



Universiteit
Leiden
The Netherlands

To detain, or not to detain: a functional approach to non-state armed groups' activities in non-international armed conflicts

Heffes, E.

Citation

Heffes, E. (2022, April 26). *To detain, or not to detain: a functional approach to non-state armed groups' activities in non-international armed conflicts*. Retrieved from <https://hdl.handle.net/1887/3289539>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/3289539>

Note: To cite this publication please use the final published version (if applicable).

Introduction

I. Detention by Non-State Armed Groups: An Expected Phenomenon

*“I understand, Hezni,’ I told him. ‘I’ll be careful.’ I knew that if we were caught at an Islamic State checkpoint, whoever was with me would be killed, and I would be returned to slavery. At the Kurdish checkpoint, the danger was that Nasser or Baser would be placed into detention”.*¹

On each occasion that public international law is tested – be it its goals, how it is conceived, orchestrated and applied by a variety of societal actors – fundamental socio-legal questions arise. This is because this legal framework is often seen as more than just a neutral body of norms that purports to regulate the relations between States and other entities – or between these other entities themselves. Instead, according to certain schools of thought, it is perceived as “bearing in itself some blueprint for improving the world, or those aspects of the world where it operates”.²

In a context in which those participating within the international realm offer different means to achieve the goals that this regime has (or intends to have), this thesis explores the legal regulation of non-State armed groups’ (NSAGs) detention activities. As non-international armed conflicts (NIACs) prevail in number over those of an international character, NSAGs tend to play leading roles,³ exerting a growing influence over the lives of millions worldwide.⁴ This trend has resulted in the proliferation of academic studies focusing on these actors from

¹ Nadia Murad and Jenna Krajeski, *The Last Girl. My Story of Captivity and My Fight against the Islamic State* (Virago 2018) 220.

² James Crawford and Martti Koskenniemi, “Introduction” in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (1st edn, Cambridge University Press 2012) 14.

³ Despite widespread recognition that the majority of armed conflicts today are non-international in nature, there are divergent views on the precise number. Bellal, in this sense, affirms that at least 51 NIACs occurred in 2018. Annyssa Bellal, *The War Report: Armed Conflicts in 2018* (Geneva Academy 2019) 19. The ICRC, however, has placed the number of NIACs up to 2016 at more than 70. See ICRC, “The Roots of Restraint in War” (2018) 13–14. In 2020, it further noted that “[t]here are currently some 100 armed conflicts around the world, most of which are non-international in nature, involving one or more non-State armed groups (NSAGs)”. ICRC, “Symposium on the Legal Regime Protecting Persons Living Under the Control of Non-State Armed Groups” (*Armed Groups and International Law*, 2020) <<https://armedgroups-internationalallaw.org/2020/05/19/symposium-on-the-legal-regime-protecting-persons-living-under-the-control-of-non-state-armed-groups/>> accessed 22 May 2020.

⁴ The ICRC has recently reported that there are currently 66 million people worldwide living in areas controlled by NSAGs. ICRC, “Communities Facing Conflict, Climate Change and Environmental Degradation Walk a Tightrope of Survival” (17 September 2020) <<https://www.icrc.org/en/document/communities-facing-conflict-climate-change-and-environmental-degradation-walk-tightrope>> accessed 22 November 2020.

legal,⁵ political science and sociological perspectives.⁶ While it is undisputed that international humanitarian law (IHL) applies to NSAGs in NIACs,⁷ thus binding them to a specific set of international obligations, the growth in scholarly studies related to these actors and their behaviours indicates that a variety of areas within the international legal realm remain a matter of concern.⁸ Not only do these entities use armed violence to achieve multiple goals, they also exercise other functions in armed conflict: NSAGs create institutions, enact “laws” and other regulations, form alliances, provide public goods, recruit individuals and, in doing so, shape the societies in which they operate.⁹ By attempting to shed some light on much-contested questions about NSAGs’ activities related to detention, this study aims to contribute to ongoing normative and practical debates that exist within the international community.

That NSAGs deprive individuals of their liberty on a frequent basis is not a new phenomenon. As the International Committee of the Red Cross (ICRC) explains, this

⁵ See, for instance, Katharine Fortin, *The Accountability of Armed Groups Under Human Rights Law* (Oxford University Press 2017); Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016); Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law* (Oxford University Press 2018); Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations and Rules on Accountability* (Routledge 2017). Daboné has explored the role of NSAGs within the international legal sphere without necessarily focusing on specific branches. See Zakaria Daboné, *Le Droit International Public Relatif Aux Groupes Armés Non Étatiques* (Schulthess Éditions Romandes 2012).

⁶ Among others, see Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015); Paul Staniland, *Networks of Rebellion: Explaining Insurgent Cohesion and Collapse* (Cornell University Press 2014); Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press 2007); Harun Maruf and Dan Joseph, *Inside Al-Shabaab: The Secret History of Al-Qaeda’s Most Powerful Ally* (Indiana University Press 2018); Jennifer M Hazen, *What Rebel Want: Resources and Supply Networks in Wartime* (Cornell University Press 2013); Ana Arjona, *Rebelocracy. Social Order in the Colombian Civil War* (Cambridge University Press 2016); Peter G Thompson, *Armed Groups. The 21st Century Threat* (Rowman & Littlefield 2014).

⁷ ICRC, *Commentary on the First Geneva Convention. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 505. The reasons why NSAGs are bound by IHL have nonetheless remained unclear, and different alternatives have been proposed. Although this is examined in chapter II of this thesis, see Sandesh Sivakumaran, “Binding Armed Opposition Groups” (2006) 55 *International and Comparative Law Quarterly* 369; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 196–197.

⁸ According to Bhuta, NSAGs’ mere existence has been a “preoccupation of international law” since the late eighteenth century. Nehal Bhuta, “The Role International Actors Other Than States Can Play in the New World Order” in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (Oxford University Press 2012) 68. The existence of NSAGs, however, is not just a contemporary phenomenon. Beckett notes that the first documented case of guerrilla warfare appears in the *Anastas*, a Hittite parchment dating from the fifteenth century B.C. See Ian FW Beckett, *Modern Insurgencies and Counter-Insurgencies: Guerrillas and Their Opponents Since 1750* (Routledge 2001) 1.

⁹ Arjona (n 6) 2. See in a similar sense Zachariah Cherian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War* (Cornell University Press 2011).

“is an ordinary and expected occurrence in situations of armed conflict. Whether carried out by government authorities or non-state parties to [non-international armed conflicts], seizing and holding one’s adversaries continues to be an innate feature of war and conflict”.¹⁰

Yet, examining detention by NSAGs (as well as by States) goes beyond its mere acknowledgment. It involves two related but quite theoretically distinct inquiries. The first question concerns the fundamental validity of detention (*why is it carried out?*), while the second relates to the standards applicable to the act (*how is it carried out?*). The former operates at a deeper level that relates to the explicit regulation of a behaviour and the functions of NSAGs in conflict settings; the latter addresses humanitarian aspects and immediate operational concerns about what NSAGs do with detainees. This dual aspect thus leads to the consideration of whether detention by NSAGs is merely a factual reality that needs to be addressed within the international legal realm, or a greater normative issue that begs the question of whether and when such groups should be either allowed to detain, or rather restricted from detaining, certain categories of persons.¹¹

II. A Shift in Focus: Moving Towards a “Functional Theory of Detention by Non-State Armed Groups”

As a term, “international law” was coined in 1789 by Jeremy Bentham, eventually becoming the predominant expression relied upon by the specialized literature, instead of “the law of nations” or “*droit des gens*”. Although none of these terms necessarily entails that this body of law exclusively regulates States and their relations, with the emergence of the nation-State this nevertheless became the focus of international law, thus excluding –, for the most part – non-State entities.¹² This thesis aims at challenging such an understanding, suggesting that it is necessary to shift the focus beyond States, in order to encompass the various functions that NSAGs fulfil in conflict settings, contexts undisputedly regulated by international (humanitarian) law.¹³ It does so by concentrating on the detention realm and addressing two

¹⁰ ICRC, “Strengthening Legal Protection for Persons Deprived of Their Liberty in Relation to Non-International Armed Conflict. Regional Consultations 2012-13. Background Paper” (2013) 3 <<https://www.icrc.org/en/doc/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf>> accessed 22 May 2020. See also Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Pedone/Hart 2013) 464.

¹¹ Frédéric Mégret, “Detention by Non-State Armed Groups in NIACs: IHL, International Human Rights Law and the Question of the Right Authority” in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020) 170–171.

¹² Crawford and Koskenniemi (n 2) 7.

