

**INTERNATIONAL HUMANITARIAN LAW ESSAY 2022**

**THE LEGAL AND PRACTICAL CHALLENGES POSED BY DETENTION BY  
ARMED GROUPS IN THE EXISTENCE OF ARMED CONFLICTS.**

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## ABSTRACT

*The turn of events in the recent past with regard to the application of International Humanitarian Law have prompted for the examination of legal regimes arising from international (herein referred as IACs) and non-international armed conflicts (herein referred as NIACs). The deprivation of human liberty is prevalent whenever an armed conflict arises. In the existence of armed conflicts of non-international character, many people are detained by non-state actors. Despite the prevalence of these challenges, it remains clear that the body of law designed to regulate deprivation of liberty by armed groups in non-international armed conflicts is limited in scope and specificity. While assessing the legal and practical challenges presented in these situations, it is important to bear in mind that non-international armed conflicts may take different forms, ranging from classical civil war situations with armed violence essentially occurring within the confines of one single territory between government forces and dissident armed forces or other organized armed opposition groups such as terrorist groups.<sup>1</sup> The question of procedural safeguards is probably the key issue in terms of legal and operational challenges with regard to detention in NIACs, more especially “multinational” NIACs. The non-state armed groups and other dissident forces should be advised to comply with the minimum guarantees concerning the treatment of individuals under their authority as these members would be punishable under municipal law for the mere detention.<sup>2</sup>*

**Key words: International Humanitarian Law, International Human Rights Law, Armed Conflict, NIACs, IACs, Detention, Internment, Group,**

## INTRODUCTION

International Humanitarian Law<sup>3</sup> is concerned with the regulation of armed conflicts both of international and non-international characters. Both the states and non-state armed groups are conferred with equal obligations under IHL in the 21<sup>st</sup> century.<sup>4</sup> The legal framework governing NIACs ranges from rules of Customary International Law, Common Article 3 to the Geneva Conventions of 1949 and the additional Protocol II to the Geneva Conventions. Armed conflicts

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<sup>1</sup> Sunday John Apochi, ‘Examining the Legal Rights of Detainees in Non-International Armed Conflicts in the twenty-first Century’ © 2020 JETIR December 2020, Volume 7, issue 12; available at [www.jetir.org](http://www.jetir.org)(ISSN-2349-5162).

<sup>2</sup> Ibid.

<sup>3</sup> Herein referred to as IHL.

<sup>4</sup> Anne-Marie La Rosa, and Caroline Weurzner, ‘armed group sanctions and the Implementation of International Humanitarian Law’ [2008] (90) ICRC; 327-329.

continue to cause immeasurable suffering among millions of people in the world in the 21<sup>st</sup> Century. About 100 armed conflicts are being fought globally, to which around 60 states and more than 100 non-state armed groups are parties.<sup>5</sup> Approximately about 600 non-state armed groups of humanitarian concernment operate where the ICRC works. More than 80 armed groups hold detainees in countries where ICRC works. About 150 million people are residents in areas where the armed groups have some degree of control.<sup>6</sup> The existence of numerous armed groups that operate in diversified ways create leeway for the violation of the rules of war. Different armed groups engage in conflicts at the same place and against a specific enemy thus creating a challenge when trying to identify group and to distinguish it from another. Non-state armed groups organize themselves horizontally and at times these groups constitute of sub-groups which are difficult to identify. The enforcement of detention practices has also increased. Detention by non-state armed groups is one of the most controversial topics at the forefront in the international legal field.

