian Persons in Times of War.

[120] See Emily Crawford, 'Eliminating the Distinction between Armed Conflicts.' *Leiden Journal of International Law,* vol. 20 (2007) p. 442

Relative to the topic under study and in relation to the detention component is the Third and Fourth Geneva Conventions; where the protection of captured members of armed forces, known as prisoners of war is regulated in the Third Convention and the protection of civilian populations detained during armed conflicts is regulated under the Fourth convention.

Prisoners of War

The concept of prisoners of war is regulated entirely in the Third Geneva Convention which contains 143 Articles divided into six parts.

Part I provides the scope of application and the definition of prisoners of war in its various categories. Article 4 recognises eight categories of persons who qualify to the status of prisoners of war: members of armed forces; members of militia belonging to a Party to the conflict; armed forces loyal to unrecognised authority by the detaining power; persons accompanying armed forces; members of crews; etc.

Part II outlines the essential principles which govern the humane treatment of prisoners. Article 12 asserts that prisoners are in the hands of the enemy power not individual military personnel. Other Articles demand humane treatment of prisoners, not to be subjected to physical mutilation or medical experiments[121]; and not to discriminated upon on any basis save for the favourable treatment accorded to women.[122]

[121] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 13. (hereafter Geneva Convention III).
[122] *Ibid.,* Articles 14 and 16.

Part III sets the standards for the conditions of captivity from the beginning to the release. It touches on interrogations, living conditions: food, water, hygiene and medical care, among others. This part is divided into six sections:

Section 1 provides for the events after capture including the profiling of captured soldiers, interrogations and exchange of information with his captors.[123] Article 18 recognises and protects the prisoners personal property and the management thereof. The safety of prisoners is dealt with under Article 19 and 20 which demands the evacuation of prisoners away from the combat zone in a humane manner in the prevailing conditions.

Section 2 regulates the internment of prisoners in confined camps[124] and it describes clearly that prisoners shall not be interned in penitentiaries[125] or areas where they may be exposed to the fire of the combat zone.[126] Article 25 to 28 ensures acceptable living conditions for prisoners in terms of food quantity and quality, suitable clothing and demands that canteens are installed in holding camps for prisoners to procure what they require in a private capacity. Prisoner's hygiene, sanitation facilities and medical attention and routine medical inspections is catered for under Articles 29 to 32.

Sections 3 allow the use of prisoners, at his voluntary will, for labour,[127] in specific categories of works[128] within suitable working conditions,[129] provided that such works

[123] *Ibid.*, Article 17.
[124] *Ibid.*, Article 21.
[125] *Ibid.*, Article 22.
[126] *Ibid.*, Article 23.
[127] *Ibid.*, Article 49.
[128] *Ibid.*, Article 50.
[129] *Ibid.*, Article 51.

are not humiliating and not those which are unhealthy or of dangerous nature such as mining.[130]

The management of prisoners financial resources are regulated under Section 4; this includes monies in the prisoners possession during capture; what prisoners can keep and use for private purchases; monthly pay and special agreements thereof; supplementary pay and working pay to prisoners permanently detailed to duties or to occupation in connection with administration, installation or maintenance of camps or spiritual and medical duties on behalf of their co-prisoners.[131]

Section 5 covers prisoners' relation with the outside world. Article 69 requires immediate notification to relevant authorities on the status of prisoners capture and Article 70 regulates the notification in writing by prisoner to his family on his status and health conditions. Exchange of letters, card and individual parcels containing food stuff, medicine and education or recreational items, as well as relief items are issues well regulated under Article 71 until 76.

In Section 6, the convention sets rules to govern the relationship between prisoners of war and the detaining authorities. Article 78 entrenches the right of prisoners to lodge complaints without reprisals. With regards to penal and disciplinary action, such shall be in accordance to the laws, regulations and orders in force in the armed forces of the detaining power after a due process of law by a military court or civil courts if permitted by the laws of the detaining power.[132] The disciplinary sanctions are specifically outlined in Article 89.

[130] *Ibid.*, Article 52.
[131] *Ibid.*, Articles 58, 60, 61 and 62.
[132] *Ibid.*, Article 82-84.

The provisions of Part IV stipulate on the terminations of captivity. The section regulates the repatriation of prisoners to neutral countries during hostilities; and repatriation at the close of hostilities and on the death of prisoners.

Part V concerns the establishment of an Information Bureau to manage prisoners of war. Article 122 defines the tasks of the Information Bureau in terms of information management, transmission, exchanges with prisoners. In addition to the Information Bureau, Article 123 creates a Central Prisoners of War Information Agency, an entity which provides support in information management.

Part VI contains some of the important provisions requiring belligerent parties to give free access to representatives of Protecting Powers and or the International Committee of the Red Cross, to go to all[133] places where prisoners of war maybe held, for inspection purposes.

Such are the provisions which govern the plight of prisoners of war in an international conflict, where members of armed forces and other categories of prisoners fall in the hands of another state, which is a party to a conflict. In the recent history, these rules have not been applied, since situations of international armed conflict are a rare occurrence.

Another category of persons deprived of freedom in a conflict situation are the civilian population. The protection regime for this category is defined under the Fourth Geneva Convention, which we will examine below.

[133] *Ibid.*, Article 126

Civilian Detainees

Civilian detainees are a category of persons who are aliens in the enemy territory and those persons who are in an occupied territory. Under the Fourth Geneva Convention and in the course of international armed conflict, the civilian population is provided with a full protection mechanism ensuring the rights of internees from their arrest to release.

The convention provides for protection of persons who 'at a given moment and in any manner whatsoever, finds themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[134]

The Fourth Geneva Conventions covers a wide range of issues, including protection of hospitals and its health staff, situation of occupation, etc. Of relevance to this study is Part III under Sections II and IV of the Fourth Geneva Convention, which tackles the issues of detainees and internees.

To start with, Article 42 confines the grounds of internment to situations where 'the security of the Detaining Power makes it absolutely necessary' or in other words 'for imperative reasons of security'.[135] Most importantly, any protected person who has been interned is entitled to have his internment reviewed by a court or a designated administrative body as soon as possible. Thereafter, the court of administrative body shall review the interment decision with a view to consider the release of the interned person.[136]

Elaborate provisions on the protection rules are contained in Section IV, which is divided into twelve chapters, the contents of which are in general analogous to the

[134] Geneva Convention relative to the Protection of Civilians of 12 August 1949, Article 4. (hearafter, Geneva Convention IV).
[135] *Ibid*. Article 78.
[136] *Ibid*. Article 43.

provisions adopted for prisoners of war. Chapter I articulate the basic responsibility of the detaining power to provide for the maintenance of internees and their dependants. In Chapter II, places of internment are conditioned to be away from dangers,[137] separate from prisoners of war camps,[138] safe in terms of hygiene and health,[139] equipped with premises for religious services,[140] and a canteen for internees private shopping.[141]

Sufficient food quantity and quality as well as provision for necessary clothing, footwear and underwear are covered under Chapter III,[142] while Chapter IV deals with the hygiene and medical attention. Article 91 requires the presence of an adequate infirmary with a qualified doctor, of their own nationality, in every place where civilians are interned.

In Chapter V, the right of internees to observe their religious duties is secured; including allocation of necessary facilities and minister of the internees' faith.[143] Article 94 encourages the detaining power to introduce recreational, educational and intellectual pursuits, subject to internees' personal desire.

Chapter VI permits internees to retain articles of personal use such as money and other valuables in their possession. It also entitles internees to regular allowances from their detaining power and to receive allowances from other sources such as his country, other states or humanitarian organisations.[144]

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[137] *Ibid*. Article 83.
[138] *Ibid*. Article 84.
[139] *Ibid*. Article 85.
[140] *Ibid*. Article 86.
[141] *Ibid*. Article 87.
[142] *Ibid*. Articles 89 and 90.
[143] *Ibid*. Article 93.
[144] *Ibid*. Articles 97 and 98.

Under Chapter VII, the detaining power is required to define a disciplinary regime consistent with humanitarian principles which does not involve any physical or moral victimization. Internees have the right to, directly or through Internees Committee, petition authorities on the conditions of internment without any reprisals.[145] Article 102 establishes the Internee Committee, whose duty is to 'further the physical, spiritual and intellectual well-being of the internees'[146].

Internees' communication with the outside world is regulated under Chapter VII. Article 106 demands that in no more than one week, every internee shall inform his relatives of his detention. Internees are also allowed to exchange of letter or cards with their relatives and to receive individual parcels or collective shipments containing foodstuffs, clothing, medical supplies or books which meet their needs.[147] In the subsequent articles, issues of shipping relief and costs thereof; means of transporting relief shipments, censorship of correspondences or consignments; are extensively covered.[148]

In Chapter XI, the Fourth Convention outlines the penal and disciplinary sanctions applicable to civilian internees: fine, discontinuance of privileges, fatigue duties and confinement. In all case, the duration of any punishment shall not exceed maximum of thirty days.

Article 120 and 121 tackles the internee escape offence; making an internee liable to disciplinary punishment only and calling for leniency not to inflict punishment of judicial nature. Where an internee is subjected to a special surveillance, it shall not entail abolition of the safeguards granted by the Convention.

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[145] *Ibid.*, Article 101.
[146] *Ibid.*, Article 103.
[147] *Ibid.*, Articles 107 and 108.
[148] *Ibid.*, See Articles 109 to 112.

Disciplinary punishment is ordered by the commandant of the internment place after giving sufficient hearing of the accused internee and his witnesses. Guilty internees shall be provided with adequate bedding,[149] allowed to exercise, read and write, send and receive letters[150] and shall not be transferred to penitentiary establishments to undergo disciplinary punishment.[151]

Chapter XII regulates the internees release, repatriation and accommodation in neutral countries. Article 132 provides that internees shall be released once the reasons for their internment cease to exist and Article 133 indicates that the release shall be as soon as hostilities close, expect for internees with penal proceedings.

Parties to the conflict shall ensure the return of internees to their places of residence or repatriation to their countries.[152] Travelling costs and expenses for returning internees and for cases of repatriation is sufficiently elaborated under Article 135 of the Fourth Convention.

Civilian Internees under Protocol I

Further protection of civilian internees in international armed conflict is provided for under Article 75 of the Additional Protocol I. Subsection 3 insists on immediate release of persons interned as soon as the circumstances justifying the internment ceases to exist. Where arrested persons have been put to trial, Subsections 4, 5, 6, 7 and 8 enumerates a number of judicial safeguards to ensure impartial judicial procedure through the process: prosecution, trial to conviction and sentencing.

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[149] *Ibid.*, Article 124.
[150] *Ibid.*, Article 125.
[151] *Ibid.*, Article 124.
[152] *Ibid.*, Article 134.

Such is the protection regime for civilian internees during international armed conflicts as provided for under the Fourth Geneva Convention and Additional Protocol I.

In summary, detention in international armed conflict is sufficiently regulated. Prisoners of war are subjects to internment under the Third Geneva Conventions and civilians can be interned for imperative security reasons under Fourth Geneva Conventions and Additional Protocol I. The law also indicates when internment must cease; either by repatriation for medical reasons or after the cessation of active hostilities; and a civilian is released as soon as reasons of internment no longer exist.

The international armed conflict law also establishes a review and assessment mechanism for civilian internment, to determine whether the internee continues to pose a threat to security. The procedure for this review is contained in the Fourth Geneva Convention. Additional safeguards in the review process are contained in Additional Protocol I, such as having the person interned duly informed in a language he understands. [153]

Do we have a similar and elaborate detention regime in the treaty law of non-international armed conflict? The section below attempts to address this question in an elaborate manner.

