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Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward

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Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward

Abstract

International humanitarian law establishes explicit safeguards applicable to detention occurring in non-international armed conflict. However, debate exists as to whether these treaty provisions establish an implicit legal basis for detention. This article approaches this debate in light of the application of international humanitarian law to non-State armed groups. It examines the principal arguments against implicit detention authority and then applies the law of treaty interpretation to international humanitarian law's detention-related provisions. On the basis of current understandings of international law – and the prohibition of arbitrary detention in particular – it is concluded that international humanitarian law must be interpreted as establishing implicit detention authority, in order to ensure the continued regulation of armed groups. Although perhaps problematic from certain States' perspective this conclusion is reflective of the current state of international law. However, this is not necessarily the end of the story. A number of potential 'ways forward' are identified: implicit detention authority may be (a) rejected, (b) accepted, or (c) re-examined in light of the non-State status of armed groups, and what this means for the content of the prohibition of arbitrary detention. These scenarios are examined in light of the desire to ensure: the coherency of international law including recognition of the role of armed groups, the continued effectiveness of international humanitarian law, and State sovereignty. An emphasis is placed on understanding the non-State status of armed groups and what this means for international regulation and the content of imposed obligations.

Keywords: armed groups, detention, non-international armed conflict, human rights, treaty interpretation

1. Introduction

International humanitarian law establishes explicit safeguards applicable to detention occurring in non-international armed conflict. These obligations are codified in article 3 common to the four Geneva Conventions of 1949 and article 5 of Additional Protocol II,¹ and they apply equally to States and to non-State armed groups.² However, debate exists as to whether international humanitarian law establishes an *implicit* legal basis for detention.³ Specifically, by regulating detention when it occurs, do these treaty rules necessarily provide legal authorisation for that detention?

It is essential that this question be resolved in order to ensure clarity regarding the application of international humanitarian law. If the law is to be effective, both States and non-State armed groups must know its contents. Specifically, they must know whether they can conduct detention operations. Although this issue is clearly of concern to States,⁴ it is particularly important in relation to armed groups. As discussed below, if all detention by armed groups constitutes arbitrary detention, then all instances of detention by armed groups are straightforwardly illegal.⁵ This may have immediate implications in relation to armed groups' treatment of individuals. For example, if all detention is illegal, will this increase the likelihood that armed groups will execute rather than release individuals whom

¹ See, Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, article 5.

² Common article 3 explicitly binds 'each Party to the conflict', while Additional Protocol II 'develops and supplements' common Article 3. See, Article I, Additional Protocol II.

³ The legal basis for detention is considered to be distinct from the regulation of detention itself, and issues such as the grounds for detention, the legal review of detention, and so on.

⁴ Regarding the importance of this issue to States, see generally, *Serdar Mohammed & Others v. Secretary of State for Defence*, Court of Appeal, Case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, 30 July 2015.

⁵ See Sections 1.B and 5. This is not the case in relation to States who can, for example, establish detention authority by means of domestic legislation.

they would otherwise detain? It also gives rise to broader concerns regarding the effectiveness of international humanitarian law: if the law prohibits activity central to the conduct of armed conflict, armed groups' incentive to respect the law as a whole may be reduced.

This is not an academic issue. Detention by armed groups is a routine activity in armed conflict, and often one of the first activities that an armed group engages in.⁶ For instance, armed groups have established detention operations in Cote d'Ivoire,⁷ Mali,⁸ Libya,⁹ and Sri Lanka.¹⁰ Indeed, the Islamic State, which exerts control over six million people in Iraq and Syria, has established both a police force and a hierarchical court system.¹¹

A significant school of thought argues that international humanitarian law is silent with respect to the legal basis for detention: although detention is regulated, it is not authorised, even implicitly.¹² Accordingly, the required legal basis must be established elsewhere, either in domestic law or, exceptionally, in other branches of international law, such as on the basis of a Chapter VII Resolution of the UN Security Council.¹³ The arguments in support of this

⁶ Zachariah Chierian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Cornell University Press 2011) 63. Other examples include the CPN-M in Nepal, the SPLA in Sudan, and FARC and ELN in Colombia. See David Tuck, 'Detention by armed groups: overcoming challenges to humanitarian action' (2011) 93 *International Review of the Red Cross*, 761.

⁷ David Tuck, 'Detention by armed groups: overcoming challenges to humanitarian action' (2011) 93 *International Review of the Red Cross*, 762.

⁸ See, 'Mali: New Abuses by Tuareg Rebels, Soldiers', Human Rights Watch (7 June 2013); 'Mali: ICRC visits detainees in the north', News Release, International Committee of the Red Cross (31 July 2012).

⁹ Human Rights Watch, 'Letter to Misrata Councils', 8 April 2012, 1.

¹⁰ International Crisis Group, 'Sri Lanka's Return to War: Limiting the Damage' (2008) 13.

¹¹ Richard Barrett, 'The Islamic State', The Soufan Group, November 2014, 8, 35.

¹² Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart 2013); Gabor Rona, 'Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?' (2015) 91 *International Law Studies*, pp.35-7; Ryan Goodman, 'Authorization versus Regulation of Detention in Non-International Armed Conflicts' (2015) 91 *International Law Studies*, pp. 158-60.

¹³ This was the argument accepted by the UK High Court and Court of Appeal in *Serdar Mohammed*. See, *Serdar Mohammed v. Ministry of Defence*, High Court of Justice, Case No. HQ12X03367, 2 May 2014, paras. 6(i) and (iv); *Serdar Mohammed & Others v. Secretary of State for Defence*, Court of Appeal, Case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, 30 July 2015, para. 125. See also, Lawrence Hill-Cawthorne & Dapo Akande, 'Does IHL provide a Legal Basis for Detention in Non-International Armed

conclusion relate, *inter alia*, to the proposal that international regulation does not constitute affirmative authorisation (based on the *Lotus* principle), that international law can (and does) regulate potentially illegal situations without legitimising those situations, and that the absence of specified grounds and procedures indicate that States did not intend to establish a legal basis for detention. Sections 2-4 examine these arguments, taking particular note of their application to armed groups where appropriate. It is concluded that these arguments either do not apply to armed groups, fail to take into consideration the prohibition of arbitrary detention, or do not pose an obstacle to the existence of implicit detention authority.

Section 5 then examines common article 3 and article 5 Additional Protocol II in light of the international law of treaty interpretation. Two factors are significant in this regard. First is the fact that no possibility exists for armed groups to independently establish a legal basis for detention outside international humanitarian law. This factor distinguishes armed groups from States who can, for example, establish a legal basis by means of domestic legislation. Second is the international human rights law prohibition of arbitrary detention which holds that in order to be lawful all detention must have an established legal basis. Accordingly, if international humanitarian law does not establish an implicit legal basis for detention, then all detention by armed groups is illegal, and so armed groups cannot detain. However, to conclude that no implicit authorisation exists frustrates the object and purpose of international humanitarian law's detention-related provisions, namely the regulation of detention by States *and* non-State armed groups, and indicates that States have undertaken

an exercise in futility: the prohibition of arbitrary detention is absolute, and States cannot regulate activity that is absolutely prohibited. In this light, the law of treaty interpretation requires that international humanitarian law be interpreted as establishing an implicit legal basis for detention.