¹³ Functional approaches are not strange to the international legal community. They have been relied upon by international institutions and scholars to deal issues such as the law of occupation and detention and targeting in armed conflict. See, for instance, ICRC, “Expert Meeting. Occupation and Other Forms of Administration of

related research questions: i) how does international law deal with NSAGs' detention activities? And ii) what is the value of NSAGs' "laws" and regulations for governing such actions? In order to address these inquiries, the thesis presents and tests the hypothesis that IHL and, on certain occasions, international human rights law (IHRL), oblige these actors not to arbitrarily deprive individuals of their liberty. Furthermore, it argues that these NSAGs must have a legal basis in order to undertake these activities, and that said basis is to be found in those "laws" and regulations established by the group itself. Other options are also possible, such as the adaptation of the State's domestic law or an agreement concluded with a third party. Indeed, these "laws" and regulations could allow them to potentially respect their obligations in the field of detention, including the principle of legality,¹⁴ addressing at the same time the various types of detention NSAGs carry out in NIACs, notably: (i) those grounded in the commission of common crimes unrelated to the conflict,¹⁵ (ii) detention of enemy fighters and other affiliated with the opposing forces for various reasons, including security and criminal reasons,¹⁶ and (iii) deprivations of liberty of their own members for disciplinary¹⁷ or criminal reasons.¹⁸

By approaching the subject from a "functional" standpoint, this thesis claims that if international law is to be effective, it must respond to the realities of armed conflicts, be capable of being implemented in practice by the parties involved – including NSAGs – and ensure the protection of individuals. With this in mind, the various chapters included herein have been conceived as part of a "Functional Theory of Detention by Non-State Armed Groups", which

Foreign Territory" (2012) 31–33 <<https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf>> accessed 20 September 2020; Tristan Ferraro, "Determining the Beginning and End of an Occupation under International Humanitarian Law" (2012) 94 *International Review of the Red Cross* 133; Monica Hakimi, "A Functional Approach to Targeting and Detention" (2012) 110 *Michigan Law Review* 1365.

¹⁴ Different definitions have been provided with respect to the principle of legality in international law. *See*, for instance, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005) 371. *See also* *Clifford McLawrence v Jamaica* [1997] Human Rights Committee Communication No. 702/1996, UN Doc CCPR/C/60/D/702/1996 [5(5)]. Interestingly, the ICRC's definition only relates to "criminal offences", thus seemingly excluding other breaches. The application of this principle to NSAGs and their detention activities is examined in chapters II and III of this thesis.

¹⁵ Although notion of *nexus* will be examined later in chapter II of this thesis, for a recent analysis *see* Elvina Pothelet, "Life in Rebel Territory: Is Everything War?" (*Armed Groups and International Law*, 2020) <<https://armedgroups-internationallaw.org/2020/05/20/life-in-rebel-territory-is-everything-war/>> accessed 22 May 2020.

¹⁶ The possibility that parties to NIACs have an "inherent power" to intern under IHL, as proposed by the ICRC, is discussed in various chapters of this thesis. *See*, in particular, chapter III.

¹⁷ This was even recognized by Ernesto "Che" Guevara in his *Guerrilla Warfare*, where he describes the imposition of "the punishment of arrest" for certain offences. Ernesto Che Guevara, *Guerrilla Warfare* (Authorized edition, Ocean; Centro de Estudios Che Guevara 2006) 129.

¹⁸ *See Situation in the Central African Republic In the Case of the Prosecutor v Jean-Pierre Bemba Gombo* [2016] International Criminal Court (Trial Chamber III) ICC-01/05-01/08 [403]. There, it is explicitly envisaged that NSAGs may detain their own members for criminal reasons.

aims at better understanding the relation between international law and these non-State actors (NSAs). The underlying idea is that the rules contained therein demand a “functional” capacity on the part of NSAGs. At a macro-level, this will be clearly evidenced when examining the requirements needed from a group to be bound by IHL and (arguably) IHRL. At a micro-level, this proposal explores possible NSAGs’ law-making functions as a result of the existence of the aforementioned prohibitions to arbitrarily deprive individuals of their liberty. To put it differently, this thesis submits that complying with these rules is inherently linked to the functions they demand from NSAGs.

Based on this view, this research shows that there are different ways in which we can think about international law and NSAs. It is an endeavour that underscores their agency and invites to re-examine the distinction between States and non-State activities altogether. Traditional approaches to international law have failed to fully grasp the challenges related to the application of IHL and IHRL in conflict settings, neglecting that their implementation often depends upon the various functions undertaken by States and NSAGs. A shift in focus, that is, the development of a new narrative, may help to meet the challenges posed in particular by NSAGs’ detentions in NIACs.

III. Scope of the Inquiry

A number of points must be highlighted regarding the personal and subject matter scopes of this thesis. As a starting point, the entities whose activities and legal regulation are analysed in this research are different from States.¹⁹ Although chapter I will offer a more refined definition of “non-State armed group”,²⁰ for the purposes of this study, the key requirements are that the entity exists independently and is, thus, not an organ of a State;²¹ the group of individuals forming that entity should also be characterized by a certain level of organization and be able to exercise a degree of armed violence. Being armed, in this sense, should be understood as being capable not only of engaging in a NIAC with another NSAG or a State,²² thus being

¹⁹ Article 1 of the Montevideo Convention includes the “qualifications” for an entity to be considered a State in accordance with international law: (i) a defined territory; (ii) a permanent population; (iii) a government; and (iv) the capacity to enter into relations with other States. Montevideo Convention on the Rights and Duties of States (1933), 165 LNTS 19, art 1.

²⁰ Throughout this thesis, the terms “non-State armed group” or NSAG are used as synonyms for armed groups in a very general sense, including both armed groups fighting against each other or against governments.

²¹ This means that the conduct of the NSAG shall not be attributable to a State in accordance with articles 4-10 of the International Law Commission, “Articles on the Responsibility of States for Internationally Wrongful Acts. Yearbook of the International Law Commission.” (2001) Vol. II (Part 2).

²² The International Criminal Tribunal for the former Yugoslavia (ICTY) has affirmed that there is an NIAC in the sense of IHL “whenever there is [...] protracted armed violence between governmental authorities and

subject to IHL obligations, but also, on certain occasions, of carrying out law-enforcement operations in the territories under their control.²³

As regards to the scope of the subject matter, this thesis examines NSAGs' detention activities, which include both their legal basis and these non-State actors' practice and motivations when undertaking such actions. Unlike other studies on the topic,²⁴ the goal of this study is to address all forms of detention by NSAGs, including administrative internment and criminal or disciplinary detentions, that may occur in NIACs. This approach is justified by the practical reality observed in these contexts. In Libya, for instance, the *thuwar* brigades – anti-Gaddafi NSAGs – are reported to have “arrested en masse” former soldiers, police officers, suspected mercenaries and those they perceived as Gaddafi loyalists when they overran cities.²⁵ The *Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (FARC-EP) have also regularly detained individuals, including civilians, police officers and members of the Colombian armed forces.²⁶ In Côte d’Ivoire, the *Forces Nouvelles* held individuals in places of detention for suspected allegiances with the government in the south, while others were deprived of their liberty for common crimes.²⁷ It has also been reported that in Syria some NSAGs held both government soldiers and civilians, sometimes in the same facilities.²⁸ When assessing the organization of the Kosovo Liberation Army (KLA) in *Limaj*, the International Criminal Tribunal for the former Yugoslavia (ICTY) considered a “Programme for Military

organized armed groups or between such groups within a State”. *Prosecutor v Dusko Tadić a/k/a “Dule”, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (1995) IT-94-1-T, T.Ch. II (International Criminal Tribunal for the former Yugoslavia) [70].

²³ These operations aim at maintaining public order and security, preventing and detecting crime, and providing assistance. The ICRC has explained that to fulfil their mission, law enforcement officials may “exercise the following basic powers: arrest, detention, search and seizure, and the use of force and firearms”. ICRC, “Violence and the Use of Force” (2011) 40 <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0943.pdf> accessed 22 May 2020. See also ICRC, “The Use of Force in Law Enforcement Operations” (14 June 2019) <<https://www.icrc.org/en/document/use-force-law-enforcement-operations-0>> accessed 22 May 2020.

²⁴ See notably Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (First edition, Oxford University Press 2016) 5; Debuf (n 10) 449–517.

²⁵ Human Rights Council, “Report of the International Commission of Inquiry on Libya” (2014) UN Doc. A/HRC/19/68 9 <https://digitallibrary.un.org/record/766468/files/A_HRC_19_68-EN.pdf> accessed 22 May 2020.

²⁶ “Colombian Farc Rebels Release Hostages after Decade of Jungle Captivity” *The Guardian* (3 April 2012) <<https://www.theguardian.com/world/2012/apr/03/colombian-farc-releases-hostages-jungle>> accessed 22 May 2020 ; and Hugo Bronstein, “Colombia’s FARC Rebels Free Eight Hostages: ICRC” *Reuters* (25 July 2008) <<https://www.reuters.com/article/us-colombia-hostages-redcross/colombias-farc-rebels-free-eight-hostages-icrc-idUSN2451150020080725>> accessed 22 May 2020.

²⁷ See United Nations Operation in Côte d’Ivoire, “Rapport Sur La Situation Des Établissements Pénitentiaires En Côte d’Ivoire” (2006) 86–109 <https://onuci.unmissions.org/sites/default/files/old_spip/docs/situationpenitentiaires_0.pdf> accessed 22 May 2020.

²⁸ Human Rights Council, “Independent International Commission of Inquiry on the Syrian Arab Republic, Thematic Report. Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic” (2016) 13 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf> accessed 22 May 2020.

