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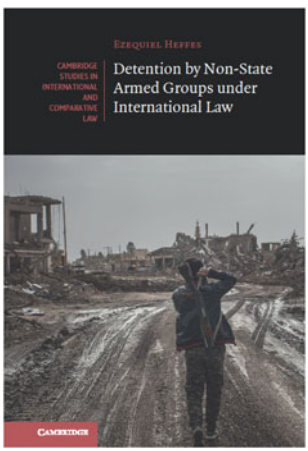
BEYOND THE LITERATURE



Detention by Non-State Armed Groups under International Law

By Ezequiel Heffes*

In "Beyond the Literature", the Editorial Team of the *International Review of the Red Cross* selects a recently published volume in the field of humanitarian law, policy and action and convenes a discussion on the book among experts, in an effort to foster constructive engagement on some of the most promising recent literature in the field.

In this iteration of the Review*'s "Beyond the Literature" series, we have invited Ezequiel Heffes to introduce his recent book* Detention by Non-State Armed Groups under International Law, *before then posing a series of questions to Tilman Rodenhäuser, René Provost, Mariana Chacón Lozano and Katharine Fortin, who have agreed to serve as discussants of the book. Tilman Rodenhäuser is a Legal Adviser at the International Committee of the Red Cross (ICRC), with*

* Published by Cambridge University Press, Cambridge, 2022. Discussion conducted by Bruno Demeyere, Editor-in-Chief of the *Review*.

particular expertise in non-State armed groups (NSAGs) and detention. René Provost is the James McGill Professor of Law at McGill University and has written extensively on public international law, including his recent monograph Rebel Courts: The Administration of Justice by Armed Insurgents.[1] *Mariana Chacón Lozano has served as the Operational Legal Coordinator for the ICRC in Colombia since October 2020 and has worked for the ICRC since 2011. Katharine Fortin is Associate Professor at the Netherlands Institute of Human Rights within the Faculty of Law, Economics and Governance of Utrecht University. The* Review *team is grateful to all four discussants, and to Ezequiel, for taking part in this engaging conversation.*

Keywords: non-State armed groups, international humanitarian law, detention, Beyond the Literature, non-international armed conflict.

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Ezequiel, what motivated you to write this book? What message does the book convey?

Ezequiel Heffes: First of all, I would like to express my gratitude to the *International Review of the Red Cross* and its team for the opportunity to discuss my book *Detention by Non-State Armed Groups under International Law*. I would also like to thank Katharine Fortin, Tilman Rodenhäuser, Mariana Chacón Lozano and René Provost for their reflections and thoughtful comments.

The inception of this book, which is based on my PhD at the University of Leiden, can be traced back to over a decade ago. I had my first opportunity to discuss the role of NSAGs in armed conflicts and their regulation under international law when I was preparing to participate in the 2011 Jean-Pictet Competition. At the time, the landscape of research pertaining to these entities and their legal status and activities within the international legal framework remained relatively uncharted, despite their increasing involvement in armed conflicts worldwide. Except for in a handful of specialized studies, NSAGs were, for the most part, relegated to general discussions within international humanitarian law [IHL] literature in chapters focusing on non-international armed conflicts [NIACs]. This situation has undergone a significant transformation since 2010, and the last few years have seen an exponential proliferation of literature focusing on NSAGs in different ways.[2]

The legal regulation of detention by NSAGs was an especially ripe and front-of-mind topic in 2014. At the time, I was working for a humanitarian organization that engages parties to armed conflict on various issues, including

1 René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, Oxford University Press, New York, 2021.

2 See, for example, thematic issue on "Non-State Armed Groups", *International Review of the Red Cross*, Vol. 102, No. 915, 2022, available at: https://international-review.icrc.org/reviews/irrc-no-915-non-state-armed-groups (all internet references were accessed in September 2023).

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on those related to detention and treatment of detainees, when the first *Serdar Mohammed* decision came out.[3] That same year, the ICRC also released its policy paper entitled *Internment in Armed Conflict: Basic Rules and Challenges*.[4] Both presented contrasting views regarding the legal basis to deprive individuals of their liberty in NIACs. I found myself grappling with fundamental questions: what would be an appropriate response if an NSAG's commander were to inquire about the legal basis to detain individuals, especially enemy fighters? How would I respond if a detainee in the hands of an NSAG asked about the legality of their detention? Was there a basis under IHL that could authorize such activity, or could NSAGs invoke a different legal framework to justify their actions?

This book addresses these queries based on a doctrinal study of normative and jurisprudential developments related to NSAGs' detentions within the various branches of international law, as well as an assessment of different means used by these entities to express their views, and selected case studies. It proposes that IHL and, on certain occasions, international human rights law [IHRL] oblige NSAGs not to arbitrarily deprive individuals of their liberty, that NSAGs must have a legal basis to undertake these activities, and that said basis is to be found in those laws and regulations adopted by the group itself, should these be respectful of international law. Alternatively, an NSAG might, for example, adapt the territorial State's domestic law or conclude an agreement with that same State or an NSAG that it is fighting against. These sources could allow NSAGs to potentially respect their obligations in the field of detention, including the principle of legality, addressing in tandem the various types of detention that NSAGs carry out in NIACs.