Although this conclusion is reflective of the current state of international law, it is not necessarily the end of the story. Section 6 examines three possible 'ways forward': the existence of implied detention authority on the basis of the argument presented in Section 5 may be (a) rejected, (b) accepted, or (c) re-examined in light of the *non-State* status of armed groups. These scenarios are discussed in light of: the coherence of international law as a legal system, including its ability to effectively incorporate the regulation of non-State armed groups; the effectiveness of international humanitarian law; and States' interests, including concerns related to sovereignty and the desire to prosecute insurgent activity. In light of the non-State status of armed groups it is suggested that although armed groups necessarily remain bound by the prohibition of arbitrary detention, the content of this prohibition may be interpreted primarily in light of its underpinning factors, such as predictability, justice, appropriateness, and so on, and not on the existence of a legal basis.

Before proceeding further, two preliminary issues must be addressed. First, the application of international humanitarian law to non-State armed groups must be confirmed, as it is this application that underpins the argument presented herein. Second, the law relating to the prohibition of arbitrary detention must be addressed: if the prohibition of arbitrary detention is not applicable, then the establishment of a legal basis for detention by non-State armed groups is not necessary.

A. The application of international humanitarian law to non-State armed groups

Article 3 common to the four Geneva Conventions of 1949 and article 5 of Additional Protocol II regulate detention during non-international armed conflict. It is clear, both from a plain text reading of the respective treaty provisions, and in light of States' discussions at Geneva, that these provisions were intended to apply equally to States and to non-State armed groups.¹⁴ Common article 3 clearly states that: '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party to the conflict shall be bound to apply, as a minimum, the following provisions...*'.¹⁵ As noted by Moir, this provision 'was obviously intended to create duties and rights for both States *and* insurgents.'¹⁶ Although the phrase 'each Party to the conflict' was deliberately omitted from the text of Additional Protocol II, article 1 thereof states that the Protocol 'develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application'. Accordingly, as Cassese notes:

the conclusion is inescapable that Protocol II was destined by its authors to operate for rebels. It would indeed be absurd to contend that Article 3 gives

¹⁴ See further, Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20 *Journal of Conflict & Security Law* 1.

¹⁵ Emphasis added.

¹⁶ Lindsay Moir, *The Law of Internal Armed Conflict* (CUP 2002) 53. See also, G.I.A.D. Draper, *The Red Cross Conventions* (Stevens & Sons 1958) 13.

rights and imposes obligations on rebels, while Protocol II – which is but an elaboration of that article – refuses to make itself available to them.¹⁷

This conclusion is reinforced by reference to the drafting process. States engaged in extensive discussion in relation to the application of both common article 3 and Additional Protocol II to armed groups.¹⁸ Indeed, the equal application of Additional Protocol II to States and armed groups was stated to be a ‘sovereign principle’.¹⁹ Capacity and compliance issues arising consequent to the application to armed groups of the detention-related provisions in Article 5 Additional Protocol II were also explicitly addressed.²⁰

B. The prohibition of arbitrary detention

The prohibition of arbitrary detention established under international human rights law is absolute.²¹ Article 9(1) of the International Covenant on Civil and Political Rights states that:

Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except

¹⁷ Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) *International & Comparative Law Quarterly*, 424.

¹⁸ See the statements of the UK, Norway and Spain, *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume II Section B, 10-11; and the statements of Syria, Iraq and France, CDDH/I/SR.40, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-77)* Volume VIII, at paras. 4, 29 and 34 respectively.

¹⁹ Argentina, CDDH/SR.49, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-77)* Volume VII, 76.

²⁰ See generally the discussion on draft Article 8 of Additional Protocol II in CDDH/I/SR.32 and CDDH/I/SR.33, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-77)* Volume VIII.

²¹ The continued application of international human rights law during armed conflict is now well accepted. See, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, International Court of Justice, 19 December 2005, para. 216.

on such grounds and in accordance with such procedures as are established by law.²²

The International Committee of the Red Cross' study on customary international humanitarian law concluded that the prohibition of arbitrary detention was a norm of customary international law applicable in both international and non-international armed conflict.²³ Similarly, in General Comment No. 29, the Human Rights Committee stated that the prohibition of arbitrary detention constitutes a peremptory norm of international law that cannot be subject to derogation.²⁴ Indeed, the prohibition of arbitrary detention has been referred to as a 'universal rule' of international human rights law, 'underpinning the regimes regulating detention in each of the key treaties'.²⁵

Although a number of factors are relevant when determining whether a particular instance of detention violates the prohibition of arbitrary detention,²⁶ a key consideration is whether a legal basis for that detention exists. All the major human rights law treaties 'provide that no one shall be deprived of his liberty *except on grounds and in accordance with a procedure that are established by law*',²⁷ and the Human Rights Committee has confirmed that arrest or detention

²² This requirement is reflected in Article 5 of the European Convention on Human Rights, Article 7 of the American Convention on Human Rights, Article 6 of the African Charter on Human and Peoples' Rights, and Article 14 of the Arab Charter on Human Rights.

²³ Rule 99, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (International Committee of the Red Cross, CUP 2005).

²⁴ Human Rights Committee, General Comment No. 29, 'States of Emergency (article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11.

²⁵ Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016). The prohibition of arbitrary detention under international human rights law did not necessarily enjoy this status at the time common Article 3 was adopted. However, the prohibition of arbitrary detention was confirmed in Article 9 of the Universal Declaration of Human Rights, which was adopted prior to the Geneva Conventions of 1949, and was clearly established prior to the adoption of Additional Protocol II, which 'develops and supplements' common Article 3. Additional issues relating to treaty interpretation are discussed further in Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016) pp. 164-166.

²⁶ See, *Saadi v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 13229/03, 29 January 2008, paras. 67-74.

²⁷ Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 255. Emphasis added.

that lacks any legal basis is arbitrary.²⁸ Accordingly, in order to be lawful, any instance of detention occurring in non-international armed conflict – whether by a State or a non-State armed group – must have a legal basis. This legal authority to detain can be established by the international humanitarian law applicable to non-international armed conflict, under domestic law, or on the basis of another source of international law, such as a UN Security Council Resolution.²⁹

For States, the establishment of a domestic law basis for detention is relatively straightforward and can be achieved through an act of legislation. Additionally, albeit under more exceptional circumstances, a legal basis may be established under international law, for instance, consequent to a Chapter VII Resolution of the UN Security Council.³⁰ However, these potential sources of legal authority simply do not exist for non-State armed groups. It is exceptionally unlikely – if not an absolute impossibility – that a legal basis for detention by an armed group will exist under domestic law.³¹ Indeed, armed group detention is typically regarded as a form of unlawful confinement subject to criminal sanction.³² It is equally unlikely that armed group detention will be authorised by the UN Security Council. While such authorisation is perhaps foreseeable in relation to certain non-State entities, such

²⁸ Human Rights Committee, General Comment No. 3, 'Article 9 (Liberty and security of person)', UN Doc. CCPR/C/GC/35, 16 December 2014, para. 11. See also, *A and Others v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 3455/05, 19 February 2009, para. 164.

²⁹ See, Articles 39 and 103, UN Charter.

³⁰ Gabor Rona, 'Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?' (2015) 91 International Law Studies, 44. Some suggest that an implicit legal basis for detention is contained in the mandate to take 'all necessary measures'. See the argument of the United Kingdom in *Al-Jedda v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 27021/08, 7 July 2011, para. 88.