Police”, in which it was stated that “soldiers who [would] leave the front line without permission of the commander will be imprisoned”.²⁹ As can be identified, there is a practical necessity to identify and examine different types of detention as NSAGs may deprive individuals of their liberty for a variety of reasons without necessarily reflecting on the various legal frameworks protecting their detainees.

In this context, the detention vocabulary has been used by different stakeholders without further specification.³⁰ The ICRC, for instance, has referred to “internment” and “administrative detention” interchangeably, noting at the same time that “[d]eprivation of liberty –detention– is a common and lawful occurrence in armed conflict that is governed by a large number of provisions” of IHL.³¹ The Human Rights Committee has relied on “security detention” to describe the same type of detention.³² Human Rights Watch has instead used “arrest”,³³ while Amnesty International, at least in some reports,³⁴ has differentiated between “arrest” when dealing with States and “detention” for NSAGs.

Certain additional definitions shall be provided to clarify the terminology employed in this research. For the purposes of this research, “detention” is understood as “the custodial deprivation of liberty [...] caused by the act of confining a person in a narrowly bounded place, under the control or with the consent of a State, or, in non-international armed conflicts, a non-State actor”.³⁵ Objective and subjective factors have been identified as essential requirements for this practice. While the former refers to “a person’s confinement in a particular restricted

²⁹ *Prosecutor v Fatmir Limaj, Haradin Bala & Isak Musliu* (2005) IT-03-66-T (International Criminal Tribunal for the former Yugoslavia) [114].

³⁰ This has been explicitly acknowledged by the UN Office of the High Commissioner for Human Rights when assessing the content of the international instruments dealing with deprivations of liberty. See OHCHR, “Fact Sheet No. 26, The Working Group on Arbitrary Detention” (May 2000) 3 <<https://www.ohchr.org/documents/publications/FactSheet26en.pdf>> accessed 22 May 2020. This has also been noted when examining the terminology used in States’ military manuals and national legislation to prohibit arbitrary deprivation of liberty. Henckaerts and Doswald-Beck (n 14) 346.

³¹ ICRC, “Internment in Armed Conflict. Basic Rules and Challenges. Opinion Paper, November 2014” (2014) 9 <<https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>> accessed 22 May 2020. See also footnote 46 on the interchangeable use of the above-mentioned terms.

³² Human Rights Committee, “CCPR General Comment No. 35: Article 9 (Liberty and Security of Person)” (16 December 2014) para 15 <<https://www.refworld.org/docid/553e0f984.html>> accessed 22 October 2020.

³³ See, among others, Human Rights Watch, “Libya: Armed Group Detains Media Figures. 2 Men Had Organized Broadcast Awards” (2018) <<https://www.hrw.org/news/2018/05/07/libya-armed-group-detains-media-figures>> accessed 22 May 2020; Human Rights Watch, “Syria: Arrests, Torture by Armed Group Move to Solidify Control, Silence Critics” (2019) <<https://www.hrw.org/news/2019/01/28/syria-arrests-torture-armed-group>> accessed 22 May 2020.

³⁴ Amnesty International, “‘Caught in the Middle’: Abuses Against Civilians Amid Conflict in Myanmar’s Northern Shan State” (2019) <<https://www.amnesty.org/download/Documents/ASA1611422019ENGLISH.PDF>> accessed 22 May 2020.

³⁵ Marco Sassòli and others, “Detention”, *How Does Law Protect in War? ICRC Online Casebook* <<https://casebook.icrc.org/glossary/detention>> accessed 22 May 2020.

space for a not negligible length of time”,³⁶ the “subjective element” entails the lack of valid consent by the person detained to the confinement in question.³⁷ “Detention” is considered in this regard as an umbrella term encompassing different types of deprivation of liberty. These include “internment”, which has been defined as a detention

“for security reasons in situations of armed conflict, i.e. the non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in relation to an armed conflict”.³⁸

“Internment”, “security detention”, and “administrative detention” have been used interchangeably by the literature devoted to the topic.³⁹ This thesis follows the same logic. Detentions grounded on the (alleged) commission of criminal acts – that is, of persons “charged with a penal offence”⁴⁰ – including violations of international law, as well as those carried out for disciplinary reasons without a criminal component are also considered to be part of the “detention” umbrella. The latter refers to those detentions ordered by a superior for breaches of a non-criminal rule within the NSAG’s structure.⁴¹

³⁶ It has been noted that relevant objective factors include “the possibility to leave the restricted area, the degree of supervision and control over the person’s movement, the extent of isolation and the availability of social contacts”. European Court of Human Rights (ECtHR), “Guide on Article 5 of the European Convention on Human Rights. Right to Liberty and Security” (2020) 9 <https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf> accessed 22 June 2020.

³⁷ *ibid*; *Storck v Germany* (European Court of Human Rights (ECtHR)) [74].

³⁸ ICRC, *Commentary on the First Geneva Convention. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (n 7) para 718. Although Pejić has also added that this type of detention is initiated/ordered by the executive branch and not the judiciary one, this element will not be considered as essential when dealing with NSAGs, as the distinction between internal “branches” or “wings” may not be as clear as it is for States, at least for certain groups. See Jelena Pejić, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence” (2005) 87 *International Review of the Red Cross* 375, 375.

³⁹ Hill-Cawthorne (n 24) 1; Maria Gavrilova, “Administrative Detention by Non-State Armed Groups: Legal Basis and Procedural Safeguards” (2020) 53 *Israel Law Review* 35, 42. See also Human Rights Committee (n 30) para 15.

⁴⁰ ICRC, *Commentary on the First Geneva Convention. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (n 7) s G.5. To avoid any confusion, the term “arrest” will only be employed if it is originally referred to in the respective source. This is a deliberate choice of the author as a result of the various definitions provided within the international realm. Although “arrest” has been defined as the act “of apprehending a person for the alleged commission of an offence or by the action of an authority”, it has also been said that it extends “beyond the realm of criminal law”. “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Adopted by General Assembly Resolution 43/173 of 9 December 1988.” <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>> accessed 22 May 2020; European Court of Human Rights (ECtHR) (n 36) 31. The Human Rights Committee has defined “arrest” differently by noting that it is “any apprehension of a person that commences a deprivation of liberty [...] Arrest within the meaning of article 9 [of the Covenant on Civil and Political Rights] need not involve a formal arrest as defined under domestic law”. Human Rights Committee (n 30) para 13.

⁴¹ See generally on disciplinary sanctions, Marco Sassòli and others, “Disciplinary Sanctions”, *How Does Law Protect in War? ICRC Online Casebook* <<https://casebook.icrc.org/glossary/disciplinary-sanctions>> accessed 22 May 2020.

IV. The Importance of Studying Detentions by NSAGs

This thesis has two overall objectives. On the one hand, it aims at contributing to a better understanding of the laws applicable to NSAGs' detention activities, while studying why and how these actors operate in certain ways. On the other hand, the thesis expects, based on this knowledge, to improve opportunities for humanitarian actors to influence the behaviour of NSAGs towards enhancing the protection of individuals in armed conflict.⁴² With this goal in mind, the concluding chapter will propose the "Basic Principles on Detention by Non-State Armed Groups". These are grounded on NSAGs' practices collected for this thesis and can be of use either for NSAGs themselves or for the humanitarian community when engaging with these armed entities on issues related to detention in conflict settings. The study has therefore two objectives, trying to fill gaps both in academic scholarship and in practice.

In this context, it is beyond doubt that IHL regulates certain aspects of detention in NIACs.⁴³ In addition, provisions related to the prohibition of arbitrary detention and the protection of detainees are also enshrined in IHRL instruments.⁴⁴ Against this background, it is of concern for this thesis the question of how NSAGs may implement these rules in practice, or, in other words, what functions international law expects them to fulfil in the realm of detention. Indeed, there are some uncertainties regarding specific provisions applicable to NSAGs during NIACs that can create practical problems, in particular for detainees, who by definition find themselves in a situation of vulnerability *vis-à-vis* their captors.⁴⁵ This is because detention creates an environment of "complete dependence" between the detaining authorities and those individuals deprived of their liberty. As the ICRC has explained, detainees are "taken out of their normal environment and are no longer allowed to manage their own

⁴² This analysis will be essential, for instance, for certain humanitarian organizations when they negotiate with NSAGs to access their detention facilities and the individuals detained therein.

⁴³ See chapter II.II.A of this thesis.

⁴⁴ These rules are best reflected in the International Covenant on Civil and Political Rights, with most other IHRL instruments containing similar or identical provisions. See, in particular, the International Covenant on Civil and Political Rights, arts 8, 9, 10 and 11. The application of IHRL to NSAGs, and the analysis of the different treaties and standards is addressed in chapter II.