[153] See Sassoli, M., *et al.* 'The Relationships', *op. cit.* at note 31, pp. 616 – 618.

3.2 Detention in Non-International Armed Conflicts

Non-International armed conflicts are regulated under the Common Article 3 of four Geneva Conventions and Additional Protocol II to the Geneva Conventions. These are so far the only two sources of treaty rules of IHL governing conflicts between a state and armed groups within a territory, or between more than one armed groups.

Conflicts between NSAGs and states have become more complex nowadays, with contexts which could all be classified as non-international armed conflicts taking different forms and geographical scope. The classical type is mentioned in the Common Article 3, where government armed forces are fighting against one or more NSAGs within the territory of a single state. A subset of the classical type is where two or more NSAGs fight against each other within the territory of single state.

Other types of non-international conflicts include: conflicts spilling over into the territory of a neighbouring state; multinational forces fighting NSAGs alongside armed forces of a host state; multinational forces supported by UN forces; cross border conflicts, where a state forces engage NSAGs operating from a neighbouring state; and finally a transnational internal conflict such as the war on terror.[154] Each of these forms of non-international armed conflict has brought about a number of legal issues adding on the complexity of defining the laws applicable to the situation in question.

Be that as it may, in this study, I will focus on the classical form of non-international armed conflicts, where an NSAG is fighting state armed forces within the territory of that state.

[154] Pejic, J., 'The Protective Scope of Common Article 3: More than Meet the Eye.' *International Review of the Red Cross*, Vol. 93 Number 881 (March 2011), pp. 193-196.

Detention by NSAGs

In the recently concluded conflict in Libya or the active conflicts in Afghanistan and Syria, there are solid examples of detention by NSAGs. Likewise in countries with a long history of internal conflicts such as Sudan, Nepal, Sri Lanka and Colombia; these have witnessed various cases of detention by armed groups in territories under their control within a state.

More evidently, the ICRC has confirmed having visited detainees held by numerous armed movements such as the TPLF (Tigray People's Liberations Front) in Ethiopia, the RPF (Rwanda Patriotic Front) in Rwanda, the SPLA/M (Sudanese People's Liberation Army/Movement) in Southern Sudan, UNITA (National Union for the Total Independence of Angola), the LTTE (Liberaton Tigers of Tamil Eelam) in Sri Lanka, the FARC (Colombian Revolutionary Armed Forces) in Colombia, the main Kurdish parties in Northern Iraqi, de facto authorities in Abkhazia and in Nagorny Karabakh, etc.[155]

The diversity of NSAGs in terms of their formation, philosophy and capacity to administer governance, has an effect on the manner which they carry out their detention activity. Stability in the territory under the control of NSAGs, their capacity in terms of financial resources, human power and relevant detention expertise are some of the determinants to the nature of an NSAG detention regime.[156]

Other researchers are of the view that there is little evidence of NSAGs having expressly instituted an internment regime. In most cases, detainees are kept by

[155] See Alain Aeschelimann, 'Protection of Detainees: ICRC Action Behind Bars.' *International Review of the Red Cross,* Vol. 87, No. 857, (March 2005) p. 90.
[156] Tuck, D., *op. cit.*, at note 5, pp. 3-4.

NSAGs until their release becomes convenient or sometimes subject to some considerations which determine that fate of the detainees.[157]

Everything seems to be unusual in situations of violence and armed conflict and detention cannot take the usual format as understood in peacetime. Detention during armed conflicts is a reality and it may take various forms which could not be fully captured by legal texts or given a precise description of what it is. It suffices to qualify a situation as a detention practice where one human being in exercising his authority over another takes into custody another person for logically valid reasons. During this period of custody, there is a need for a set of rules to prescribed duties and responsibility of the detaining authority towards the detained person.

Reasons for NSAGs Detention

In line with its objectives, every NSAG has its own reasons for conducting detention or depriving people of their liberty. However, of the general objectives behind the deprivation of liberty for NSAGs is to secure military advantage over the opposing armed forces or to safeguard their own security.[158] Example of this kind of detention is evident in many contexts: JEM detained Sudan armed forces;[159] CPN-M detained the Royal Nepalese Army; *Ansar Al Sharia* detained Yemen armed forces[160]; and many other examples of NSAGs in Somalia, Afghanistan, Libya and most recently in Syria.

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[157] *Ibid.*, p 4.
[158] *Ibid.*, p. 4.
[159] Amnesty International, Sudan: Amnesty International appeals for safety of captured Sudanese soldiers, available at https://www.amnesty.ie/news/sudan-amnesty-international-appeals-safety-captured-sudanese-soldiers, on 28 February 2008, (last visited on 10 December 2015)
[160] Al Qaeda in Yemen frees 73 soldiers: available at http://www.thenational.ae/news/world/middle-east/al-qaeda-in-yemen-frees-73-soldiers (last visited on 10 December 2015)

Other NSAGs arrest individuals for alleged criminal violations and use detention as a means to ensure law and order, in conformity to their 'criminal code' applied in the territories under their control. The LTTE in Sri Lanka and FAFN in Ivory Coast are examples of two groups which had held criminal detainees in their territories.[161]

Some other groups detain people for purposes of treating the victims as hostages. This is when a capture or an arrest exercise by NSAG is accompanied by threat against the life, integrity or liberty of the arrested individual in pursuance of concessions by a third party. [162]

Examples of NSAGs Detention

In the following lines I will demonstrate with some details examples of detention regimes by some NSAGs.

JEM (Justice and Equality Movement) – Sudan

JEM is a major rebel group in Darfur, established early in 2003 by a group of educated, politically experienced Darfurians and had quickly gained control of territories in West Darfur in areas of *Jebel Mun*, before losing its main strongholds in North Darfur mid-2010. However over the course of the year, JEM reactivated a largely dormant presence across South Darfur, along the main supply route to Nyala.[163]

In the field of detention, the ICRC has reported having visited captured members of the Sudan armed forces under JEM custody, and in various occasions facilitated the

[161] Tuck, D., *op. cit.*, at note 5, p. 4.
[162] *Ibid.*, p. 4-5.
[163] See Justice and Equality Movement: http://www.smallarmssurveysudan.org/fileadmin/docs/facts-figures/sudan/darfur/armed-groups/opposition/HSBA-Armed-Groups-JEM.pdf (last visited 24 November 2013).

transfer of freed detainees back to government authorities. In July 2009, the ICRC, acting as a neutral intermediary, facilitated the transfer of 55 armed forces personnel and five police personnel to the Sudanese authorities in *Kutum*, North Darfur.[164] One year later, in May 2010, the ICRC acting as a neutral intermediary, reported as having facilitated the handover of 44 members of the Sudanese armed forces to government authorities close to Nyala, South Darfur.[165]

The circumstances leading to the capture of the Sudan armed forces by the NSAG are not clear, nor are the duration of their captivity and subsequent terms of their release. However, one can conclude three distinct issues out of this incident: the capture and detention of state armed forces by an NSAG; the subsequent possible negotiation between the parties to the conflict involving an intermediary; and the ultimate release and handover of detainees to state organs.

Forces Nouvelles de Cote d'Ivoire (FNCI) – Ivory Coast

FCNI is a political coalition that was formed in December 2002, in the wake of the first peace accords of the Ivorian civil war which ended in March 2007 where a peace agreement was signed with the group and its leader Guillaume Soro became the Prime Minister of Ivory Coast.[166]

Following the outbreak of violence between FAFN and the State, the group secured territorial control of much of Northern Ivory Coat between 2002 and 2007. Then

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[164] Sudan: Detainees Transferred Under ICRC Auspices, available at http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/sudan-news-180709.htm (last visited 23 November 2013)

[165] Sudan: ICRC facilitates handover of 44 freed detainees, available at http://www.icrc.org/eng/resources/documents/news-release/2010/sudan-news-230510.htm (last visited 23 November 2013)

[166] Forces Nouvelles de Cote d'Ivoire, available at http://en.wikipedia.org/wiki/Forces_Nouvelles_de_Cote_d'Ivoire (last visited 23 November 2013)

FAFN maintained extensive and routine detention operations, utilizing the detention infrastructure of the state. Under the auspices of the military and the police, respectively, the FAFN segregated conflict related detainees, such as members of the state armed forces, and common law detainees, subjecting the latter to a nominal trial.[167]

3.3 Legality of Detention by NSAGs

Whereas the reality of detention by NSAGs is no more an issue of dispute, the questions remains if the legality of such an action by NSAGs is tolerated in the eyes of the law. We will examine the legality of NSAGs detention under the domestic law and under the IHL, as the *lexi specialis* to situations of internal conflicts.

3.3.1 Detention by NSAGs under Domestic Laws.

Detention is a sensitive state practice and a strictly regulated by state laws under the supervision of the judiciary at the national level and closely monitored by various international human rights and civil activist bodies.

In Kenya, the regulations governing the arrest and detention of any person within the borders of the country are stipulated in the constitution and the other relevant laws. Under the Constitution of Kenya, the right to personal liberty is protected. Article 29 safeguards the right of freedom and security of all Kenyans including the right not to be deprived of freedom arbitrarily or without just cause; and not to be detained without trial.

Likewise, under the provisions of the International Covenant on Civil and Political Rights, Article 9 provides that no one shall be deprived of his liberty except on such

[167] Tuck, D., *op. cit.,* at note 5, pp. 3-4.

grounds and in accordance with such procedures as are established by law.[168] If applied to NSAGs, the Kenyan Constitution and this provision totally denies them the right to hold any person under their custody, in the absence of an enabling condition set by the article: 'in accordance with procedures established by law'. When NSAGs operate, there are no laws enacted and there will not time to establish one in such chaotic circumstances.

Not only does the domestic law deny NSAG the right to detain, it actually criminalises such action and punishes the culprits with heavy sentences. The Kenya Penal Code equates the act of detaining persons carried out by NSAGs with abduction. Under article 256, abduction is defined as a forceful compel or by deceitful induction of a person to go from any place. If a person is found guilty, the sentence for abduction is ten year imprisonment where the intent of abductors is to murder or to cause grievous harm[169] and seven years imprisonment if the intent is only to confine the abducted person.[170]

Just like Kenya, domestic laws of any civilised nation will not recognise NSAGs as legitimate authorities, but are rather outlawed groups, whose actions are punishable in most cases, with death penalty for treason and or imprisonment for other specific acts such as abduction (confinement of persons).

3.3.2 Detention by NSAGs under IHL

As explained earlier, rules of the IHL are the applicable laws to situations of armed conflicts involving NSAGs, which falls under the category of non-international armed

[168] See, International Covenant for Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1969, Article 9. (Hereafter ICCPR).
[169] Penal Code, Chapter 63, Revised Edition 2014 (2012), Laws of Kenya, Article 258 and 260
[170] *Ibid.,* Article 259.

conflict. In Chapter 2, we found that NSAGs are recognised subjects under the IHL and that the treaty law applicable to them are the Common Article 3 to the 1949 Geneva Conventions and Additional Protocol II of 1977. The question here is to determine the basis of a specific activity, i.e. detention by NSAGs under the rules of IHL.

Deprivation of liberty is an inevitable reality and unfortunately a lawful incident during armed conflicts. The IHL foresee and recognises the reality of detention by NSAGs and does not prohibit it but does not expressly either allow.[171] What exactly the humanitarian law did was to (partly) regulate the treatment and conditions of deprivation of liberty in internal conflicts, but without providing an express authority for NSAGs to detain.[172] An expert meeting on detention in internal conflicts attempted to fine tune the spirit of IHL in this regard, saying that there was not so much a 'right' for NSAG to detain but rather an authorization inherent in IHL to intern persons in non-international armed conflict; there was 'power to intern' rather than a 'right to intern'.[173]

Hence, the IHL treaties do not provide a clear legal basis for NSAG to detain. Experts have taken three diverse positions to determine the basis of internment generally in non-international armed conflict.