The book should be seen as practice-driven, as it tackles some of the recurring scenarios observed in the battlefield when NSAGs detain and proposes practical solutions and guidelines to increase the protection effected by these non-State entities in conflict settings.

Discussants, do you share the book's primary premise that NSAGs should be allowed to rely on their own norms to prevent the arbitrariness of their detention activities under international law?

Tilman Rodenhäuser: Before answering the question, I would like to congratulate Dr Heffes for having completed a book that treats a highly relevant subject, combines thorough legal analysis with case studies and strives to provide solutions.

At the ICRC, our most recent estimate is that over 100 armed groups hold detainees.[5] The reality we see is diverse, ranging from a handful of people detained for alleged crimes and held in a town under the armed group's control, all the way to

3 UK High Court of Justice, *Serdar Mohammed v. Ministry of Defence*, Case No. HQ12X03367, 2 May 2014.
4 ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, opinion paper, Geneva, November 2014, available at: www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges.
5 For a recent ICRC study on this subject that combines a restatement of the IHL rules applicable to detention by NSAGs and a selection of practical measures for how they can be implemented, see ICRC, *Detention by Non-State Armed Groups: Obligations under International Humanitarian Law and*

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thousands of "enemy" soldiers detained in prisons. Heffes' law- and practice-based analysis of this subject is thus welcome and needed.

Coming back to the question on the book's primary premise, my answer is a qualified yes. In my view, there are two sides to this answer. On the one hand, and as I will explain further below, IHL does not prohibit NSAGs from relying on their own laws or norms when detaining people in relation to an armed conflict; in fact, it may be argued that they must have laws or norms in place to comply with IHL if they detain. On the other hand, there are limits on the content of such laws, some of which I will come back to below.

In his book, Heffes looks at two types of detention that are explicitly mentioned under IHL treaties and commonly occur in practice: "criminal detention", meaning the detention of a person who is suspected of having committed a crime, is awaiting trial or sentencing, or has been convicted of a crime; and "internment", which refers to detention for security reasons in situations of armed conflict.

If we look at the question of which laws NSAGs are allowed to rely on in the context of criminal detention, our starting point should be the penal law principle, explicitly found in IHL, that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed".[6] Thus, if an NSAG conducts a trial, it may only convict for a crime as defined under the law as it applied at the time the alleged crime was committed. Heffes rightly explains that IHL does not specify which "law" an NSAG may apply when conducting criminal trials. Based on the wording of Additional Protocol II to the Geneva Conventions [AP II] and its drafting history, the ICRC supports the view that NSAGs can conduct trials based on the law of the State in whose territory they operate or a law adopted by an NSAG, provided this law is in compliance with international law.[7] This view reflects the reality of the past decades: in practice, NSAGs have continued to

Examples of How to Implement Them, Geneva, 2023, available at: www.icrc.org/en/document/detention-non-state-armed-groups.

6 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 6(2)–(4); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 101, available at: https://ihl-databases.icrc.org/en/customary-ihl.

7 See also ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), para. 728. Note that the English version of Article 6(2)(c) of AP II speaks of "law", unlike the French version, which speaks of "domestic and international" law. As the ICRC Commentary of 1987 explains: "The possible co-existence of two sorts of national legislation, namely, that of the state and that of the insurgents, makes the concept of national law rather complicated in this context": see Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), para. 4605. This view was supported by States during the negotiations and subsequently. See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Additional Protocols to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, pp. 746–747, para. 2.7; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 561. See also ICRC Commentary on GC III, above, para. 728.

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apply the criminal law already in place prior to the conflict – at times with certain changes – but have also developed new criminal law defining crimes and sentences, often modelling such laws on the laws of third States or laws accepted in the region in which they operate.[8]

This being said, additional questions arise, especially on how a law is adopted and promulgated, and whether an NSAG would be at liberty to adopt laws that reflect its interest or ideology but infringe on the protection and rights that international law provides for people (Heffes discusses some of these laws on pages 183–184 of his book). On the latter point, the least that must be stressed is that such laws must not violate IHL, for instance by discriminating in the application of law against certain groups or "authorizing" punishments prohibited under IHL. A more challenging question is whether it could ever be legally permissible for an NSAG to adopt and enforce laws that restrict the human rights of people living in territory under its control if such rights are protected under international law treaties binding on the territorial State.

The legal analysis is different when we consider "internment", to which penal law principles such as *nullum crimem sine lege* do not apply. As Heffes examines at length, the ICRC's view is that IHL contains "an inherent power to detain in non-international armed conflict. However, additional authority related to the grounds and procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in keeping with the principle of legality."[9] Thus, to avoid that internment turns into arbitrary detention, meaning people being interned for vague reasons and without procedural safeguards, grounds and procedures for internment must be established by the NSAG leadership in a set of rules that are respected by NSAG members and enforced by the NSAG's internal disciplinary system. In other words, NSAGs must provide grounds and procedures for internment in rules that are considered binding by all members, which could be their laws, rules, code of conduct, general orders or similar instructions.[10] Importantly, the grounds and procedures defined in such rules must not be a "fig leaf" for arbitrary detention but must limit internment to cases in which such detention is necessary for imperative reasons of security and for which procedural safeguards are in place.

