Detention by Organised Armed Groups in Non-International Armed Conflicts: the Role of Non-State Actors in a State-Centred International Legal System

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A. Introduction

Following the swift change in nature of armed conflicts in recent history, the number and importance of NIACs and non-State actors especially has grown significantly.[1] Conflicts are also increasingly taking place in areas where State influence is limited or even absent. Especially the recent conflicts in Syria, Iraq, Yemen and the Democratic Republic of Congo have powerfully illustrated which devastating impact armed groups can have on the lives and livelihoods of the respective civilian populations.[2] Although it is well-established by now that non-State actors / OAGs are bound by IHL to a certain extent, the scope of applicable norms remains very much unclear when dealing with the conduct of hostilities in the context of NIACs.[3] When touching upon human rights obligations of OAGs, the 'fog of law', *in concreto* the question of applicable norms, becomes even more obscure.[4]

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1 See Annyssa Bellal (ed), *The War Report – Armed Conflict in 2014* (OUP 2015) 23-25 (hereafter Bellal, *War Report*) for a comprehensive overview of currently existing conflicts.

2 Daragh Murray, *Human Rights obligations of Non-State Armed Groups* (Hart 2016) 1-6 (hereafter Murray, *Human Rights obligations*), with further examples.

3 Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) para 200 et seq (hereafter Dinstein, *NIAC*); for an analysis of IHL and its early relationship with human rights, see Charles Lysaght, 'The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments' (1983) 33 American University Law Review 9 et seq; René Provost, *International Human Rights and Humanitarian Law* (CUP 2002); UN SC Res 1564 (8 September 2004) UN Doc S/RES/1564.

4 For a detailed discussion, see: Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014), 766 (hereafter Clapham, 'Focusing on Non-State Actors'); Andrew Clapham, *Human Rights Obligations*

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Notwithstanding their individual character and other issues in NIACs, OAGs[5] possess one common denominator in all conflicts: They all capture or detain individuals in a variety of situations. After the experiences in countries such as Afghanistan and Iraq, the international community still struggles both practically and conceptually with the detention of belligerents in NIACs; moreover, it is still very much unclear which legal obligations those groups actually are subject to when dealing with detainees.[6] In other words, to which standards of treatment must these groups adhere after having captured or detained individuals in the context of an armed conflict? The legal question that follows this debate, is inevitably linked to the role of a distinct legal personality, which may or may not be awarded to OAGs in order to assert their possible legal obligations under international treaty and customary law.[7]

Bearing in mind that there is an urgent need to improve the protection of civilians and those detained or deprived of their liberty in armed conflicts,

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of Non-State Actors (OUP 2006) (hereafter Clapham, *Human Rights Obligations*). However, this uncertainty largely stems from the fact that, although armed conflicts and the deprivation of liberty are inexorably linked, IHL itself does not offer a specific internment regime in NIACs for States; moreover, States seem to be in considerable disagreement over the applicability of human rights law in those situations. For arguments on the legal basis of detention by States in NIACs, see Manuel Brunner, 'Security Detention by the Armed Forces of a State in Situations of Non-International Armed Conflict: the Quest for a Legal Basis' in this volume 89 (hereafter Brunner, 'Security Detention'); Marco Sassòli and Laura M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts' (2008) 90 IRRC 871.

5 Although the terms 'armed non-State actor', 'insurgents', etc. are used in differing manners to describe those involved in armed conflicts acting outside of State control, this contribution will refer to the terminology of organised armed groups following the *Tadić*-jurisprudence of the ICTY, see *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) (hereafter *Prosecutor v Tadić*).

6 Chris Jenks, 'Detention under the law of armed conflict' in Rain Liivija and Tim McCormack (eds), *The Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 301 (hereafter Jenks, 'Detention').

7 In order to apply any legal rights and duties under international law, OAGs must possess an international legal personality. Since the question of legal personality is almost inevitably linked with legitimisation, some have coined that dilemma a legal 'Gordian-Knot' as it seems almost impossible to solve without a pragmatic approach to detention; Jenks, 'Detention' (n 6) 301. This approach will also be taken throughout this contribution.

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this contribution in its outset, will try to set a legal framework on how and to what extent OAGs might be bound *de lege lata* to IHL and human rights law within the context of 'detention' in order to gain some legal clarity on the matter. Before dealing with the issue of detention itself *in intenso*, it is important to note, what is actually *not* covered by this terminology. Although armed groups are engaged in hostage-taking to a large extent, not every deprivation of liberty by an OAG also automatically amounts to hostage-taking since the latter requires a specific intention for the deprivation of liberty.[8] The focus of the present contribution will therefore be placed on the effect of the conduct of OAGs on treaty and customary obligations under the 1949 Geneva Conventions and its Additional Protocols, the 1907 Hague Regulations (as far as they can be related to NIACs) and international human rights law outside of the 'regime of hostage-taking'.[9] Since States differ in their use of terminology, sometimes explicitly avoiding any attribute that may link a non-State conduct to a State-like action, the inevitably linked debate of the distinction between detention and deprivation of liberty directed at the perceived risk of the group's legitimisation will be touched upon as well. This may constitute a relevant factor to ascribing them legal obligations under the regime of humanitarian protection.[10] It is therefore worth investigating whether the existing regime of IHL is still capable of regulating modern conflicts

8 The deprivation of liberty must be conducted through a threat to the life, integrity or liberty of the captured person in order to pursue concessions by a third party, as stated in Art. 1 of the International Convention against the Taking of Hostages (opened for signature 17 December 1979, entered into force 03 June 1983) 1316 UNTS 205. The convention currently has 176 States Parties, not including *inter alia* the Republic of the Congo, Democratic Republic of the Congo, East Timor, Gambia, Indonesia, Israel, Somalia, South Sudan and Syria. See also ICRC, 'ICRC position in hostage taking' (2002) 84 IRRC 467.

9 See, for example, ECHR, ICCPR, ACHR. For the broader scope of 'equality' (before the law), 'freedom' (right to liberty and security), 'dignity' (as the core principle) and 'solidarity' (collective effort to secure the rights in question) as the underlying principles of the human rights regime, see Ilias Bantekas and Lutz Oette, *International Human Rights, Law and Practice* (2nd edn, CUP 2016) 71 et seq (hereafter Bantekas and Oette, *Human Rights Law*) in that respect.

10 This is an argument put forward within the context of human rights law. Some differentiate between deprivation of liberty and detention; the latter usually entails a formal prolonged internment of the individual under the activation of all accompanying procedural guarantees, whereas the former is, by definition, short-lived and not necessarily conducted by the State or a State agent. The consequence may be a different scope of applicability of human rights.

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properly and whether a reasonable discussion outside of CA 3 can take place.

When talking about applicable international law, the role of domestic law within the debate over the conduct of OAGs in NIACs should not be forgotten. The application of existing domestic law in the respective State where the conflict occurs (and its possible primacy over international obligations) might already represent an adequate tool to bind OAGs to a certain legal standard. In other words, do we even need to create legal obligations for non-State actors at the international level or is the existing domestic law already sufficient to deal with the matter?

Without prejudice to the nature of the applicable law, the case of a possible accountability of non-State actors for violations of IHL and human rights needs to be investigated in order to complete the picture.

B. The Legal Personality of Organised Armed Groups and the Risk of their Legitimisation

To gain a certain degree of legal certainty, the answer to this highly debated and (at first glance) contradictory question can only be found in international law. Given the prohibitive character of IHL and its function as a minimum legal order,[11] once all efforts to a peaceful settlement of the conflict have failed, the question of legal personality of OAGs under international law is central to the complementary protection offered by IHL for victims of the conduct of hostilities in armed conflicts and the effective human rights protection in areas of limited statehood.

It may be argued that (a) a certain degree of legal personality and/or capacity should be the necessary prerequisite for OAGs to assert their possible legal obligations under international treaty and customary law in the context of detention, as only subjects of international law may be addressed by it, and (b) incorporating those actors into the existing

11 The prohibitive character of IHL remains the rule rather then the exception. Where there is an authorisation to act, the Geneva Conventions and their Protocols will mention it explicitly as in Art. 43 (2) AP I. It hereby deviates from its prohibitive nature. For a further interpretation of the prohibitive/permissive character of IHL, see Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law' in this volume 59 (hereafter Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?').

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protection regime might require a renunciation from the current State-centric public international law.[12] Before dealing with possible legal obligations of OAGs, it is important to define what can be perceived as an OAG in the first place. Its definition plays an important role within the debate, especially in terms of a distinct legal personality or even a legal capacity in international law, as, by their very nature, these groups are characterised by their diversity; the clarification of their definition will therefore add effectiveness and validity to the legal regime they might be involved in.[13] Thus, the variety of non-State actors involved in modern (non-international) armed conflicts requires different treatments depending on their specific legal character.[14]

I. Defining Organised Armed Groups in International Law

Although defining organised armed groups seems to be straightforward at the first glance, adequately defining the term in a legal sense is not without difficulties. The term OAG is used by political analysts and sociologists in international relations as well as in various other contexts.[15] For example, the UN Office for the Coordination of Humanitarian Affairs refers to OAGs as armed non-State groups and defines them as:

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12 This is a change some expect to take place soon. For further details, see Janne E Nijman, 'Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality' (2009) Amsterdam Center for International Law Research Paper Series <http://dx.doi.org/10.2139/ssrn.1522520> accessed 16 November 2017.

13 David Tuck, 'Detention by armed groups: overcoming challenges to humanitarian action' (2011) 93 IRRC 759, 761, also elaborating on the (factual) humanitarian challenges regarding the internment by OAGs.

14 See, for example, Bantekas and Oette, *Human Rights Law* (n 9) 762, who negatively define non-State actors as 'entities that do not exercise governmental functions or whose conduct cannot be described as possessing a public nature'. This seems to exclude those entities from the vertical system of human rights obligations by definition.