³¹ Gabor Rona, 'Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?' (2015) 91 International Law Studies, 38.

³² In relation to Canadian criminal law see Section 279(2), Criminal Code, R.S.C., 1985, c. C-46, see the offence of false imprisonment under the common law in England and Wales. See further, Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart 2013) 460, 462.

as a UN peacekeeping operation, given armed groups active opposition to States, authorisation by the Security Council is an exceedingly remote possibility.³³

It may be argued that armed groups – as non-State actors – are not bound by international human rights law and so the prohibition of arbitrary detention simply does not apply. This argument is not endorsed.³⁴ However, irrespective of the direct application of international human rights law to armed groups it is unequivocal that States are directly bound by international human rights law. The obligation to protect establishes that States must protect individuals against third party violations of international human rights law,³⁵ requiring that States protect against arbitrary detention by non-State armed groups. The prohibition of arbitrary detention therefore prevents States from intentionally creating international treaty law allowing arbitrary detention by non-State armed groups. While States may potentially allow or regulate detention by non-state actors, that regulation must comply with the requirements of international human rights law, and must therefore include a legal basis.³⁶ Detention cannot be arbitrary.

The principal arguments against the existence of an implicit legal basis for detention will now be addressed. The first and second of these arguments are closely related. The first argument (in section 2) addresses the Lotus principle, and the proposition that States can regulate activity without establishing an associated legal basis, as States are free to act as

³³ Even if a legal basis for armed group detention is established consequent to a Chapter VII UN Resolution, such authority will necessarily be sporadic and restricted in its applicability. As such, it fails to satisfy the difficulties addressed in Section 5 below.

³⁴ See further, Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016).

³⁵ See generally, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Decision, African Commission on Human Rights, Communication No. 155/96, 27 October 2001, para. 57; *Osman v. United Kingdom*, Judgment, European Court of Human Rights, App. No. 87/1997/871/1083, 28 October 1998, para. 115.

³⁶ International human rights law requires that there be a legal basis for detention, irrespective of who actually conducts the detention. This is evident from a plain text reading of the relevant treaty law, see for instance, Article 9(1) International Covenant on Civil and Political Rights.

they choose, provided the conduct in question is not prohibited by international law.³⁷ The second argument (in section 3) addresses a related but distinct point, namely that States can – and do – regulate potentially illegal situations, and that this regulation does not necessitate an underlying legal basis.³⁸ The third argument examines the proposition that implicit detention authority cannot be presumed, given the absence of grounds and procedures for detention.

2. The argument that regulation of activity does not constitute affirmative authorisation

It is argued that the international regulation of an activity does not automatically constitute affirmative authorisation for that activity:³⁹ the fact that States create international humanitarian law to regulate detention does not imply authorization for that detention. A basis for this argument may be derived from the principle that international law grants States freedom of action on the international plane, and so States are free to engage in any conduct not expressly prohibited by international law. This principle was expressed by the Permanent Court of Justice in *The Case of the S.S. Lotus (France v. Turkey)*:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as

³⁷ This argument focuses on the fact of regulation.

³⁸ This argument focuses on the regulation of illegal situations.

³⁹ See, Derek Jinks, 'International Human Rights Law in Time of Armed Conflict' in Andrew Clapham & Paola Gaeta (eds.) *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) pp. 666-9; Lawrence Hill-Cawthorne & Dapo Akande, 'Does IHL provide a Legal Basis for Detention in Non-International Armed Conflicts?', *EJIL:Talk!*, 7 May 2014. Available at: <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>. It is highlighted that these authors do not explicitly refer to the Lotus principle, and that some of the arguments addressed therein are also relevant in the context of section 3 below.

expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*⁴⁰

Accordingly, the Lotus Principle holds that States are awarded 'a wide measure of discretion which is only limited in certain areas by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable'.⁴¹ This principle was upheld by the International Court of Justice in the Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*,⁴² and is a corollary of States' sovereignty and independence. As stated in the Separate Opinion of Judge Anzilotti in *Customs Regime between Germany and Austria (Protocol of March 19th, 1931)*:

Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (suprema potestas), or external sovereignty, *by which is meant that the State has over it no other authority than that of international law.*⁴³

⁴⁰ *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, Permanent Court of International Justice, Judgment No. 9, 7 September 1927, para. 44. Emphasis added.

⁴¹ *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, Permanent Court of International Justice, Judgment No. 9, 7 September 1927, para. 46.

⁴² *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*, Advisory Opinion, International Court of Justice, 22 July 2010, para. 56.

⁴³ *Customs Regime between Germany and Austria (Protocol of March 19th, 1931)*, Separate Opinion of Judge Anzilotti, Permanent Court of International Justice, 5 September 1931, para. 81. Emphasis added.

The Lotus-based argument holds that, as a broad legal authority exists under international law, States can establish rules to regulate conduct without establishing a specific legal basis for that conduct: States are free to act as they choose, provided that the conduct in question is not expressly prohibited by international law.⁴⁴ However, arbitrary detention *is* expressly prohibited,⁴⁵ and this prohibition is recognised as forming part of customary international law.⁴⁶ The Lotus principle cannot, therefore, apply to detention in non-international armed conflict, and States do not enjoy freedom of action in this regard. As all detention-related activity must be consistent with the prohibition of arbitrary detention, a legal basis is therefore required.⁴⁷ For armed groups party to a non-international armed conflict, international humanitarian law provides the only possible source of this legal basis.⁴⁸

3. The argument that international law regulates potentially illegal situations without establishing legal authority for those situations

A second, related, argument against the establishment of an implicit legal basis for detention in non-international armed conflicts holds that international law can, and does, regulate potentially illegal situations without providing legal authorisation for those situations.⁴⁹

Two examples may be provided in this regard. The first is the distinction between the *jus ad bellum* and the *jus in bello*, and the fact that the *jus in bello* applies irrespective of any legal

⁴⁴ The UK Court of Appeal questioned the continuing legitimacy of the Lotus principle. *Serdar Mohammed & Others v. Secretary of State for Defence*, Court of Appeal, Case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, 30 July 2015, para. 197.

⁴⁵ See above Section B.

⁴⁶ See, for example, Rule 99, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (International Committee of the Red Cross, CUP 2005).

⁴⁷ The *Serdar Mohammed* case centred upon the identification of this legal basis.

⁴⁸ See above fns, 30-33, and accompanying text.

⁴⁹ Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart 2013) 468.

authorisation established under the *jus ad bellum*. The second is that the International Court of Justice has held that international law may regulate State activity – in this case the phased withdrawal of Ugandan forces from the DRC – without providing legal authorisation for that activity.⁵⁰ Accordingly, this argument holds that international humanitarian law can regulate detention, even if the detention itself is unlawful, and so international humanitarian law provisions regulating detention cannot be considered as implying a legal basis for that detention.