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[171] Casalin, Deborah. 'Taking Prisoners: Reviewing the International Humanitarian Law Ground for Deprivation of Liberty by Armed Opposition Groups.' *International Review of the Red Cross,* Vol 93, Number 883, (September 2011) p. 2.

[172] Tuck, D., *op. cit.*, at note 5, p. 7.

[173] Expert Meeting Summary on Procedural Safeguards for Security Detention in Non-International Armed Conflict, (Chatham House), London 22-23 Sept 2008, p. 4, available at http://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf, (last viewed on 01 July 2012).

One view suggest that since IHL does not provide a legal basis to intern, and human rights law being a more specific body of law with relevant rules in this case, constitutes the default legal regime which must be applied.[174] This view would be more relevant for both detention by a state party and NSAGs, but states totally ignores the reality of warfare and denies the authority of NSAGs to detain. For the sake of establishing a legal base beyond IHL, this argument regards the human rights law as the *lexi specialis*; at the expense of ignoring the differences between laws applicable in peace time (human rights) and those applied on conflict situations (humanitarian law)

Another view acknowledges the differences of peace and war times; and suggests the application of a modified human rights law regime, diluted to accommodate a reality of the war context.[175] This justification also concerns states more than NSAGs and its application undermines the *ratio legis* of human rights law which is to preserve the rule of law and prevent abuses of human rights by states in peacetime.

The final approach, which is a favourable one in this thesis, confirms that both IHL treaty and customary rules of IHL provides an inherent power to intern during internal conflicts, and this may provide a legal basis for internment to both parties of the conflict: states and non-state armed groups.

In situations of non-international armed conflict, the treaty based humanitarian law prescribes how persons deprived of their liberty must be treated and lays down judicial guarantee for those undergoing prosecution. [176]

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[174] Wilmshurst, Elizabeth, (ed), International Law and the Classification of Conflicts, Oxford University Press, UK (2012) p. 93.
[175] *Ibid.,* p. 94.
[176] Sassoli, M. *et. al.* 'The Relationships', *op. cit.* at note 31, p. 618.

Under Common Article 3 and Additional Protocol II, NSAGs are *not prohibited* from restricting the liberty of persons.[177] Common Article 3 envisages a situation where both parties to a non-international armed conflict would be holding detainees and demands from both parties, one of which would be an NSAG that (p)ersons … placed *hors de combat* by sickness, wounds, *detention*, or any other cause, shall in all circumstances be treated humanely'. The article prohibits both parties from undertaking specific acts against the categories placed *hors de* combat. Prohibited acts include violence to life, cruel treatment and torture; outrages upon personal dignity; and passing of sentences or executions without a proper judicial process.

In Protocol II, the law recognises the possibility of detention in non-international armed conflicts[178] and prescribes minimum rules to be respected with regards to persons deprived of their liberty as detainees or internees.[179] Article 6 of the Protocol II goes beyond detention and envisages a situation where a party to the conflict including an NSAG could be more sophisticated to the extent of conducting a judicial process and criminal prosecutions.

Furthermore, the principle of equality of belligerents, by which IHL sets equal parameters for each party to the conflict, regardless of the overarching illegality or legality of the conflict of the nature of the parties, secures the extension of the authority to detain to NSAG equally as it does for states.[180]

Supported by the strict application of the principle of equality of belligerents, the law as contained in both Common Article 3 and Protocol II offers a basis for NSAGs to carry out detention activities. The reference to 'persons, *horse de combat* by …

[177] Zegveld, L., *op. cit.,* at note 4, p. 65.
[178] Sassoli, M. *et. al.*, 'The Relationships', *op. cit.,* at note 31, p. 618.
[179] Additional Protocol II, Article 5.
[180] See Tuck, D., *op. cit.* at note 5, p. 9 and also Zegveld, L., *op. cit.,* at note 4, p. 64.

detention' in the Common Article 3, would be superfluous if not understood to be accompanied by an authority to detain by either party to the conflict.

The law, however, does not prescribe the reasons for which persons may be detained nor do they dictate the right to judicial control during detention or internment.[181] This is a major challenge facing humanitarian organisations involved in the promotion of IHL principles during armed conflicts. The ICRC, as a central organisation in IHL issues, has developed a working policy with regard to detention/internment in NIAC situations, largely drawn from the language of the Fourth Geneva Convention. Its policy relies on 'imperative reasons of security' as the minimum legal standard that should inform internment decisions in NIAC. Though not sufficiently defined, the standard of 'imperative reasons of security' provides a workable balance between the need to protect personal liberty and the detaining authority's need to protect itself against security challenges.[182]

Limitations on NSAG Detention

As briefly explained above, the authority to detain by parties to a conflict is not absolute. The law has specifically identified situations where deprivation of liberty by NSAGs is prohibited.

To start with, the IHL has a protection regime[183] which ensures humane treatment of persons who are no more participating in hostilities, including those deprived of

[181] Zegveld, L., *op. cit.,* at note 4, p. 65.
[182] Pejic, J., "The protective Scope", *op. cit.,* at note 154, pp. 208-209.
[183] For more information on the IHL protection of persons regime, review the following Article in Geneva Conventions and its Additional Protocols:
Geneva Convention I: Article 12 (Protection of wounded and sick of armed forces), Article 24-26 (Protection personnel of medical and aid societies);
Geneva Convention II: Articles 36-37 (Protection personnel of medical and aid societies);

freedom and aspires to ensure their detention is done on valid grounds. We shall dwell on more on this issue in the coming chapters.

The IHL also confers protection on persons not taking part in hostilities, generally all non-combatants (civilians) and a specific group of people is protected under Geneva Conventions. This group is concerned with the alleviation of pain and suffering during armed conflicts. They include medical personnel, religious personnel and humanitarian relief personnel. They are protected by the conventions and Additional Protocols.

In Article 9 of the Additional Protocol II, the law not only calls for the respect and protection of medical and religious personnel; it demand parties of the conflict to 'grant all available help for the performance of their duties', in a professional manner. This law implies that medical and religious personnel would be that last persons to be subjected to detention without strong justifiable grounds.

The protection of these persons is not absolute also; it is subject to their keeping a clear distance from combat operations; and they lose their protection if they commit, outside their professional function, acts harmful to the enemy.

In the same spirit, the Customary IHL rules consider the same category of persons as protected. Medical personnel,[184] religious personnel[185] and humanitarian relief

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Geneva Convention III: Article 33 (Protection of medical personnel and chaplains assisting prisoners);
Geneva Convention IV: Article 13 (Protection of civilian populations in general), Article 44 (Protection of refugees) and Article 50 (Protection of Children);
Additional Protocol I Articles 15 (Protection of civilian medical and religious personnel), Article 50 - 51 (Protection of civilian populations), Article 71 (Protection of relief personnel), Articles 76-77 (Protection of women and Children), and Article 79 (Protection of Journalist);
Additional Protocol II Article 7 (Protection and care of wounded) and Article 9 (Protection of medical and religious personnel).

[184] Customary IHL, Rule 25 (Medical personnel must be respected and protected in all circumstances)

[185] Customary IHL, Rule 27 (Religious personnel must be respected and protected in all circumstances)

personnel[186] are respected and protected. Rules related to these categories are applicable to both International and non-international conflicts.

In addition to this limitation on NSAGs detention to target specific categories of persons for detention, there are other forms of detention practices which are prohibited.

Prohibited forms of detention are clearly mentioned in the wording of the Common Article 3, which include: detention on discriminatory grounds, arbitrary detention and taking of hostages; are all described as inhumane treatment, and prohibited under the IHL rules.[187]

The concept of arbitrary detention is not available in the treaty law regulating non-international conflicts. However, International bodies such as the Inter-American Commission for Human Rights and UN Commission on Human Right Rights prohibits arbitrary detention except where necessary for imperative reasons of security. These bodies appear to have derived this prohibition from conventional humanitarian law applicable to situations of international armed conflicts[188], as defined in the Fourth Geneva Convention in Articles 42 and 43.

In Article 6 of Protocol II, the term 'deprived of their liberty for reasons related to the armed conflict', does not cover persons detained under normal rules of the criminal codes, where there is no link between their crimes and the situation of conflict. The International law fails to provide even an implicit legal basis for deprivation of liberty, not related to the conflict. NSAGs are thus permitted to detain, prosecute and

[186] Customary IHL, Rule 31 (Humanitarian relief personnel must be respected and protected).
[187] Nelleke van Amstel. 'In Search of Legal Grounds to Detain for Armed Groups.' *International Humanitarian Legal Studies*, 3 (2012) p. 164.
[188] Zegveld, L., *op. cit.* at note 4, p. 65.

try persons for violations of laws of war but not to prosecute on common law crimes.[189]

Indeed, the prohibited detention or rather detention like practices is clearer in the treaty law and this entails that the treaty resolved to deal with situations of detention by NSAGs as a reality. Thus the law intended to create authority to detain by NSAGs and also to contain detention practices within a specific parameter; i.e.:

1. Deprivation of liberty should be on issues related to the armed conflict as stated under Article 6 of the Additional Protocol II;

2. It shall be carried out for imperative reasons of security; and

3. If carried out, it will conform to the minimum standards of treatment, human dignity and sufficient judicial guarantees.

[189] Commentary on Additional Protocol II, *op. cit.,* at note 34, p. 1387; See also Tuck, D., *op. cit.,* at note 5, p. 8.

Conclusion

It could rightly be said that NSAG detention activities within a territory of a state has a direct and deep effect on the state sovereignty more than anything else in a given conflict. In essence, proper detention activity involves a lot of internal organisation and discipline, human and financial resources and administrative capacity. And for an NSAG to claim having detainees under its authority even for a couple of days, it's an issue which brings about a new dimension to a conflict. It takes an NSAG from being a mere group of fighters involved in an armed struggle to a group with a demonstrated ability to govern a territory. This is something which no sovereign state will accept.

As such, states are not expected to create an express authority for NSAGs to run parallel prisons which could ultimately draw the attention of international institutions such as ICRC. Treaty law to expressly regulate NSAGs detention is a necessary evil for states to consider for the sole sake of providing a window of protection for persons *hors de combat* under the authority of NSAGs.

States, for sure, set for themselves a ground of detention for 'imperative reasons of security' and not for NSAGs. It is only when a state fails to prevent an NSAG to carry out detention in territories under its control, that an NSAG is, by virtue of 'facts on the ground', authorised also to detain persons for the same ground of 'imperative reasons of security.

Beyond the inherent authority of an NSAG to detain; there is rather an important question about the laws governing the detention regime as a whole. Why, when and how can an NSAG go about detaining persons in an internal conflict according to the law. In the following chapter, this study will identify the relevant laws which govern the detention, living conditions, treatment and release. The study will outline

provisions of law designed to ensure the safety of the persons deprived of freedom and humane treatment through the period of detention.

CHAPTER FOUR: RULES REGULATING NSAG DETENTION

Introduction

In Chapter three, the recognition of treaty laws for NSAGs authority to carry out detention activities was reviewed and confirmed; and the practical evidence of NSAGs engaging in detention was seen to be wide spread from Sri Lanka to Darfur and Colombia. However, the pertinent issue in this regard is the identification and dissemination of the relevant laws governing the deprivation of liberty of persons and armed forces by NSAGs.

As highlighted in the past chapters, the law governing detention by NSAGs is not adequate; it is thus imperative to identify areas of deficiency and possible gaps; and ultimately suggest the way forward. The goal is to present a solid detention regime which could form a basis for an NSAG to deprive persons of their liberty.