15 For a detailed discussion on the interdisciplinary approach towards defining an OAG and the definition of an OAG, see Vincent Widdig, 'Perspektiven einer möglichen Einbindung bewaffneter organisierter Gruppen als nicht-staatliche Akteure in den Normsetzungsprozess des Völkerrechts' (2016) 29 J. Int'l L. of Peace & Armed Conflict 109, 110 et seqq (hereafter Widdig, 'Perspektiven einer möglichen Einbindung').

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> … hav[ing] the potential to employ arms in the use of force to achieve political, ideological or economic objectives; … [being] not within the formal military structures of States, State-alliances or intergovernmental organizations; and [not being] under the control of the State(s) in which they operate.[16]

Other authors like *Philip Alston* have resorted to a negative approach to the definition for a long time already by defining non-State actors by what they are not, rather than by what they are.[17] When interpreting the term itself, three basic prerequisites can be identified. The actors in question ought to be (1) a group, (2) armed and (3) organised. Although there is no formal membership test and it is still disputed whether a 'certain function' or a 'continuous combat function' might be required for establishing the affiliation to the group,[18] it can be considered sufficient that gatherings take place on a more than just sporadic basis, bearing in mind that the affiliation criterion is ultimately met on a factual basis.[19] A certain degree of armament is rightly seen as a *conditio sine qua non* for such groups, since international law does not provide for specific technology standards. In general, possessing a political wing does not change the characterisation of the group as 'armed'.[20] The most interesting and relevant part of the definition is the organisation of the group in question. Since CA 3 and Art. 1 (1) AP II differ in their scope of requirements, this aspect must be dealt with carefully. In that respect, a certain command-and-control structure of the group is required.[21] This follows the line of the ICTY and its famous *Tadić*-Judgment, which was later specified in the *Boškoski*-jurisprudence in which the tribunal laid down five decisive criteria for the part of the definition referring to the organisation of a group.[22] Firstly, a chain of command, for

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16 Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups, A Manual for Practitioners* (UN 2006) 6.

17 See Philip Alston, *Non-State Actors and Human Rights* (OUP 2005) (hereafter Alston, *Non-State Actors*), referring to the 'not-a-cat syndrome'.

18 See Dinstein, *NIAC* (n 3) para 128 et seqq.

19 Liesbeth Zegveld, 'Accountability of Organized Armed Groups' in International Institute of Humanitarian Law (ed), *Non-State Actors and International Humanitarian Law. Organized Armed Groups: A Challenge for the 21st Century* (FrancoAngeli 2000) 109, 112.

20 Dinstein, *NIAC* (n 3) para 129.

21 Bellal, *War Report* (n 1) 17; *Prosecutor v Ramush Haradinaj et al* (Judgment) IT-04-84-T (3 April 2008) para 60.

22 *Prosecutor v Tadić* (n 5); *Prosecutor v Jean Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), para 620 (hereafter *Prosecutor v Akayesu*) following the line of the ICTY; *Prosecutor v Boskoski et al* (Judgment) IT-04-82 (10 July 2008) paras 199-203.

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instance the setting up of headquarters, the emergence of a military hierarchy or the issuance of directives to commanders in the field must be proved.[23] Secondly, organisational capacities to carry out military-style operations and coordinate efforts are required – a requirement that has to be established on a factual basis.[24] Thirdly, a logistical base for food, communications, training, etc. should be provided.[25] Fourthly, a certain discipline to obey IHL must exist. Fifthly, the group must speak with one voice, for instance in the form of common statements.[26] Although these criteria seem ample, they can only remain indicators as they merely touch upon some of the problems of defining an OAG[27]; thus, it might still prove difficult to factually establish the aforementioned facts when dealing with such a group. Nonetheless, the criteria remain a sufficient roadmap in order to better deal with this kind of actors. However, it should not be forgotten that these criteria will certainly not cover the majority of smaller groups involved in NIACs. Broadening the scope of definition too much would only hinder the effective application of the obligations in question. Thus, in sum, OAGs can be understood as actors who operate outside of State control, mainly pursue political goals which they enforce by resort to armed force, and who possess an effective organisational and commando structure which enables them to take part in hostilities.[28]

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23 *Prosecutor v Limaj et al* (Judgment) IT-03-66 (30 November 2005), paras 46, 94-103 and 111.

24 Ibid, paras 108, 129, 158.

25 Ibid, paras 118-23.

26 Ibid, paras 113-17 and 125-29.

27 See Dinstein, *NIAC* (n 3) para 140, who also addresses the question of whether a group remains sufficiently organised when its members frequently violate IHL. Dinstein rightly argues that even if violating the laws of war may be a broader strategy or policy of an OAG, the group remains organised notwithstanding. It is only when members wantonly violate their obligations without any control of the group they belong to that they can be seen as 'unorganised'. See also Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart 2011) 163.

28 Following a similar approach, see Orla Buckley, 'Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law and Violence in Western Sahara' (2012) 37 North Carolina Journal of International Law and Commercial Regulation 793, 797.

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II. Arguments on International Legal Personality and/or Capacity of Organised Armed Groups

In order to assert the possible legal obligations of OAGs, the pretext of their legal personality and capacity has to be investigated and analysed, as only subjects of international law may be bound by the latter. That being said, it should be noted that the mere exercise of factual legal capacity is usually just the consequence of, but not the evidence for the existence of a legal personality.[29] Another issue that should be addressed in this context is whether the debate over the distinction between 'detention' and 'deprivation of liberty' directed at the perceived risk of the group's legitimisation and its connection to a State-like behaviour, might be a relevant factor to ascribing them legal obligations under the regime of humanitarian protection in the first place.

1. Arguing in favour of an international legal personality and/or capacity of Organised Armed Groups

International law and legal personality in particular have long been solely State-centric. However, since the ICJ's Advisory Opinion concerning reparations for injuries suffered in the service of the UN,[30] this perception has undergone some changes. Following the ICJ's Advisory Opinion, a subject of public international law may be every entity, that is (1) able to possess international rights and duties, (2) maintain those rights by bringing international claims[31] and (3) bear responsibility for the breaches of those obligations, for example by being subject to an international claim.[32] The core element that can be taken from this definition is the ability to take part

29 James Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 127 (hereafter Crawford, *Brownlie's Principles*).

30 Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 179 (hereafter Reparation for Injuries Suffered).

31 Ibid.

32 Ibid; Crawford, *Brownlie's* (n 29) 115: 'an entity possessing international rights and obligations and having the capacity to maintain its rights by bringing international claims and to be responsible for its breaches of obligation by being subjected to such claims'; Antonio Cassese, *International Law* (2nd edn, OUP 2005) 71 et seq (hereafter Cassese, *International Law*).

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in international legal relations independently and outside domestic law.[33] The inability to fulfil this last criterion will have important consequences for the quality of the legal personality in question; it will not lead to a negation of a legal personality as such, but rather results in limiting it to the application of rights and duties under existing customary international law.[34] A conclusion that was also reached by the ICJ in its Advisory Opinion. The mere acquisition of a (derived) international legal personality does not necessarily enable the entity to enjoy the same rights and duties as States. As States are the primary subjects of international law, they alone enjoy an unlimited legal personality.[35] This traditional approach, however, seems rather circular, as, in case of doubt, the decisive criterion of whether or not an entity possesses a distinct legal personality is the factual determination of its exercise of the capacity to enter into sovereign international relations with other subjects; more precisely, its capacity to bear rights and duties under international law.[36] Therefore, the ability to participate in international legal relations as well as the immunity from national jurisdiction is the result of a previously established legal personality, thereby empowering the entity as a bearer of rights and duties under international law as a consequence, and not as a prerequisite. Beyond that, the reality of international relations cannot always be reduced to a simple formula, which further complicates any attempts at determination.[37]

When arguing in favour of OAGs possessing a legal personality in the context of armed conflicts, it is well established by now that, once the non-State party has been recognised as a formal belligerent by the State party to the conflict (given that the insurgents exercise effective control over a certain part of the State's territory and their conduct reaches the threshold of an armed conflict), these actors enjoy partial legal personality in relation to the recognising belligerent State.[38] This partially enables them to act on

33 Crawford, *Brownlie's Principles* (n 29) 115.
34 Ibid.
35 Reparation for Injuries Suffered (n 30) 180; Volker Epping, 'Grundlagen' in Knut Ipsen (ed), *Völkerrecht* (7th edn, Beck 2018) para 7 et seq.
36 Crawford, *Brownlie's Principles* (n 29) 115; Clapham, *Human Rights Obligations* (n 4) 64.; Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia 2001) 24.
37 Crawford, *Brownlie's Principles* (n 29) 116.
38 Cassese, *International Law* (n 32) 125; Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 IRRC 491, 492 (hereafter Clapham, 'Human Rights Obligations in Conflict Situations').

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the international legal plane and to enter into legal relations with other subjects of international law.[39] Some even argue that this includes the ability to conclude international agreements with third Parties.[40] However, this assertion seems highly doubtful, as third Parties would hereby regularly violate the principle of non-intervention. The conclusion of an international agreement with an OAG will always be accompanied with its recognition. Any legal relations in this case are limited to the belligerents and an interference with this constitutes a violation of matters within the sole domestic jurisdiction of the belligerent State. This formal recognition, however, rarely occurs in practice, as States are eager to avoid conferring any legal personality to insurgents in order to limit their own legal obligations and responsibilities when combatting insurgency to their own domestic sphere.[41]

Another approach in this context can be taken from the (limited) principle of reciprocity in armed conflict. The answer could lie in the form of a limited recognition of the OAG beneath the threshold of the recognition as a belligerent: the recognition as an insurgent. This theory relies on practical considerations. An insurgency is understood as 'a more substantial attack against the legitimate order of the State with the rebelling faction being sufficiently organized to mount a credible threat to the government'[42]. In this case, the limited recognition by the belligerent State is vested in the protection of its own interests – for instance a reciprocal standard of

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Some argue that such a recognition of belligerency was set into effect by the conduct of the State of Israel within its conflict with the Palestinian Forces. Otherwise, the naval Blockade put in effect on the Gaza-shore would remain illegal.