It is submitted that the *jus ad bellum / jus in bello* argument does not apply in a straightforward manner to the situation at hand. Within international law there is a clear distinction between the *jus ad bellum* and the *jus in bello*. The *jus ad bellum* regulates the inter-State resort to force, while the *jus in bello* regulates armed conflict itself.⁵¹ These are two distinct bodies of law and it is accepted that the *jus in bello* applies irrespective of the legality or illegality of the conflict under the *jus ad bellum*.⁵² This distinction is possible because international law does not absolutely prohibit all instances armed conflict. Although article 2(4) of the UN Charter prohibits ‘the threat or use of force against the territorial integrity or political independence of any state’,⁵³ this prohibition is subject to two notable exceptions: the use of force is permissible in the exercise of individual or collective self-defence,⁵⁴ or if authorised by a Chapter VII Resolution of the UN Security Council in the interests of

⁵⁰ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, International Court of Justice, 19 December 2005, paras. 92-105. See, Lawrence Hill-Cawthorne & Dapo Akande, ‘Does IHL provide a Legal Basis for Detention in Non-International Armed Conflicts?’, *EJIL:Talk!*, 7 May 2014. Available at: <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>.

⁵¹ Further discussion relating to the *jus ad bellum*, the *jus in bello*, and the relationship between the two is beyond the scope of this paper.

⁵² See, preamble, paragraph 5, Additional Protocol II; article 2 common to the four Geneva Conventions of 1949; Derek Jinks, ‘International Human Rights Law in Time of Armed Conflict’ in Andrew Clapham & Paola Gaeta (eds.) *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) p. 668.

⁵³ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, article 2(4).

⁵⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, article 51.

international peace and security.⁵⁵ These exceptions mean that it is possible – and indeed desirable – to establish a clear distinction between the *jus ad bellum* and the *jus in bello* and to regulate armed conflict irrespective of the legality of the initial use of force. However, this is not the case in relation to detention, as all instances of detention must be consistent with the prohibition of arbitrary detention.

It is noted that, in the absence of exceptions to Article 2(4) of the UN Charter – i.e. if armed conflict was absolutely prohibited – the regulation of armed conflict would be impermissible: international law cannot regulate activity that is subject to an absolute prohibition. For example, instances of torture cannot be regulated as torture is subject to an absolute prohibition.⁵⁶ The same is true with respect to armed group detention in non-international armed conflict: the absolute prohibition of arbitrary detention precludes the possibility of regulating arbitrary detention.⁵⁷

A related argument notes that in the *Armed Activities* case the International Court of Justice rejected the view that treaties regulating the withdrawal of Ugandan armed forces from the DRC constituted consent to those forces being present in the DRC – ‘in the sense of validating that presence in law’⁵⁸ – including during the withdrawal phase.⁵⁹ As the presence of foreign troops on the territory of a State absent the territorial State’s consent *prima facie*

⁵⁵ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, article 42.

⁵⁶ *Prosecutor v. Furundzija*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-17/1-T, 10 December 1998, para. 155.

⁵⁷ See section 1.B above.

⁵⁸ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, International Court of Justice, 19 December 2005, para. 105.

⁵⁹ Lawrence Hill-Cawthorne & Dapo Akande, ‘Does IHL provide a Legal Basis for Detention in Non-International Armed Conflicts?’, *EJIL:Talk!*, 7 May 2014. Available at: <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>.

constitutes a violation of sovereignty and territorial integrity,⁶⁰ this decision appears to support the argument that international law can regulate a potentially illegal situation without authorising that situation.⁶¹

However, in the *Armed Activities* case the Court was dealing with a situation markedly different to that of detention in non-international armed conflict. The agreements underpinning the Ugandan withdrawal were intended to ensure 'an eventual peace, with security for all concerned'.⁶² In this regard the agreements regulated the withdrawal of Ugandan troops in order to secure a return to a situation in conformity with international law through restoration of the *status quo ante*.⁶³ This situation is distinct from the issue of detention in non-international armed conflict. Indeed, applying the *Armed Activities* argument to armed group detention would suggest that international humanitarian law should secure the release of detainees thereby restoring the situation to one in conformity with international law. It should not establish safeguards regulating continued detention thereby facilitating the perpetuation of an illegal situation.

Significant to this conclusion is the International Court of Justice's finding in relation to the Luanda agreement. This agreement held that, as part of the overall withdrawal, 'Ugandan troops shall remain on the slopes of Mt. Ruwenzori [in the DRC] until the Parties put in place security mechanisms guaranteeing Uganda's security'.⁶⁴ This agreement was not

⁶⁰ See, Articles 2(1) and 2(4) of the UN Charter.

⁶¹ The use of force and infringements on territorial integrity are not subject to an absolute prohibition. See, Articles 42 and 51, UN Charter.

⁶² *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, International Court of Justice, 19 December 2005, para. 99.

⁶³ An illegal situation was regulated in order to secure a return to a situation in compliance with international law.

⁶⁴ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, International Court of Justice, 19 December 2005, para. 103.

intended to secure a return to the *status quo ante* but was intended to regulate Uganda's continued – albeit limited – presence in the DRC. Absent a legal basis, this presence would violate the international law requirements relating to territorial integrity. Significantly, the International Court of Justice held that, unlike the other agreements discussed, the Luanda agreement did in fact constitute authorisation for Uganda's continued presence in the DRC.⁶⁵

On the basis of the above, it is submitted that the two principal arguments in support of the proposition that regulation of a (potentially illegal) situation does not imply authorisation of that situation are not applicable to the issue of detention in non-international armed conflict.

4. The argument that the absence of grounds and procedures for detention precludes an implicit basis for detention

A final argument suggests that the absence of clearly specified grounds and procedures for detention in non-international armed conflict precludes an interpretation that international humanitarian law contains an implicit authority to detain. As stated by Debuf, 'for an implicit legal basis to detain or intern to exist [...] it should at least be possible to deduce from it the grounds and procedures in accordance with which a person can be deprived of his or her liberty.'⁶⁶ This argument was also advanced by the High Court in *Serdar Mohammed*:

⁶⁵ *Serdar Mohammed v. Ministry of Defence*, High Court of Justice, Case No. HQ12X03367, 2 May 2014, para. 105.

⁶⁶ Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (2013 Hart Publishing) 466.

I do not see how CA3 or AP2 could possibly have been intended to provide a power to detain, nor how they could reasonably be interpreted as doing so, unless it was possible to identify the scope of the power. However, neither CA3 nor AP2 specifies who may be detained, on what grounds, in accordance with what procedures, or for how long.⁶⁷

However, the absence of detail is not uncommon in international law. Aughey & Sari note that: 'just because the law of armed conflict does not regulate the exercise of a particular power in great detail does not mean that it does not recognise the existence of that power at all.'⁶⁸ The example given is civilians' loss of protection from direct attack 'for such time as they take a direct part in hostilities.'⁶⁹ This is a provision of significant importance – it is quite literally a matter of life and death – but no further guidance is provided as to what constitutes direct participation in hostilities. Indeed, this is an issue that continues to give rise to significant – often heated – debate.⁷⁰ Yet, despite the lack of clearly specified grounds regulating the loss of protection from direct attack, this principle continues to be applied, and indeed constitutes a fundamental component of the law of armed conflict.

⁶⁷*Serdar Mohammed v. Ministry of Defence*, High Court of Justice, Case No. HQ12X03367, 2 May 2014, para. 246; *Serdar Mohammed & Others v. Secretary of State for Defence*, Court of Appeal, Case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, 30 July 2015, para. 217.

⁶⁸ Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence' (2015) 91 *International Law Studies*, 96.

⁶⁹ Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence' (2015) 91 *International Law Studies*, 96.