Katharine Fortin: Yes, I think that this part of the book is very well reasoned. I share the view that there is no legal basis for parties to detain in treaty or customary IHL that applies to NIACs. Although I see why some people have said that the treaty law recognizes a "power" to intern, I have never been sure what the word "power" means in this context – in fact, I have increasingly become convinced that it is a word carrying very little legal consequence, especially since most parties who use it agree that an "additional authority" is needed for the grounds and process of the detention. In this sense, I agree with the book's primary premise that in order

8 See ICRC, above note 5, p. 59.
9 ICRC Commentary on GC III, above note 7, para. 765.
10 ICRC, above note 5, pp. 55–56.

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for detention by armed groups to be lawful, it is necessary to identify some kind of other external legal rule to justify it, such as the pre-existing law of the State, or the armed group's own domestic law.

While some scholars may (still) find this a rather radical prospect, the book convincingly argues that there are good reasons for this position. The first set of reasons are legal, the strongest being indications that the drafters of Article 3 common to the four Geneva Conventions [common Article 3] and AP II were well aware that armed groups could have their own laws and would rely upon them in certain circumstances. The second set of reasons are pragmatic. As the book points out, there is very often a working set of laws in force in armed group territory, and it makes a lot of sense to say that they have to be relied upon. Otherwise, one ends up with the ironic situation in which it is the international legal framework itself that turns these spaces into Hobbesian lawless zones, even though a wealth of empirical research has long recognized that this is far from being the case on the ground. There is, however, one point on which Ezequiel will need to convince me a little: while I agree that there is evidence that civilians can benefit from laws being in place, those laws being known, and armed actors relying upon them in their daily interactions with the civilian population, I am not sure that I would go so far as to say that armed groups should be encouraged to pass laws. I find this quite a radical prospect, and I do wonder whether there could be merit in exploring alternative suggestions – for example, the use of model criminal codes, like in Syria, where the Unified Arab Code was employed in some areas.

René Provost: I think that it is very difficult to challenge the soundness of the premise of the book that armed groups can invoke their own legal standards as the basis for detention in conflict zones. One of the many merits of this very good book is that it starts from an acknowledgement that there is a significant body of detention practice on the part of NSAGs, a reality that States engaged in hostilities against such groups have been keen to systematically hide from view or, alternatively, to recast as kidnapping aimed at extortion or reflecting arbitrary brutality. Indeed, States most often reach for the label of terrorism to characterize the nature and actions of insurgents in armed conflicts, a stance that forestalls any possibility of discerning between lawful and unlawful detention at the hands of such groups. Despite the admittedly fluid definition of terrorism in international law, lawyers should resist this reductive move to the semantics of terrorism and should try to ascertain more closely and discerningly the practice of each specific group in a given conflict. As Heffes notes, it is not at all unusual for armed groups to deploy forms of public governance in areas under their authority. Thus, insurgents become providers of public goods like education, health, security, environmental protection, justice, and many more. Such public governance may or may not be carried out by formal institutions established by armed groups, but the nature of these public services does call for normative structuring.

Detention, the focus of this book, thus demands a set of rules that will determine the circumstances justifying detention and the conditions under which it

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will take place. It is possible that an armed group will simply apply State law, as some of the rebel groups did in the NIAC in Syria. Alternatively, rebels may apply international law, as the Farabundo Martí National Liberation Front did in El Salvador; local customs, as the Revolutionary Armed Forces of Colombia – People's Army [Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP] did in Colombia; foreign law, as the Liberation Tigers of Tamil Eelam partly did in Sri Lanka; or religious law, as the Taliban and the so-called Islamic State of Iraq and Syria did in Afghanistan and Iraq. Importantly, groups will sometimes elect to legislate their own laws that align with the ideology fuelling the insurgency. I would query Heffes' tendency to put "law" in scare quotes when referring to rebel law in the book; much of the world operates largely on the basis of law that does not owe its authority to the State but rather comes from customs and practices, and it is unremarkable to acknowledge that this may be the case for NSAGs as well.

The book argues that detention activities by NSAGs are better understood when categorizing these actors in ideal types (de facto authorities, armed opposition groups and militias). According to the author, this could serve to predict how similar types of groups operate. Do you agree?

Mariana Chacón Lozano: First, I'd like to congratulate Dr Heffes for the thorough research and analysis reflected in his book, which, while combining theory and practice, endeavours to propose ways forward on a subject that is of great importance for the protection of people affected by armed conflicts, particularly those detained by NSAGs.

