Comment: Detention by Armed Groups

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In his contribution, *Vincent Widdig* raised a number of questions concerning the role of armed groups in international law. To what extent are they bound by IHL or even IHRL? To what extent does this require them to possess a certain degree of legal personality and how could it be established? What are the further consequences of ascribing armed groups this kind of status? Would this legitimise their conduct and their goals on a political level? And would this also allow them to become law-makers, instead of mere law-takers, on a legal level? Finally, should armed groups be held accountable for their violations of international law?

All of the above are pertinent questions and inform us about the challenges international law, and especially IHL, faces in areas of limited statehood – where not only the exact meaning and scope of certain norms is contested, but the significance of international law itself is sometimes rejected.[1] We can approach these issues with the idea of ascribing armed

1 Concerning such a rejection by armed groups, see for example: Geneva Academy, 'Reactions to Norms: Armed Groups and the Protection of Civilians', Policy Briefing No. 1, (Geneva 2014) 13, 29 et seq; Olivier Bangerter, 'Reasons why armed groups choose to respect international humanitarian law or not' (2011) 882 IRRC 353, 380 et seq; Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 ICLQ 416, 426; Andrew Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement' (Geneva Academy 2010) 23; Jann K. Kleffner, 'The applicability of international humanitarian law to organized armed groups' (2011) 93 IRRC 443, 446 (hereafter Kleffner, 'The applicability of international humanitarian law'); Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (ICRC 2008) 11; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale J. Int'l L 107, 127.
However, also governments reject the applicability of international law in their conflict zones from time to time: Secretary-General, 'Minimum humanitarian standards: Analytical report of the Secretary-General submitted persuant to Commission on Human Rights resolution 1997/21' UN Doc E/CN.4/1998/87

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groups a certain legal personality or capacity, thereby explaining that such groups are bound by international law obligations, but also prompting the conclusion that they could, or at least should, take part in the creation of international law.[2] This is one of the ideas international law is based on – sovereign equality, meaning that one should only be bound by rules one consented to. Hence, States either negotiate the law in State conferences or through their conduct on the battlefield, or at least they create their own obligations by adhering to a certain instrument or by not persistently objecting to a certain practice.

So, can we identify this kind of synchronicity of law-creation and corresponding obligations in the law of armed conflict or do we rather see non-State actors as being bound without having any influence? The fact that armed groups and their members are bound by and have obligations under international law – and can even be held accountable for their violations – seems to be settled.[3] The scope of these obligations is sometimes challenged, but that also holds true for States involved in NIACs, as for

(5 January 1998) 20; Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (ICRC 2008) 11; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 260 et seq; Lindsay Moir, *The Law of Internal Armed Conflict* (CUP 2002) 34, 67 et seq, 85 et seq (hereafter Moir, *The Law of Internal Armed Conflict*); Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 ICLQ 416, 426; Dawn Steinhoff, 'Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups' (2009) 45 Texas International Law Journal 297, 313.

2 On the concepts and consequences of international legal personality, see especially Janne E. Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (TMC Asser Press 2004) and Roland Portmann, *Legal Personality in International Law* (CUP 2010).

3 *Prosecutor v Akayesu* (Judgment) IT-96-4-T (2 September 1998) 617; *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) 134; Kleffner, 'The applicability of international humanitarian law' (n 1) 445; Moir, *The Law of Internal Armed Conflict* (n 1) 53; Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20 JCSL 101, 122; Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War*, vol. I (ICRC 2011) chapter 12, 25 et seq.

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example the debate on the power of the UK's armed forces to detain in the conflict in Afghanistan demonstrates.[4]

What hereby becomes apparent is the complete disregard of States and international organisations involved in the debate on the role of armed groups in international law, for the idea of international law being made by those who are bound by it. When we try to argue against that, we should analyse whether international law really accepts actors as being treated as mere objects or whether there is something in the law which might trigger a change of status from object to subject – at least in a limited area of the law.