39 Cassese, *International Law* (n 32) 118; Volker Epping, 'Sonstige Völkerrechtssubjekte' in Knut Ipsen (ed), *Völkerrecht* (7th edn, Beck 2018) para 11 et seq (hereafter Epping, 'Sonstige Völkerrechtssubjekte').

40 Gerald Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957) 92 RdC 5, 10; UNYBILC 1958/II 24,32; UNYBILC 1962/II 161, the original Draft Articles on the Law of Treaties used the formulation 'States and other subjects of international law' thereby including insurgents.

41 Cedric Ryngaert, 'Non-State Actors and International Humanitarian Law' (2008) Institute for International Law K.U. Leuven Working Paper, <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf> accessed 27 March 2018 (hereafter Ryngaert, 'Non-State Actors').

42 Lindsay Moir, *The Law of Internal Armed Conflict,* (CUP 2007) 4.

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protection or a 'humane conduct of hostilities' – resulting in a *de facto*, but not *de jure* recognition as a belligerent.[43]

This mere factual recognition as insurgents for practical considerations can thereby only constitute a partial and particular legal personality of the OAG in relation to CA 3.[44] An argument that seems very convincing in the light of the object and purpose of CA 3, which predominately guarantees a minimum standard of protection for vulnerable persons in armed conflicts and which does not assert or regulate any international legal status between the parties to the conflict. Nevertheless, even in this case, there ultimately has to be some explicit recognition of the belligerent group by the State itself at some point in time.

Apart from the creation of a legal personality via recognition, an argument for its constitution is also made with the link to the threshold of applicability of IHL. The determination of the applicability of IHL transforms the previously national situation into an international one. This might be done by either the standard of CA 3 or Art. 1 (1) AP II, depending on the organisational structure of the group itself. As a consequence, a relative legal personality in international law is created for the non-State party to the conflict. The question of consent is often the centrepiece of the debate over the legal personality of OAGs, since, as a principle of international law, its subject may only be bound by consent; moreover, no third party shall be affected be an agreement which it has not consented to following the *pacta tertiis nec nocent nec prosunt* principle.[45] The rejection of the consent requirement would indeed overcome a major obstacle towards the direct applicability of international treaty law. Whether or not this principle only extends to States or represents a basic principle of public international law binding all of its subjects surpasses the scope of the

43 Ibid, 5; Hans-Peter Gasser, 'International Humanitarian Law and Human Rights Law in Non-International Armed Conflict' (2002) 45 GYIL 149 et seq.

44 Robert Frau, 'Entwicklungen bei der gewohnheitsrechtlichen Einbindung nicht-staatlicher Akteure' in Heike Krieger and Dieter Weingärtner (eds), *Streitkräfte und nicht-staatliche Akteure* (Nomos 2013) 28 et seq; Jean-Marie Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law' in Marc Vuijlsteke et al (eds), *Relevance of International Humanitarian law to non-state Actors* (College of Europe/ICRC 2003) 123, 129 et seq.

45 See Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20 *JCSL* 101, who rejects the applicability of the *pacta tertiis nec nocent nec prosunt* principle on the basis of non-applicability to armed opposition groups.

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present contribution. As OAGs – if at all – merely possess a limited legal personality that still is distinguished from that of States, it is convincing to solely limit this principle to the conduct of States at the level of international treaty relations, even under customary international law.[46]

2. Arguing against an international legal personality and/or capacity of Organised Armed Groups

Although recognition might be the easiest way to create some form of legal personality for the OAG, its actual implementation is highly unlikely as granting OAGs a relative or extensive legal personality always implies some form of legitimisation of the group's conduct – at least from a State-centric perspective. A position that was also taken by the ILC in its early drafts to Art. 10 ASR, which explicitly did not include any prerequisites for a legal personality of insurgents in order to avoid the emergence of a formal legal personality for the latter.[47] However, the stronger and bigger the group becomes, the harder it is for the international community to deny its existence on the international plane. Even if a legal personality of OAGs with the capacity to make treaties could be asserted in theory, there is almost no evidence in recent State practice that would prove their full legal capacity on the international plane, such as States claiming the group's international responsibility on the grounds of international law.[48] The rare exception to this rule is the American Alien-Tort Claims Act.[49] Under the Alien-Tort Claims Act, several cases were filed against the non-State actor as such, claiming his responsibility under international customary law.[50] Of course,

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46 An Argument that can be supported by the interpretation of the principle itself. Since it derives from international treaty law, Art. 34 to 36 VCLT. The treaty itself only addresses States by its wording. An exception might has to be made of course, when conferring treaty-making capacities to a non-State actor.

47 UNYBILC 1975/I, 41-6.

48 James Crawford, *State Responsibility: The General Part* (OUP 2013) 81 (hereafter Crawford, *State Responsibility*).

49 28 U.S.C. § 1350 (1994). Applicable law in such cases is only customary international law. The acceptance thereof may be seen as evidence for an *opinio iuris*.

50 See eg *Mohamad et al v Palestinian Authority et al*, 556 US 494 (2012) (hereafter *Mohamad v Palestinian Authority*); *Tel-Oren et al v Libyan Arab Republic et al*, (1984) 726 F.2d 774, 233 U.S.App.D.C. 384 (hereafter *Tel-Oren v Libyan Arab Republic*).

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the incidents as such cannot suffice to set a precedence for a new rule of international law or serve as evidence for sufficient State practice yet. On the contrary, in most cases, States implement their international obligations into their domestic law in order to avoid any legal interaction with the insurgents on the international plane.[51] Even in the case of recognition through the belligerent State, where a derived and limited subjectivity of international law is awarded to the OAG, a full legal capacity comparing to that of a primary subject of international law (which would enable the OAG to enter and participate in the creation of international treaties and therefore create an international common responsibility) must be negated. A capacity to make treaties therefore remains unrealistic and sometimes even undesirable for OAGs.[52] Some even deny any legal personality of an OAG as such and argue that this kind of groups ought to be seen as what they are: clusters of individuals, who jointly exercise their individual rights and duties under IHL; a collective legal personality is not created by this joint exercise.[53]

C. The Argument of Effectiveness

Although State practice seems to support this view until now, it might be worth asking whether the changing character of warfare and the ever-growing power of OAGs will inevitably alter the current discourse about their position in the international legal system, especially in areas of limited statehood. The central element of this discussion is the effective exercise of territorial control by OAGs.

It is often argued that international law must be obeyed in order for it to exert its full authority and to be effective. The specific reason for adherence to it is often deemed controversial: Sometimes law is obeyed due to the perceived (legal and political) threat of force and coercion by others. However, for more powerful actors, such as the permanent members of the UN SC or other strong nations, this might not be the motivation. Rather, it is the levelling of the playing field of the actors, the *do ut des* of traditional consensual public international law, which provides the true reason behind adherence to international law. The continued emergence of powerful non-

51 Crawford, *State Responsibility* (n 48) 81.
52 Clapham, 'Focusing on Non-State Actors' (n 4) 767.
53 See Dinstein, *NIAC* (n 3) para 210.

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State actors seems to disrupt the playing field and shift it to a more three-dimensional sphere.[54]

Without prejudice to the very question of statehood, the argument and effect of the 'failed State' constellation may be invoked here to make a case for human rights protection in situations of limited statehood in order to level the playing field once more. The argument can be based on factual considerations for a determination of a possible legal personality in comparison to the prerequisites of statehood, as found in arguments within the 'failed State' debate. When adding the principle of effectiveness to the debate, it might be a valid point to ascribe some legal obligations to OAGs with regard to the protection of human rights in situations of deprived liberty within armed conflicts.

The main question to be asked is whether the exercise of effective control might be sufficient to confer legal obligations under the human rights regime to OAGs. In the context of prescribing a legal personality to OAGs *sui generis* on the basis of the common principle, it is often argued that international law cannot ignore actors with a certain presence on the international legal plane, despite their particular anomalous character.[55] This cannot be made dependent on their factual status.[56] Taken seriously and put in conjunction with the principle of effectiveness, a valid argument can be made. The effective exercise of permanent control over people and territory may very well be a factual criterion for international legal subjectivity. When a group is in fact effectively able to exercise control over a substantial area of a State's territory and enforce the rule of law, this threshold may be reached, as the group is organised in a State-like structure.[57]

From this point onwards, the OAG crosses the line towards a subject of international law that may even have the capacity to make and enter international treaties, as States can no longer ignore its existence.[58] Its legal

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54 A sphere in which powerful non-State entities challenge the primacy of the States exercise of ultimate and sovereign power over everyone contained within their legal space, diluting the clear cut existing horizontal and vertical system.

55 Crawford, *Brownlie's Principles* (n 29) 124.

56 Ibid.

57 This will have be determined on a factual level. Although the gain and loss of captured territory is subject to change in the ebb and flow of a NIAC, the group must effectively control a substantial part of the territory permanently.