To answer the question, I agree, though with a caveat. I understand that proposing a categorization of NSAGs would not only serve the pragmatic purpose set forward by the author – that is, predicting how similar types of groups operate – but would also address Heffes' concern about a State-centric view of international law where all non-State actors are defined only in opposition to States. This is very valuable in and of itself, taking into consideration the realities of NIACs. In addition, as a matter of practice, I do believe that grouping NSAGs based on their characteristics does help us to adopt parameters within which obligations and messaging can be adapted and transmitted more effectively.

Nonetheless, I would argue that basing this characterization not only on the "extent [that NSAGs] exert control over territory and population … and [their] internal organizational structures" but also on "their objectives"[11] may play against the desired effect of finding more effective ways to ensure that NSAGs respect IHL. Experience has taught me that the line is blurrier than described by Heffes, particularly between "militias" and "armed opposition groups", even more taking into consideration that during protracted armed conflicts, an NSAG's objective or structure may change rapidly. This has happened in Colombia between 2017 and 2023, as most of the five NSAGs classified by the

11 *Detention by Non-State Armed Groups under International Law*, p. 64.

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ICRC as parties to seven NIACs[12] have adapted both their structures and their motivations to position themselves as best as possible vis-à-vis the Colombian government and other NSAGs. To provide a specific example, the Autodefensas Gaitanistas de Colombia, an NSAG linked to paramilitary origins[13] and therefore likely defined by Heffes as a "militia", possesses a structure, dynamic and behaviour that would be more adequately described within the realm of "armed opposition groups". The group has been classified by the ICRC as a party to two NIACs, one against the State and another against an NSAG, the National Liberation Army.

Heffes does recognize that these issues exist,[14] but I think more attention could be paid to the potential unwanted negative incentives that the categorization according to "motivations" could create. Often, both State and non-State actors link the existence of an armed conflict to an armed group's (political) objectives, bringing the "legitimacy" argument to the table, hence challenging the application of IHL in situations where such political objectives are not existent or not clear.

Therefore, while I agree that a certain categorization of NSAGs is useful for approaching their obligations under IHL, from a legal point of view I'd recommend staying away from using the motivation or objectives of the group in such categorization, without denying that both factors could be useful for determining how to approach such groups, engage in dialogue, and make their obligations understood and resonate with them.

Finally, it's important to highlight that even if we categorize NSAGs into "ideal types", the IHL obligations binding such groups are the same for all three types. At the same time, when proposing to call on NSAGs to respect IHRL as a matter of policy, the question remains as to which IHRL responsibilities would be demanded from which type of armed group. In my view, for this assessment a categorization as proposed by Heffes has particular value.

Katharine Fortin: Yes, I think that there is certainly merit to this, particularly when considering issues relating to compliance. To an extent, the typology adopted by the book mirrors the typology that is encouraged by the legal framework itself, which distinguishes between two thresholds of NIACs: common Article 3 and AP II. Common Article 3 applies to groups fighting in opposition to the government (what Heffes calls "armed opposition groups"); AP II adds to those obligations, when armed groups control territory, and applies to what Heffes calls "*de facto* authorities". Heffes adjusts this typology a little bit, for example by adding an

12 ICRC, *Colombia: Retos Humanitarios 2023*, March 2023, available at: www.icrc.org/es/document/colombia-retos-humanitarios-2023. The ICRC has classified seven NIACs in Colombia: three between the State and NSAGs, and four between NSAGs.

13 Luz Ángela Domínguez Coral, "¿Cuál es el origen de las Autodefensas Gaitanistas de Colombia?", *El Tiempo*, 28 June 2023, available at: www.eltiempo.com/justicia/conflicto-y-narcotrafico/cual-es-el-origen-de-las-autodefensas-gaitanistas-de-colombia-781574.

14 *Detention by Non-State Armed Groups under International Law*, p. 64.

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extra "militia" category, which divides the traditional common Article 3 category into two subcategories. This typology is useful because the more that is known about the relationship between compliance and the organizational features of armed groups, the better. I think the use of such a typology could serve to predict how similar types of groups will operate or what can be expected of certain groups, in functional or operational terms – but there are limits to the extent to which this kind of typology can predict a group's compliance with IHL. Research has long shown that there are many other factors driving a group's compliance, such as ideology, funding, culture, religion, relationship with the civilian population, military strategy, and the cultural and political environment out of which the group has emerged. These factors are not captured by this typology.

The "militia" category, also referred to as paramilitary groups, self-defence groups and vigilantes, may need a bit more thought. In particular, I would caution against placing groups fighting on the side of the State and groups fighting independently against the State in the same category. It might be sensible to keep groups fighting *on the same side as the State* in a separate category of their own, due to the special considerations that need to be weighed when determining whether they have independent legal personality and the need to take into account the group's relationship with the State when thinking about compliance. It is noted that the Alliance of Patriots for a Free and Sovereign Congo [Alliance des Patriotes pour un Congo Libre et Souverain, APCLS] – a "militia" that is the subject of a case study in the book – is a group fighting against the government, so these issues do not arise in this case.