⁴⁵ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 292. See also ICRC, "33rd International Conference of the Red Cross and Red Crescent. International Humanitarian Law and the Challenges of Contemporary Armed Conflicts. Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions" (2019) <https://www.icrc.org/sites/default/files/document/file_list/challenges-report_ihl-and-non-state-armed-groups.pdf> accessed 22 May 2020.

lives”.⁴⁶ How vulnerable they are will depend on a variety of factors, such as their individual characteristics (age, sex, physical conditions, etc.), as well as the situation in which they are deprived of their liberty, the stage detainees are at in any judicial or administrative process, the reason for their detention and who is holding them. As Jelena Pejić has identified,

“it is fairly common that in practice people interned or held in administrative detention are not or are only vaguely informed of the reasons for their deprivation of liberty. There is often no mechanism in place to review, initially and periodically, the lawfulness of internment/administrative detention or, if there is one, its lack of independence prevents it from effectively examining cases. The question of legal assistance to internees/administrative detainees in challenging the lawfulness of their internment/administrative detention remains contentious, as do other issues, such as contact for internees/administrative detainees with their families, family visits to them, etc.”⁴⁷

Some of these difficulties are also present in other types of deprivation of liberty, and not only in cases of internment or administrative detention. In north-east Syria, for example, Human Rights Watch has documented violations against individuals detained for the commission of common crimes by the police forces of the “Autonomous Administration”, a NSAG.⁴⁸ In a 2014 report, it claimed that these forces “regularly failed to present a warrant when making an arrest”, and that detainees “either did not know they had the right to a lawyer or they lacked the money to pay for one”.⁴⁹ Individuals also complained “about the length of time in detention before seeing an investigative judge”.⁵⁰ The respect of detainees’ safeguards can also be challenging if the NSAG in question does not have a permanent facility, thus placing individuals in a temporary or mobile one. In the midst of an armed conflict, it would not be a surprise that these locations are indeed improvised.⁵¹

Although a number of recent academic endeavours have attempted to tackle these difficulties, notably from an IHL perspective,⁵² no comprehensive study has yet been conducted about NSAGs’ detention activities and a range of key issues either have not been

⁴⁶ ICRC, “Protecting People Deprived of Their Liberty” (2020) 2 <https://www.icrc.org/sites/default/files/topic/file_plus_list/0685_002_people-deprived-liberty_web.pdf> accessed 20 July 2020.

⁴⁷ Pejić (n 38) 376.

⁴⁸ Human Rights Watch, “Under Kurdish Rule Abuses in PYD-Run Enclaves of Syria” (2014) <<https://www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria>> accessed 22 May 2020.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ ICRC (n 46) 2.

⁵² An exception has been Fortin, who has addressed detentions by NSAGs also from a human rights law perspective. Katharine Fortin, “Which Legal Framework Applies to Deprivation of Liberty by Non-State Armed Groups and Do They Address the Particular Challenges When Detention Is Conducted by Non-State Armed Groups?” in Giorgio Battisti and Gian Luca Beruto (eds), *Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies. 41st Round Table on Current Issues of International Humanitarian Law* (Franco Angeli 2018).

examined or remain unclear. Generally, detention by these non-State actors involves a variety of legal challenges and practical problems in the fields of IHL, IHRL and international criminal law (ICL).⁵³ Furthermore, detention in NIACs touches upon the relationship between international law and the respective national legal frameworks, as the latter criminalizes any activity that a NSAG may undertake in a conflict setting. This topic also presents specific difficulties when dealing with the legal value of NSAGs' own regulations or "laws", which – as this thesis will argue based on a "functional" approach – could serve to provide the grounds for these non-State entities' activities. In addition to the issues identified by the ICRC and Pejić, there are several others which can be added to the list of challenges. These include (i) the legal basis for depriving different categories of individuals of their liberty,⁵⁴ (ii) the safeguards protecting detainees once in the power of these groups; and (iii) whether the degree of organization and control of these groups affects the extent to which they respect the applicable provisions. As the ICRC pointed out recently, challenges relating to detention by NSAGs can be derived from their significant diversity. This is mostly linked "to their differing operational realities, organizational structures, material capabilities, knowledge and acceptance of international law, and motivation or ideology".⁵⁵

V. The Motivation Behind This Study

In this context of uncertainty, three developments provided the incentive for conducting this research. The first relates to the case of *Serdar Mohammed v. Ministry of Defence*, which addressed the authority of the United Kingdom (and, by implication, all States) under IHL to detain individuals during the course of a NIAC in Afghanistan.⁵⁶ In 2014, Justice Leggatt affirmed that

⁵³ Although this is referred to later in this thesis, it should be noted that imprisonment "or other severe deprivation of physical liberty" is considered to be a crime against humanity. According to the Elements of Crimes of the Rome Statute, in order to be considered as such, the gravity of this detention should be "in violation of fundamental rules of international law". Rome Statute, Elements of Crimes, 2010, 7 www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf. This has been addressed by the ICTY Trial Chamber, for instance, in *Prosecutor v Milorad Krnojelac* (2002) IT-97-25-T, T.Ch. II (International Criminal Tribunal for the former Yugoslavia).

⁵⁴ The relation between the category to which a detainee belongs and his/her possible vulnerability has been acknowledged by the ICRC. See ICRC, "ICRC Detention Work: Why, Where, Who?" (2015) <<https://www.icrc.org/en/document/icrc-detention-work-why-where-who>> accessed 22 May 2020. In terms of categories of detainees, these are examined in chapter IV of this thesis.

⁵⁵ ICRC, "33rd International Conference of the Red Cross and Red Crescent. International Humanitarian Law and the Challenges of Contemporary Armed Conflicts. Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions" (n 45) 54.

⁵⁶ *Serdar Mohammed v Ministry of Defence* (2014) 1369 (QB) (EWHC). See also *Serdar Mohammed & Others v Secretary of State for Defence* [2015] EWCA Court of Appeal Civ 843; *Serdar Mohammed and others v Ministry*

“[s]uch detention may be lawful under the law of the state on whose territory the armed conflict is taking place, or under some other applicable law; or it may be entirely unlawful. There is nothing in the language of [Common Article 3] or [Additional Protocol II] to suggest that those provisions are intended to authorize or themselves confer legality on any such detentions”.⁵⁷

On the contrary, in his view, such rules aim “to guarantee certain basic minimum standards of treatment to all individuals who are deprived of their liberty for reasons relating to the armed conflict” without determining the legality of detentions.⁵⁸ Additionally, Justice Leggatt added that “neither [Common Article 3] nor [Additional Protocol II] specifies who may be detained, on what grounds, in accordance with what procedures or for how long”.⁵⁹ He also affirmed that *de facto* detentions do not necessarily imply in any way the existence of an explicit authorization.⁶⁰ Similarly, in the 2017 decision by the Supreme Court, Lord Sumption concluded that while detention is practised, “a significant number of states participating in non-international armed conflicts [...] do not yet regard detention as being authorised in such conflicts by customary international law”.⁶¹

The United Kingdom Court of Appeal explained in 2015 that the fact that States are bound by IHL does not establish an explicit power to detain persons in NIACs because “to do so would have enabled insurgents to claim that the principles of equality, equivalence and reciprocity (which would be usual in international humanitarian law) meant that they would also be entitled to detain captured members of the government’s army”.⁶² Instead, IHL regulates the conduct of States and NSAGs in NIACs, which “is not the same as authorisation. It does not follow from the fact that detention and internment by insurgents is regulated under international humanitarian law that such behaviour is authorised”.⁶³ This view directly underscores the very nature of international law, creating an imperative for discussions about whether such law authorizes or merely regulates detention in armed conflict, or whether a NSAG should rather be legally accepted to do so under certain conditions, irrespective of its fundamental legality.⁶⁴ Furthermore, although the United Kingdom argued that there was no

of Defence [2017] UK Supreme Court 2 UKSC 2015/0218. Serdar Mohammed, a suspected Taliban commander, was detained during a military operation in northern Helmand in 2010. In total, he was held by United Kingdom armed forces for 110 days.

⁵⁷ *Serdar Mohammed v. Ministry of Defence* (n 54) para 243.

⁵⁸ *ibid* 244.

⁵⁹ *ibid* 245.

⁶⁰ *ibid* 243.

⁶¹ *Serdar Mohammed and others v Ministry of Defence* (n 54) para 16.

⁶² *Serdar Mohammed & Others v. Secretary of State for Defence* (n 54) para 178.

⁶³ *ibid* 180.