58 With regard to the principle of effectiveness, see Heike Krieger, *Das Effektivitätsprinzip im Völkerrecht* (Duncker & Humblot 2000) 35 et seq

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personality is therefore created from its effective control: *ex facto jus oritur*.[59] A possible consequence might then be the ability to accede to international agreements; a convincing argument, considering that the effectiveness of an entity is a prominent criterion regarding the determination of statehood and governance, for instance in terms of effective jurisdiction to enforce and adjudicate.[60] Evidence for the effectiveness of an OAG can be deduced from its ability to be held responsible for its conduct at an international level. This, of course, depends to a certain extent on the definition of international responsibility. When taking the general approach, which defines international responsibility as 'legal relations which arise under international law by reason of an internationally wrongful act'[61], the ability of OAGs to fall under that system is not entirely farfetched. A conclusion that was already reached by special rapporteur *Ago* to the ILC when discussing the issue of State responsibility at the end of the 1960s; already then, he argued that 'an insurrectional movement which establishes its authority over a State's territory becomes a "separate subject of international law"'. This entailed the ability to have rights and obligations under international law and be held liable to claims.[62]

Even though his argument did not make it into the final draft, his point is still relevant today, especially in relation to the principle of effectiveness. Typical examples of an effective jurisdiction are the establishment of a 'domestic' court system or the setting up of a healthcare or taxation system.[63] Yet, this international legal subjectivity *sui generis* must be

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(hereafter Krieger, *Effektivitätsprinzip*). For its basis in customary international law see 49 et seq.

59 See Robert Frau, 'Überlegungen zur Bindung nichtstaatlicher Gewaltakteure an internationale Menschenrechte' (2013) 26 J. Int'l L. of Peace & Armed Conflict 13.

60 Krieger, *Effektivitätsprinzip* (n 58) 82, relating to Art. 1 (d) 'capacity to enter into relations with other states' of the Montevideo Convention on Rights and Duties of States (opened for signature 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

61 Commentary on Art. 1 of the ILC Draft ASR, UNYBILC 2001/II 31.

62 UNYBILC 1972/II 129; see also earlier UNYBILC 1966/II 134.

63 A group that is worth noting here is the Liberation Tigers of Tamil Eelam (LTTE), which maintained an own 'judicial' system for the detention of persons captured under its authority and within the territory it controlled. This system reportedly amounted up to 17 courts with a hierarchical structure; see Kristian Stokke, 'Building the Tamil Eelam state: emerging institutions and forms of governance in LTTE-controlled Sri Lanka' (2006) 27 Third World Quarterly 1027 (hereafter Stokke, 'Building the Tamil Eelam state'). See also Sandesh

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formally created in the first place, either by treaty or customary international law. The mere existence as an entity *sui generis* itself does not *per se* create an international legal personality in practice.[64]

However, if we compare an OAG which acts as a *de facto* authority by exercising effective control and jurisdiction to the concept of a 'failed State', the recognition of the existence of the former can only be declaratory in nature. As long as effective control in terms of government-like power is exercised, as in cases of the Tamil Tigers in Sri Lanka, the Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC) in Colombia or the Sudan People's Liberation Movement (SPLM) in Sudan, an international legal personality exceeding that created by CA 3 will be constituted as a consequence of the principle of effectiveness. Whether this extends to the applicability of human rights is highly debated.

Once an OAG, by its factual size and effective control over a relevant piece of territory, grows to be a State-like entity and therefore can be classified as a *de facto* authority,[65] it is not farfetched to attribute a distinct (partial) legal personality to it – at least with respect to IHL and basic human rights law.[66]

D. Provisional Summary

Concluding the arguments made above, OAGs can be seen as groups that exercise effective authority and have a certain standard of organisation and stability. Thus, they can be awarded a *de facto* limited legal personality in international law, which will bind them to existing international customary international law in NIACs. As a consequence, members of OAGs lose their status and protection as civilians following the wording and logic of both

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Sivakumaran, 'Courts of armed opposition groups: fair trials or summary Justice?' (2009) 7 JICJ 489 (hereafter Sivakumaran, 'Courts of armed opposition groups').

64 Crawford, *Brownlie's Principles* (n 29) 124. To this day, the only traditionally recognised subjects of international law are the Order of Malta, the ICRC and the Holy See.

65 Epping, 'Sonstige Völkerrechtssubjekte' (n 39) paras 11 et seq. This will hold true especially once OAGs possess a military capacity equal to that of a State.

66 Ibid; Bantekas and Oette, *Human Rights Law* (n 9) 763 rightly arguing, that although some application of human rights can be conferred if the non-state entities do act state-like, it is not expected, that to provide the whole range of economic and social rights, since it would dilute the difference to the actual primary subject of international law, the state, too much.

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CA 3 and AP II as well as the reasoning of the principle of distinction. The most effective argument in this case may be made when an OAG exercises substantial and effective control over a territory of a State Party to the GC, therefore becoming a *de facto* authority, or if its legal personality can be derived from the recognition by a belligerent State. However, State practice does not show any support for a creation of an international legal personality outside this narrow constellation. This may only cover a small group of entities, but everything else would be excessive and counter-productive to the validity of the legal argument, keeping in mind that States and their interactions on the international plane still build the normative foundation of modern international law. It is still unclear, however, to what extent such a legal commitment can actually be asserted. Since newly created subjects of international law are bound by a pre-existing foundation of (customary) rules of international law, this must be the vague minimum standard by which they have to live at the very least.

E. The International Normative Basis

When dealing with the framework of international legal personality and its effect on international obligations for OAGs, the international normative base, which may be applicable in situations of armed conflict, is the focal point of current debates as well as the legal authority for the act of detention under IHL itself. Since the deprivation of liberty by OAGs in NIACs is neither an irregular occurrence nor a small-scale issue, this debate should not be taken lightly.[67] Evidently, this should lead to the conclusion that, whenever there is an armed conflict, international law must also regulate the treatment and protection of those detained by OAGs. Although CA 3 and the AP II differ in their scope of application, the minimum requirement for an armed conflict would be, 'a resort to … protracted armed violence between governmental armed authorities and organized armed groups or between such groups within a State'[68].

Setting aside internal disturbances since they are solely governed by domestic law, it is important to factually distinguish between the two legal

67 Groups worth mentioning in this context are the Communist Party of Nepal-Maoist (CPN-M) in Nepal, the LTTE in Sri Lanka, the Forces Nouvelles de Côte d'Ivoire (FAFN) in Ivory Coast, the Taliban in Afghanistan, the SPLAM in Sudan, the FARC and the Ejército de Liberación Nacional (ELN) in Colombia, the Separatists in Eastern Ukraine and ISIS in Syria and Iraq, among others.

68 *Prosecutor v Tadić* (n 5) at para 70.

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bodies of CA 3 and AP II for the determination of the specific conflict status of a NIAC. From the beginning, the two regimes displayed a very different approach. This becomes clear when looking at the drafting of AP II and the question of rules on the conduct of hostilities implemented in the protocol. In this context, the final draft of AP II contained almost the same set of rules and obligations for all parties to the conflict as AP I. Nevertheless, these provisions were ultimately deleted from the treaty before its final conclusion.[69] Notwithstanding the deletion of many of the provisions, AP II still contains a variety of precise regulations with respect to detention which may become applicable once its threshold of application is reached. CA 3 in its wording is vague and only determines very basic obligations; it therefore contains a very different set of rules for the respective parties to the conflict. This, however, does not change the overarching object and purpose of both frameworks, which is to create an 'equality of belligerents' in a sense. This entails a binding effect on all parties falling within its applicability, regulating their conduct and protecting those affected by the conduct of hostilities regardless of the characterisation as State or non-State entities.

As a consequence, members of OAGs will lose their status as civilians and become 'fighters' or so-called 'unprivileged combatants'; they are hence rendered lawful targets. Apart from their own specific status under IHL, members of OAGs are also often engaged in the detention of enemy 'combatants' outside the sphere of national law.[70] This implied lack of status and privilege, for example the lack of combatant-immunity, may be easily connected to obligations under IHL, resulting in a factual imbalance in rights and duties. This conclusion is, however, not quite convincing, as the Geneva Conventions and the AP II specifically address all entities involved in armed conflicts equally. The original distinction between OAGs and State entities is mainly rooted in the regulation of the conduct of

69 Nils Melzer, *International Humanitarian Law: A comprehensive Introduction* (ICRC 2016) 125 (hereafter Melzer, *IHL*). The reasoning behind this shift was ultimately seen in the desire of States to avoid any possible legitimisation or privilege of non-State parties to a conflict, be they insurgents or non-State belligerents. This hesitation is particularly interesting because CA 3 (2) itself states that '[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict.' Ultimately, this legal containment of the non-State entity aside its political implications may be a finding that is reasonable in theory, but almost impossible to uphold in practice.

70 Ibid, 126.

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hostilities itself, without prejudice to status and, therefore, rights and duties under internment.

I. Applicability of International Humanitarian Law with Respect to the Deprivation of Liberty

The major sources of applicable international law in the specific context of the deprivation of liberty and OAGs may be found first and foremost in treaty law and customary international law. Although OAGs never became parties to the Geneva Conventions and will not be able to do so in the future due to their limited legal personality, the direct applicability of the Geneva Conventions seems to be excluded for them at the first glance, thereby limiting the range of applicable law to customary international law. Customary international law seems to be the appropriate legal tool set at first, since it is able *qua* its legal nature to apply to OAGs with a limited legal personality.[71] A direct treaty-based application of at least CA 3 however, can be derived from interpreting CA 3 itself. Once the threshold of applicability of CA 3 is reached and the OAG in question is qualified as a party to the conflict, the convention, by its wording, addresses the OAG directly under international treaty law. Whether or not the obligation may stem directly from an international treaty or only from customary law is irrelevant at this point, as the binding nature of customary law to OAGs is undisputed.[72]

Although the Geneva Conventions offer some protection under CA 3 by demanding a 'humane treatment' of detainees and safeguarding the fundamental guarantees offered by Art. 4 and 5 of AP II, there is no specific detention regime in NIACs that regulates further procedural guarantees of the deprivation of liberty. Something that is usually found in human rights treaties.[73]

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71 With respect to applicable international customary law, see Murray, *Human Rights obligations* (n 2) 82 et seq.