This chapter concerns the substantive rules which govern the period of detention under the authority of an NSAG, including the treatment of detained persons; the humane living conditions of detention; and the administration of justice.

4.1 IHL Rules of Detention by NSAGs

Under the IHL regime, the authority of NSAGs to detain is literally in practical sense, a settled matter. However, the mere authority to detain is not sufficient to provide for the humane treatment and judicial safeguards of detained persons. In this section, this study will look into the main source of rules applicable to detention activities by NSAGs under various categories.

Rules of detention which are directly applicable to situations of non-international armed conflict, where NSAGs form one part of the conflict, are contained in two main instruments of the Geneva Conventions: Article 3 which is Common to the four Geneva Conventions and the 1977 Additional Protocol II to the Geneva Conventions.

As explained earlier, the concept of detention during international conflict is extensively regulated by other Geneva Conventions; but their application does not extend to situations of non-international armed conflicts. However, academics and researchers repeatedly use provisions such as Article 75 of the Additional Protocol I to define the concept of judicial guarantees; but in the legal sense the article could not be used to establish obligations against NSAGs.

This study will look into the obligations of NSAGs in conducting a proper detention regime in accordance to the treaty law applicable to non-international armed conflict.

Common Article 3

Under IHL, the Common Article 3 was the first treaty to establish NSAGs obligation towards detainees in internal conflicts, in addition to its original objective: to regulate the general obligation of parties in internal conflicts. The wording of the Common Article 3 provides a set of basic guarantees which are fundamental in nature for detainees who are considered as protected persons in the enemy hands, i.e. those *hors*

des combat. Generally, the article regulates two key domains of IHL rules in internal conflicts: the treatment of persons in enemy hands and conduct of hostilities.[190]

Article 3 demands from parties to the conflict, in our case, the NSAGs; specific conduct in relation to their dealing with detained persons:

i) Humane treatment without any adverse distinction founded on race, colour, religion or faith, sex, birth of wealth, or any other similar criteria.[191]

ii) Prohibits violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;[192]

iii) Prohibits taking of hostages;[193]

iv) Prohibits outrage upon personal dignity, in particular, humiliating and degrading treatment; and [194]

v) Prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.[195]

With these provisions, Common Article 3 has imposed upon NSAGs as a party to a conflict the responsibility to ensure humane treatment of detainees and requiring them to refrain from specific practices such as hostage taking; violence; degrading treatment and summary sentences or executions. Although neither the Article expressly mentioned detention/internment nor elaborated on the permissible grounds

[190] See Pejic, J., "The protective Scope", *op. cit.,* at note 154, p. 205.
[191] Geneva Conventions, Common Article 3 (1)
[192] *Ibid.,* Common Article 3 (1) (a)
[193] *Ibid.,* Common Article 3 (1) (b)
[194] *Ibid.,* Common Article 3 (1) (c)
[195] *Ibid.,* Common Article 3 (1) (d)

or process; but the provision did provide a sense of a responsibility to either party of the conflict, towards persons placed *hors de combat*; in the least minimum standard of protection and care.

Much can be said of the principles stipulated by Common Article in terms of their meaning and scope. Terminologies such as 'humane treatment', 'personal dignity', 'judicial guarantees', encompasses wide interpretations and unfortunately the *travaux preparatoires* provided little assistance in deciphering the definitional context of Article 3. Quite probably the lack of discussion was precipitated by the unwillingness to specify examples other than those delineated in the brief list of universally condemned proscriptions for fear that a *contrario* reasoning might result in justification of all actions not proscribed.

As commented by the ICRC, it is unnecessary to define some expressions; it's pointless and even dangerous to enumerate things which a human being must be provided for his normal maintenance as distinct from that of an animal. Instead the Article enumerated things which are incompatible with humane treatment and long lists or too much detail were avoided on purpose. Great care was taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts and the more specific and complete a list tries to be the more restrictive it becomes.[196]

What is 'humane' is subjective; the standard will vary according to the socio-economic background of the victims and the vanguishers.[197] It becomes more problematic to define words like 'humane' and 'dignity; especially where NSAGs are involved. They mean different things to different people and its constituent elements

[196] Elder, David A., 'The Historical Background of Common Article 3 of the Geneva Convention of 1949.' *Case Western Reserve Journal of International Law*, Vol. 11 Number 1 (1979) p. 60; See also Pictet, Jean, ed., *op. cit.,* at note 63, p. 53.
[197] Elder, D., *op. cit.,* at note 196, p. 60.

are dependent on cultural and religious backgrounds delineate the doctrine of humaneness and dignity.[198]

Common Article 3 is strictly humanitarian in character. Thus when the law invokes humane treatment; it's not a question of 'legal treatment' but simply 'humane treatment' for persons placed *hors de combat*; that is they receive a standard of treatment which is accorded to a normal human being in normal circumstances.[199]

An outstanding provision in Common Article 3 in terms of regulating detention by NSAGs is the caution expressed when dealing with judicial sentences and executions without previous trials, because they are too open to error. The Article has rightly proclaimed that administration of justice should be properly safeguarded and thus, summary justice is prohibited. The article does not interfere with the right to prosecute, sentence and punish according to the law.[200]

In reality, the limited and doubtful capacity of NSAGs to administer justice is well understood. This is so due to a specific challenge for NSAGs not being able to focus on delicate judicial matters in a conflict situation. In essence, administration of justice is a state function par excellence and the factual compliance of NSAGs with most of the guarantees will be highly contextual.[201]

Finally, common Article 3 offers a convenient possibility, encouraging parties to the conflict to enter into 'special agreements, all part of the other provisions of the present convention'. Situations of conflict may extend or turn into a real war, may be with detainees running into thousands from both sides and the application of Article 3 may no longer be enough. Hence, parties to the conflict are under obligation to

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[198] See Pejic, J., "The Protective Scope", *op. cit.* at note 154, p. 215.
[199] Pictet, J., *op. cit.,* at note 63, p. 56.
[200] *Ibid.,* p. 54.
[201] Pejic, J., "The protective Scope", *op. cit.* at note 154, p. 214.

bring to a fuller application of the Convention by means of bilateral agreement;[202] for example an agreement to apply the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War of 1949.

Additional Protocol II

Since 1945 until 1977, Common Article 3 was the only international treaty with provision applicable to conflicts involving NSAGs which represented 80% of the victims of armed conflict. Although the article established a solid basis for detention by NSAGs, among other things, it was necessary to complement the fundamental principles articulated in the Common Article 3 with other rules in areas such as the judicial guarantees.

In the making of Additional Protocol II, the ICRC proposed for more extensive guarantees for persons who have fallen into the power of adverse party, which were refused. Other experts favoured specific protection for combatants captured in armed conflicts while others opted for a prisoner of war treatment by analogy with Article 4 of the Third Convention. Such proposals though ambitious but were seen unrealistic in situations of internal conflicts because they collided with the treaty distinction between international and internal conflicts; the principle of sovereignty of state; and the domestic legalisations which criminalised armed struggle.[203]

Nevertheless, the provisions of Articles 4 to 6 of the Additional Protocol II provide an improved detention regime for NSAGs which complements in many ways the principles mentioned in the Common Article 3. Rules defining an NSAG detention regime as contained in the Additional Protocol II may be divided into three groups:

[202] Pictet, J., *op. cit.,* at note 63, p. 59.
[203] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1332 – 1333.

rules of humane treatment contained in Article 4; minimum standards during detention stipulated in Article 5; and judicial guarantees as defined in Article 6.[204]

Rules on Humane Treatment of Detainees

The basis of this category of rules is the Common Article 3, which obliges NSAGs to treat humanely all persons placed *hors de combat*, including the obligation relating to detention and internment of persons.

Article 4 of Protocol II reiterates the essence of Common Article 3 and takes much inspiration from other laws such as the Hague Law and the Covenant on Civil and Political Rights.[205] The third sentence of subsection one articulates 'the rule on quarter' that 'it is prohibited to order that there shall be no survivors'. Inspired by the Hague law, the rule aims at protecting combatants when they fall into the hands of the adversary by prohibiting harm or extermination when they are captured.[206] This in principle encourages parties to a conflict to practice capture and detention instead of murder and executions of persons placed *hors de combat.* Respect for this rule is fundamental, since without sparing captives/detainees, guarantees of humane treatment and or judicial guarantees for detainees would not be necessary.[207]

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[204] *Ibid.* p. 1365.
See also, Zegveld, L., *op. cit.,* at note 4, p. 60.
[205] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1369.
[206] See Additional Protocol II, Article 4(1).
The rule of quarter is stipulated at the end of subsection (1), which reads: 'It is prohibited to order that there shall be no survivors'. For this prohibition to be respected, NSAGs need to be encouraged to engage in detention practices instead of executing those captured for any given reason. Where the right of NSAGs to detain is not recognised initially by parties to the conflicts, including states, and increasingly by respective international judicial and monitoring bodies, NSAGs will definitely resort to issue the orders of 'there should be no survivors' in their conduct of hostilities.
[207] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1371.

Under Article 4, the Protocol illustrates in a non-exhaustive lists, a number of prohibited acts: violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishments; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; slavery and the slave trade in all their forms; pillage; and threats to commit any of the foregoing acts.

The scope of prohibition here is fuller, considerably strengthened and further reaching in protection than that of Common Article 3. Some new prohibitions introduced in this Article include the prohibitions on collective punishments, acts of terrorism; slavery and slave trade; all these has an impact on the honour and dignity of a detainee.

International bodies such as the Inter-American Commission, the UN Commission on Human Rights and the UN Mission for El Salvador, have widely applied these norms, particularly the prohibition of violence to life and person. [208]

Rules on the Material Conditions of Detention

Under Article 5, the Protocol ensures that conditions of detention will be reasonable for detainees; guaranteeing humane treatment. In this Article, there are specific obligations on NSAGs to do certain things to realise reasonable conditions of detention.

In its opening statement, the Article define its scope of application on 'persons deprived of their liberty for reasons related to the armed conflict' irrespective

[208] Zegveld, L., *op. cit.,* at note 4, p. 62.

whether they are interned or detained; without giving them a special status. Although the scope covers persons prosecuted under penal law and or interned for security reasons, but there must be a link between the conflict situation and deprivation of liberty.[209] As mentioned earlier, prisoners held under criminal law are not covered by this provision.

As a minimum NSAGs are required to provide treatment to the sick and wounded captured in a humane manner and without no distinction on any ground save for the medical ones; as required by Article 7. Other paragraphs demand NSAGs to provide essential minimum requirements for food, hygiene, water and shelter. Aware of the reality and general difficulties in conflict situations, the treaty places obligations on detaining authority at the standard of the prevailing living conditions in the area in terms of type, quality and amount of food, water every detainee should receive.[210]

The local measure of capacity and considerations on cultural and community peculiarities stipulated in Article 5 (1) is among the important steps taken to help NSAGs implement its international obligations towards detainees under its authority.

Detainees must be protected against the rigours of the climatic conditions and against the dangers of the armed conflict. Detainees are allowed to receive individual relief, designated by name, or collective relief sent by humanitarian organisations. The fact that detainees receive parcels and relief does not relieve NSAGs of their obligation to provide detainees with food, water, etc.

NSAGs are under obligation also to guarantee persons deprived of their liberty to practice their religion and to receive appropriate spiritual assistance. While the right to practice one religion is absolute, the obligation to provide spiritual assistance is

[209] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1385-1386.
[210] *Ibid.,* p. 1387.

somewhat relative, taking into account the difficulty to find adequate religious assistance.[211] Here also, the provisions are considerate on the capacity of some parties to the conflict, especially NSAGs, given the challenges to fulfil some complex obligations related to religion, whose issues are normally susceptible to controversy. As such the obligation is to respond to requested needs in an appropriate manner.