### **What constitutes an armed group?**

Treaty law does not outline what constitutes an armed group. ICRC, however specifies that an organized armed group is the armed wing of a non-state party to a non-international armed conflict that may consist of either dissident armed forces for instance, breakaway parts of the state armed forces; or other organized armed groups which recruit their members primarily from the civilian population but have developed a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict.<sup>7</sup>

#### **I) Authority to detain**

Detention refers to the deprivation of one's personal liberty except where such a person is being convicted for an offence.<sup>8</sup> Under IHL, detention is the custodial deprivation of liberty with the consent of a state under international armed conflicts or non-state actor under non-international armed conflicts.<sup>9</sup> Deprivation of human liberty is an inevitable event whenever there is an armed conflict not of an international character. Once an individual is detained in NIACs, the application of the provisions of common article 3 arises.<sup>10</sup> The deprivation of liberty in NIACs is further governed by AP II to the Geneva Conventions. IHL treats detention in international armed conflicts and non-international armed conflicts separately

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<sup>5</sup> "ICRC Appeals 2022-World | ReliefWeb" <https://reliefweb.int/report/world/icrc-appeals-2022>.

<sup>6</sup> ICRC APPEALS, 2022.

<sup>7</sup> "Armed groups | How does law protect in war? – online casebook" <https://casebook.icrc.org/glossary/armed-groups>.

<sup>8</sup> "Body of Principles for the Protection of all Persons under any form of detention or imprisonment/OHCHR" General Assembly Resolution 43/173; <https://www.ohchr.org/en/instruments-mechanisms/instrument/body-principles-protection-all-person-under-any-form-detention>.

<sup>9</sup> International Committee of the Red Cross (ICRC).

<sup>10</sup> ICRC, 'Opinion Paper, Internment in an Armed Conflict: Basic Rules and Challenges' (November 2014); [www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges](http://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges).

Armed groups are definitely duty-bound in their actions by Humanitarian Law. Parties to a NIAC are conferred with the authority to deprive people of their liberty. This power is implied from the provisions of common article 3 which recognizes the protection of ‘persons *hors de combat* by detention as well as the mention of ‘regularly constituted courts.’ The authority can further be inferred from article 5 & 6 of AP II which outlines the guarantees of persons ‘interned.’ According to ICRC, both treaty and customary IHL contain an inherent power to intern and thus may be said to provide the legal basis for internment in NIACs.<sup>11</sup> The IHL principle of ‘equality of belligerents’ sets equal parameters for all parties to an armed conflict, regardless of the overarching (il)legality of the conflict or the nature of the parties.<sup>12</sup>

## II) Judicial Guarantees.

Pursuant to Common Article 3 and AP II, all parties to a NIAC including armed groups have an obligation to ensure persons deprived of their liberty are granted the basic fundamental guarantees. The judicial guarantees for civilized people can be looked into in the human rights law. The preamble of AP II recognizes the basic protection offered to human persons by the international instruments relating to human rights. Article 9 of the ICCPR provides that anyone who is deprived of his liberty either by arrest or detention has a legal right to initiate a claim in a court of law to enable it determine the lawfulness of his detention without delay and to order for his release where the detention is unlawful.<sup>13</sup> Jurisprudence has proved that the protection of the ICCPR does not cease in times of war except by operations of article 4 of the covenant whereby certain provisions may be derogated from in a time of national emergency.<sup>14</sup> Further that the right not to arbitrarily deprive of one’s life applies in hostilities.<sup>15</sup> Customary IHL requires armed groups in NIACs to enter into record the personal details of detainees<sup>16</sup> and to allow them have contact with family members.<sup>17</sup>

Detainees who are lawfully under the pre-trial detention are given protection by the judicial guarantees entrenched in common article 3 and in AP II. Armed groups comply with the provisions on treatment of detainees in ensuring that the physical and mental integrity of detainees is protected and that their well-being is upheld. According to the ICRC, acts such as murder, torture and other forms of cruelty, inhumane and degrading treatment, mutilation, and medical or scientific experiments and other forms of violence including sexual violence are prohibited both in IHL and

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<sup>11</sup> Jelena Pejic, ‘The Protective Scope of Common Article 3: more than meets the eye’, in *international review of the Red Cross*, Vol. 93, No. 881, 2011, p. 207.

<sup>12</sup> see generally Jonathan Somer, ‘Jungle justice: passing sentence on the equality of belligerents in NIACs’, in *international review of the Red Cross*, Vol. 89 No. 867, 2007, pp.681-682.

<sup>13</sup> Art. 9 ICCPR.