72 Ibid, 89 et seq.

73 To cope with this difference in regulation, a distinction between detention and the deprivation of liberty is often invoked. Whereas detention is perceived as a specific conduct by a state entity, the deprivation of liberty re is referred to the either procedural part regulated by human rights (for example the internment of a suspected pirate on board a ship at the High Seas (deprivation of liberty) until a port is reached to present him before a judge (detention)) or a vague term to

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The protection by the conventions is not necessarily linked to the status of the detaining power. They follow a rather conduct-based approach by not prohibiting the internment by any party to the conflict *per se* without referencing to a victim and perpetrator narrative, but rather regulating the situation of internment once it occurred.[74] This reasoning hereby follows the same logic as for the authority for the participation to a conflict itself. The reference by the Geneva Conventions to civilians, combatants, fighters, etc. is solely made with respect to the level of protection and regulation of the conduct of hostilities and not with respect to any authority to participate.[75]

Indeed, a legal authority to detain cannot be found in the framework of IHL.[76] A conclusion, that was also reached by the High Court of England and Wales in its famous *Serdar Mohammed v Ministry of Defence* decision where it held that neither the relevant portions of the Geneva Conventions nor AP II contain:

> … any express statement that it is lawful to deprive persons of their liberty in an armed conflict to which these provisions apply. All they do is to set out certain minimum standards of treatment which must be afforded to persons who are detained during such an armed conflict.[77]

Hereby following this argument and applying the old *Lotus* principle, if international law does not prohibit a particular conduct, that conduct is permitted.[78] Even then, the consent-based reasoning of the *Lotus* case is still valid.[79] Critics argue that the *Lotus* principle may only be applied in inter-State relations, since it was developed in an inter-State dispute at a time where no debate over other possible subjects of international law existed. It then would only be applicable to State parties to AP II and the Geneva

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differentiate from a state-conduct when talking about non-state actors. This however is mere semantics and driven by political reasoning and can have no effect on the legal regulation of the conduct itself.

74 Melzer, *IHL* (n 69) 208.

75 Ibid; although prohibited under national law, the direct participation in hostilities is not prohibited *per se* by international law. The only consequence is the loss of the protected status as a civilian.

76 See also Brunner, 'Security Detention' (n 4).

77 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) 239.

78 For a critical reading of the *Lotus*-case and its current interpretation, i.e. the *Lotus*-principle, see Pia Hesse, 'Comment: neither Sunken Vessel nor Blooming Flower! The Lotus-Principle and International Humanitarian Law' in this volume 80. For the role of the *Lotus*-principle concerning IHL, see Schöberl and Mühreel, 'Sunken Vessel or Blooming Flower?' (n 11).

79 The Case of the S.S. "Lotus" [France v Turkey] [1927] PCIJ Series A No 1.

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Conventions. Nevertheless, the reasoning behind the principle, i.e. that a subject of international law may only be bound by it through consent, is easily transferable to the current debate. A strict reliance on the *Lotus* principle itself is therefore not necessary. Moreover, the intent of the Geneva Conventions was clearly not to deal with any matters of authorisation in this respect, as they follow a conduct-based approach aimed to provide protection to those vulnerable, but not to legitimise a party to the conflict. However, the authority to detain and its penal regulation may still be found in domestic law.

1. Application of CA 3

Although the Geneva Conventions do not provide a definition of what a conflict *not of an international character* might be, they in essence require as a minimum, that the OAG is organised, has control over some territory and is able to obey the rules of war.[80]

Although humane treatment remains a vague concept, it does include, as a minimum, the prohibition of any violence to life or threats thereof, insults and public curiosity including the physical and mental well-being of the internees; moreover, it specifically prohibits murder, torture, corporal punishment, mutilation, outrages against human dignity, collective punishment and hostage-taking as well as the prohibition of any physical and psychological coercion.[81] Although CA 3 (1) (d) explicitly mentions the prohibition of passing out sentences or carrying out executions without *due process*, it does not authorise the establishment of specific courts for OAGs in which these cases could be dealt with, again following the

80 Emily Crawford and Alison Pert, *International Humanitarian Law* (CUP 2015) 63 (hereafter Crawford and Pert, *IHL*); Lindsay Moir 'The Concept of Non-International Armed Conflict' in Andrew Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2016) para 2 et seq.

81 Melzer, *IHL* (n 69) 195. The extent to which medical care and adequate food has to be provided to detainees found some clarification in the *Aleksovski* Judgment by the ICTY, where the tribunal defined certain minimum standards. Judging, that a standard that would fail to meet the requirement of peace times would still be sufficient in times of war; *Prosecutor v Aleksovski* (Judgment) IT-95-14/1-T (25 June 1999).

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conduct-based approach of the Conventions.[82] Although CA 3 itself does not offer procedural guarantees, it does contain the prohibition of arbitrary detention as a minimum standard. Arbitrary deprivation of liberty, for instance detention without any due process of law, may already inherently constitute a violation of human dignity contained in the meaning of cruel treatment under CA 3.[83] Whether or not this constitutes a war crime, the prohibition of arbitrary deprivation of liberty constitutes a basic element of protection guaranteed by CA 3.

2. Application of Art. 4 and 5 Additional Protocol II

As mentioned before, AP II differs in its scope of application. According to Art. 1 (1), AP II applies to all conflicts not regulated by AP I and further requires the conflict to:

> … take place in the territory of a High Contracting Party between its armed forces, dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

A discussion on the binding effect of AP II is therefore only reasonable once the OAG reaches this specific threshold. In relation to the deprivation of liberty, the most comprehensive obligations are contained in Art. 4 AP II, including the obligation to respect the fundamental guarantees of persons who are not directly taking part, or who have ceased to take part in hostilities as well as the obligation to protect persons deprived of their liberty. Apart from their binding effect on all States parties, these obligations represent customary international law.[84]

This limitation of the scope of application of AP II actually serves the interests of the Protocol (and the Conventions) itself, as, only when OAGs can effectively exercise their duties under it, an effective protection of those interned by such groups can be guaranteed. Broadening the scope of application would merely serve to water the obligations down, ultimately leaving no satisfactory result.

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82 See Melzer, *IHL* (n 69) 215; Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016) 77 (hereafter Hill-Cawthorne, *Detention*).

83 *Prosecutor v Limaj et al* (Prosecution's final Brief [Confidential]) ICTY-03-66 (20 July 2005) para 391-2. This position was later overthrown by the trial chamber.

84 Crawford and Pert, *IHL* (n 80) 257.

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3. The Hague Regulations

Another international norm which mentions the internment of parties to a conflict is Art. 3 Hague Regulations which provides that 'the armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy, both have the right to be treated as prisoners of war'.

This regulation was later taken up by Art. 4 (4) and (5) GC III. However, it remains doubtful whether one can actually draw from the Hague Regulations here, as they (as well as Art. 4 GC III) are only applicable to IACs. The question is, therefore, whether or not OAGs can be qualified as combatants and whether the argument of Art. 3 Hague Regulations can be extended to NIACs in order to further root their legal obligations in international law. One could argue that Art. 3 not only contains legal obligations under the Hague Regulations, but is also a basic rule of IHL itself. A rule that ought to be applicable irrespective the character of the conflict, as this distinction may be one of the basic principles of IHL; there is no reason why it should not to be applied to modern asymmetric armed conflicts. After all, the drafters of the Hague Regulations certainly did not have NIACs in mind at the time.

Both CA 3 and AP II do not explicitly refer to the parties as combatants. The concepts of the mentioned 'armed forces' as well as 'dissident armed forces' and 'other organised armed groups' are unfortunately not further defined in the practice pertaining to such NIACs. However, those taking direct part in hostilities in NIACs are sometimes referred to as 'combatants'.[85] This wording is often only used as a generic term with the main purpose of distinguishing between the persons in question and protected civilians, without implying a formal combatant status or prisoner-of-war status, which would be the consequence in IACs.[86] Additionally, the

85 See UN GA Res 2676 (9 December 1970) UN Doc A/RES/2676 referring to 'combatants in all armed conflicts' in the context of human rights or the Cairo Declaration and Cairo Plan of Action, UN Doc TD /B/EX(24)/2 (5 May 2000) at 68–69 and 82 resp. of 3–4 April 2000 adopted at the Organization of African Unity and the European Union Africa-Europe Summit.

86 The term 'combatant' is often used synonymously when translated into different languages, which adds to the confusion. Although its original meaning would have been 'fighter' instead of a formal 'combatant'; a mere interpretation of the wording alone cannot be wholly satisfactory. See also Michael N. Schmitt et al (eds), 'The Manual of Law of Non-International Armed Conflict: with Commentary' (2006) 36 IYHR 71, Rule 1.1.2 - Fighters.

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assertion that the term 'combatant' might be extended to NIACs would need some proof in form of *opinio iuris* and a uniform State practice. As evidence for this is scarce, its direct application must be negated. However, the basic principle contained in Art. 3 Hague Regulations can, of course, be considered when interpreting possible legal obligations for OAGs under customary international law, as modern-day norms are a further development of that principle – even in NIACs.

II. Application of Human Rights Law in Cases of Deprivation of Liberty

No field of international law is more controversial than the application of human rights to non-State actors and to OAGs in particular. Bearing in mind the exception of the effectiveness argument made above, the special nature of human rights *per se* seems to bar non-State entities from its direct application. In current State-centric international law, only States may be the bearers of human rights obligations. Any violation of human rights should be seen as a violation of the domestic transformations of those obligations and, therefore, as a domestic criminal offense which the State must prosecute.[87] The failure to do so is seen as a due diligence violation of the respective State.[88] Setting aside the domestic argument for a second, we shall firstly examine whether human rights obligations may be invoked by international law directly.