In paragraph 2, the provisions of Protocol II demand from NSAGs as the detaining authority to meet specific obligations 'within the limit of their capabilities': to house women in separate quarters and designate a woman for their supervision; to allow detainees send and receive letters with their families; to hold detainees far from combat zone[212] and to provide medical attention including the physical and mental health accordingly.

Again the parties are called upon to submit to the obligations in paragraph 2 within the limits of their capacities. This may be considered as a sort of a guideline, depending on the circumstances and ground realities. The rules mentioned in the law serve as an illustration of the humane principles which have a wider protection meaning. As such NSAGs should adopt their interpretation and understand their limited capacity in light with the obligation to achieve 'humane treatment' called for in Common Article 3 and Article 4 of the Protocol.

The obligation for humane treatment is extended in paragraph 3 to cover persons who are neither interned nor detained within the meaning of paragraph 1. This could be person under house arrest or under some form of surveillance or restricted movement. Protocol II demand that NSAGs are obliged to ensure such persons have

[211] *Ibid.,* p. 1388.
[212] This is based on Article 23 of Geneva Convention III and Article 83 of Geneva Convention IV

the benefit of fundamental guarantees laid down in Article 4 as well as provisions of Article 5 which are not concerned with the material conditions of detention.[213]

Finally, where NSAGs have decided to release persons deprived of their liberty, they have an obligations to ensure the safety of released detainees. The element of safety and the release of detainees are in this respect interdependent. It is difficult to determine the condition of safety, but it is reasonable to suppose that NSAGs will have an obligation that the released persons have reached an area where the detainees are no longer considered enemies.[214]

Rules on Prosecution and Fair Trial Rights

Protocol II supplements Common Article 3's prohibition of summary sentences and executions without proper judgements, with a defined notion of judicial guarantees. Under Common Article 3, the court is termed as 'regularly constituted court' and in Protocol II, it is termed as ' a court offering the essential guarantees of independence and impartiality'.[215] The different use of terminology referring to principally the same thing shows that States did not put much emphasis on how an NSAG court is established, rather the concern was about fair trial guarantees.[216]

In terms of scope, the Article 6 confines the application to the prosecution and punishment of criminal offences related to armed conflict, not merely administrative or disciplinary offences. In this way, NSAGs are discouraged to carry out arbitrary

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[213] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1393

[214] *Ibid.,* pp. 1393 – 1394.

[215] The term 'court offering essential guarantees of independence and impartiality' was originally used in Article 84 of Geneva Convention III.

[216] Jan Willms, 'Justice through Armed Groups' Governance – An Oxymoron?,' *SFB – Governonance Working Paper Series*, no. 40, (October 2012) p. 7, available at http://www.sfb-governance.de/en/publikationen/sfbgov_wp/wp40_en/index.html (last visited 10 Dec 2013)

detention or detention on flimsy security reasons. Such cases do not find space in the IHL judicial setup.

By this Article, NSAGs are guided by a number of fundamental principles which in total offers essential guarantees of independence and impartiality:

- That the accused is informed without delay of the particular of an offences alleged against him.

- That the accused is informed of his rights, able to exercise them and be afforded means of defence at every stage of the prosecution.

- That an accused person will be prosecuted and convicted on the basis of offences personally committed: the principle of individual responsibility.

- That no crime will be attributed to accused persons without a basis in law (*nullum crimen sine lege*)

- That an offender will have a lighter penalty even if the provision for it was made after the offence was committed.

- That an accused person is innocent until proven guilty. [217]

- That the accused has the right to be tried in his presence if he so wish.[218]

- That the accused shall not be compelled to testify against oneself or to confess guilt.

[217] This provision was inspired by Article 67 of the Fourth Geneva Convention, it also contained in Article 14 (2) of the Covenant of the Civil and Political Rights.
[218] Also this provision was inspired by Article 14 (3d) of the International Covenant of the Civil and Political Rights.

At the sentencing, the Protocol requires NSAG courts to advise the accused of his judicial remedies and other available appeal mechanisms. The ICRC commentary notes that the right is not limited to being informed of judicial remedies, but that the convicted persons should not be denied the right use such remedies.[219] Death sentence shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.[220]

In a pure humanitarian spirit, Article 6 (5) introduces the concept of amnesty for those deprived of liberty for reasons related to the armed conflict. This is purely a gesture of reconciliation between an NSAG and a state or between two or more NSAGs; highly encouraged on both parties, with no obligation on parties to the conflict. It is unlikely for state parties to heed to the call for amnesty and its justification will be validated by the domestic law which demands prosecution of its citizens for committing crimes such as hostage taking and abduction.

States are not prohibited to prosecute its own citizens in accordance with its domestic laws. However, as IHL suggest more lenient provisions such as amnesty; where possible, members NSAGs should be made to benefit from such IHL rules. In this way, setting an example where NSAGs would get the encouragement to apply IHL rules to persons who have fallen under their control. Unfortunately the desire of states in most contemporary internal conflicts is to fight NSAGs to the end, thus denying any chance for the application of IHL rules for the benefit of victims or members of NSAGs.

[219] Commentary Additional Protocols, *op. cit.* at note 34, p. 1401.
[220] See the details at Additional Protocol II, Article 6(2). This provision was inspired by the provisions of Article 68(4) of the Geneva Convention VI.

Although the pillars or 'a court offering essential guarantees of independence and impartiality' seem straight forward and logical, the field application of it may be quite challenging. NSAGs would definitely require support and guidance from relevant international bodies to stand up to the challenge. It is legitimate to assume that the requirements of Article 6 may be exceeding the capabilities of some NSAGs for various reasons. However, the principles so proclaimed would continue to provide a good and mandatory example for NSAGs to comply with.[221]

In this respect, a good example was documented by the United Nations Mission for El Salvador (ONUSAL) with regard to the penal laws made by an NSAG, Farabundo Martí National Liberation Front (FMLN).[222] ONUSAL reviewed penal laws made by FMLN to determine whether they were in conformity with IHL, since the term in accordance with the 'law' in Article 6 would mean also laws of NSAGs. ONUSAL found out that the norms mentioned in the FMLN document lacked essential norms of a penal system: no rights and means of defence in the trial phase; absence of right to appeal; and lack of independence and impartiality.[223]

What ONUSAL said about FMLN document lacking essential norms of a penal system could actually be said to about some of the developing countries where the judicial systems are below the required standards. Some are actually undergoing some form of a program to uplift and develop their judicial systems to the level of international standards. May be some well organised NSAGs would require little support to improve their judicial system to the satisfaction of the common Article 3 and Articles 4, 5, and 6 of Additional Protocol II related to the deprivation of liberty of persons in

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[221] Zegveld, L., *op. cit.,* at note 4, pp. 72-73.

[222] FMLN was an insurgent group that became a legal political party of El Salvador at the end of the country's civil war in 1992. By the end of that decade, the FMLN had become one of the country's prominent political parties. For more information see http://www.britannica.com/EBchecked/topic/201692/Farabundo-Marti-National-Liberation-Front-FMLN (last visited on 10 December 2013).

[223] Zegveld, L., *op. cit.,* at note 4, pp. 70-72.

non-international armed conflicts. Nay, this kind of support to NSAGs will be considered as a direct interference to the states internal affairs.

Rules on Procedural Safeguards

This category of rules concerns detention for purely security reasons related to the conflict, known as internment or security detention. Under IHL, and for situations of international armed conflicts (occupation), procedural safeguards for cases of internment are provided for under Article 78 of the Fourth Geneva Convention.

The convention requires that a decision to intern a person for imperative reasons of security shall be done according to a regular procedure which shall include two necessary elements: the right of appeal which needs to be decided without delay; and periodic review, every six month on the decision of the appeal by a competent body set up by the respective authority.[224]

There are no similar provisions in Common Article 3 which regulates non-international armed conflict, presumably because the drafters of the Geneva Conventions didn't take into account that NSAGs could undertake internment. Where internment is carried out by states, the domestic laws are normally equipped with sufficient judicial mechanism in place to challenge continued detention.

When Additional Protocol II came into being, it explicitly mentioned internment, confirming it as one form of deprivation of liberty in situations on non-international armed conflict. However, it failed to list down the internment grounds or the right for a review process during internment.

[224] See Geneva Convention VI, Article 78.

To fill in this gap, the ICRC in 2005 issued an institutional guideline entitled 'Procedural Principles and Safeguards for Internment/Administrative Detention; to be used in its operational dialogues with states and non-state parties to conflicts. The guidelines are derived from the Geneva Convention IV; Article 75 of the Additional Protocol I, common Article 3; Additional Protocol II and the rules of customary IHL.[225] In Chapter 3 of this study, we reviewed the rules contained in Geneva Convention IV and Additional Protocol I, relating to internment of civilians in international conflicts.

The ICRC guidelines identified five major principles[226] regarding interment:

1. That internment is an exceptional measure, an absolute necessity and for imperative reasons of security;[227]

2. That internment is not an alternative to criminal proceedings and where there is a crime, one should be tried in a regularly constituted, independent and impartial court;

3. That internment can be ordered on individuals on case-by-case basis without discrimination. *En bloc* interments based on nationality or any other category of persons amount to collective punishments which is prohibited; [228]

4. That interment cease as soon as the security reasons for its cease to exist;[229]

5. That internment must conform to the principle of legality, where valid reasons and procedures according to the domestic or international law.

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[225] Pejic, J., 'Procedural Safeguards', *op. cit.,* at note 7, pp. 377-378.
[226] *Ibid.,* pp. 380-383.
[227] Geneva Convention IV, Articles 42 and 78.
[228] Additional Protocol I, Article 75 (2) (d).
[229] See Geneva Convention IV, Article 132; see also at, Additional Protocol I, Article 75 (3); and the International Convention for Civil and Political Rights, Article 9 (4).

The guideline also suggests a number of procedural safeguards; some of which we have already discussed in this chapter such as: detainee attending proceedings in person;[230] the right to medical care and attention;[231] and the right to family contacts.[232] Given the importance of these rules in defining an exemplary detention regime, we shall summarise the rights contained in the ICRC institutional guideline here below:

Right to information about the reasons of internment in a language one understands; conveyed in prompt manner and in sufficient detail. This is to enable the accused person exercise his right to challenge the lawfulness of his internment and if the decision for continued detention is maintained, its reasons must be provided to the internee as well. This procedure is contained only in Additional Protocol I and human rights law treaties.[233] In non-international conflict situations, the right to challenge lawfulness of detention is a key component of the right of liberty to persons under human rights law.[234] If such a case of detention is determined as unlawful, then continued detention will be a clear case of arbitrary detention.

Review of lawfulness of internment must be carried out by an independent and impartial body. This procedure set out in the Fourth Geneva Convention, is designed to be 'regular'[235] and undertaken by a 'competent body' of the court or administrative board,[236] offering the necessary guarantees of independence and impartiality, as opposed to a one officers' decision.[237]

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[230] This right is recognised under Article 6 of the Additional Protocol II.
[231] This is clearly mentioned under Article 5 (1) (b) of the Additional Protocol II.
[232] This is covered fully under Article 5 (2) (b) of the Additional Protocol II.
[233] See Additional Protocol I, Article 75 (3) and in the International Covenant for Civil and Political Rights, Article 9 (2). See also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10, 11 (2).
[234] Pejic, J., 'Procedural Safeguards' *op. cit.* at note 7, p. 386.
[235] Geneva Convention IV, Article 78.
[236] Geneva Convention IV, Article 43.
[237] Pejic, J., 'Procedural Safeguards' *op. cit.* at note 7, pp. 386-387.