<sup>14</sup> ICJ *Nuclear Weapons Case*

<sup>15</sup> Ibid

<sup>16</sup> Rule 123 of the ICRC Study on *Customary International Humanitarian Law*.

<sup>17</sup> Rule 125, *ibid*.

Human Rights Law.<sup>18</sup> The provisions of common article 3 are intended to apply at any time when an armed conflict occurs and there is detention for serious security reasons, ie internment. Those of AP II are said to reflect customary IHL thus sufficient enough to govern the deprivation of liberty in Non-International Armed Conflict.<sup>19</sup> The mentioning of internment by AP II indicates its acknowledgement as an aspect of deprivation of liberty inherent to NIACs. In this respect, it is pertinent to advance in this area, that IHL presents a solid regulatory guideline to regulate detention by state and non-state actors.

### III) Right to Fair Trial

Any person detained during a non-international armed conflict for being suspected of committing criminal offenses is conferred with a number of fair trial rights enunciated under IHL and human rights law. The rights to fair trial in IHL and human rights law are almost similar. Under IHL, the right to fair trial in NIACs is entrenched in AP II. The provisions of the ICCPR reflects rules of customary IHL applicable in both IACs and NIACs. Any conviction or sentencing is prohibited except where there is a fair trial that affords the necessary judicial guarantees which are considered indispensable by civilized people.<sup>20</sup> Common article 3 to the Geneva Conventions renders unlawful the sentencing of persons or exercising executions where previous judgements have not been made by a regularly constituted court. IHL provides a number of judicial guarantees detainees must be accorded when being tried. Article 6 of AP II imposes various obligations upon the detaining power. Without any delay the accused should clearly be informed of the nature and the cause of the crime alleged, the accused should be accorded with the necessary rights and means of defence, the right of the accused not to be convicted of an offence except on the basis of individual penal responsibility, the right to be presumed innocent, right to be tried only when one is physically present, right not to be compelled to testify against oneself or to confess guilt, the right to be tried and punished for a crime established in law (*nullum crimen, nulla poena sine lege*) and the imposition of a penalty that does not exceed the one outlined by the law at the time of the offence as well as the right to be advised of one's judicial and other remedies and the time limit within which they must be exercised.<sup>21</sup> These judicial guarantees have attained the status of customary IHL rules applicable in both International and Non-international armed conflicts. Depriving any person in detention the right to fair trial is a war crime in IHL statutes.<sup>22</sup>

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<sup>18</sup> ICRC Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (2011); 18-20<<http://www.icrc.org/eng/asset/files/red-cross-crescent-movement/31st-international-conference/31-conference-ihl-challenges-report-115-1-2-en.pdf>.

<sup>19</sup> Nicholas Tsagourias and Alasdair Morrison, '*International Humanitarian Law, Cases, Materials and Commentary*,' page 271.

<sup>20</sup> Customary IHL Rule 100, this rule has been established as a norm of customary IHL and is applicable in both international and non-international armed conflicts.

<sup>21</sup> AP II, Art. 6

<sup>22</sup> ICC Statute, Article 8(2)(a)(vi); ICTR Statute, Article 4(g); Statute of the SCSL, Article 3(g). d

#### IV) Application of human rights and domestic law in detention

Detention is a sensitive state practice that is strictly governed by state laws under the supervision of the judiciary at national level and closely monitored by various international human rights and civil activist bodies. Civilized nations like Kenya and the US prohibit the arbitrary deprivation of liberty in their constitutional frameworks ie art 29 of the Constitution of Kenya and Section 9 of the US constitution. This rule applies to armed conflicts both of international and non-international character.