Vincent Widdig correctly mentioned the principle of effectiveness in this regard. IHL is meant to effectively protect individuals from the consequences of war as far as possible. In contrast to most other fields of law, IHL refrains from taking into account the status of an actor and simply prescribes norms of behaviour to all those engaging in armed conduct. Therefore, the rules are formulated to either apply to each 'party to the conflict',[5] or do not mention the actor at all and simply prescribe that 'the wounded and sick shall be respected and protected in all circumstances'.[6]

In this sense, I would argue that IHL also effectively accepts attempts by any actor within an armed conflict to adjust the rules to the specific conflict or to expand the protection provided by its rules. Even if we understand international law to generally remain a State-centric system – and there are many reasons to do so – IHL already accepts other actors. Consider CA 3, which provides:

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

Likewise, the UNESCO Convention on the protection of cultural property in armed conflicts[7] by itself includes only a limited protection regime in case of NIACs, but again provides in Art. 19 (2) that

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4 Manuel Brunner, 'Detention for Security Reasons by the Armed Forces of a State in Situations of Non-International Armed Conflict: The Quest for a Legal Basis' in this volume 89.

5 For example, CA 3 (1).

6 For example, Art. 12 GC I; Art. 7 AP II.

7 Convention for the Protection of Cultural Property in the Event of Armed Conflict (opened for signature 14 May 1954, entered into force 7 August 1956) UNTS 249.

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> The parties to the Conflict shall endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

Other treaties follow this example. In addition to this, all of them include a caveat,[8] stating:

> The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

IHL, thus, already allows armed groups to change from mere objects of the law to real subjects, who are able to influence, at least in part, the law as it applies to their respective armed conflict. The trigger mechanism seems to be that the armed group must effectively be able to, first, engage in an armed conflict, and, second, to force their enemy into negotiating an agreement.

In other words: If an actor is in a position to effectively make the law applicable in a specific armed conflict, IHL will not ask for this actor to provide some further international status or legitimacy, but it will simply attempt to steer that actor's conduct on the battlefield and his law-making activities into certain directions, thus trying to maintain, or even to improve, the protection provided by IHL.

This also brings us back to the contribution by *Katja Schöberl* and *Linus Mührel* on the permissive and/or restrictive nature of IHL.[9] If this law is simply trying to steer the behaviour of those engaged in an armed conflict reaching a certain threshold, its goal is not to permit or otherwise legitimise this action as such. IHL, as the *jus in bello*, is concerned with how parties to a conflict behave, not about whether they should engage in an armed conflict at all. In the same way, it does not permit or forbid detention by armed groups, but rather provides certain standards to be observed during detention.

Looking at the applicable domestic law, we have to expect a totally different picture. States usually prohibit non-State actors from carrying out armed attacks as well as from detaining people, especially when this concerns the State's own armed forces. Here again, IHL does neither permit

8 For an early example, see Art. 152-55 of the Lieber Code (Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24. April 1863); see also African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 23 October 2009, entered into force 6 December 2012).

9 Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law' in this volume 59.

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nor forbid States to prohibit non-State actors from doing so. This is articulated in Art. 6 (5) AP II, which states that

> … at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict …

Thus, States are not obliged to accept activities by non-State armed groups, but are merely requested to contemplate amnesties at the end of hostilities. And not only States are asked to do so, but also 'the authorities in power'. As many post-conflict situations around the world have demonstrated, 'the authorities in power' are often not simply the government which has defeated a domestic armed group, or an armed group that has taken over State authority, but it is frequently both of them. Most internal armed conflicts are not terminated by the complete defeat of one party to the conflict, but by a negotiated settlement between the parties.[10] So, here again, IHL provides a way for armed groups to have an impact on the law, this time at the end of hostilities.

What all of this tells us is that, when trying to assess the law of detention in NIACs or any other aspect of this law, we should not limit ourselves by looking only into the universal treaties and customs of IHL, IHRL or even domestic law. Instead, we must consider agreements made between the parties to the specific conflict and what they provide, for example on detention. Looking ahead, the parties to armed conflicts should be encouraged to conclude such agreements, as they not only raise awareness for IHL in the first place, but also allow to translate the law into the specific context and, lastly, provide more legitimacy as both parties mutually agree to be bound by them.

10 Sidney D. Bailey, *How Wars End: The United Nations and the Termination of Armed Conflict 1946-1964*, vol. I (Clarendon Press 1982); David M. Morriss, 'From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations' (1996) 36 VJIL 801.

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