Article 43 specifies that the periodical review shall take place twice yearly or 'if possible every six months' according to Article 78 of the Geneva Convention IV. The purpose of the periodic review is to ascertain whether the detainee continued to pose a real threat to the security of the detaining authority.

The sophistication of the review process would be beyond the capacity of many NSAGs; given the unstable circumstances they are living in and limited resources. It would be unrealistic to have a periodical review of cases and handling of appeal processes again and again. However, as a general principle, NSAGs would be required to comply with a procedure that would put an end to arbitrary deprivation of liberty; giving due consideration to their local capacity and limitations. The caveat for local capacity is rightly entrenched in Article 5 of the Additional Protocol II, to give due consideration to the challenges which would face an NSAG as a party to a conflict.

Another **right is to be registered** and held in an officially recognised place of internment. The place of internment is also made known to the detainees' family and accessible to the ICRC. In both field of law IHL and IHRL, there are rules which sufficiently regulate the registration of internees and family notification.[238]

The ICRC procedural safeguards for internment have proposed some other rights which are logically possible for states. An Issue such as the right to legal assistance for an internee is challenging for NSAGs to comply with and this would be among those issues whose implementation largely relies on the NSAGs capacity and ground realities. Rarely would advocates camp in areas witnessing violent clashes between government forces and an outlawed armed group. Additionally the mere appearance of an advocate in the court or administrative board of an NSAG to look into a matter of a detainee could qualify to be a crime under the domestic laws.

[238] See Geneva Convention IV, Article 136 relating to notification for foreigners; Article 143 regarding ICRC visits; and Articles 106, 107, 137 and 138 regarding notification to family and next of kin.

The intention of the procedural safeguards is to further promote protection of persons in conflict situations and reduce situations of arbitrary deprivation of liberty. Most of the rights are treaty obligations under international armed conflict situations and it would be unrealistic to fully import all rights to situations of non-international armed conflict. When dealing with NSAGs, due consideration should be had to the NSAGs capacities and obligations should be subject to the ground realities.

4.3 Rules of Detention by NSAGs under Customary IHL

Customary IHL has a wider application, covering both international and non-international armed conflicts situations. The ICRC 10 year study of the customary practices during conflict situations identified a number of rules, some of which are related to detention in internal conflicts. In this study we shall examine these rules and the extent of their application in non-international armed conflicts. As a party to a conflict, NSAGs are under an obligation to comply with the relevant rules identified as applicable to their situation.

The ICRC study contains 161 rules, divided in 6 thematic topics and 44 distinct chapters. Of relevance here are rules in Part V on treatment of civilians and persons hors de combat, where general fundamental guarantees are stipulated and chapter 37 for persons deprived of their liberty.

In Chapter 37, rule 87[239] of the customary Law confirms that civilians and persons *hors de combat* must be treated humanely. This requirement is established in common Article 3 as well as in four Conventions and its part of the fundamental guarantees in both Additional Protocols: Article 75 of Protocol I and Article 4 of

[239] See Customary IHL, *op. cit.,* at note 109, p. 306.
Rule 87 reads: 'Civilians and persons hors de combat must be treated humanely'.

Protocol II. In human rights law, Article 10 of the International Covenant on Civil and Political Rights, requires persons deprived of liberty be treated with humanity.

Rule 89[240] specifically prohibits murder, which conforms with the prohibition of violence to life to persons hors de combat contained in common Article 3 and prohibition of arbitrary deprivation of the right to life under human rights law in Article 6(1) of the ICCPR.

Prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity is provided for under Rule 90[241]. Other rules prohibit corporal punishment, as in rule 91[242]; collective punishment as in rule 103[243]; rape and sexual violence as in rule 93[244] and forced labour as in rule 95[245] of the customary IHL. The corresponding treaty basis of these rules is clearly stipulated under Articles 4 and 5 of the Protocol II.

Taking of hostages and arbitrary deprivation of liberty are prohibited under rules 96 and 99 respectively.

Rule 100 confirms the essential judicial guarantees: 'No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees'. The rule does not require a 'regularly constituted court' as in Article 3, but suffices that the court can afford essential guarantees. Other essential guarantees: no crime without law (rule 101 corresponding to Article 6 (2c) of Protocol II); individual criminal responsibility (Rule 102 corresponding to Article 6 (2b) of Protocol II.

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[240] *Ibid,.* p. 311. Rule 89 reads: 'Murder is prohibited'.
[241] *Ibid.,* p. 315. Rule 90 reads: 'Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited'.
[242] *Ibid.,* p. 319. Rule 91 reads: 'Corporal punishment is prohibited'.
[243] *Ibid.,* p. 374. Rule 103 reads: 'Collective punishments are prohibited'.
[244] *Ibid,.* p. 323. Rule 93 reads: 'Rape and other forms of sexual violence are prohibited'.
[245] *Ibid.,* p. 330.Rule 95 reads: 'Uncompensated or abusive forced labour is prohibited'.

Under Rule 104 and 127, the religious convictions and practices are safeguarded in conformity to Article 4(1) of the Protocol II and in Rule 105, the sanctity of family life is respected which corresponds to Article 5 .

In all the above cases, the rules apply to both situation of detention in international and internal conflicts.

NSAGs have an obligation under the customary law to ensure proper material conditions of detentions. Rules 118[246] demands for adequate food, water and medical attention; separate accommodation for women and children, according to rule 119[247] and rule 120 of the customary IHL. Further, rule 121 demands that in all cases detainees shall be held in premises away from combat zone, which corresponds to the wording of Additional Protocol II, Article 5 (2) (c).

Rules 125[248] and 126[249] establishes the right of detainees to correspond with their families at a reasonable frequency and for civilian internees to receive visitors especially near relatives. The condition of 'reasonable frequency' in rule 125 and the caveat 'to the degree practicable' in rule 126 is similar to the limitation indicate in Article 5 (2) of the Additional Protocol II; both which gives consideration to NSAGs capacity and other situational challenges.

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[246] *Ibid.,* p. 428. Rule 118 reads: 'Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention'.

[247] *Ibid.,* p. 431. Rule 119 reads: 'Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women'.

[248] *Ibid.,* p. 445. Rule 125 reads: 'Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities'.

[249] *Ibid.,* p. 448. Rule 126 reads: 'Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable'.

Rule 159[250] adopts the wording of Article 6 (5) of Protocol II on amnesty for persons deprived of liberty and introduces an exceptional clause which excludes from amnesty persons who are suspected, accused or sentenced for war crimes. Adjudication of war crimes is a sensitive and complex undertaking and NSAGs may not have the full capacity, or the political will, to put on trial persons accused of war crimes.

4.4 Rules of Detention by NSAGs under International Human Rights Law

Right at the preamble, Protocol II recalls that the international instruments relating to human rights offer a basic protection to human person. International instruments are those adopted by the United Nations such the Universal Declaration and others especially, the Covenant on Civil and Political Rights. This is the first time that the term 'human rights' is explicitly used in a treaty on humanitarian law.[251] It establishes the long perceived complementarity role between two distinct branches of international law: humanitarian (applies during conflict situations only) and human rights law (applied in peace time and runs concurrently in time of armed conflict). It is beyond the scope of this study to determine the extent to which human rights law apply in conflict situations, as such we will confine our study on the basis of a complementary application of human rights principles on detention.

[250] *Ibid.,* p. 611. Rule 159 reads: 'At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes'.
[251] Commentary Additional Protocols, *op. cit.,* at note 34, p.1341.

Some human rights may be suspended 'in time of public emergency which threatens the life of the nation'[252] except for the fundamental rights as contained in Articles 6, 7, 8, 11, 15, 16, and 18.[253] As seen above, the protection regime in Protocol II contains the fundamental guarantees and essential judicial rights for persons deprived of their liberty. These, actually constitutes all the irreducible rights singled out in the Covenant on Civil and Political Rights.

In the commentary of Protocol II, it is mentioned that Articles 4, 5, and 6 bear the mark of international human rights law, and the ICRC in drawing up its draft article, was inspired by the Covenant on Civil and Political Rights. The fundamental guarantees constitute a minimum standard of protection which anyone can claim at any time and they underlie the whole system of human rights.[254]

Article 10 of the CCPR establishes the humane treatment of persons deprived of freedom. The principle of humane treatment is provided for in the Common Article 3 and Article 4 of the Additional Protocol II and in Article 6, the Protocol took much inspiration from Article 14 of the CCPR on judicial rights. This include: the right to be presumed innocent; to be informed of the charge; to be tried in presence; not to testify or confess guilt; and not to be convicted without crime according to the law; almost in the same wording of Article 6 of Protocol II. However, other rights such as the right to a legal assistance,[255] may not feasible in conflict situations and NSAGs

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[252] See Art. 4 of the Covenant on Civil and Political Rights. 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

[253] Non-derogable rights include: the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude and the right to be free from retroactive application of penal laws

[254] Commentary Additional Protocols, *op. cit.,* at note 34, p. 1366.
See also, Zegveld, L., *op. cit.,* at note 4, p.64.

[255] See Article 14 (3d) of the ICCPR.

can't be obliged to provide advocates for accused persons, as such it was not included in the Protocol II.

Other international instruments with extensive regulations on humanitarian concepts related to detention include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which entered into force on June 1987; UN Standard Minimum Rules for the Treatment of Prisoners, adopted in August 1955; and the Body of Principles for the Protection of All Persons under Any Forms of Detention or Imprisonment, UN resolution adopted in December 1988.

As some of the IHL detention rules are derived from the human rights law, the latter would provide the best interpretation of the contentious issues arising from the concepts in question.[256] However important that international human rights law provides interpretation of IHL rules, caution should be exercised in importing rules without taking into account the differences in the IHL and human rights system, as well as the contexts in which they operate. [257]

Nevertheless, there is a growing trend and evidence in the international practices which suggests that NSAGs obligation to provide fundamental guarantees of protection to persons under their custody exists not only under IHL, but also under human rights law. In a resolution, the UN Commission on Human Rights requested the government of El Salvador and the FMLN,[258] an NSAG, to take appropriate measure to put an end to attempts on life and physical integrity of individuals in all

[256] Customary IHL, *op. cit.,* at note 109, p. xxxi.
[257] Casalin, D., *op. cit.,* at note 171, p. 8.
See also Sassoli, Marco, 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law.' *International Humanitarian Legal Studies,* Vol. 1, (2010) p. 391.
[258] See note 34 above for a brief profile on FMNL, an armed group in El Salvador.

types of action constituting a violation of fundamental rights and freedom of the Salvadorian people.[259]

Indeed, the practice shows that NSAGs are gradually obligated to abide by the provisions of two distinct systems of laws. This is because of the identical nature of the rules on prohibition of violence to life and the requirement for humane treatment and other fundamental rights. It could be said that the humanitarian law is equally and sufficiently regulated, and there was little for human rights law to add to humanitarian law in terms of fundamental guarantees.

If there any regulatory gaps, especially in relation to judicial issues, then it would be on those issues which could be difficult to actualise for reasons associated to the nature of situations of armed conflicts such as the right of an accused person to be represented by an attorney which is provided for by human rights law but not under humanitarian law.

[259] UN General Assembly Resolution A/RES/43/145, para. 7, available at http://www.un.org/documents/ga/res/43/a43r145.htm (last visited 10 December 2015).

Conclusion

As a detaining authority, NSAGs have obligations under various international legal systems (the IHL regime, customary IHL and human rights law) to ensure the observation of fundamental guarantees, humane treatment and proper conditions of treatment for detainees. It is apparent in the IHL regime, that the law has given special consideration to situations of armed conflicts, to promote compliance with the IHL rules and may be to cater for the capacity and interests of NSAGs.