René Provost: Jurists toil under the empire of legal categories. The very architecture of legal discourse demands that arguments be constructed by placing claims in identified boxes to which are tied particular catalogues of rights and obligations. The nearly irrepressible urge of lawyers, as architects of social structures, to create and invoke categories is not, however, without its dangers. It is important to keep in mind that while categorizing can regulate, it is an operation that demands a degree of violence to suppress the ineluctable variety that subsists within any class of thing: it foregrounds some facets while erasing some others.

All of this is a roundabout and admittedly obscure way of saying that I am somewhat sceptical of the categories of NSAGs put forward by Heffes in his book. He identifies three ideal types under which to classify the detention practices of armed groups: *de facto* authorities, with effective control over a territory and population; armed groups, with a somewhat lower degree of control; and militias, which do not control territory. We see that the idea of control over territory is the central differentiating criterion among these three categories. Both the notions of "control" and "territory" are ones that we international lawyers tend to use constantly, but without critical interrogation. Other fields like human geography have much to offer to our discipline in this regard, in terms of explaining how the idea of territory is distinct from that of land or geography; indeed, we can understand the concept of territory as incorporating notions of control or administration. Heffes is aware of this challenge and admits that the

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typology is made difficult by the incompleteness of the available data with respect to any given armed group, and by the fluidity in the structure and practice of armed groups over time and place.

We might see in the typology a reflection of the "not-a-cat syndrome" articulated by Philip Alston and mentioned in the book: we tend to define non-State actors by the extent to which they are not States, rather than defining them on the basis of parameters that reflect their own nature. As much as we admit that there is no Montevideo Convention for NSAGs, we still grasp at territory as a defining feature of any legally significant entity in international law. Heffes offers case studies corresponding to each ideal type: the Kurdish Autonomous Administration of North and East Syria [AANES] as a "*de facto* authority", the FARC-EP in Colombia as an "armed opposition group", and the APCLS as a "militia". I am familiar with the first two for having done case studies of their justice practices, much less so with the third one, and I struggle to align in any neat fashion the AANES and the FARC-EP respectively with the first two categories. These two groups, in a fashion that is frequently observed, display a pattern of effective authority that does not mirror that of States. The territory is most often under a degree of shared authority, not only in "rebel areas" but even in government areas. Just as the State rarely vanishes altogether from areas under rebel control, armed groups are often able to effectively project effective authority in areas under government control. For example, the first stage of the Taliban takeover of a government district in Afghanistan involved the Taliban deploying its own judges, in a manner that was far from meaningless despite not being supported by anything like "control" over the area.

The danger posed by the typology suggested by Heffes is that we reject State denialism of rebel governance only to recreate it along different lines. The alternative is a fuzzier, messier approach that grapples with the factual uncertainties of armed insurgency in order to apply legal standards in a tailored manner that is a neater fit to the reality on the ground and the humanitarian needs of victims of war.

Heffes proposes a series of minimum humanitarian principles applicable to situations of detention by NSAGs, based on some selected case studies. What is your opinion of this proposal? To what extent are these principles reflected in the practice of NSAGs already?

René Provost: It seems very important to assert, as Heffes does in his book, that any detention carried out by NSAGs ought to be governed by minimum humanitarian principles. This is so primarily because to deprive an individual of their liberty amounts to a violation of a fundamental right protected under both IHL and IHRL, often placing that person in a position of extreme vulnerability in which several other fundamental rights may be violated; as a result, this is a situation that must be regulated under international law. A set of minimum humanitarian principles is also justified because when an armed group detains an individual, either as part of a criminal accountability process or as a security-related internment, it very often makes a particular claim of authority reflecting

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collective interests inscribed in law (broadly defined). Whether the law in question is State law, international law, religious law or rebel law, the invocation of legal authority amounts to a decision-making process grounded in pre-existing norms applied in a fair manner. What a fair process corresponds to depends on the nature of the process to which this idea is applied: what is fair in a labour arbitration, in a divorce proceeding before a religious tribunal, in a civil liability class action in State court or in a criminal prosecution before the court of an armed group in a conflict zone will necessarily correspond to different standards reflecting the institution, the parties, the law and the context.

Heffes in his book offers a list of basic principles that seems largely derived from Article 75 of Additional Protocol I, Article 6 of AP II and Article 14 of the International Covenant on Civil and Political Rights. I have carried out a similar exercise with respect to the administration of justice in rebel courts more broadly, and while I might diverge in some of the details of what standards govern detention by armed groups, I fully agree that this is an important and neglected conversation that must include academics, States, humanitarian actors and also armed groups themselves. As Heffes notes, we have not articulated clear demands under law in this respect, so it is not surprising that the practice of NSAGs to a large extent does not yet reflect the proposed list of minimum standards.