⁶⁴ Although the legal basis for detention is addressed later in this thesis, it should be noted that the jurisprudence of international tribunals, in particular of the International Court of Justice, has presented differing conceptualizations of the normative nature of international law, ranging from a perspective of this legal regime as

need to apply such a power in a reciprocal manner, certain commentators have explained that the issue of equality of obligations between States and NSAGs under IHL continues to display a certain conceptual persuasiveness and remains a practical pull factor.⁶⁵

The second development is rooted in the work of the ICRC.⁶⁶ During the 32nd International Conference of the Red Cross and Red Crescent Movement, the ICRC reported that it “has understood from the consultations that States see a risk that regulation would imply the lawfulness of armed groups’ detention activities, or accord them a legal status under international law”.⁶⁷ The Preamble to the resolution of the Conference, however, opened with the following paragraph:

“mindful that deprivation of liberty is an ordinary and expected occurrence in armed conflict, and that under international humanitarian law (IHL) States have, *in all forms of armed conflict*, both the power to detain, and the obligation to provide protection and to respect applicable legal safeguards, including against unlawful detention for all persons deprived of their liberty [...]”.⁶⁸

Although addressing only the “power to detain” of States under IHL, the quoted paragraph is essential, as it concerns “all forms of armed conflict”. The phrasing naturally covers conflicts in which NSAGs are also parties. Following this, in 2016, the ICRC published its updated Commentary to Common Article 3 to the 1949 Geneva Conventions, in which it stated that

“customary and international humanitarian treaty law contain an inherent power to detain in non-international armed conflict. However, additional authority related to the grounds and

merely a prohibitive one to an approach of international law as an authorizing legal regime. Milanovic, in this sense, explains that “while IHL targeting or detention rules evolved as limitations (for instance, while people will inevitably be killed in wartime, deliberately targeting civilians is prohibited), they are now seen as permissive rules authorizing departures from human rights (for instance, while an enemy fighter may be killed even if he or she does not pose an imminent threat, preventive detention for reasons of security is authorized even if human rights law generally prohibits preventive detention)”. Marko Milanovic, “The End of Application of International Humanitarian Law” (2014) 96 *International Review of the Red Cross* 163, 185. For further discussions on the difference between regulation and authorization, see generally Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?* (Edward Elgar 2020). See also Hill-Cawthorne (n 24) 69 and ff.

⁶⁵ Andrew Clapham, “Detention by Armed Groups under International Law” (2017) 93 *International Law Studies* 1, 8. See also Ezequiel Heffes, “Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law” (2015) 20 *Journal of Conflict and Security Law* 229, 238–241.

⁶⁶ There are various ICRC’s institutional documents that deal with the topic of detention in NIACs, of which two are of particular importance (2005 and 2014). These are reviewed and analysed in chapter III of this thesis.

⁶⁷ ICRC, “32nd International Conference of the Red Cross and Red Crescent. Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report” (2015) 32 <http://rcrcconference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf> accessed 22 May 2020.

⁶⁸ ICRC, “Resolution 1 of the 32nd International Conference of the Red Cross and Red Crescent, Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty” (2015) <<https://casebook.icrc.org/case-study/32nd-international-conference-red-cross-and-red-crescent-strengthening-international>> accessed 22 May 2020. Emphasis added.

procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in keeping with the principle of legality”.⁶⁹

This statement, which is repeated in other institutional documents, is enlightening for a variety of reasons. Not only does it argue in favour of the existence of an “inherent power” to deprive individuals of their liberty for all parties – a view that has correctly been challenged by the specialized scholarship – it also requires States and NSAGs to adopt further provisions with the goal of respecting the principle of legality.

The third development that provided a driver for the present thesis is based on selected NSAGs’ practices. The ICRC, in this sense, has recently noted that more than 80 NSAGs hold detainees in countries where it operates,⁷⁰ and there have been documented practices of these entities depriving individuals of their liberty all around the world. In February 2018, the UN International Commission of Inquiry on Syria issued a report to the UN Human Rights Council detailing detentions carried out by the different parties to the conflict, including NSAGs. The Commission found that “[a]cross Raqqah, Dayr al-Zawr, and Hamah governorates, [the Islamic State group] detained civilians accused of violating its rules or suspected of cooperating with enemy forces, members of minority religious groups, journalists and activists accused of reporting on alleged violations committed by the group”.⁷¹ The report added that some “anti-Government armed groups used makeshift detention sites in areas under their control to hold civilians”, and that during the course of military operations, the Syrian Democratic Forces (SDF) claimed that they had detained 1,397 “terrorist” fighters, “the majority of whom are or were [Islamic State group] members”, including women and children.⁷² At the same time, a dissident faction of the FARC-EP – a NSAG that had undergone a transitional justice process in Colombia agreeing to surrender its weapons – simultaneously detained three Ecuadorian journalists,⁷³ all of whom were later found dead, allegedly executed by this newly created

⁶⁹ ICRC, *Commentary on the First Geneva Convention. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (n 7) para 728. This sentence was also included in subsequent Commentaries. In any case, it should be noted that this paragraph refers to those detentions “outside a criminal process”, also known as internment.

⁷⁰ ICRC, “33rd International Conference of the Red Cross and Red Crescent. International Humanitarian Law and the Challenges of Contemporary Armed Conflicts. Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions” (n 45) 54.

⁷¹ Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic” (2018) 15 <<https://reliefweb.int/sites/reliefweb.int/files/resources/A-HRC-37-72-1.pdf>> accessed 22 October 2020.

⁷² *ibid.*

⁷³ Thalía Flores, “Dos Periodistas y Un Conductor Secuestrados En La Frontera de Ecuador Con Colombia” (27 March 2018) <https://www.abc.es/internacional/abci-periodistas-y-conductor-secuestrados-frontera-ecuador-colombia-201803272042_noticia.html#ns_campaign=mod-

group.⁷⁴ It has also been reported that individuals have been detained in the past by the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka,⁷⁵ the Communist Party-Maoist (CPN-M) in Nepal,⁷⁶ the Taliban in Afghanistan,⁷⁷ the Moro Islamic Liberation Front (MILF) in the Philippines⁷⁸ and the National Movement for the Liberation of Azawad (MNLA) in Mali.⁷⁹ In 2018, Amnesty International published a report on Libya which addressed serious violations of international law and abuses of human rights by forces affiliated to three rival governments, as well as NSAGs and militias. When dealing with arbitrary arrests and detention, it claimed that these non-State actors

“abducted and unlawfully detained hundreds of people because of their opinions, origin, perceived political affiliations or perceived wealth. Those abducted included political activists, lawyers, human rights activists and other civilians. Militias carried out abductions with the aim of extracting ransoms from families, to negotiate an exchange of detainees or to silence criticism”.⁸⁰

This report by Amnesty International should not be seen in isolation. Since the 1990s, human rights non-governmental organizations (NGOs) have taken an active role in dealing with international law and NSAGs,⁸¹ including on their detention activities in various contexts.⁸²

sugeridos&ns_mchannel=relacionados&ns_source=dos-periodistas-y-un-conductor-secuestrados-en-la-frontera-de-ecuador-con-colombia&ns_linkname=noticia.foto.internacional&ns_fee=pos-1> accessed 22 May 2020.

⁷⁴ Semana, “Fotografías Confirmarían El Asesinato de Los Periodistas Ecuatorianos” (12 April 2018) <<https://www.semana.com/nacion/articulo/periodistas-ecuatorianos-fueron-asesinados-por-disidencia-de-las-farc/563531/>> accessed 22 May 2020. For a recent analysis on the FARC-EP’s dissident factions after the conclusion of the 2016 Peace Agreement with the Colombian government, see Juan Pappier and Kyle Johnson, “Does the FARC Still Exist? Challenges in Assessing Colombia’s ‘Post Conflict’ under International Humanitarian Law” (*Ejil: Talk!*, 22 October 2020) <<https://www.ejiltalk.org/does-the-farc-still-exist-challenges-in-assessing-colombias-post-conflict-under-international-humanitarian-law/>> accessed 22 October 2020.

⁷⁵ “LTTE, GSOL Exchange Detainees of War” *TamilNet* (28 September 2002) <<https://www.tamilnet.com/art.html?catid=13&artid=7555>> accessed 22 May 2020.

⁷⁶ UN Office of the High Commissioner for Human Rights, “Human Rights Abuses by the CPN-M. Summary of Concerns. September 2006” (2006) <<https://www.refworld.org/docid/477e3f130.html>> accessed 22 May 2020.

⁷⁷ See, among others, BBC News, “Afghan Conflict: Special Forces “free” Prisoners of Taliban” (6 May 2016) <<https://www.bbc.com/news/world-asia-36230668>> accessed 22 May 2020; Salaam Times, “Afghan Special Forces Rescue 13 Captives from Taliban Prison in Helmand” (4 October 2019) <https://afghanistan.asia-news.com/en_GB/articles/cnmi_st/newsbriefs/2019/10/04/newsbrief-02> accessed 22 May 2020..

⁷⁸ AJ Siytagco, “A Closer Look inside an MILF Detention Facility” *Manila Bulletin* (23 August 2018) <<https://mb.com.ph/2018/08/23/a-closer-look-inside-an-milf-detention-facility/>> accessed 22 May 2020.

⁷⁹ Mohamed Vall, “Prisoners of Mali in Legal Limbo” *Al Jazeera* (29 April 2013) <www.aljazeera.com/blogs/africa/2013/04/69481.html> accessed 22 May 2020.

⁸⁰ Amnesty International, “Amnesty International Report 2017/18 – Libya” (2018) <<https://www.refworld.org/docid/5a9938c64.html>> accessed 22 October 2020.

⁸¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 276.