The issue of capacity of NSAGs to meet its obligations towards detainees is prominent when it comes to discussing judicial guarantees and court processes. Judicial administration in terms of independence and impartiality of processes is a challenge to established court systems; let alone NSAGs. Its takes quite an effort for an NSAG to demonstrate its ability to meet the essential judicial guarantees stipulated under Article 6.

Procedural safeguards to ensure detention according to the law, is one of the areas which is under developed in the Additional Protocol II. It is one of the regulatory gaps which need to be looked into by international humanitarian law academics and most importantly by state parties to the Geneva Conventions. Proper action in this regard will result in an enhanced protection framework for detainees under NSAGs authority.

Importantly, the three relevant branches of law: the IHL as the *lexi specialis*; the customary law and the human rights law; all complement one another to confirm the application of fundamental rules for the protection of persons deprived of their freedom in the hands of any party of the conflict.

CHAPTER 5: ENFORCING DETENTION RULES ON NSAGs

Introduction

The purpose of this thesis was to study the status of NSAGs under International law and to analyse the specific obligations of NSAGs under International humanitarian law and other related treaties towards persons deprived of their liberty in their custody.

Initially, this study observed that IHL regime recognised the character of NSAGs in its principles and placed upon them certain obligations in their own capacity. The law attributed certain conditions which qualify NSAGs to bear responsibilities towards protected categories of persons and property under the IHL regime. Likewise, the study confirmed that the rules of customary IHL were applicable to NSAGs. With regard to IHRL, we argued that this regime was to be applied to NSAGs in a cautious manner, owing to the peculiarity of IHRL principles and their specific application to states.

Later, it was shown that deprivation of freedom in international armed conflicts was adequately regulated, but unfortunately its rules and regulations did not apply to all situations of conflict. It is argued here that this is the result of the distinction between conflicts in international law; conflicts between sovereign states did not share the same regime of laws governing situations of deprivation of liberty, as that of internal conflicts.

The study made an extensive reading of the law regulating prisoners of war and other forms of deprivation of liberty for civilians in situations of international armed conflicts before tackling the question of detention by NSAGs, as the central focus of this study.

The reality and legality of NSAGs to assume the roles of a detaining authority were discussed and it was observed that IHL, under Common Article 3, had created some room to accommodate situations where an NSAG would have deprived persons of their liberty for reasons related to the conflict. Specific obligations for humane treatment and judicial guarantees are clearly placed on parties to the conflict, including NSAGs.

In the preceding chapter, the study looked into the substantive laws and customs which construct the pillars of NSAGs detention regime. Under IHL, the Common Article 3 was carefully analysed, making reference to the principle of humane treatment and its meaning when dealing with detainees. Also under the IHL, the study analysed the contents of Additional Protocol II and singled out the relevant articles touching on the deprivation of liberty in non-international armed conflict.

The study identified four categories of rules regulating detention by NSAGs. There are rules which are concerned with the humane treatment of detainees, another category or rules talked about the material conditions of detention and the final category concerns the judicial guarantees of detainees.

Finally, it remains to determine how the how the rules governing detention in non-international armed conflicts set out in the IHL, customary IHL and IHRL; could be enforced on and applied by NSAGs. Moreover, it can be asked what mechanisms are available to hold NSAGs accountable for not abiding by these rules, either through omission of what the law demands or commission of prohibited practices when dealing with persons deprived of their freedom. In this final chapter we shall examine these questions and then conclude this thesis.

5.1 Prohibited Detention Practices

Reading from the two major sources of detention rules: Common Article 3 and Addition Protocol II; there are a number of clearly prohibited practices related to the deprivation of liberty of persons for reasons related to the conflict.

Under Common Article 3, the following acts are prohibited:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) 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.[260]

Other prohibited acts under Additional Protocol II include:

(a) violence to the life, health and physical or mental being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishment;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;

[260] See, Geneva Conventions, Article 3 (1) (a) – (d).

(g) pillage; and

(h) threat to commit any of the foregoing acts.[261]

It should be noted that the laws applicable to International and internal conflicts, have classified violations in both situations in a distinct way.[262] We shall examine in the section below the categories of violations in international and internal armed conflicts and how it impacts on the accountability of NSAGs as a party to internal conflicts.

5.2 Accountability of NSAGs for Violations of Detention Rules

The 1949 Four Geneva Conventions and Protocol I are a system of laws regulating international armed conflicts which has an elaborate regime establishing certain consequences for 'grave breaches' of its rules. The treaty mechanisms include the duty of states to criminalise violations in domestic laws; to prosecute or extradite those who commit IHL violations; and to assist other states in the investigation of violations. [263]

The law identifies the following breaches:[264] wilful killing, torture or inhumane treatment; biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity; unlawful deportation or transfer or unlawful confinement of

[261] See Additional Protocol II, Article 4 (2) (a) – (h).
[262] See Bassiouni, M. Cherif. The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors', *The Journal of Criminal Law and Criminology*, vol. 98, no. 3, 2008, p. 731.
[263] See for example Geneva Convention I, Articles 49 – 50; Geneva Convention II, Articles 50–51; Geneva Convention III, Articles 129–130; and Geneva Convention IV, Articles 146–147.
[264] See Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; and Geneva Convention IV, Article 147.

persons who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals; wilfully depriving such persons of the rights of fair and regular trial; taking of hostages; and forcing a prisoner of war or protected civilian to serve in the forces of a hostile power.

There is no replica of similar obligations for internal conflicts. Treaty laws regulating internal conflicts: Common Article 3 and Additional Protocol II; where NSAGs are obliged to comply with its provisions: do not contain anything of this nature.[265] Some of these depredations are only deemed as 'violations' (and not as grave breaches) under the internal conflict laws.[266]

In absence of determining criminal responsibility, prosecution of NSAGs was rendered impossible under the treaty law. However, this gap in Geneva Conventions was recognised and clarified further in the ICTY Trial Chamber in *Prosecutor v Delalic* which stated that:

> 'The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of Common Article 3 clearly does not in itself, preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting 'grave breaches' and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While 'grave breaches' *must* be prosecuted and punished by all States, 'other' breaches of the Geneva Conventions

[265] Bassiouni, C., *op. cit.,* at note 262, p. 733.
[266] *Ibid.,* p. 735.
See also in Willmott Deidre, 'Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court'. *Melbourne Journal of International Law*, Vol. 5, (2004) p. 205-207, available at http://intranet.law.unimelb.edu.au/files/dmfile/download811e1.pdf (last visited February 2014).

> *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions'.[267]

Earlier than the ICTY clarification on the criminal responsibility of NSAGs under the IHL, the Rome Statute had attempted to clarify the jurisdiction of the ICC court in respect to 'war crimes'. Article 8 defines the jurisdiction of the Court in respect of war crimes. For this study, the issue of relevance is the specific mention of the jurisdiction of the Court on 'serious violations' of Common Article 3. Under Article 8 (3) (c), the Rome Statute replicates prohibited acts which are mentioned in Common Article 3 (1) (a) – (d).[268]

But a drastic change happened in the international practice following the dreadful events of the early 1990s in Rwanda and Yugoslavia. Very importantly, atrocities committed by parties to conflict then, signalled a change in the approach to the enforcement of existing treaty and customary international law on all parties.

Following the Rwanda and Yugoslavia genocides; the UN Security Council voted to establish the ICTY[269] and the ICTR[270]. The Statutes and jurisprudence of these two

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[267] Prosecutor v Delalic, Case No. IT-96-21-T, at para 308; available at http://www.icty.org/x/cases/music/tjug/en/981116_judg_en.pdf (last visited 10 March 2014). See also Lindsay, M., *op. cit.* at note 11, p. 157.

[268] This includes the prohibition for violence to life; taking of hostages; outrages of personal dignity; and passing of sentences and executions without judgement.

[269] UN Security Council Resolution 827 of 1993 was adopted unanimously. The council noted the alarming violations of international humanitarian law in former Yugoslavia and especially in Bosnia and Herzegovina, including mass killings, systematic detention and rape of women and ethnic cleansing. For more details visit the ICTY website at: http://www.icty.org/sid/319 (last visited February 2014).

[270] UN Security Council Resolution 995 of 1994 was adopted to prosecute violations of international humanitarian law including the genocide, crimes against humanity and violations of Common Article 3 of Geneva Conventions and Additional Protocol II. See details in the UN Resolution and its annexed Statute, available at http://www.unictr.org/Portals/0/English%5CLegal%5CResolutions%5CEnglish%5C955e.pdf (last visited February 2014).

tribunals set a number of historic declarations which in their totality amount to an improved international criminal justice system where criminal responsibility for NSAG leaders was envisaged.[271]

In terms of categories of actionable crimes; the Statues of both tribunals considered that detention, imprisonment and violations thereof as some of the crimes which the established tribunals were empowered to look into.

Within the proceedings of the ICTY in *Tadic* case the court mentioned that there was a body of customary international law applicable to internal armed conflict and that the violation of these rules can involve individual criminal responsibility. The ICTY recognised that the emergence of customs in international law require both state practices and *opinio juris*; but it placed more emphasis upon *opinio juris* as evidenced by official statements, military manuals and judicial decisions, rather than just actual state practice.[272]

In addition to the historic declaration the Tribunal made Common Article 3 and provisions of Protocol II as customary in nature, it also reaffirmed the customary law status of crimes against humanity. Article 5 of the ICTY Statute state as follows:

'the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;

[271] See Zegveld, L., *op. cit.,* at note 4, p. 98.
[272] Lindsay, M., *op. cit.* at note 11, pp. 134-138.

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious ground;

(i) other inhumane acts.

The defence in *Tadic* case argued that crimes against humanity could only be committed during international armed conflict,[273] but the ICTY posed that it was a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.[274]

Article 4 of the ICTR Statute is more articulate; it contains explicit reference to Common Article 3 of the Geneva Conventions and Additional Protocol II:

> 'The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 …' [275]

One point to emphasize with respect to the accountability for violations of prohibited acts is the concept of war crimes and the individual criminal responsibility of members of NSAGs under the Rome Statute.

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[273] Tadic Jurisdiction case, *op. cit.,* at note 6, para 139.

[274] *Ibid.,* para 141.

To be noted that crimes against humanity were required to be connected to a situation of armed conflict of international nature, however, this was said to be peculiar to the Nuremberg Tribunal and does not exist in the contemporary international law. ICTY settled this matter by dropping the connection of war crimes with conflict.

[275] See Article 4 of the ICTR Statute, available at http://www.unictr.org/tabid/94/deafult.aspx (last visited 14 March 2014).

Article 25 of the Rome Statute determines the jurisdiction of International Criminal Court on such matters. In part, it provides the following:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; ….

The Rome Statute is more precise that ICTY and ICTR and in this Article the Statute provides various models and a framework to determine individual criminal responsibility.

The recent landmark case of Prosecutor v. Thomas Lubanga has dealt extensively on the question of individual criminal responsibility among other issues which include the question of classification of conflicts international and non-international. On the

later question the court rules that the conflict was of a non-international character.[276] The court also noted that there was no requirement for legal evaluation by perpetrators as to the existence of an armed conflict or its character or for that matter awareness of perpetrator of the facts establishing the character of the conflict.[277] This position promotes the notion that classification of conflicts between international and non-international is irrelevant when determining war crimes. Thus providing a wider jurisdiction to put to trial persons accused of war crimes, including violations of prohibited acts related to detention activities by members of NSAGs in their individual capacity.