Tilman Rodenhäuser: Honestly, I am in two minds about the proposal. Heffes must be commended for thinking about how to turn his strong analysis of international law and practice into something that can be implemented by NSAGs or used by humanitarian actors that engage with these groups.[15] The "basic principles" that Heffes sets out are useful; in fact, many of them reflect long-standing rules of IHL or legal policy proposals by humanitarian organizations, such as the ICRC, which should be "disseminated" among NSAGs.[16] In the set of principles presented by Heffes, this applies in particular to principles 1–8, which address criminal law detention and internment. However, drawing up a practical list of "basic principles" also comes with dilemmas. I do not have the solution to them, and I am sure Heffes did balance the advantages and disadvantages that he saw, but I think it is worth flagging two.

Firstly, given that some parts of IHL rules on the protection of detainees in NIACs, in particular on grounds and procedures for internment, are not sufficiently elaborate in all aspects, drawing up a list of relevant principles will likely combine law and policy. The downside is, however, that Heffes does not clarify which of the "basic principles" in his list reflect law – and a number of them do – and which reflect standards commonly used in operations but that are not legally binding. No doubt, from a humanitarian point of view, all of them "should" be followed, and one may argue that for some groups, it does not make a difference

15 For a set of rules contained in a "pocket card" on "The Treatment of Detainees" that was recently produced by the ICRC, see: https://shop.icrc.org/treatment-of-detainees-print-en.html.

16 See, in particular, Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, 2005.

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what the source of each principle is. But from a legal point of view, it is very important to know which ones "must" be complied with, including violations of which ones amount to war crimes.

Secondly, whenever we aim to be concise and present a short list of principles, we almost inevitably omit others. When I look at the list produced by Heffes, I would have, for example, recommended being more explicit on the IHL obligations on the treatment of detainees, such as the prohibition of torture and other forms of ill-treatment (I am sure Heffes subsumes that under the imperative of humane treatment). In reality, this is a huge challenge seen by ICRC delegates in too many places of detention, be they run by State or non-State parties to armed conflicts; and legally, this is one of the most fundamental rules on the protection of detainees. Similarly, I would have expected to see an explicit requirement to record the personal details of detainees, which is a legal obligation of all Detaining Powers and is significantly important for preventing disappearances.[17] Instead, Heffes includes the requirement to hold detainees in "recognized places of detention", which raises the question of what such a "recognized place of detention" is when we consider detention by NSAGs, not all of which hold detainees in official places of detention.

Katharine Fortin: I think there is a lot of value in identifying a set of principles like this, and I notice that there is considerable overlap between these principles and the overview of detention rules presented in the recent ICRC report *Detention by Non-State Armed Groups*.[18] However, when I read a set of principles like this I immediately start thinking about what has been left out, especially when the principles are quite detailed but also quite short. I notice, for example, that Article 9 says that detainees shall be provided with floor space, food, drinking water, clothing and adequate measures of health and hygiene, but it says nothing about shelter or the need for the location of the detention to be far from the combat zone (provisions found in AP II and the commentary to common Article 3). Likewise, principles 7 and 8 pertain to fair trial rules, but list only some of them; the right to examine witnesses and the right to a public judgment, for example, are left out. Noticing these small omissions makes me curious about the exact basis on which these principles have been drafted, especially considering that some of the principles – for example, those on the conditions on detention – do not emerge from the research in the book itself, which does not explicitly focus on this legal aspect.

As for the question of whether these principles can be observed in the practice of NSAGs, the book makes clear that the answer will never be "yes" or "no". There are many examples of some of these rules being violated by armed groups, but examples can also be found of measures taken by armed groups to comply with some of these rules. The ICRC report just mentioned is particularly informative in that respect, as it provides details of measures taken by different

17 See AP II, Art. 5(2)(b); ICRC Customary Law Study, above note 6, Rule 123.
18 ICRC, above note 5.

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armed groups to fulfil some of these obligations and prevent, oversee and punish their violation.

Which of the book's chapters or arguments did you find most illuminating, and why?

René Provost: The argument in the book is very well researched and presented, so I find it difficult to identify one chapter or argument that is more illuminating than the whole. I would simply offer two thoughts. First, as noted in the first question, Heffes makes a clear and compelling argument that it must be accepted under international law that detention can be grounded in the law of NSAGs. It is important to challenge the necessary association of law and the State in order to broaden our notion of legal normativity; if we do not do so, we deprive ourselves of the tools necessary to effectively speak to the behaviour of armed groups when they detain individuals, in order to avoid the risk that any possible critique of rebel detention practices will be reduced to the blanket condemnation of such detention.

The second point is a methodological one. Heffes has made an effort to ground the legal analysis offered in the book in a series of specific case studies assessing the detention practice of armed groups, including an analysis of the legal standards invoked by these groups in justifying and regulating detention. This is a new model for research in international law, integrating some dimensions of ethnography that have been central to sister disciplines like sociology and anthropology for a very long time. Reading the book, one feels that the rubber hits road when the somewhat abstract legal analysis meets the harsh reality of armed hostilities. After all, as humanitarian lawyers, we aim first and foremost to improve protection on the ground for victims of war. Too often academic writing in the field remains, as it were, "academic" – that is, disconnected from the reality of implementation. I might have suggested to Heffes that he incorporate these case studies much earlier in the book so that they could inform the analysis in real time, but the key point is to make the connection to reality on the (battle)ground.