⁷⁰ See, Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (International Committee of the Red Cross, 2009); Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Security Journal*; W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 *N.Y.U. Journal of International Law and Politics*; Bill Boothby, "'And For Such Time As": The Time Dimension To Direct Participation in Hostilities' (2010) 42 *N.Y.U. Journal of International Law and Politics*.

The definition of non-international armed conflict is another example on point. Common article 3 simply refers to ‘the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. No further guidance is provided as to what constitutes non-international armed conflict, despite the fact that such information is essential in order to determine when a situation transitions from internal disturbance to armed conflict, thereby giving rise to the application of the law of armed conflict.⁷¹ It was only in the *Tadic* case, 46 years after the codification of the Geneva Conventions, that the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia held that non-international armed conflict is ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.⁷² Indicators relevant to the organisation and intensity criteria associated with the non-international armed conflict threshold were developed in subsequent case law.⁷³

It is concluded that international humanitarian law can establish an implicit legal authority to detain absent explicitly specified grounds and procedures. Although beyond the scope of this paper, it is suggested that the applicable grounds and procedures can be determined by reference to existing international law and the object and purpose of international humanitarian law.⁷⁴

⁷¹ This has significant implications. For example, it indicates the transition from a use of force model based on international human rights law, to authorisation of the use of direct lethal force against individuals directly participating in hostilities (under appropriate circumstances).

⁷² *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-1, 2 October 1995, para. 70.

⁷³ *Prosecutor v. Milosevic*, Decision on Motion for Judgment of Acquittal, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, Case No. IT-02-54-T, 16 June 2004, para. 17; *Prosecutor v. Boskoski*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, Case No. IT-04-82-T, 10 July 2008, para. 177; *Prosecutor v. Lubanga*, Judgment, Trial Chamber, International Criminal Court, Case No. ICC-01/04-01/6, 14 March 2012, para. 537.

⁷⁴ See further, Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016) Chapter 8(I). In relation to detention in non-international armed conflict generally, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016).

5. Applying the law of treaty interpretation to international humanitarian law's detention-related provisions in light of their application to non-State armed groups

Having discussed the principal arguments against the existence of an implicit legal authority to detain, the detention-related provisions of international humanitarian law must now be examined in light of the international law of treaty interpretation, in order to determine whether implied detention authority does in fact exist. The international law of treaty interpretation requires that a treaty be interpreted in a manner capable of ensuring its intended effect.⁷⁵ Article 31(1) of the Vienna Convention on the Law of Treaties establishes that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁷⁶ This requirement is recognised as forming part of customary international law.⁷⁷ Applying this rule of interpretation is intended to ensure satisfaction of the principle of effectiveness (*ut res magis valeat quam pereat*),⁷⁸ which holds that 'a treaty must be given an interpretation that enables its provisions to be "effective and useful", that is, to have an appropriate effect.'⁷⁹ As such, '[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.'⁸⁰

⁷⁵ See, eg *Hassan v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 29750/09, 16 September 2009, para. 100.

⁷⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S. vol. 115, 331.

⁷⁷ *Case Concerning the Territorial Dispute (Libya Arab Jamahriya/Chad)*, Judgment, International Court of Justice, 3 February 1994, para. 41.

⁷⁸ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 428.

⁷⁹ Antonio Cassese, *International Law* (OUP 2005, 2nd edn.) 179.

⁸⁰ 'Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session', UN Doc. A/6309/Rev.1, (1966) Yearbook of the International Law Commission Volume II, p. 219, para. 6.

Further support for this approach to treaty interpretation may be found in the jurisprudence of the International Court of Justice. In the *Reparations* Advisory Opinion the Court was asked to determine whether the United Nations had the authority to bring an international claim. This authority was not explicitly established in the relevant treaty – the United Nations Charter – and so the court was required to determine whether an *implicit authorisation* existed. In answering this question in the affirmative the Court held that:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it *by necessary implication* as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization [...] and must be applied to the United Nations.⁸¹

This approach to treaty interpretation – typically referred to as the ‘implied powers’ doctrine⁸² - is grounded in the principle of effectiveness. Recognition of the implied powers established under the UN Charter was necessary to give effect to States’ intentions, and to ensure the object and purpose of the Charter itself.⁸³

Returning to the issue of detention in non-international armed conflict, it is apparent that neither common article 3, nor article 5 Additional Protocol II, establish an explicit legal basis

⁸¹ *Reparations for injuries suffered in the services of the United Nations*, Advisory Opinion, International Court of Justice, 11 April 1949, 182. Emphasis added.

⁸² See generally, Dr. Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 *British Yearbook of International Law*, 111 (1970).

⁸³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 25.

for detention. However, it is equally apparent that they do not explicitly preclude such a legal basis. In order to resolve this issue and to establish whether an implicit legal basis exists, the law of treaty interpretation must be applied. Two factors relevant to this interpretation are recalled.⁸⁴ First, it is unequivocal that States intended to regulate the occurrence of detention in non-international armed conflict, and that international humanitarian law obligations arising in this regard were intended to bind non-State armed groups.⁸⁵ This clear intention to regulate detention operations carried out by State and non-State armed groups may be said to constitute the ‘object and purpose’ of common article 3 and article 5 Additional Protocol II. Second, it is unequivocal that in order for detention to be lawful it must conform to the prohibition of arbitrary detention: a legal basis for that detention must exist.

Two possibilities are open: either international humanitarian law establishes an implicit legal basis for detention, or it does not and the authority to detain must be established elsewhere. If international humanitarian law *does not* establish an implicit legal basis for detention then all instances of detention by armed groups will necessarily violate the prohibition of arbitrary detention as a legal basis for armed group detention does not exist under domestic law or elsewhere in international law.⁸⁶ Yet, to interpret common article 3 and article 5 Additional Protocol II in this way is to conclude that States have developed international treaty law to regulate detention operations by armed groups, despite the fact

⁸⁴ See above Section 1, subsections A and B.

⁸⁵ See for example the discussion relating to armed group capacity issues in relation to draft Article 8 (relating to detention) of Additional Protocol II in CDDH/I/SR.32 and CDDH/I/SR.33, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-77) Volume VIII*.

⁸⁶ See above, Section 1, subsection B.

that all instances of armed group detention are illegal.⁸⁷ This interpretation is incapable of giving effect to States' intentions, and to the object and purpose of the provisions themselves.⁸⁸ As discussed above, States cannot regulate that which is absolutely prohibited,⁸⁹ and so the only means by which common article 3 and article 5 can regulate detention by armed groups is if these provisions establish an implicit legal basis for that detention.

Accordingly, an interpretation that international humanitarian law *does not* establish implicit detention authority must be regarded as invalid: 'an interpretation that renders a text ineffective and meaningless is incorrect.'⁹⁰ The law of treaty interpretation therefore requires that international humanitarian law be interpreted as establishing an implicit legal basis for detention. In light of the prohibition of arbitrary detention's requirement that a legal basis exist, this is the only interpretation capable of giving effect to States' intent to regulate detention operations carried out by both States and non-State armed groups in non-international armed conflict.

The International Committee of the Red Cross supports the existence of implicit detention authority, although their underlying legal reasoning is not clearly expressed. In a November 2014 Opinion on *Internment in Armed Conflict* the ICRC stated that:

⁸⁷ In this situation the regulation of detention would be invalid as, absent a legal basis, the detention itself would be prohibited. See above Section 3.