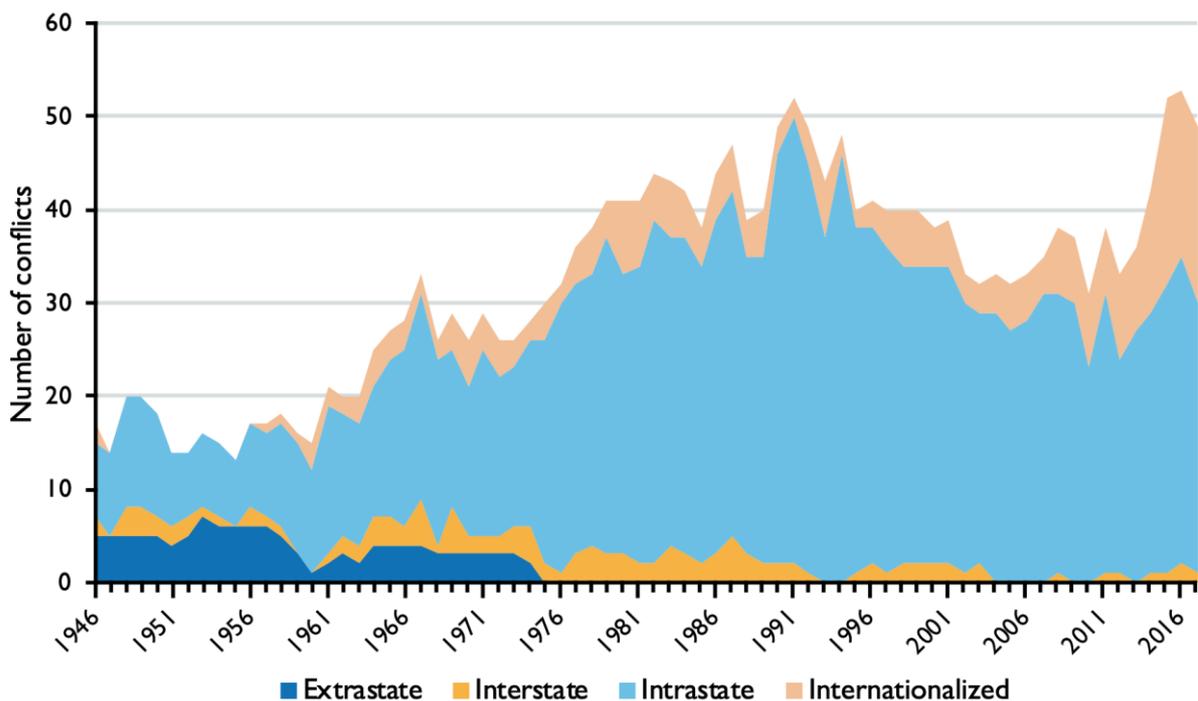
⁸² See, among many others, Human Rights Watch, “Syria: Arrests, Torture by Armed Group Move to Solidify Control, Silence Critics” (n 33); Amnesty International (n 33); Human Rights Watch, “Colombia: Guerrillas Should Free Kidnapped People Suspended Peace Talks No Excuse” (2018) <<https://www.hrw.org/news/2018/10/30/colombia-guerrillas-should-free-kidnapped-people>> accessed 22 October 2020; Human Rights Watch, “Colombia: Rebel Abuses Worsening Human Rights Watch Letter to Commander Manuel Marulanda” (2001) <<https://www.hrw.org/news/2001/07/09/colombia-rebel-abuses-worsening>> accessed 22 October 2020; Human Rights Watch, “War Without Quarter. Colombia and International

The aforementioned developments all present key legal difficulties summarized by the main questions examined in this thesis: How does international law deal with NSAGs' detention activities, and what is the value of their "laws" for regulating these same activities? The relevance of these inquiries reaches beyond the cases cited, and their complexity is not limited to the issues flagged here. Armed conflicts involving a variety of NSAGs have erupted in numerous countries over the past thirty years, including in the Central African Republic, the Democratic Republic of Congo (DRC), Iraq, Mali, Myanmar, South Sudan, Syria, Ukraine and Yemen. In each case, NSAGs with differing degrees of organization and control have been responsible for detaining enemy forces, civilians and even members of their own group for different motives. This situation is likely to become more complex, with researchers identifying three key trends. The first relates to the number of groups involved in armed conflicts, which has grown exponentially over the last few years. According to a recent study by the ICRC, only one-third of conflicts today involve two belligerent parties, while 44 per cent include between three and nine opposing forces, and 22 per cent have more than ten.⁸³ Indications suggest that this tendency will continue,⁸⁴ as figure 1 shows.

Humanitarian Law" (1998) <<https://www.hrw.org/legacy/reports98/colombia/index.htm#TopOfPage>> accessed 22 October 2020.

⁸³ ICRC, "The Roots of Restraint in War" (n 3) 13.

⁸⁴ Brian McQuinn and Fabio Oliva, "Preliminary Scoping Report: Analyzing and Engaging Non-State Armed Groups in the Field" (2014) United Nations System Staff College 2.



Number of armed conflicts by type, 1946-2017. Kendra Dupuy and Siri Aas Rustad, ‘Trends in Armed Conflict, 1946-2017’, PRIO. Conflict Trends, May 2018, <https://reliefweb.int/sites/reliefweb.int/files/resources/Dupuy%20Rustad-%20Trends%20in%20Armed%20Conflict%201946%E2%80%932017%20Conflict%20Trends%205-2018.pdf> accessed 22 May 2020.

The second trend, scholars explain, is characterized by a shift in the patterns of violence, with the majority taking place outside situations conventionally understood as armed conflicts.⁸⁵ As identified by Chinkin and Kaldor, these “new wars” are largely fought in the name of identity – ethnic, religious or tribal – rather than for political ideas. Unlike “old wars”, that were fought by regular armies, the participants of these new conflicts are “loose and fluid networks” of State and NSAGs that cross borders, who aim at acquiring political control of territory, often fund their activities through criminal enterprises and prefer to perpetuate violence and disorder than “winning”.⁸⁶ How these “new wars” have affected the way NSAGs behave, in particular with regards to their detention activities, has not been sufficiently explored. The final trend relates to the functions that these non-State actors serve nowadays, offering protection to civilians and/or providing security in fragile cities or regions,⁸⁷ including law-enforcement operations. Based on these dynamics and scenarios, the need for a solid understanding of the legal framework applicable to NSAGs’ detentions becomes undeniable, not merely as an academic exercise but as a humanitarian necessity.

⁸⁵ *ibid* 2.

⁸⁶ Christine M Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017) 7–19.

⁸⁷ McQuinn and Oliva (n 84) 3.

VI. Place of the Thesis in the Relevant Literature

These three trends have been reflected within the legal and humanitarian communities working on NSAGs' detention activities, and the last few years have seen an exponential increase in studies on this issue where the complexities of this phenomenon are reflected upon. Since this thesis is built on some of their findings, a few paragraphs are needed to identify its place in the literature on the topic.⁸⁸ Broadly speaking, these studies can be classified under two headings: i) research employing political sciences perspectives; and ii) studies that have dealt with NSAGs' detentions from a legal perspective.

In relation to the first category, NSAGs and their detention-related activities have been the object of a number of scientific studies in the realm of political sciences. Hyeran Jo, for instance, has devoted an entire chapter of her *Compliant Rebels* to analyse issues related to access to NSAGs' detention facilities by humanitarian organizations, in particular the ICRC.⁸⁹ Other authors have similarly addressed these non-State entities' deprivations of liberty when dealing with their governance activities. Even if not all armed groups have branches dedicated to the provision of services, one branch provided by some of them is related to dispute adjudication and resolution services through a body similar to a local police force.⁹⁰ Weinstein has defined security, in fact, as “[t]he most important collective good rebel groups provide”.⁹¹ These studies have been of assistance for the development of this thesis for various reasons, notably because many of them include in-depth information on the organizational structures of NSAGs, their behavioural variations and the way in which they interact with the civilian populations living in the territories under their control.

Scholars have also explored NSAGs' detentions from a legal standpoint, and a few authors deserve to be mentioned. Hill-Cawthorne's *Detention in Non-International Armed Conflict* and Debuf's *Captured in War: Lawful Internment in Armed Conflict* represent two of the most important studies in this regard. Some of the elements contained therein have served as a basis for this thesis. Their scope, however, only covers cases of “internment”, thus excluding other forms of detention that may occur in NIACs.⁹² Furthermore, both authors deal

⁸⁸ These paragraphs should not be seen as exhaustive in nature, and there are other scholarly studies have been used throughout this thesis that have not been included herein.

⁸⁹ Jo (n 6) 182-211.

⁹⁰ Lindsay L Heger and Danielle F Jung, “Negotiating with Rebels: The Effect of Rebel Service Provision on Conflict Negotiations” (2017) 61 *Journal of Conflict Resolution* 1203, 1207.

⁹¹ Weinstein (n 6) 37.