1. General considerations concerning how and when human rights may become directly applicable

Much has been written and said about the direct application of human rights in the context of non-State actors and armed conflicts.[89] Unlike IHL, which

87 One might hesitate to incorporate non-State entities into the human rights realm, as that may require a reconsideration of the basic human rights architecture and rationale, since it is founded on the premise that only States may hold absolute and ultimate power over its people; on this, see Bantekas and Oette, *Human Rights Law* (n 10) 716. It remains to be seen whether this can be upheld in areas of limited statehood, where no or only a limited State authority is present.

88 Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 118 et seqq.

89 See Alston, *Non-State Actors* (n 17); Clapham, *Human Rights Obligations* (n 4).

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addresses OAGs directly as a party to the conflict and hereby imposes direct obligations on them, human rights almost always address States.[90] That being said, both the UN SC and the UN GA address non-State actors with respect to their human rights obligations in NIACs.[91] Even if one would apply certain customary IHRL to non-State actors, a number of difficulties would arise when applying such rules to them.[92] Neither the UN SC nor other bodies have yet clearly referenced the legal source of the proclaimed human rights obligations for OAGs, leaving it unclear why these actors should be bound in the first place.[93] As far as human rights obligations are already contained within the basic protection offered by CA 3, they only serve as a complementary protection regime under IHL. This may be relevant in cases of torture or degrading treatment in situations of internment. The minimum requirement for the applicability of human rights law is that the violation occurs on the territory of a State Party to the respective convention and that the respective entity exercises effective control over the territory in question. This approach seems to be adopted by other UN bodies as well.[94] An argument that has been put forward here is that the OAG in question would thereby be bound by human rights obligations of the State whose territory it controls, thus implementing a rule of succession.[95] This, however, is not very convincing in light of Art. 10

90 See Clapham, 'Human Rights Obligations in Conflict Situations' (n 38). An accession to the relevant treaties for non-State actors is still impossible. If any binding law exists, it will have to be customary in nature.

91 UN GA Res 67/262 (4 June 2012) UN Doc A/Res/67/262 with respect to the conflict in Syria or UN SC Res 1834 (24 September 2008) UN Doc S/Res/1834 and UN SC Res 1814 (15 May 2008) UN Doc S/Res/1814 with respect to Chad and Somalia.

92 Hill-Cawthorne, *Detention* (n 82) 217; Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 90-1.

93 Hill-Cawthorne, *Detention* (n 82), 218. Apart from the factual addressing by the UN SC, the legal nature of its resolutions in the context of non-State actors is very much unclear, since resolutions can neither be classified as a classic treaty nor as customary international law, however they may have gained a separate legal status in international law in that respect altogether. See *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para 23; Brunner, 'Security Detention' (n 4).

94 For extensive examples, see Hill-Cawthorne, *Detention* (n 82) 218.

95 UN HRC, 'General Comment No. 26: Continuity of Obligations' (8 December 1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1; Anthony Cullen and Steven Wheatly, 'The Human Rights of Individuals in de facto Regimes under the

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ASR, which only retroactively converts acts of an OAG into an act of the State once the insurrection is completely successful. A direct application of human rights obligations to OAGs is therefore not convincing.

2. Applying the 'minimum standard' to Organised Armed Groups

Although the consideration of the application of a minimum human rights standard is an argument which is often put forward, it is not quite clear what this standard actually entails. A hint to what this standard may comprise can be found in the 1990s Turku Declaration:[96] Art. 3 restates the existing obligations under CA 3. Art. 4 specifically relates to the situation of

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European Convention on human Rights' (2013) 13 Human Rights Law Review 691, 717-23.

96 Turku Declaration of Minimum Humanitarian Standards, UN Doc E/CN.4/Sub.2/1991/55 (2 December 1990). The declaration was adopted by a meeting of experts and organised by the Human Rights Institute of Åbo Akademi in Turku/Åbo (Finland) in cooperation with *inter alia* the ICRC, which participated in the drafting. It was designed as a draft treaty, but its international legal reception was controversial. Despite its positive reception within the UN, the declaration was never included in a formal treaty due to the lack of States willing to take on these broad obligations in internal conflicts. Nevertheless, it remained an important document for the development of human rights protection in NIACs, see Knut Ipsen, 'Die Entwicklung von Kriegsrecht zum Recht des bewaffneten Konflifts' in Knut Ipsen (ed), Völkerrecht (6th edn, Beck 2014) 1195, and paved the way for the complementary protection approach to human rights in armed conflict, see Hans-Joachim Heintze, 'Theorien zum Verhältnis von Menschenrechten und humanitärem Völkerrecht' (2011) 24 J. Int'l L. of Peace & Armed Conflict 4. It was also recognised by the ICTY in its *Tadić*-jurisprudence, which referenced the declaration when debating the core principles of customary humanitarian law, *Prosecutor v Tadić* (n 5) para 119. The ICRC had initially criticised the declaration in the drafting process for its progressive stance on human rights and humanitarian law, but later revised its opinion and contributed to its spreading, see Louise Doswald-Beck and Sylvian Vité, 'International Humanitarian Law and Human Rights Law' (1993) 75 IRRC 99; Djamchid Momtaz, 'The minimum humanitarian rules applicable in periods of internal tension and strife' (1998) 80 IRRC 487. It is noteworthy in that context that even this progressive draft expressly addressed armed groups without conferring any legal status to them, see Art. 2 of the declaration: 'These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination', herby echoing Art CA 3.

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detention referring to the obligations under Art. 5 AP II but exceeding it in its scope, declaring that

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

When thinking about customary international human rights obligations, applicable to OAGs exercising effective control over a territory, it is often referred to the core of human rights that may not be derogated from. Although arguments concerning effective control and jurisdiction may be made for OAGs such as Al-Shabab or the Kurdish militias in northern Iraq, the question remains whether or not OAGs fall within the scope of the conventions in the first place. Whereas CA 3 refers to 'the case of armed conflict not of an international character occurring in the territory of one of the *High Contracting Parties*, *each Party to the conflict* shall be bound to apply',[97] thereby differentiating between the territorial applicability and the applicability *rationae personae*, the basic human rights covenants expressly refer to States only with respect to their applicability.[98]

From a human rights perspective, the legal definition of the perpetrator in cases of internment may be almost irrelevant. For the victim it does not make a difference whether a violation of his or her rights occurs through a State or an OAG. As long as there is a manifest exercise of effective control or authority over a certain territory or area, the application of human rights

97 Emphasis added.
98 Eg Art. 1 ECHR: 'High Contracting Parties'; Art. 2 ICCPR: 'Each State Party'.

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obligations following the argument of the *Al-Skeini* jurisprudence of the ECtHR with its 'divided and tailored' approach seems to be favourable.[99] It may well be argued here that the division and tailoring may not only be done by the applicable obligations, but also by the obligated actor himself. However, this specific jurisprudence was solely designed for the application in an inter-State realm and may not be easily transferred out of the vertical level of human rights protection. Indeed, neither State practice nor any judgment by an original human rights body would support the claim that this system is on the verge of changing. Whether those actors are able to actually fulfil their possible obligations in the first place remains highly questionable. After all, the ability to enforce and provide human rights and their protection remains the essence of sovereignty and statehood. Humanitarian legal obligations for OAGs exceeding the minimum standards under IHL therefore remain highly doubtful.

F. The Domestic Argument

Picking up the debate opened above, the question to be dealt with now is the application of domestic law in the State where the conflict occurs. As mentioned, this might already constitute an adequate tool to legally bind organised armed groups to a certain legal standard regarding the deprivation of liberty. Within this debate, the question of the primacy of existing domestic law over possible international obligations will also be dealt with. In other words, do we even need to create international legal obligations for non-State actors or is the existing domestic law sufficient to deal with the matter? Problems arise especially when international and national obligations contradict each other. Is the applicable international law only a complementary protection alongside national law as the primary source of law in NIACs?

I. Domestic Relations of International Law

The case that is often put forward here is the argument of legislative jurisdiction. Not only in terms of applicable domestic, but also international

99 *Al-Skeini and Others v the United Kingdom*, App no 55721/07, 7 July 2011, 134; confirmed in *Al-Jedda v the United Kingdom,* App no 27021/08, 7 July 2011.

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law. It is argued that, since the belligerent State in question has already ratified the international treaty and may even have implemented it into its domestic law, the obligation is therefore automatically binding for non-State actors operating on its territory and within its jurisdiction.[100] The advantage of this theory is that OAGs operating in the State's territory may be bound without their explicit consent, as the State exercises the will of the people it represents. However, this argument is not convincing on two grounds. Firstly, it ignores the sometimes divergent inner structure of States that either follow a dualistic or monistic system and, secondly, especially in areas of limited statehood, the further the insurgents progress, the less authority and factual existence of State there is. Thus, there would be no one liable to the violations of IHL and human rights law for the duration of the conflict. For example, notwithstanding the principle of continuity and the assumed continuous sovereignty over Somalia, it is highly doubtful that the Somali government may be held accountable for human rights violations perpetrated by Al-Shabab within the vast territory it effectively controls.

II. Primacy of Existing Domestic Law over International Obligations

Apart from the argument of legislative jurisdiction, the actual relation between national and international law with respect to non-State actors offers a further obstacle which would have to be overcome first. Existing national law often already deals with the deprivation of liberty on the penal und public law level. If an authority for OAGs to detain existed in international law, it would consequently entail an immunity from penalisation for the act of detention under national law and maybe even for taking part in the conduct of hostilities in the first place, analogous to the combatant immunity in IAC. This, however, might not be a concept the drafting States of AP II and especially the Geneva Conventions had in mind when regulating the treatment of OAGs in NIACs. National law must remain applicable alongside international law during conflicts. Furthermore, in most cases, the existing national law regulating the deprivation of liberty is the implementation of existing human rights obligations, for example the prohibition of arbitrary deprivation of liberty

100 Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369, 381; Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 ICLQ 416, 429.