Katharine Fortin: All the chapters of the book are very illuminating, so it is hard to pick one. I think the most illuminating chapter is the one that contains the case studies, because it sheds important light on armed group practice through the interviews conducted by the author. So many international law monographs employ purely desk-based research, so the interviews that Heffes conducts need to be commended. They provide vital and fascinating insights into armed groups' detention practices, procedures and motivations, showing also how these change over time. We need more research like this!

The analysis in this chapter supports the adoption of a typology of "detainees" for armed groups that is based on practice. It also sheds light on how the various groups see and use the various legal frameworks – that is, international law and their own laws. It shows that armed group practice is far from uniform in this regard, and may be difficult to predict. An example is seen

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in the different ways in which different non-State armed groups treat captured fighters, with the less organized among them using the term "prisoner of war".

Mariana Chacón Lozano: Rather than a specific chapter, I was very drawn towards the argumentative connections made between the position of NSAGs in international law and the concept of "legal combative pluralism" to assert that NSAGs' own "laws" can be considered as the legal basis for their actions in order to fulfil the requirements imposed by IHL not only in criminal law procedures but also in other instances. While I find this approach bold and innovative, I do see some concerns.

As an operational legal adviser in Colombia, I can directly see how the issues developed by Heffes in this book are extremely relevant for our humanitarian work. The ICRC in Colombia has direct dialogue with all NSAGs classified as party to the seven NIACs in the country,[19] as well as with other armed groups. As all the NSAGs conduct detention activities, both criminal and internment, the ICRC does use IHL to convey messages on a case-by-case basis regarding respect of IHL obligations on humane treatment and conditions of detention. It is true that discussions about procedural safeguards are more challenging than the topics already mentioned; however, they do occur in cases where trust is stronger and such discussions are appropriate in the context of our dialogue.

As none of the five NSAGs have "recognized places of detention", this dialogue is often conducted during field visits and when people are released from armed group detention, where the ICRC acts as a neutral intermediary between parties and receives people detained by NSAGs in order to bring them back to their families. The detainees can be civilians, members of other NSAGs or members of the State security forces. In 2021, the ICRC facilitated twenty-seven unilateral releases; in 2022 the figure was sixty-three,[20] and over fifty have taken place during 2023.

While I will not touch upon the lawfulness of the types of detention conducted by NSAGs in Colombia, and nor do these figures mean that the overall humanitarian situation in Colombia has improved, it is true that releases have increased during the last year. I believe this is in part due to the moral, political and legal incentives presented by the Total Peace policy[21] launched by the government of Colombia one year ago: NSAGs are often keen to show their willingness to be part of such processes through these types of "peace gestures", which are sometimes publicized by them. In this sense, when an NSAG issues a

19 See above note 12.

20 ICRC, "Liberaciones: Un reflejo de la intermediación neutral", available at: www.icrc.org/es/document/colombia-liberaciones-un-reflejo-de-la-intermediacion-neutral-2023.

21 "On August 7, 2022 newly inaugurated President Gustavo Petro announced that he would be implementing a total peace effort to end violence in Colombia. The Total Peace policy is a multifaceted effort that seeks to minimize violence, protect civilians and dismantle the many armed groups operating in Colombia". See WOLA, "What Exactly is Colombia's Total Peace Effort and How Is It Advancing?", available at: www.wola.org/events/what-exactly-colombias-total-peace-effort-how-advancing/. Petro's administration seeks to do this simultaneously with all armed groups.

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public declaration about a release, whether during the release or after it's completed, they often do refer to IHL and how they abide by it.

I mention this because I found it very interesting that the author considers that "NSAGs do not rely on IHL to deprive individuals of their liberty, including cases that given their nature could be considered as internments".[22] Perhaps a look at unilateral or bilateral releases of detainees would shed additional light on whether NSAGs do or do not rely on IHL for their detention practices; in fact, in our experience NSAGs regularly consider at least the detention of soldiers and members of the adversary as part of an armed conflict, not unlawful, and not regulated by criminal law.

Are there any issues – legal, political, social – that the book fails to capture, or that fall beyond its scope? What should future research in this area focus on?

Katharine Fortin: The book is very thorough and does an excellent job at providing a policy-oriented examination of detention by armed groups. In that sense, it fulfils its ambition and actually does a better job than many studies at dealing with the legal, political and social dimensions. It does raise several interesting questions that could be explored in future studies. One question is the need for a better understanding of "what is law" when we are talking about armed groups. I realize that there is an irony in me advocating for such a legalistic enquiry, when as a scholar I have written quite a lot about the importance of getting away from this question. But I am curious to know more about the different ways in which armed groups create laws, and also more about what the law demands of these processes. I also think it could be valuable to complement the top-down empirical research that Ezequiel has done – questioning armed group officials – with more bottom-up empirical research. This would involve interviewing civilians and (prior) detainees about their knowledge of the laws that were apparently in force in these areas, giving an insight into whether those laws were known, whether they were meaningful and whether they were enforced, but from a civilian/ detainee perspective.