⁸⁸ i.e. the regulation of all instances of detention occurring in non-international armed conflict.

⁸⁹ See above Section 3.

⁹⁰ Maglosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcom D. Evans (ed.), *International Law* (OUP 2014, 4th edn.) 182.

both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC. This position is based on the fact that internment is a form of deprivation of liberty which is a common occurrence in armed conflict, not prohibited by Common Article 3, and that Additional Protocol II – which has been ratified by 167 States – refers explicitly to internment.⁹¹

To summarise, application of the law of treaty interpretation indicates that both common article 3 and article 5 Additional Protocol II must be interpreted as establishing an implicit legal basis for detention. In light of the prohibition of arbitrary detention and the application of these provisions to non-State armed groups it appears that no other interpretation is possible.

6. Searching for a way forward

The conclusion reached in Section 5 is consistent with current understandings of international law. This is not to suggest, however, that it is unproblematic, and objections from certain States may be anticipated. In order to determine a potential way forward three scenarios may be identified, the consequences of which must be explored: (a) the existence of an implied authority to detain, as established on the basis of the preceding argument, is rejected; (b) the existence of an implied authority to detain, as established on the basis of the

⁹¹ 'Internment in Armed Conflict: Basic Rules and Challenges', International Committee of the Red Cross (ICRC) Opinion Paper, November 2014, p. 7. See also, Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' (2011) 93 *International Review of the Red Cross*, 207.

preceding argument, is accepted; or (c) the prohibition of arbitrary detention is re-examined in light of its application to non-State armed groups, thereby altering the basis of the preceding argument, and raising the possibility that international law can regulate armed group detention without establishing implicit authority for that detention.

In evaluating these scenarios, and charting a way forward, a number of factors are relevant. First is the need to ensure coherence within international law. Specifically, the rules of international law should apply consistently in relation to all international activity, in order to facilitate the application of the law. With respect to the issue at hand, for example, the prohibition of arbitrary detention should apply both during and outside armed conflict, and to States and non-State armed groups. If the application of this prohibition is modified in any way, the legal basis for this modification, and how it applies, should be clearly understood.⁹² In this regard, it is particularly important that the distinct status of non-State armed groups be recognised, and that the consequences of this status vis-à-vis the application of international law be understood and effectively incorporated into the international legal system. Issues relating to the coherence of international law are discussed further in Section A below. Second, the effectiveness of international humanitarian law must be maintained. This body of law provides much needed regulation and establishes much needed protection during armed conflict. Its effectiveness, and its ability to regulate armed groups party to a non-international armed conflict, must be ensured. Third, the primary role of States within the international system must be acknowledged. In this regard, States' concerns at Geneva that the regulation of non-international armed conflict not unduly

⁹² The content of the obligation may need to be altered. For example, the prohibition of arbitrary detention may be interpreted differently during armed conflict in light of the applicable law of armed conflict.

restrict the rights of States,⁹³ not grant legitimacy to armed groups,⁹⁴ and not constitute incitement to insurrection,⁹⁵ must be accommodated. A key element in this regard was the right of States to punish insurgents in accordance with their domestic law.⁹⁶ The three possible scenarios, or ways forward, will now be examined in turn.

A. Rejecting the existence of implied detention authority

The existence of implied detention authority, as established on the basis of the argument presented in Section 5, may be rejected. This approach ensures that States remain capable of criminalising detention by armed groups at the domestic level. However, the consequences of this approach on both the coherence of international law and the effectiveness of international humanitarian law are significant.

When the application of international humanitarian law to armed groups is taken into consideration there does not appear to be a strong legal basis for rejecting the existence of implicit detention authority.⁹⁷ A decision to reject such authority accordingly runs the risk of undermining the coherence of international law by treating the regulation of non-State armed groups in an *ad hoc* manner, isolated from the application of the broader system of international law. For example, rejecting the existence of implicit detention authority is only possible if the prohibition of arbitrary detention is ignored. Yet the continued application of

⁹³ Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II Section B, France, 10.

⁹⁴ David A. Elder, 'The Historical Background of Common Article 3 of the Geneva Conventions of 1949' (1979) 11 *Case Western Reserve Journal of International Law*, 68.

⁹⁵ See, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II Section B, Greece, 11. But, see the statement of Hungary which disagreed with this proposition, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II Section B, Hungary, 11.

⁹⁶ Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II Section B, United States of America, 12.

⁹⁷ See above Section 5.

international human rights law during armed conflict is authoritatively accepted,⁹⁸ and the prohibition of arbitrary detention is regarded as both non-derogable,⁹⁹ and as forming part of the customary international law applicable to both States and armed groups.¹⁰⁰ The rejection of implicit detention authority therefore requires a certain degree of legal exceptionalism in relation to the regulation of non-State armed groups. However, such exceptionalism renders the application of international law uncertain, frustrating the ability of the international legal system to effectively respond to the reality of armed group activities and posing problems for the application of international law more broadly. These problems are perfectly illustrated by the issue at hand. As demonstrated by the *Serdar Mohammed* case, the scope of activity permitted under international humanitarian law is uncertain – posing difficulties for both States and armed groups seeking to comply with the law – and the current debate on this issue neglects the application of international law to armed groups, undermining the unity of international law. For instance, rejecting the existence of implicit detention authority appears inconsistent with the international law of treaty interpretation, raising questions as to how this component of international law should be applied in relation to armed groups.

Rejecting implicit detention authority also has potentially significant consequences with respect to the effectiveness of international humanitarian law, both at the level of affected individuals and more generally in relation to the utility and relevance of international humanitarian law itself. At the individual level, if international humanitarian law prohibits

⁹⁸ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, International Court of Justice, 19 December 2005, para. 216.

⁹⁹ Human Rights Committee, General Comment No. 29, 'States of Emergency (article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11.

¹⁰⁰ Rule 99, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (International Committee of the Red Cross, CUP 2005).

all instances of detention by armed groups, the question arises as to what will happen to individuals who would otherwise be detained. The reality of armed conflict suggests that there is an increased risk that such individuals will be executed.¹⁰¹ Equally, if armed groups do in fact decide to detain, the underlying illegality of this detention means that international law cannot then regulate the conditions of detention and the treatment of detainees. This potentially increases the risk of torture, or cruel, inhuman or degrading treatment. At a more general level, it is evident that detention forms a central component in the conduct of any armed campaign. If international humanitarian law regards detention by armed groups to be illegal, the relevance of international humanitarian law to armed groups must be questioned.¹⁰² This in turn risks undermining respect for international humanitarian law more broadly, with potential implications for fundamental rules such as the principle of distinction or the rules regulating the conduct of hostilities.

B. Accepting the existence of implied detention authority

The existence of an implied authority to detain may be accepted on the basis of the argument presented in Section 5 above. This approach both ensures the coherency of international law – it is based on a straightforward application of the international law of treaty interpretation and applies to both States and non-State armed groups – and ensures that international humanitarian law remains capable of effectively regulating the activity of armed groups party to a non-international armed conflict. It is suggested that this approach

¹⁰¹ For instance, in Mexico it was reported that vigilante groups detained suspected members of drug gangs and handed them over to the police for prosecution, but that these individuals were released a short time later. In response to this apparent lack of action, the vigilante groups stated that ‘we decided not to detain anyone anymore’. Stephanie McCrummen, ‘In Mexico, self defense groups battle a cartel’, *The Washington Post* (Washington, 10 September 2013).