To safeguard the right to liberty, IHRL confers to any person whose liberty has been deprived a chance to challenge the legality of detention via court proceedings. The UN Human Rights Committee confirms the lawfulness of administrative detention that has complied with the provisions of IHL in the existence of an armed conflict. Where both IHL and human rights law are applicable, the doctrine of *lex specialis* is used as a conflict-resolution technique.<sup>23</sup>

#### V) Transfer of Detainees

IHL and human rights law complement each other when it comes to issues of transferring detainees in NIACs. The transfer of detainees into an authority where there are substantial grounds to believe that such people are likely to face danger and infringement of their fundamental rights is prohibited under the IHL principle of *non-refoulement*. This principle is encompassed in IHL, international refugee law and human rights law.<sup>24</sup> According to ICRC this principle is implied from the prohibitions of common article 3 that specifically prohibit transfer of persons to places or authorities where their basic rights are likely to be violated. The principle binds all parties to an armed conflict, including armed group, while carrying out detention activities. Under Human Rights Law, *non-refoulement* principle is enshrined under article 3 on the Convention against Torture and other cruel, inhuman or degrading treatment or punishment.

However, it not arguable that when humanitarian problems occur during an armed conflict, it is not as a result of failure to comply with and/or enforcement of these rules. This is because this normative framework allows for the transfer of detainees and in the process the right to life may be infringed, the detainees may be subjected to torture and other forms of ill-treatment.

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<sup>23</sup> Lex Specialis is generally accepted as a valid maxim of interpretation or conflict-solution technique in public international law; see International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law- Report of the Study Group the International Law Commission*, UN Doc. A/CN.4/L.682(April 13, 2006), para 62, page 58 (hereby ILC Fragmentation Report).

<sup>24</sup> ICRC, Note on Migration and the Principle of *Non-refoulement*, ICRC, 2018.

## LEGAL AND PRACTICAL CHALLENGES

In spite of the existence of the legal framework governing detention by armed groups, ICRC has stated that detention by non-state armed groups presents a number of legal and practical challenges primarily derived from the significant diversity of NSAG in relation to their differing operational realities, structures of organization, material capabilities, knowledge and acceptance of international law and ideology.<sup>25</sup>

### a) Authority to detain by armed groups.

IHL does not expressly establish the legality of deprivation of liberty in NIACs, instead it outlines the treatment and conditions of detention. It is contested as to whether the provisions of Common Article 3 and AP II legally confers upon armed groups the power to detain in armed conflicts. Lack of express authority implies that detention by armed groups lacks a legal basis and as such the humanitarian actors are likely to be precluded from intervening to perform their humanitarian duties. The power to detain as per the meaning of common article 3 raises the concern as to whether non-state armed groups are capable of enacting a law and whether the courts of such groups are 'regularly constituted', and the capacity of the groups to ensure the guarantee of the necessary judicial provisions.<sup>26</sup>

Even when we presume that armed groups have the power to detain under IHL, the relevant legal framework does not outline what is needed for detention not to be arbitrary. Armed groups unnecessarily detain even civilians in attempt to illustrate how powerful they are. Sometimes non-state armed groups detain in order to underline their existence and claim legitimacy.<sup>27</sup> The significant diversity of armed group is an issue of concern in the 21<sup>st</sup> Century. Teresa Whitfield explains that armed groups are characterized by great diversity<sup>28</sup> thus their dealings with regard to detention is so diversified. The level, frequency and areas of detention, infrastructure, and financial resources available for administration of detention vary. IHL recognizes armed groups in a specific way thus its provisions are not complex enough to accommodate the existing varieties of groups. The groups have different levels of organization, command and control. This creates an obstacle whenever an impartial body like ICRC seeks to intervene and offer support to detainees.

Armed groups are legally to detain persons in order secure military advantage over the adversary and to protect their own security. This is not always the case, armed groups at times act beyond this scope and detain people to use them as hostages. They also use detention as a measure to achieve law and order, in compliance with their criminal code that is applicable in areas under their control.

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<sup>25</sup> ICRC Report on IHL and Challenges of Contemporary Armed Conflicts, p. 55.

<sup>26</sup> See Common Article 3(d) and Art. 6 of AP II; Sandesh Sivakumaran, 'Courts of armed opposition groups: fair trials or summary justice?', in *Journal of International Criminal Justice*, Vol 7, 2009, pp. 498-509.