⁹² Hill-Cawthorne (n 24); Debuf (n 10) 449-517.

with both States and NSAGs, thus overlooking some of the intricacies related the functions that these non-State entities exert. Clapham has also examined NSAGs' detention activities, highlighting the reticence of the international community to discuss their obligations in this realm. He has further noted that some specific challenges, such as NSAGs' disciplinary measures, merit further critical examination.⁹³ In 2012, Sandesh Sivakumaran published a seminal study, *The Law of Non-International Armed Conflict*.⁹⁴ There, he offers a thorough analysis of the international law applicable in NIACs, also including selected NSAGs' practices and views. Given this inclusiveness, and despite not exclusively focusing on NSAGs' detention activities, this thesis has taken Sivakumaran's work as an obvious inspiration. There are three remaining books that are worth mentioning. Murray's *Human Rights Obligations of Non-State Armed Groups* and Fortin's *The Accountability of Armed Groups under Human Rights Law* examine the application of IHRL to NSAGs. While Murray includes a chapter on "Prosecution, detention and satisfaction of the right to health by armed groups",⁹⁵ Fortin briefly explores NSAGs' detentions when assessing the notion of *nexus*.⁹⁶ Finally, René Provost's recently published *Rebel Courts. The Administration of Justice by Armed Insurgents* relies on a legal pluralistic perspective to assess how NSAGs administer justice.⁹⁷

As can be observed, scholars have only dealt with detention by NSAGs tangentially. It is therefore expected that this thesis will fill this gap. In particular, three points can be identified that differentiate this research from the aforementioned studies. First, no book has argued, based on a "Functional Theory of Detention by Non-State Armed Groups" and an extensive examination of their actual practices, that they should be able to rely on their own "laws" to detain individuals. Second, although Murray and Fortin have assessed the relation between IHRL and NSAGs, there is no thorough study on this issue through the lens of their detention activities. Finally, as noted, despite being the most relevant analysis on detention in NIACs, Hill-Cawthorne and Debuf only focus on cases of "internments" by both States and NSAGs, thus excluding other types of detention and many of the challenges related to the nature of these non-State entities in the international legal realm.

⁹³ Clapham (n 65) 43.

⁹⁴ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012).

⁹⁵ Murray (n 5) 205-271.

⁹⁶ Fortin (n 5) 37-59.

⁹⁷ René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press 2021).

VII. Methodology

This research has addressed the aforementioned trends and developments through two complementary steps. The first one has involved a doctrinal study of normative and jurisprudential developments related to NSAGs' detentions within the various branches of international law, including IHL and IHRL. As noted, commentators and institutions have addressed NSAGs' behaviours in these realms on a regular basis.

The second step has involved an analysis of the practice and interpretations of NSAGs in this specific area.⁹⁸ Different activities have been undertaken in this regard. This thesis has paid particular attention to the various means used by these non-State actors to express their views, such as unilateral declarations, criminal "laws", internal orders, decrees, codes of conduct, special agreements and peace or ceasefire agreements.⁹⁹ Documentary sources, albeit under-utilized in empirical legal research, can provide a rich source of data.¹⁰⁰ The goal of this phase was to map NSAGs' documents (i.e. "verbal" acts) so as to have an overview of the rules related to detention that different types of groups have agreed to respecting and applying. More than 100 of such documents from various regions and adopted between the 1940s and 2020 were found and analysed systematically.

In addition, this thesis has also embarked into a qualitative analysis on the practice of selected NSAGs. This exercise, which took the form of case studies,¹⁰¹ aimed at understanding the *rationale* behind their specific policies on detention and to compare them with their actual behaviour on the battlefield. The case study method was selected as it enables a wider focus beyond dichotomous variables,¹⁰² thus allowing for investigation of different NSAG

⁹⁸ Some of the findings have been collected in the context of a research project undertaken by the Geneva Academy of IHL and Human Rights and Geneva Call, of which the author is part of. For further information, see Annyssa Bellal, Pascal Bongard and Ezequiel Heffes, "Research Brief. From Words to Deeds: A Research of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms." (2019) <<https://www.geneva-academy.ch/joomlatools-files/docman-files/From%20Words%20to%20Deeds%20A%20Research%20of%20Armed%20Non-State%20Actors%E2%80%99%20Practice%20and%20Inter.pdf>> accessed 22 May 2020. See also "From Words to Deeds Research Project" <<https://words2deeds.org/>> accessed 17 August 2021.

⁹⁹ The research draws on the database www.theirwords.org, which includes more than 500 humanitarian commitments and internal norms adopted by 230 NSAGs from 60 countries.

¹⁰⁰ Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 938.

¹⁰¹ A "case" has been defined as "an instance of a class of events", which in turn refers to a phenomenon of scientific interest, such as revolutions, types of governmental regimes, kinds of economic systems, etc. A "case study" can therefore be defined as an aspect "of a historical episode that the investigator selects for analysis, rather than a historical event itself". Alexander L George and Andrew Bennett, *Case Studies and Theory Development in Social Sciences* (MIT Press 2005) 18–19.

¹⁰² *ibid* 85. There are other advantages to using case studies compared to other methods. George and Bennet cite their potential for achieving high conceptual validity, their strong procedures for fostering new hypotheses, their

behaviours, rather than simply restricting the research to a focus on “detention” or “non-detention”. This is particularly relevant, as these non-State entities frequently experience stark fluctuations in their military structures and behaviours.¹⁰³ It has also been noted that case studies serve “to investigate and understand complex issues in real world settings”,¹⁰⁴ and that they are particularly valuable when compared to other methods because of

“their potential for achieving high conceptual validity; their strong procedures for fostering new hypotheses; their value as a useful means to closely examine the hypothesized role of causal mechanisms in the context of individual cases; and their capacity for addressing causal complexity”.¹⁰⁵

Although this research technique has been criticized for introducing biases,¹⁰⁶ it has also been said that selection with some previous knowledge of the contexts may mitigate shortcomings.¹⁰⁷ Such selection produces much stronger research designs as “cases can be selected with a view toward whether they are most-likely, least-likely, or crucial for a theory, making the process-tracing test of a theory more severe”.¹⁰⁸

Three NSAGs have been selected in this regard. The research focuses on the so-called “Autonomous Administration of North and East Syria” and its various armed components, including the People’s Protection Units/Women’s Protection Units (Yekîneyên Parastina Gel/Yekîneyên Parastina Jin, YPG/YPJ), the SDF and the internal security forces, in Syria; the FARC-EP in Colombia; and the People’s Alliance for a Free and Sovereign Congo (*Alliance du Peuple pour un Congo Libre et Souverain*, APCLS), from the DRC. Due to their links and relations, YPG/YPJ and SDF (and their behaviours) are analysed as part of the same NSAG.¹⁰⁹

value as a useful means to examine the hypothesized role of causal mechanisms in the context of individuals cases and their capacity to address causal complexity. *ibid* 19.

¹⁰³ Kasfir, in this regard, affirms that “[i]t is commonplace but seriously misleading to characterize rebel groups as if they were unchanging organizations perpetually committed to a single doctrine or practice. Groups that pursue rebellion for many years frequently experience severe fluctuations in their military fortunes”. Nelson Kasfir, “Rebel Governance – Constructing a Field of Inquiry: Definitions, Scope, Patterns, Order, Causes” in Ana Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015) 34.

¹⁰⁴ Helena Harrison and others, “Case Study Research: Foundations and Methodological Orientations” (2017) Vol 18 *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research* No 1 (2017), 1.

¹⁰⁵ George and Bennett (n 101) 19.

¹⁰⁶ Katerina Linos, “How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics” (2015) 109 *The American Journal of International Law* 475, 479.

¹⁰⁷ This selection draws on personal knowledge of the contexts. The author of this thesis has experience working with these three non-State actors on humanitarian issues. It shall be noted, in any case, that other NSAGs’ practices have also been included when appropriate.

¹⁰⁸ George and Bennett (n 101) 24. The case study method has even been defined as “the strongest of available alternatives”. *See*, in this sense, Katerina Linos (n 106) 479.

¹⁰⁹ The relation between SDF and YPG/YPJ was officially recognized within the international community in 2019 when the former signed a UN Action Plan to end and prevent the recruitment and use of children, which followed the listing of the YPG/YPJ in the UN Secretary-General’s annual report on Children and Armed Conflict. At that time, it was acknowledged that YPG/YPJ “operates under the effective command and control” of the SDF. *See*

A number of reasons justify the selection of these three cases. First, the different contexts in which they operate or have operated, including the variety of stakeholders with whom they interact or have interacted, enable the analysis of possible variations in their detention activities. Second, the presence of detention activities has been confirmed with documented examples. Third, they serve as samples of certain typologies of NSAGs, which are identified and described in chapter I (“*de facto* authorities”, a category that encompassed the “Autonomous Administration” of north-east Syria, “armed opposition groups”, comprising of the FARC-EP and “militias”, where the APCLS can be located). Finally, it was possible to access former and current members of the NSAGs, as well as other relevant stakeholders, such as staff from international organizations and NGOs with experience relating to the NSAGs in question, in order to carry out semi-structured interviews.¹¹⁰ Twenty of such interviews were conducted face-to-face or remotely (via telephone or video). The external sources allowed for a critical assessment of what NSAGs affirmed, thus providing a more comprehensive picture of the practices in conflict settings. The case study process also incorporates background information on the conflicts and the respective NSAGs, as well as on their detention activities, thus serving as an “umbrella strategy” that combines a range of data (documentary and historical analysis, and interviews).¹¹¹

Some caveats are in order, as conducting mixed-method research in and on conflict settings is notoriously complex. First, as mentioned, armed conflicts are dynamic and the groups fighting them may transform and adapt over time.¹¹² Hazen has explained, in this regard, that “[a] group’s capacity to fight does not remain constant over time, and because of this the opportunities for war and peace change as well”.¹¹³ As a result, it is expected to observe variations in the detention practices of selected NSAGs through the conflicts they were (or are) parties to. With respect to the FARC-EP, for instance, it has been said that it is evident that the ways in which this NSAG “relate[d] with the civilian population changed according to social

UN Office of the Special Representative of the Secretary General for Children and Armed Conflict, “Syrian Democratic Forces Sign Action Plan to End and Prevent the Recruitment and Use of Children” (1 July 2019) <<https://childrenandarmedconflict.un.org/2019/07/syrian-democratic-forces-sign-action-plan-to-end-and-prevent-the-recruitment-and-use-of-children/>> accessed 22 May 2020. Other actors are also part of the SDF, such as the Raqqa Military Council and the Syriac Military Council.