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as well as regulations concerning the procedural requirements regarding the establishment of an independent judicial body and a fair trial. What it does not regulate is an authorisation of such acts – neither for State Parties nor for other actors involved. The authority to detain under international human rights law may only be found in national law itself or by particular acts of the UN SC.[101] Additionally, States will most likely avoid any authorisation for OAGs to detain under international law for reasons of enforcing their own domestic penal law.

In areas of limited statehood, the validity of this argument can be questioned. It may well be argued here that, in such cases, the effective protection of human rights should to be prioritised. If neither the State nor the OAG can be held accountable for their actions, at least for the prolonged duration of the conflict, a gap of protection arises.[102] This is especially the case when rights and duties in that respect are only provided by domestic law and the interests of the individual in the international sphere are assumed by the respective State through the voluntary system of diplomatic protection.[103] Additionally, from the perspective of a victim, the factual violation of an individual's right and the legal character of the perpetrator do not make a substantial difference anyway.

III. Conclusion

Ultimately, the answer of applicable domestic law to OAGs and their obligations for situations of internment will have to be found in the actual effectiveness of the OAG as an entity exercising territorial control and therefore in the effectiveness argument made earlier and or the absence of the State. A point that validity may be made comparing this case to the argument made in situations of failed States and their legal obligations under international law regarding the principle of effectiveness.

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101 Cf Brunner, 'Security Detention' (n 4).

102 Although individual criminal responsibility deriving from international law directly will hold some individuals accountable, for instance in cases of war crimes, this might not suffice in all cases, for example regarding crimes against humanity, Bantekas and Oette, *Human Rights Law* (n 9) 764.

103 Ibid, 762.

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G. Integrating Organised Armed Groups into the Process of 'Law-Making'

When accrediting OGAs with a distinct legal personality, thereby setting aside the primacy of domestic law and creating a legal framework for their involvement in the deprivation of liberty, the subsequent topic to be dealt with is the discussion of the relationship between OAGs and positive international norms, may they be treaty- or customary-law based. While certain groups do not seem to recognise any substantial standards of internment, some OAGs expressly recognise entitlements of their detainees under IHL and IHRL and regulate the conduct of its members according to those presumed obligations.[104] Therefore, the focus should be placed on the conduct of such groups and their conducts effect on treaty and customary obligations under the Geneva Conventions and international human rights. This also relates to the basic question of whether or not those actors remain 'law-takers' as opposed to 'law-makers' and how they affect the international (State) practice of those norms.[105] In the end, it must be asked to what extent OAGs should be incorporated into the process of the creation of rules of international law in the first place. Taking OAGs seriously in that respect might help to enhance compliance with international norms by these actors but might also just be a political argument.[106]

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104 See the example of the FAFN in Ivory Coast, which secured and maintained territorial control over a substantial part of northern Ivory Coast between 2002 and 2007. The Group established routine detention operations utilising the captured facilities of the State and even segregated conflict-related detainees from regular persons detained under their control. The behaviour of the FAFN can largely be recognised as 'State-like', see David Tuck, 'Detention by armed groups: overcoming challenges to humanitarian action' (2011) 93 IRRC 759, 761. As mentioned above, the LTTE maintained an own 'judicial' system for the detention of persons captured under their authority and within their controlled territory, see Stokke, 'Building the Tamil Eelam state' (n 63), 1027. For the usage of detention to implement an OAG's own 'rule of law' within its controlled territory to ensure its continuous exercise of power over the area, see Sivakumaran, 'Courts of armed opposition groups' (n 63) 489.

105 For further details, see Widdig, 'Perspektiven einer möglichen Einbindung' (n 15) 109 et seqq.

106 For the compliance argument, see Annyssa Bellal and Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3 GOJIL 175.

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I. The Integration of Organised Armed Groups into the Creation of International Treaty and Customary Law

The question of the relationship between OAGs and international treaties remains highly controversial. The basic argument in this debate is, in fact, not a legal one, but rather one of compliance. If we accept that some conduct of OAGs (for instance detention), even though banned under national law, is not illegal or at least tolerated under international law, there should be an incentive for them to respect the laws of war. Taking the process of detention out of the illegality from the States perspective, might be an incentive for the respective group to detain those captured and respect their dignity and due process rights, rather than simply kill them.[107] This is something that might be achieved by the incorporation of OAGs into the 'law-making' process. However, the question remains of whether this is possible at all.

Art. 2 in accordance with Art. 1 VCLT defines international treaties as agreements between States. Today, most States accept and recognise this definition of an international treaty, thereby rendering it customary international law.[108] By this standard, the incorporation of OAGs into the process seems to be impossible. However, Art. 3 VCLT stipulates the fact that the Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, shall not affect their legal force, nor the applicability of certain rules of the convention, as far as these rules constitute customary international law.

Consequently, agreements that qualify under Art. 3 VCLT can be seen as an international treaty, although not concluded between two primary subjects of international law.[109] The inclusion of OAGs in international agreements therefore seems not to be completely out of the question.[110] The formal requirements for such an inclusion would be the competence and

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107 Andrew Clapham, 'Detention by Armed Groups under International Law' (2017) 93 ILS 1, 2-3.

108 For its basis in customary international law, see Duncan Hollis, 'Defining Treaties' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 12 et seq.

109 Ibid, 13.

110 Ibid, 23; Yves Le Bouthillier and Jean-Francois Bonin, 'Article 3' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I (OUP 2011) 72.

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jurisdiction of the actor in question and the free will of the other party to enter the agreement.[111] This might apply to a stabilised *de facto* regime or an effective *de facto* authority. Ultimately, there is no positive obligation or rule neither within the VCLT nor in international law in general which prescribes what OAGs may or may not regulate with States through an international agreement. [112] Even if convincing in theory, this argument simply lacks sufficient State practice to be proven correct.

Therefore, it remains to be asked whether there are other ways for OAGs to be incorporated into the process of international 'law-making'. Art. 38 (1) (b) ICJ-Statute requires 'international custom as evidence of a general practice accepted as law' for the genesis of new customary international law. The influence of OAGs on that custom seems to be limited at first, but its indirect effect is quite substantial, as the conduct of States often is motivated by or is a reaction to the conduct of OAGs and their newly consolidated power in modern NIACs.[113] The OAG's influence or incorporation therefore is only an indirect one, which may come in the form of a (formal) recognition of its conduct and/or statements and declarations in the process of the creation of new rules.[114] This comprehensive approach can actually be beneficial to States, since it increases the probability of non-State actors complying with new rules of law as they were involved in the process to a certain extent.[115]

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111 Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 664 et seq.

112 Thomas Grant, 'Who Can Make Treaties? Other Subjects of International Law' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 145.

113 Ryngaert, 'Non-State Actors' (n 41) 1, 6: referring to *Prosecutor v Tadić* (n 5) para 70, where the Appeals Chamber is said to also incorporate the practice non-State actors as proof for the formation of new customary international law at paras 107 et seq; Sandesh Sivakumaran, 'Lessons from the law of armed conflict from commitments of armed groups: identification of legitimate targets and prisoners of war' (2011) 93 IRRC 1 (hereafter Sivakumaran, 'Lessons').

114 An approach also recognised by the ICRC study on existing customary IHL, which concludes that conduct or practice by OAGs *per se* may not be qualified as State practice and classifies their conduct as 'other practice' or gives it an auxiliary character in the process. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I: Rules (CUP 2005) xlii.

115 See Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2011) 37 Yale J. Int'l L. 108, 126 et seq (hereafter Roberts and Sivakumaran, 'Lawmaking by Nonstate Actors').

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However, putting too much emphasis on the conduct and practice of non-State actors may hold the risk of a mere regression of customary international law.[116] Some OAGs explicitly do not want any attribution to human rights or other State-like obligations and duties and, by definition, oppose any legislative action that derives from the regime they fight against, even on the international plane. Yet, it is not entirely out of the question to take into consideration statements made by OAGs in relation to IHL. For example, the so-called Deeds of Commitments facilitated by the NGO Geneva Call allows OAGs to express their perception of binding humanitarian norms.[117] The relevance of such actions can be asserted following the argument of the ICJ; for proof of international custom as evidence of a general practice, emphasis has to be put on the subjects of international law that contribute to the practice and whose interests are touched by the relevant provision.[118] This might be a very progressive and dynamic interpretation of the decision as the court might have only had States in mind at the time of judgment, but the argument itself still holds some validity. Aside this indirect influence on customary international law, a further incorporation is not possible. Only if the rebellion of the OAG is successful, its conduct and practice will become that of a State and therefore gain relevance retroactively.[119]

II. The Integration of Organised Armed Groups into Law-Making through Unilateral Declarations

The nature of unilateral declarations made by OAGs is disputed; some see them as meaningless, and as a mere political tool for negotiation, whereas

116 Ryngaert, 'Non-State Actors' (n 41) 6.

117 Although they are intentionally not called 'treaties', the content of such agreements essentially resembles that of the respective treaty and *de facto* reflects the practice of existent international obligations. An approach that was most likely also taken by the ICTY in *Prosecutor v Tadić* (n 5) para 108 with reference to the abovementioned declarations by the FMLN in El Salvador (para 107 of the judgment).

118 North Sea Continental Shelf Cases (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) (Judgment) [1969] ICJ Rep 3, para 73 et seqq; Wolff Heintschel von Heinegg, 'Völkergewohnheitsrecht' in Knut Ipsen (ed), *Völkerrecht* (6th edn, Beck 2014) para 11; Maarten Bos, *A Methodology of International Law* (Elsevier 1984) 231 et seq.

119 Art. 10 ASR.

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others grant them a certain legal value. However, OAGs regularly make use of unilateral declarations to voice their perception of existing binding legal obligations. The scope of such declarations ranges from the mere restatement of the law to explicit violations of existing international standards.[120] Therefore, the nature and effect of such declarations on customary international law deserves some further investigation.