With regard to the individual criminal responsibility, the ICC charged Lubanga on the basis of Article 25(3)(a) on perpetration in its three forms: direct, co-perpetration and perpetration by means. [278] The Prosecution charge Lubanga with indirect co-perpetration, alleging that as a leader, he had control over the organisation; made decisions and dictated the policy of his group, UPC and FPLC; as such the crimes he is accused of were committed with his direct intention and knowledge.[279]

To determine the criminal responsibility the Chamber analysed five factors of individual liability. Of the five factors, the two objectives elements were: the existence of common plan and the coordinated essential contribution made by each co-perpetrator to reach the criminal objective;[280] and the other three subjective elements were: that the accused was aware of the criminal consequences of the common plan; that the accused of his essential contribution to the common plan and

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[276] *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, para. 565, available at https://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf, (last visited 9 December 2015) (hereafter referred to as ICC Lubanga Case).
[277] *Ibid.,* para. 975.
[278] https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/
[279] ICC Lubanga Case, *op. cit.,* at note 277, para. 250 -348.
[280] *Ibid.,* para. 923.

that the accused was aware of the factual circumstance that established the existence of armed conflict.[281]

The Chamber was satisfied that Lubanga acted with the intent and knowledge necessary to establish the charges; was aware of the circumstances establishing the armed conflict and its connection with his conduct to enlist, conscript and use children below the age of 15 in acts of hostilities.[282]

The crimes determined in the ICTR, ICTY and ICC cases above are some of the typical violations of laws of armed conflict which could be committed by members of any NSAG in situations of conflict; as well as against persons deprived of freedom. Indeed, some of the listed crimes in ICTR and ICTY cases such as enslavement, imprisonment; torture and other inhumane acts are more probable in detention settings.

With this clarification by the Rome Statute and the tribunals of ICTY and ICTR, it could thus be said that the prohibited detention practices under the treaty law of non-international armed conflicts, qualify as crimes of 'serious violations' under the Rome Statute and NSAGs could thus be held accountable for such violations.

It should be clear that NSAGs are not accountable for merely carrying out detention of persons for reasons related to the conflict. Capture and detention of government forces is not a crime under the international humanitarian law, but it will be a crime if that detainee is subjected to torture for example. It will be also a crime if NSAGs would resort to intern persons without justification as to the reasons behind such an internment.

[281] *Ibid.,* para. 1013 – 1018.
[282] *Ibid.,* para. 1357.

CONCLUSION

Detention of members of a state armed force and or its civilians by NSAGs operating within the territory of a state is a natural consequence of non-international armed conflict and requires to be dealt with in the spirit of humanitarianism. The occurrence of detention incidences is but a frequent activity, sometimes it would last for very long periods of time. Most importantly, when detention happens, it should not be a matter of politics and law, but rather a humanitarian issue par excellence, where the protection of lives and human dignity of persons deprived of their freedoms takes precedence and transcends the domestic legal arguments and political interests of the parties to the conflict.

To uphold the humanitarian concerns during non-international armed conflicts, including the protections of persons deprived of their freedom, the common Article 3 was introduced after a long debate. This thesis confirmed that the intention and wording of Common Article 3 did not intend to create a special status for NSAGs under international law. However, the states reluctance to accept applicability of even a limited set of international legal rules will exist in addition to the unwillingness of governments to have its hands tied by rules of humanitarian protection. In practice the study noted the positive role played by international institutions such as the International Court of Justice and other tribunals which provided advisory opinion and independent court rulings which in most cases supported the humanitarian protection agenda of IHL treaties.

Despite this, NSAGs very existence is suppressed under domestic laws in the name of outlaws or terrorists, and its status is never to be recognised under international law; and that was the best position offered by a state centric system: ever protective of its rights of existence and ensuring its political interests.

However, this study confirms that, for humanitarian considerations, the position of NSAGs is fully entrenched in IHL treaties, initially under the common Article 3 and later under the Additional Protocol II. Under these instruments, NSAGs as a party to a conflict, has an obligation to respect and comply with the IHL principles and rules, independent of the obligations of other parties to the conflict. Among the rules to be observed by NSAGs during the conflict is the protection of persons deprived of their freedom either as members of armed forces or civilians for reasons related to a conflict.

In addition to analysing the status and source of NSAGs obligations under IHL, this study also analysed the source of NSAGs obligation under customary IHL and IHRL. For customary law, the study confirmed its application to NSAGs, despite it having no role in their formation or development. It is clear that most of the IHL rules which have acclaimed an international customary status have a solid basis in IHL regime, but being customary in nature, it provides such rules a wider scope of application. Customary rules are binding even on states which may not have been party to an international treaty which has the same provisions as the rules of international law. It is not necessary for a state or an NSAG to be a party to a treaty for it not to be obliged by the provisions of international treaties which prohibit torture, simply because the prohibition of torture is part of the customary international law.

As regard the IHRL, this study noted that the IHL instruments especially the Additional Protocol II was inspired in some of its rules by the IHRL principles; this complementarity cannot be disputed. However, NSAGs are not qualified members of the IHRL regime and the IHRL rules were not designed to govern relationship between an NSAG and members of a state armed force.

In practice, the international community has increasingly been demanding NSAGs to observe human rights obligations during armed conflicts. This study is of the opinion

that IHRL regime could be used for purposes of expounding on issues which are common between the two branches of international law. However, this application should be considerate to the capacity of NSAGs and realities on the ground.

The study demonstrated two distinct regimes governing the conditions and treatment of persons deprived of their liberty. It relayed extensively, the concept of prisoners of war and civilian internees as contained in the Geneva Convention IV and Additional Protocol I as instruments which govern deprivation of liberty in international armed conflicts. It was evident that the rules regulating detention in international armed conflict were extensive, clear and tackled various protection aspects: human, physical, financial, judicial, etc. and all phases from capture to release.

For situations of non-international armed conflicts, the study researched the basis of the NSAG act of depriving persons of their freedom. The study gave concrete examples of NSAGs in most recent conflicts where detention activities were carried out and duly recognised and dealt with by the international community. The ICRC facilitated handover of detainees in Darfur and visited others in Ivory Coast.

Under domestic laws, the study showed that all forms of deprivation of liberty, otherwise known as kidnapping or abduction, by NSAGs are punishable crimes under the Kenyan constitution and penal codes. However under the IHL regime, the study demonstrated rules which provided a legal platform for NSAGs detention during armed conflict. The wording of common Article 3 and provisions of Additional Protocol II gave NSAGs an authority to govern the proper treatment and protection of persons placed *hors de combat* for various reasons including detention. The thesis argued that although the authority for NSAGs to detain under the IHL was not expressed in clear terms, but the wording of Common Article 3 and AP II sufficiently envisaged that an NSAG could be faced with a situation where it has to detain members from their opponent. When such a detention scenario arises, the IHL

regulated a set or rules which NSAGs should observe towards the detainees' fundamental guarantees to life, human dignity, humane treatment and essential judicial guarantees.

Determining the central question on the rules governing detention by NSAGs, this thesis identified the relevant IHL instruments as well as the customary IHL and IHRL regime in search of the individual rules which could form basis for the NSAGs obligation towards detainees.

A closer look at the wording of common Article 3 of the Geneva Conventions, revealed the intention of the treaty drafters to place upon parties to the non-international armed conflicts specific responsibility which would ensure 'humane treatment', preserve 'personal dignity' and essential 'judicial guarantees' for persons placed *horse de combat* including by detention. These terminologies may be ambiguous, but it was dangerous to exactly define and enumerate what should be considered as humane. This thesis believes that this ambiguity was designed to allow some space for the positive role of local cultures and religious beliefs which are inherent in most NSAGs, to exercise the normal humane conduct towards detainees and protected persons.

Still on common Article 3, the thesis determined whether authority to detain by NSAGs was stipulated therein. The Article may not have expressly pronounced the authority of NSAGs to detain; but it had sufficiently secured the least minimum standard of protection and care from parties to the conflict, which necessarily includes NSAGs.

The thesis analysed the content of Additional Protocol II and identified three categories of rules pertinent to detention practices by NSAGs: rules on the material conditions of detention; rules on the material condition of detention and rules on

prosecution and fair trial rights. Articles 4, 5 and 6 of the Additional Protocol II, are the central source of provisions which regulate the practice and obligations of NSAGs towards persons deprived of their freedom under their authority.

The thesis found that the rules governing detention under Common Article 3 and Additional Protocol II provided a solid detention regime which could be applied by an NSAG. The rules on detention protected the life of detainees, murder and torture; prohibited outrage upon personal dignity; ensured proper living conditions of detainees in terms of safety, hygiene and giving special consideration to women and children. The rules also set fundamental principle to offer essential guarantees of independence and impartiality during trial for offences related to the conflict.

What the common Article 3 and Additional Protocol II did not have were a set of rules contained in Geneva Conventions IV related to the procedural safeguards which governed situations of administrative detention. The thesis outlined and discussed the procedural safeguards as suggested and developed by ICRC, complimenting those which are contained in the Additional Protocol II. To be noted that the procedural safeguards were best suited for states application and not NSAGs where such advanced requirements may not be within their limited capability.

The thesis also looked into the customary IHL and IHRL regime for rules which could qualify to govern detention activities under NSAGs authority. Interestingly, the thesis found that the various rules of customary IHL related to situations of deprivation of liberty were in conformity to what is contained in common Article 3 and Additional Protocol II.

As for rules of detention under the IHRL regime, the thesis found that the rules contained in IHL laws were actually inspired by the Covenant on Civil and Political Rights, in Articles 10 and 14. However, the thesis was cautious not to call for a

blanket application of IHRL rules of detention on NSAGs since some rights such as right for legal assistance may not be feasible in conflict areas. The thesis rightly argued that IHRL regime could be used to give interpretations of identical rules which are also available in IHL.

Finally in this chapter, the thesis briefly verified the accountability and criminal responsibility of NSAGs in case of violations. The Rome Statute and the cases of ICTY and ICTR set the necessary precedents, making the historical change where NSAGs are accountable for the violations and breaches of IHL rules and where necessary they could be prosecuted before the international criminal courts and tribunals.

RECOMMENDATIONS

For NSAGs detention, the IHL provides a basis for such activity and lays down specific obligations on NSAGs which provide the necessary protection to persons deprived of their freedom. What IHL lacks in this respect is two things:

1. Explicit rules which determine the grounds for which detention may be carried out by NSAGs, especially administrative detention, one which is mostly based on issues of security; and
2. The procedures that must be applied to determine the end and regular review of administrative detention.

The ICRC has proposed a framework of guidelines, drawing from IHL and IHRL instruments, which is a good start to fill in this gap, but its binding effect vis-à-vis the state and NSAGs is merely persuasive. There have been also some other initiatives such as the Turku declaration which have met only limited success.

It is clear that more effort is required at the international level to fill this regulatory gap by developing a law, which could be in the form of standards or guidelines; if not drafting and adopting a new international treaty specifically on detention and internment in non-international armed conflict. Such a law should give clear consideration to the ground realities that NSAGs, as parties to the conflict, are equally carrying out detention activities as part of their struggle.

On the other hand, it is necessary to give due consideration to the specific challenges for NSAGs to comply with sophisticated obligations, which would sometimes would be illogical to request from a party involved in active conflict. As such, the law has to be implementable; in that, the required obligations would reflect on the different capabilities of the two sides of the conflict.

Finally, the international criminal system should be enforced regularly against NSAGs to adjudicate violations of IHL and Customary IHL rules. The political will of states should support the positive approach taken by international judicial and monitoring institutions, to promote accountability of NSAGs, as a party to the conflicts. It is not a good incentive to promote NSAGs compliance of IHL rules; but it is a fair deterrence mechanism which will call for a cautious conduct by respective members of NSAGs and their leadership.

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