Lastly, it strikes me as interesting that in the last few years, there have been at least four monograph-length studies on detention in armed conflict, several monographs on the right to life and several on the right to a fair trial. All of these studies are vastly valuable. Clearly, the rather intense scholarly focus on these issues reflects the importance of the rights at stake and the complexity of the legal issues that they involve, including the relationship between IHL and human rights law. However, I sometimes wonder why we do not have more studies on other issues that involve less dramatically disruptive legal circumstances than detention, trial or death, but which are also fundamentally important to people's lives and also involve complex legal issues. I'm thinking for example about issues such as freedom of movement, birth registration, education, health care, taxation, mental health or family life. Seeing as protractedness is increasingly a characteristic of armed conflicts, I think it's important that these

22 *Detention by Non-State Armed Groups under International Law*, pp. 228, 244.

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kinds of issues pertaining to people's everyday lived experience will get more attention in the coming years.

Tilman Rodenhäuser: In my view, Heffes' book has focused on one of the legally most interesting – and challenging – questions with regard to detention by NSAGs – namely, in Heffes' words, "How does international law deal with NSAGs' detention activities, and what is the value of their 'laws' for regulating these same activities?" The question is posed in a broad manner, but Heffes' analysis is primarily focused on the "lawfulness" of such detention. Can detention by NSAGs ever be lawful, and if so, under what conditions? If we consider Heffes' book together with other excellent academic publications on this subject by Jelena Plamenac (focused on "internment", meaning security detention) and René Provost (focused on "fair trials", meaning criminal detention), as well as the ICRC study *Detention by Non-State Armed Groups*[23] (which looks at rules on the treatment of detainees, their conditions of detention, and procedural questions), we see that in recent years a significant number of legal questions have been analyzed, including on where existing rules of IHL might not be sufficiently elaborate.

In my view – and this is an issue that is of course not limited to detention by NSAGs – our focus should turn to building a better understanding of the law. This must happen at multiple levels. Most importantly, continued investment is needed by States as well as humanitarian organizations and academia to ensure that NSAGs know their legal obligations, implement them, and take steps to alleviate the suffering of detainees. I would argue that the law is clear on the vast majority of questions: no torture, no sexual violence, the obligation to provide shelter, food, water, health care, among others. Many NSAGs have integrated these obligations into their internal rules and have taken practical steps to implement them. We have many examples – we must make additional efforts to make them known and implemented.

To pass clear operational messages to NSAGs, however, academia, humanitarian organizations and human rights organizations should work towards a common understanding of how international law applies to NSAGs. This is especially important for actors that have influence, operationally and in the policy field. For example, while experts look at the issue of "NSAG detention" from different perspectives, from the point of view of a lawyer working primarily on situations of armed conflict, it is surprising to hear claims that NSAGs cannot conduct trials in accordance with international law, disregarding the IHL framework as presented by Heffes and others and applying human rights law jurisprudence instead. And even on issues on which different legal and operational experts can have diverging views, such as on the question of which "grounds and procedures" must be followed by NSAGs when they detain people in the context of an armed conflict, all actors will agree that detaining people for months or years without any legal safeguards is unlawful. And this message is essential, too.

23 ICRC, above note 5.

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René Provost: Upon concluding my reading of the book, I was not left with the impression that there were particular legal, political or social issues that had been neglected by Heffes in framing and making his argument. If there is a conceptual elephant in the room, it relates to data. One of the central challenges for a study on detention by NSAGs, like much else that is related to the practice of such groups, is the paucity of available information: we literally don't know what we are talking about, or we know relatively little. Heffes readily acknowledges this limitation, and works within the confines of what is known in general about detention activities of armed groups and, in relation to the three case studies, what he was able to unearth. If the reflection in international law on rebel governance is to become more sophisticated, there must be a concerted effort to produce and analyze a much more fine-grained understanding of insurgent practice. Of course, there are significant obstacles to such an endeavour. The first is a simple lack of attention or interest on the part of international lawyers, something that books like this one can contribute to remedying. The second and more daunting obstacle is that information on rebel practice is very difficult to obtain: armed groups tend to operate away from the public eye for obvious reasons of security given the common military superiority of the State's armed forces, and war zones are an environment that is broadly inimical to ethnographic research. It is not completely impossible to carry out fieldwork in conflict areas, but it is dangerous and difficult. Heffes' book was initially a doctoral dissertation, and one can easily imagine that universities would be unwilling to send their students to war zones to gather materials for their theses. The ICRC, along with some other organizations, has continuous and privileged access to many armed groups, but legitimate concerns of neutrality and impartiality mean that it is not sharing the information that it is no doubt gathering. Geneva Call, for which Heffes worked for several years, has been able to combine engagement with armed groups and a degree of publicity for its findings on their practice. Future research of the kind offered in this book will hopefully be able to mine an ever-increasing body of information on rebel governance that can offer deeper and surer footing for legal analysis.

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