¹⁰² See, eg Marco Sassoli, ‘Should the obligations of states and armed groups under international humanitarian law really be equal?’ (2011) 882 *International Review of the Red Cross*, 429.

is the one most attuned to the current state of international law, and as such arguably has the strongest legal basis. However, it does give rise to a number of concerns. First, and perhaps foremost, is the impact on States' ability to criminalise detention by armed groups at the domestic level. If implied detention authority is accepted, States cannot criminalise detention by armed groups, for instance on the basis of unlawful captivity or kidnapping, as a legal basis for detention exists under international law. Of course, States can still criminalise an individual's involvement in armed group activity, perhaps on the basis of membership of an illegal organization or treason, and can still criminalise illegal detention by armed groups. However, accepting the legality of armed group detention may be perceived by States as limiting their ability to quell an insurrection and thus as unacceptable. Second, this approach does not acknowledge the distinct international status of armed groups, and the rules of international law are applied equally to State and non-State armed groups. As discussed in section C this may not be entirely appropriate.¹⁰³

C. Re-examining the prohibition of arbitrary detention in light of its application to non-State armed groups

A third possibility also exists. The previous two scenarios, and the argument presented in Section 5, were based on the equal application of the prohibition of arbitrary detention to armed groups. Specifically, this prohibition was applied to States and armed groups in the same manner, with the content of the obligation unaltered. However, this may not be appropriate in light of the differences between these two entities. As discussed above, the

¹⁰³ See below, Section C.

existence of a legal basis for detention forms part of the prohibition of arbitrary detention, but independently establishing that legal basis is impossible for the majority of armed groups party to a non-international armed conflict.¹⁰⁴ This raises questions in relation to how the prohibition of arbitrary detention should be applied to armed groups, and whether the content of the prohibition should be altered to accommodate such groups' lack of authority to make law, which arises as a result of their distinct status under international law.¹⁰⁵

In attempting to resolve this issue reference may be made to the case law of the European Court of Human Rights. In *Hassan v. the United Kingdom* the European Court was required to apply human rights law in relation to detention occurring in the context of an international armed conflict. In international armed conflict international humanitarian law establishes a legal basis for internment,¹⁰⁶ but this is not permissible under the European Convention, absent derogation.¹⁰⁷ In light of the appropriateness of international humanitarian law to the regulation of international armed conflict, the Court held that the European Convention should be interpreted as permitting the existence of detention authority.¹⁰⁸ The content of the international human rights law obligation was thus significantly altered in light of the circumstances. Importantly, the Court held that any alteration to the content of a right must remain consistent with the 'fundamental purpose'¹⁰⁹ of the right in question. In relation to

¹⁰⁴ The majority of armed groups can not independently establish a legal basis for their activity as they do not have legislative authority. As such, any legal basis must be established under international law.

¹⁰⁵ i.e. armed groups are not States and should not necessarily be treated as such. See for instance, *Reparations for injuries suffered in the services of the United Nations*, Advisory Opinion, International Court of Justice, 11 April 1949, 179.

¹⁰⁶ See, for instance, Article 4, Geneva Convention III, Articles 42, 43, 78 Geneva Convention IV.

¹⁰⁷ Articles 5, 14 European Convention on Human Rights.

¹⁰⁸ *Hassan v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 29750/09, 16 September 2014, para. 104.

¹⁰⁹ *Hassan v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 29750/09, 16 September 2014, para. 105.

internment, and the right to liberty and security, this required ensuring the protection of the individual from arbitrariness.¹¹⁰

This approach may be applied to the issue at hand. As armed groups cannot independently establish a legal basis for their activity, the content of the prohibition of arbitrary detention, as applied to armed groups, could be altered to acknowledge this reality. In this regard it is respect for the fundamental purpose of the prohibition that is perhaps important, and not rigid application of the full content of the obligation, in a manner that treats armed groups as equivalent to States.¹¹¹ As such it is the protection of the individual from arbitrariness that should be of principal concern, and not the requirement of a legal basis.¹¹²

This suggestion is reinforced by reference to international case law which holds that, in determining whether detention is arbitrary, the existence of a legal basis is only one factor to be considered.¹¹³ In *Saadi v. the United Kingdom* the European Court held that ‘the notion of “arbitrariness” [...] extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.’¹¹⁴ Other factors relevant to a determination of arbitrariness identified by the Court include, *inter alia*, ‘an element of bad faith or deception on the part of the authorities’,¹¹⁵ whether detention conforms with the permissible grounds for detention established under international human rights law, and whether detention was necessary to

¹¹⁰ See further, *Hassan v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 29750/09, 16 September 2014, paras. 105-7.

¹¹¹ Noting that the current content of the prohibition was developed for the purposes of binding States.

¹¹² Of course, this requirement remains applicable vis-à-vis States’ detention.

¹¹³ See, Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 257-63.

¹¹⁴ *Saadi v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 13229/03, 29 January 2008, para. 67.

¹¹⁵ *Saadi v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 13229/03, 29 January 2008, para. 67.

achieve the stated aim.¹¹⁶ Similarly, in *Mukong v. Cameroon*, the Human Rights Committee stated:

The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.¹¹⁷

It is suggested that a broader understanding of arbitrariness can be applied to instances of armed group detention in order to ensure conformity with the fundamental purpose of the prohibition of arbitrary detention, while acknowledging that armed groups cannot establish a legal basis. Armed groups necessarily remain bound by the prohibition of arbitrary detention, but the content of this obligation focuses on factors such as predictability, justice, appropriateness, and so on, and not on the existence of a legal basis. Significantly, if this understanding of the prohibition of arbitrary detention is applied to armed groups, international humanitarian law can regulate detention by armed groups without authorising that detention, as armed groups can conform with the prohibition of arbitrary detention, without the need to establish a legal basis for their detention operations.

Conformity with this understanding of arbitrariness may be achieved through the promulgation of detention rules by the armed groups themselves. The development of internal rules and codes of conduct by armed groups occurs relatively routinely in

¹¹⁶ *Saadi v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 13229/03, 29 January 2008, paras. 67-68.

¹¹⁷ *Mukong v. Cameroon*, Views, Human Rights Committee, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991, 10 August 1994, para. 9.8.

practice,¹¹⁸ and the elaboration of detention-related rules on this basis may be regarded as proximate to State's establishment of a legal basis through domestic legislation, acknowledging the different legal status and authority of State and non-State entities. However, this is not an ideal solution for the simple reason that rules promulgated by different armed groups will inevitably be different. This may mean that the rules affecting an individual are somewhat arbitrary as they are dependent upon which armed group actually captures the individual, and not on a uniform standard. In the *Serdar Mohammed* case a similar problem was noted when States' detention authority is established under domestic law but States operate in multinational operations.¹¹⁹ A better approach may be to develop standards at the international level. It is suggested that the grounds and procedures applicable to detention in non-international armed conflict can be derived from existing international law, in light of the object and purpose of international humanitarian law.¹²⁰ This task could be undertaken by an entity such as the International Committee of the Red Cross,¹²¹ or through the development of international standards, perhaps by means of a UN General Assembly Declaration.¹²² The promulgation of standards at the international level would assist armed groups in conforming to the prohibition of arbitrary detention, and enable other actors – including individuals – to foresee when detention may occur and how it is regulated.