¹¹⁰ The interviewees were selected based on their knowledge of NSAGs’ policies and practices regarding detention. Generally, a semi-structured interview is a qualitative data collection strategy in which informants are asked a series of predetermined but open-ended questions. Lioness Ayres, “Semi-Structured Interview” in Lisa Given (ed), *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE Publications, Inc 2008) 810. It shall be noted that semi-structured interviews were not restricted to these three case studies, and other contexts were also included.

¹¹¹ Webley (n 100) 939.

¹¹² Hazen (n 6) ix. See also Kasfir (n 100) 34.

¹¹³ Hazen (n 6) ix.

scenarios, the situation of the armed group and the military process” that was being undertaken.¹¹⁴ Similarly, it has been reported that in December 2017 the APCLS split into two factions,¹¹⁵ a scenario that has affected the way in which this NSAG has dealt with its detention activities. It should also be mentioned that the case studies were conceived mainly between 2019 and early 2021, and thus some of the developments occurring hereinafter and affecting these NSAGs may have been excluded from the analysis. Furthermore, assessing the FARC-EP, APCLS and the “Autonomous Administration’s” attitudes with respect to specific rules may differ according to the temporal and geographical scopes of the analysis. When dealing with the FARC-EP, the ICRC has noted that it only ceased to kidnap “once peace negotiations had begun”.¹¹⁶ In the same sense, the “Autonomous Administration” and its armed components have adapted their own applicable framework throughout the past few years, including an increasing number of rules regulating their detention activities. Ignoring the existence of these dynamics may be detrimental for any case study and they are included when appropriate. Finally, the responses provided during the interviews by the current or former members of the groups can be situated in different political moments. While the “Autonomous Administration” and its various armed branches are still participating in various active conflicts in Syria, the FARC-EP has officially ceased to exist after the conclusion of the peace agreement with the government,¹¹⁷ when it was evident that the hostilities had ceased and there was no real risk of their resumption. As a result, many of the latter’s former members are now going through a post-conflict scenario, which includes transitional justice (judicial and non-judicial) processes, some of them addressing the group’s detention activities.¹¹⁸ In these various contexts, some individuals may have responded more openly to certain inquiries than others. In order to overcome this limitation, the case studies include external sources to contextualize the statements made and provide a more nuanced picture of the events on the ground.

¹¹⁴ Mario Aguilera Peña, *Guerrilla y Población Civil: Trayectoria de Las FARC 1949-2013* (Centro Nacional de Memoria Histórica 2014) 24 <<http://www.centrodememoriahistorica.gov.co/descargas/informes2013/farc/guerrilla-y-poblacion-civil-jun-2016.pdf>> accessed 22 May 2020.

¹¹⁵ UN Security Council, “Letter Dated 18 December 2018 from the Group of Experts on the Democratic Republic of the Congo Addressed to the President of the Security Council” (2018) S/2018/1133 13 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/396/03/PDF/N1839603.pdf?OpenElement>> accessed 22 May 2020.

¹¹⁶ ICRC, “The Roots of Restraint in War” (n 3) 41.

¹¹⁷ “Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the National Government of Colombia and the Revolutionary Armed Forces of Colombia–People’s Army (FARC-EP)” (24 November 2016) <<https://www.peaceagreements.org/viewmasterdocument/1845>> accessed 22 October 2020.

¹¹⁸ In fact, the Special Jurisdiction for Peace released in January 2021 a decision dealing with the hostage-taking activities by the FARC-EP. *Caso No 01 Toma de rehenes y graves privaciones de la libertad cometidas por las FARC-EP* (Jurisdicción Especial para la Paz Salas de Justicia Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas). The decision has been included in the analysis undertaken in chapter IV.

VIII. Structure of the Thesis

The thesis is divided into two parts, each of which explores a variety of topics from different perspectives, often challenging at conceptual and empirical level the predominant State-centric paradigm of international law with respect to non-State actors. In-depth analysis will include socio-legal considerations of NSAGs' detention activities aimed at achieving a more complex and thus fuller understanding of the current difficulties that the application of international law faces in real-life contexts. These considerations will be particularly useful as this thesis combines theoretical and empirical perspectives, which will be evidenced when identifying and examining both the types of NSAGs that operate in conflict settings and their actual practices in the realm of detention – and how these may affect the way we conceive the applicable law.

Part I presents the scope of the research, identifying the subject of inquiry. It starts by combining legal and political science literature on the existence of NSAGs and their international legal obligations. The first chapter (“Non-State Armed Groups, Legal Personality and Typology”) assesses NSAGs' legal personality through the lens of a “functional” capacity approach. It identifies, in this sense, the key elements required for an entity to be considered as a NSAG under international law. Different practical scenarios are examined, proposing a typology of groups under examination – “*de facto* authorities”, “armed opposition group” and “militias” – and addressing their legal personality under this legal regime. Chapter II (“Locating Non-State Armed Groups Within the International Legal Architecture”) considers these findings and offers various arguments as to why their detention activities should be conceived through the lens of both IHL and IHRL. The second part of this chapter deals with the role and regulation of NSAGs within these realms, assessing the mechanisms through which these non-State actors could be bound by the rules contained therein. Although the application of IHRL to NSAGs is still disputed, chapter II demonstrates a slow shift towards recognizing that these entities have obligations under this legal regime.

Part II examines NSAGs' detention activities and their legal regulation. Chapter III (“Detention in Non-International Armed Conflict: From Prohibitions to Restrictions and Acceptance”) explores how international law responds to these behaviours in conflict settings. This entails an examination of conventional and customary IHL sources applicable to NIACs with the goal of determining the existence, or absence, of a permission for the parties to deprive individuals of their liberty. By relying on a “legal pluralistic” approach and the principle of

equality of belligerents under IHL, chapter III argues that NSAGs' "laws" and regulations can serve as a valid legal basis for their actions, including those related to detention. This view follows the aforementioned "Functional Theory of Detention by Non-State Armed Groups", according to which these law-making functions are required for the implementation of NSAGs' obligations. Chapter IV ("To Detain, or not to Detain: An Assessment into Non-State Armed Groups' Practices in Non-International Armed Conflicts") assesses the reasons why NSAGs actually choose to deprive individuals of their liberty, challenging some common misconceptions on how these entities operate in real-life. This exercise is based on the case studies, and introduces the various forms of detention carried out by NSAGs in conflict settings and the normative bases these actors rely on so as to prevent their arbitrariness.

The conclusion presents the main findings of the study, bringing together insights from the doctrinal, socio-legal and empirical research segments. Based on the practices collected for this thesis, the concluding chapter argues that NSAGs should be included in the future elaboration of good practice and guideline development processes. These have become more commonplace in the last few years due to the little appetite within the international community for formal legal-making processes on detention.¹¹⁹ As a first step towards this endeavour, this thesis proposes the "Basic Principles on Detention by Non-State Armed Groups". Bearing in mind that this study is practice driven, these "Basic Principles", which are based on the collected NSAGs' practices, aim to address some of the recurrent scenarios that these entities (may) encounter in the battlefield when attempting to differentiate between categories of detainees, and offers practical solutions and guidelines addressed in particular to humanitarian actors engaging armed groups on the ground. Underpinning the practical consideration remains our concern with international law's normative pull and therefore the implications of the tested hypothesis on the legitimacy of NSAGs within the international legal realm.

¹¹⁹ In an opening speech at the San Remo Roundtable on the topic of detention in armed conflict, Helen Durham, Director of International Law and Policy at the ICRC, affirmed the following: "In light of the important need to address this situation, in late 2015 States agreed to work collectively on concrete and implementable outcomes to strengthen IHL protections for detainees. However, until today it has not been possible to agree on how to work collectively towards such outcomes". Helen Durham, "Detention and Armed Conflicts: Exploring Realities and Remedies" (10 September 2018) <<https://blogs.icrc.org/law-and-policy/2018/09/10/detention-armed-conflicts-exploring-realities-remedies/>> accessed 22 September 2021.