<sup>27</sup> International Institute of Humanitarian Law, 41 Round Table on Current Issues of IHL; "*Deprivation of Liberty and armed conflicts: exploring realities and remedies.*"

<sup>28</sup> Teresa Whitfield, *Engaging with armed groups, Dilemmas & Options for Mediators*, Centre for Humanitarian Dialogue, October 2010 p. 6

### **b) Grounds and procedures of detention.**

IHL lacks provisions dealing with procedural safeguards. Even if we have clear laws on treatment, if there are no safeguards around it particularly on the initial capture and procedural guarantees, the detainees are likely to face ill-treatment. There is uncertainty on the period within which one may be put in intern, legally the interned detainees are supposed to be released when the hostilities have ended. Neither common article 3 nor AP II specifies the grounds and procedures for detention. They both presume detention in their provisions. Due to lack of legal framework outlining grounds for detention in NIACs in IHL, armed groups end up depriving civilians and even their own group members liberty to prove how authoritative they are.

### **c) Application of IHRL and Domestic Law in Detention.**

Armed groups are likely to be alleged to have violated domestic laws if they carry out detention. It is not surprising to state that while states in providing the legal basis and procedural guidelines for detaining in NIACs generally rely on domestic law, such domestic laws do not recognize the legality of detention or internment by non-state actors within the states' territories. Where NIACs are extraterritorial in nature, it is unclear as to which state's domestic law is applicable. With regard to the application of the concept of *lexis specialis*, where both human rights law and IHL are applicable, IHRL cannot be applied as IHL is the one law that is specifically meant to deal with armed conflicts. The ICJ in the *Nuclear Weapon Case* enunciated that the application of human rights law is to be determined with reference to the *lexis specialis* legal doctrine. This implies that where there is both a general and a specialized source of law applicable to particular circumstances it is the specialized source of law, IHL, that prevails. If IHL does not provide the rule for the circumstance at hand, (grounds and procedures for NIAC detention in this case) then it cannot endorse nor govern then we look into the general law (human rights law).

The application of human rights law in areas where IHL is silent on a particular issue overlooks the legal and practical limits of the applicability of IHRL to organized armed groups. It is difficult to comply with the higher standard in IHRL while applying the principle of military necessity in NIACs.

### **d) Treatment of Detainees and Material Concerns**

How armed groups treat detainees under their control is a question that begs for responses. Irrespective of the legal and institutional framework set aside to offer humanitarian assistance to detainees, detention is faced with myriad humanitarian concerns. One of the major challenges is



that of ensuring armed groups have knowledge and acceptance of the law and that they have integrated the provisions of the law on their internal rules and organizational culture.<sup>29</sup> In their operations, armed groups lack practical guidance on the implementation of IHL.<sup>30</sup> There is no doubt that armed groups subject detainees to ill-treatment. In the USA case of *Alshimari v CACI Premier* is an illustrates the abuse and torture suffered by detainees of *Abu Graib* prison while they were interrogated by CACI, a private military and security company. According to the Operation Protective Edge of Palestine, Palestinian Armed Groups subjected detainees to ill-treatment and torture.<sup>31</sup>

While other groups acknowledge and offer to detainees their humane treatment, other groups do not recognize the humanitarian entitlements of detainees at all. Access to detainees under the control of armed groups is problematic due to the remote, clandestine and transient nature of the detention. Armed groups at times keep their detainees with mobile, operational military units and/or decline contact with humanitarian actors in order to safeguard the security of the group.<sup>32</sup> Unlike the guidelines issued when detainees are interned by states, where detention is conducted by an armed group visitation of detainees is rarely possible. Humanitarian actors are compelled to initiate contact with multiple individuals within the armed group to enable them reach detainees. At times it is difficult to get to know clearly who leads an armed group, their leadership system is complicated depending on the structure of the group. Further, armed groups in most cases treat detainees according to their dictates thus violating the detainees' basic humanitarian rights.