In its famous *Nuclear Test Cases*, the ICJ elaborated on the binding effect of unilateral declarations (by States), arguing that, by public unilateral declaration of the existence of a positive legal obligation, the declaration becomes binding for the declaring actor itself. However, further implications and legal effects on third parties may not be established with the exception of obligations having an *jus cogens* character.[121] It may be argued that now, although this reasoning was construed with only States in mind, there is no apparent obstacle in applying it to OAGs as well, particularly because States have a genuine interest in binding OAGs to their statements. For the respective group its binding character will come from its own consent to be bound and or held accountable.[122] This legally self-binding ability seems favourable, at least in cases in which *de lege lata* the group is bound by international law anyway.

Although it can be effectively argued that unilateral declarations have a binding effect on the group that issues them, the question of the legal nature of the agreement itself remains. Is it governed by international law or can its legal nature only be derived from the sovereign (domestic and political) decision of the responding State that engages the actor? Looking at State practice, evidence of States reacting to declarations by OAGs is fragmented,

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120 Sivakumaran, 'Lessons' (n 113) 3-4. Groups such as the SLM-Unity in Darfur or the UNITA in Angola.

121 Nuclear Tests (*Australia v France*) (Judgment) [1974] ICJ Rep 253; Nuclear Tests (*New Zeland v France*) (Judgment) [1974] ICJ Rep 457; ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries' (2006) UN Doc A/61/10, Guiding Principle 1.

122 In some cases, OAGs even go beyond the scope of existing international law. The Moro Islamic Liberation Front, for example, issued a declaration obliging itself to not conduct any operations that may cause collateral damage to civilians; see the Agreement on the Civilian Protection Component of the International Monitoring Team (20 October 2009) <http://www.opapp.gov.ph/sites/default/files/Terms_of_Reference_of_the_International_Monitoring_Team.pdf> accessed 27 March 2018. As far as a declaration exceeds existing international law, its involvement in the international legal process will remain at the political level only.

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but existent. The accession to the 1997 Ottawa Convention[123] by the Sudanese government, for example, was said to be the result of a declaration issued by the SPLMA stating to be bound by it.[124] The recent peace agreement between the State of Colombia and the FARC or the ongoing negotiations between the Taliban and the Afghan government through an intermediary in Doha are further examples of States engaging in a legal agreement following declarations by OAGs to adhere to certain standards.

However, although these agreements did and will involve the implementation of obligations under international law, they remain within the sovereign decision and will of the negotiating State and, therefore, governed within its domestic sphere. Moreover, these agreements were deemed a national conciliation effort, but not a formal peace agreement which could be governed by international law. Nevertheless, international courts and tribunals tend to rely on those declarations as evidence for the international legal obligations of OAGs.[125] This, however, should only be interpreted as the exploration of the group's political intent to act and not as a direct influence on international legal practice. Its effect on international legal practice may only be an indirect one, as the conduct of the OAG in question certainly influences the State's conduct when dealing with it. Unilateral declarations by OAGs are therefore regulated by domestic law or, at most, have a *sui generis* character.

H. Accountability

Lastly, the question of a possible accountability of non-State actors for violations of IHL and human rights law should be briefly examined in order to complete the picture. International obligations may only come to their full effect, once they may also be enforced. The reparation for the damage caused may take the form of *restitutio in integrum*, monetary compensation or satisfaction, including a public apology with the acceptance of

123 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction (opened for signature 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

124 Roberts and Sivakumaran, 'Lawmaking by Nonstate Actors' (n 115)128-29.

125 See *Prosecutor v Akayesu* (n 22) para 627; Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary Executions, 'Mission to Sri Lanka' (27 March 2006) UN Doc E/CN.4/2006/53/Add.5 para 30.

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responsibility or guarantees of non-repetition.[126] Considering that the attribution of unlawful conduct and the hereby created obligation to compensate the damage caused is one of the core principles of international law, the inclusion of OAGs in this principle seems to be self-evident. However, existing compensation mechanisms mainly address States as the primary holders of international obligations for their unlawful conduct, most prominently the ASR. If the group succeeds in its insurrection, the question of responsibility is answered by Art. 10 ASR; thus, the group's conduct is retroactively treated as the conduct of a State. The question that remains is what happens in prolonged conflicts, where neither party can make decisive victories nor end the conflict. This especially holds true in the case of detention, where serious violations of international law occur.

Following the definition of OAGs set up above, requiring them to exercise effective control over a certain part of territory, and acting as de facto authorities, thereby conferring them a certain legal personality, it may not be farfetched though, to hold them accountable for their unlawful conduct.[127] As already argued above, ILC Special Rapporteur *Agos's* proposition that 'an insurrectional movement which establishes its authority over a State's territory becomes a '*separate subject of international law*' at the end of the 1960s is still valid in this context.[128] Even if we define international responsibility as 'legal relations which arise under international law by reason of an internationally wrongful act'[129], the decisive criterion for conferring those OAGs international legal responsibility is their actual capacity to fulfil those responsibilities and to

126 See UN SG, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616 18-19.

127 Cf Ryngaert, 'Non-State Actors' (n 41) 4 et seq. For a further account in favour of the accountability of armed organised groups for violations under international law, see Jann Kleffner, 'The Collective accountability of organized armed groups for system crimes' in Harmen van der Wilt and Andre Nollkaemper (eds), *System Criminality in International Law* (CUP 2009) 238 (hereafter Kleffner, 'Collective accountability').

128 UNYBILC 1972/II 129; also earlier UNYBILC 1966/II 134.

129 Commentary on Art. 1 Draft ASR, UNYBILC 2001/II 31; See also UN GA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (21 March 2006) UN Doc A/Res/60/147, Basic Principle 15: '[i]n cases where a person, a legal person, or any other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State, if the State has already provided reparation to the victim'.

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enforce eventually existing claims against them, such as their 'jurisdiction to enforce'. Additionally, the mere establishment of an international responsibility *de jure* might not lead to a responsibility *de facto* for most OAGs, since the actual enforcement of those claims might prove difficult.

However, to this day, cases in which States hold OAGs responsible and accountable by international law and which could therefore be used as evidence for a broader existence of OAGs on the international plane, remain rare and selective incidents rather than precedents.[130] The only exception to this can be found in the US Alien Tort Claims Act[131]. Within the Alien-Tort-Claims-Act jurisprudence, cases can be found where the group as such is collectively held accountable for its actions.[132] Although legal proceedings are instigated at a national level, the applicable law within such cases remains international customary law; the cases are therefore used as supplementary evidence for the emergence or existence of a rule of law itself. However, this alone is not sufficient to serve as evidence for international custom, as it remains limited to the practice of the USA. The response by third parties on the international plane remains divided; States rather prefer to implement their international legal obligations into national law to avoid any interaction with those actors on the international legal plane.[133]

Setting aside the practical problems concerning the actual enforcement of claims, the international responsibility of OAGs for unlawful conduct therefore only remains a distant dream – if States deem it appropriate at all.[134] After all, the recognition of the existing mechanism of accountability

130 Crawford, *State Responsibility* (n 48) 81. For example, see the recommendation of the International Commission of Inquiry on Darfur to the UN SC, which noted that, apart from States, its agents or de facto organs, rebels and insurgents have a similar obligation to compensate for the crimes they committed, UN Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2000) para 600 <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> accessed 27 March 2018. Although Reports by International Commissions of Inquiry cannot be considered direct State practice, the recurrence on them may still be valid, as an auxiliary source of international law as in Art. 38 (1) (d) ICJ-Statute.

131 28 U.S.C. § 1350 (1994). Although the case may be tried before a national court, the applicable law in such cases will be customary international law.

132 Mohamad v Palestinian Authority (n 50); *Tel-Oren v Libyan Arab Republic* (n 50).

133 Crawford, *State Responsibility* (n 48) 81.

134 Kleffner, 'Collective accountability' (n 127) 250 also notes the practical issue of enforcement, but makes the argument for monitoring, compliance and sanctions with regard to their obligations.

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of non-State actors outside the individual criminal responsibility will always be accompanied by some form of legitimisation. This, however, is something most, if not all, States certainly do not want to see happening.

I. Conclusion

For the time being, the deprivation of liberty by OAGs in areas of limited statehood remains an uneasy terrain. Although the legal obligations in CA 3 as well as, to a certain extent, Art. 4 and 5 of AP II (as far as they constitute customary international law) provide some protection to those captured in NIACs, the protection of human rights, especially those exceeding the scope of the 'minimum standards of humanity', which itself remains a rather murky concept, remains unsatisfactory *de lege lata* in most cases. The most common human rights treaties and the obligations set within their non-derogative provisions are not applicable to OAGs in general, as they exceed the protection provided by IHL. Although an argument can be made with respect to the principle of effectiveness in order to confer human rights obligations to these groups, future State practice will show whether international courts and State practice accept the idea of OAGs being involved in the delicate matter of detention to a more sophisticated level. Especially in cases when the principal organs of the State struggle to exercise control over the relative territory. Until then, it can only be restated that

> International Law is constantly evolving but still is State-centric in the way in which it is made and applied: treaties are made by States …, and customary law is formed primarily by State practice and State *opinio iuris*; international law still struggles to recognize entities other than States and IOs as legal persons.[135]

A resolution to this dilemma might be found at the policy level. Taking armed non-State actors seriously and engaging them as a legal actor in terms of policy on the international plane might be advantageous to all parties to the conflict, as reciprocal obligations offer the most effective contribution to the protection of civilians and other vulnerable persons in an armed conflict. This pragmatic conduct based on the engagement of OAGs without prejudice to status, ensuring their legality under national law and possible involvement into the international legal process might provide an effective tool to further one of the basic intentions of IHL: a humane conduct of hostilities.

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135 Crawford and Pert, *IHL* (n 80) 261 et seq.

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