¹¹⁸ See, eg. Olivier Bangerter, 'Internal Control: Codes of Conduct within Insurgent Armed Groups' (2012) Small Arms Survey Occasional Paper No. 31.

¹¹⁹ See, *Serdar Mohammed & Others v. Secretary of State for Defence*, Court of Appeal, Case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, 30 July 2015, para. 190.

¹²⁰ See further, Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016) Chapter 8(I).

¹²¹ Broadly similar undertakings include Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (ICRC 2009).

¹²² See, eg. *Standard Minimum Rules for the Treatment of Prisoners*, and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

Adopting the approach presented in this scenario has a number of benefits. First, the coherence of international law is maintained. Instead of being regulated in an *ad hoc* manner – resulting in exceptionalism and uncertainty – armed groups are incorporated into a unitary international legal system. Although the content of the prohibition of arbitrary detention is slightly adapted in light of its application to armed groups, the application of the prohibition is consistently applied. This adaptation of content is a feature of international law, and occurs for example, in relation to the co-application of international human rights law and the law of armed conflict.¹²³ Second, the effectiveness of international humanitarian law is maintained, as international humanitarian law can continue to regulate armed group detention, while remaining consistent with the requirements of international law more generally. This means that international humanitarian law remains relevant to armed groups, as they can conduct detention operations within the limits established by international law. Indeed, encouraging armed groups to promulgate detention rules, or to adhere to international rules developed specifically for armed groups, may have the effect of encouraging compliance more broadly. Finally, as international law does not authorise armed group detention (through the establishment of a legal basis), but instead regulates it should it occur,¹²⁴ States can criminalise detention by armed groups at the domestic level. This may seem unfair from the perspective of armed groups. However, this is consistent with the current law of non-international armed conflict, as demonstrated by the fact that members of armed groups do not enjoy immunity from prosecution for legitimate acts of

¹²³ *Hassan v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 29750/09, 16 September 2014, para. 104; *Coard et al v. United States*, Decision, Inter-American Commission on Human Rights, Case 10.951, 29 September 1999, para. 42.

¹²⁴ A legal basis is not required as armed groups can conform to the prohibition of arbitrary detention, without establishing a legal basis. This is only possible if the prohibition of arbitrary detention is interpreted as excluding the legal basis requirement when applied to armed groups. If it is not, regulation requires authorisation, as discussed above in Section 3.

war. Furthermore, it is perhaps unrealistic for armed groups to expect States to provide legal support for their efforts to overthrow the State.¹²⁵

Of the three scenarios, this approach is perhaps the most appropriate. It has the potential to ensure the coherent application of international law, to acknowledge the distinct status of armed groups, and to accommodate States' desire to prosecute armed group activity. However, this approach will require further acceptance at the international level, and an acknowledgment that the content of obligations can be adapted in light of their application to armed groups. This adaptation is appropriate in light of the distinct status of armed groups, and is by no means a radical suggestion. In fact, it is entirely consistent with existing approaches to the context-dependent application of human rights law, for instance in relation to States' extraterritorial human rights obligations,¹²⁶ or the co-application of international human rights law and the law of armed conflict.¹²⁷

7. Conclusion

This article has analysed the existence of an implicit authority to detain in non-international armed conflict in light of international humanitarian law's application to non-State armed groups. Applying the international law of treaty interpretation to the detention-related

¹²⁵ In this regard it is suggested that a key issue in relation to armed group compliance with international law is whether international law is appropriate to the reality of armed groups, and not whether armed group conduct is criminalised under national law.

¹²⁶ See, *Al-Skeini v. The United Kingdom*, Judgment, European Court of Human Rights, Application No. 55721/07, 7 July 2011, para. 137.

¹²⁷ *Hassan v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 29750/09, 16 September 2014, para. 104; *Coard et al v. United States*, Decision, Inter-American Commission on Human Rights, Case 10.951, 29 September 1999, para. 42.

provisions of international humanitarian law results in the conclusion that international humanitarian law must establish implicit detention authority. No other conclusion is capable of giving effect to the object and purpose of these provisions, namely the regulation of detention occurring in non-international armed conflict. This analysis is predicated on the prohibition of arbitrary detention, which requires that a legal basis for detention must exist, and the fact that international law cannot regulate a situation that is absolutely prohibited.

In light of this conclusion three possible scenarios arise: (a) the existence of implicit detention authority may be rejected, (b) the existence of implicit detention authority may be accepted, or (c) the content of the prohibition of arbitrary detention may be reconsidered in light of its application to non-State armed groups, resulting in the possibility that international law can regulate detention without requiring that such detention be authorised.

It is suggested that the straightforward rejection of implicit detention authority is inappropriate. As discussed above, this approach is inconsistent with current understandings of international law, and furthermore undermines both the coherence of international law and the effectiveness of international humanitarian law.

Acceptance of implicit detention authority has the benefit of ensuring the coherence of international law and the effectiveness of international humanitarian law. This approach is based on a straightforward application of current international law. However, the existence of implied detention authority may be unpalatable to States as it will restrict their ability to criminalise armed group activity. If international law authorises detention in non-

international armed conflict, detention by armed groups cannot be criminalised at the domestic level. This approach also fails to fully acknowledge the distinct status of armed groups. Although it is unquestionably an improvement on the rejection approach, it does not adapt the content of armed groups' obligations in light of the restrictions associated with their legal status.

The third approach re-examines the content of the prohibition of arbitrary detention in light of its application to armed groups. It suggests that this prohibition cannot be applied to armed groups in exactly the same manner as States as a result of armed groups' distinct legal status and the fact that they cannot establish a legal basis for their detention operations. Accordingly, the content of the obligation may be adapted such that 'arbitrary' is understood more broadly, in a manner consistent with the fundamental purposes of the prohibition, but without requiring a legal basis. This approach appears to present a number of clear benefits. It has the potential to ensure the coherent application of international law, to maintain the effectiveness of international humanitarian law, to acknowledge armed groups' distinct status, and to facilitate States' criminalisation of armed group activity. Furthermore, this approach may pave the way for the more effective integration of armed groups into the international legal system, and may facilitate the resolution of other issues that are likely to arise, such as those relating to the international human rights law prohibition of arbitrary killing and whether international humanitarian law establishes implicit authority to kill in non-international armed conflict.

Irrespective of the approach taken, it is clear that international law must pay greater attention to the role of armed groups and how they are regulated. The international

regulation of armed group activity should not be undertaken in an *ad hoc* manner, based on exceptionalism. Increased clarity is also required vis-à-vis the regulation of detention in non-international armed conflict. The current lack of clarity means that States and armed groups seeking to comply with international law are not necessarily able to do so, as demonstrated by the *Serdar Mohammed* case in the United Kingdom. It is suggested that existing international law, taking note of the object and purpose of international humanitarian law, can be used to establish the required regulatory regime.¹²⁸ Further work is clearly required in this regard, and is indeed necessitated by the international human rights law requirement that a detainee be able to effectively challenge the legal basis for their detention.¹²⁹

¹²⁸ See further, Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016) Chapter 8.

¹²⁹ See, eg Article 9(4) International Covenant on Civil and Political Rights; Article 5(4), European Convention on Human Rights.