Detention centers are overcrowded either because they are in poor state or they lack proper infrastructure. ICRC opines that armed groups lack guidance on how to dispose the requisite material resources to achieve the humane treatment requirement during detention. One of the operational challenges is lack of political will to allocate the necessary resources by the detaining authorities. Sometimes the detaining powers working in centers where resources are scarce end up appropriating the detainees' essentials. Overcrowding is further stimulated by the lacuna in the administration of justice. The judicial processes applied in detention by armed groups are unnecessarily slow making the detainees to stay for long in detention. IHL does not provide for alternative punitive measure such as imprisonment as a way of reducing the number of detainees. There detainees do not have adequate access to food, water, hygiene as well as healthcare. Detainees do not always have access to doctors when they most need them and medical examinations are less likely to be undertaken.

#### **e) Judicial Guarantees**

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<sup>29</sup> ICRC 2019 Report on IHL and Challenges of Contemporary Armed Conflicts, p 56.

<sup>30</sup> Ibid.

<sup>31</sup> Detention in Armed Conflict | How does law protect in war? – Online Casebook”  
<https://casebook.icrc.org/highlight/detention-armed-conflict>.

<sup>32</sup> Tuck- Detention by armed groups: overcoming Challenges of humanitarian action, para. 2 p. 770

IHL does not provide grounds upon which one may be detained. This poses a critical challenge to during detention since it cannot be determined when detention activities of armed are arbitrary. It is evident that despite presence of the legal provisions of IHL guiding detention, in the first decade of the twenty first century, various armed groups such as the Taliban in Afghanistan, the Liberation Tigers of Tamil Ealam in Sri Lanka, the Fuerzas Armadas Revolucionaries de Columbia, the Sudanese Liberation army in Sudan and the Communist Party Maoist in Nepal have all in several occasions deprived people of liberty.<sup>33</sup>

Armed groups violate the humanitarian rules because these rules ‘prohibit the sort of action that serve the strategic interest of rebel groups-the sort of actions that may at times give them a competitive advantage over government forces.’ Armed groups breach IHL principles of detention either because they have little or no knowledge of their international obligations during detention. They breach the rules due to lack of proper organizational structures and the resources that would allow them to acknowledge, understand and implement their obligations. In 2017, it was identified that armed groups fail to fulfil their legal obligations mainly due to lack of resources. Armed groups with a lower degree of organization and with a weak coercive capacity to enforce organizational decisions are faced with the challenge of guaranteeing judicial provisions in IHL.

#### **f) Right to fair trial**

Despite IHL providing for the right to fair trial ie obligations requiring sentences and convictions to be in accordance with the law and that they be issued by regularly constituted courts, armed groups essentially do not have the capacity or interest to courts and for that they do not have a forum providing judicial remedies for detainees. Even when armed groups have the capability to establish courts, they cannot fully meet the threshold of common article 3 as they have no idea on how they can ensure that such courts are regularly constituted

“Certain governments have been reluctant in acknowledging the need for the ICRC and other components of the movement to engage non-state actors on issues relating to their security and access to victims, as well as disseminate IHL and humanitarian principles, on the grounds that armed groups in question are ‘terrorist organizations’ or otherwise outlaws”<sup>34</sup> for instance, In *Holder v Humanitarian Law Project case*, the US Supreme court in its ruling upheld the provisions of the USA PATRIOT ACT, which prohibits any assistance to terrorist organizations, effectively ensuring legal grounds for the prosecution of anyone engaging in the promotion of humanitarian norms with groups or individual listed as terrorists.<sup>35</sup>

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<sup>33</sup> Tucker, David, “Detention by Armed Groups: Overcoming Challenges to Humanitarian Action.” *International Review of the Red Cross*. Vol93, Number 883, (September 2011), p 3.

<sup>34</sup> ICRC, “International Humanitarian Challenges,” 5

<sup>35</sup> Geneva Academy, “Rules of Engagement,” 17

## **CONCLUSION.**

It is clear that the legal framework governing detention by armed groups is not clearly and sufficiently explored. The legal and practical challenges of detention by armed groups can be solved by reviewing the relevant legal framework. ICRC opines that in order to ensure detention is not arbitrary, grounds for detainment can be codified in a document that legally binds the detaining powers.<sup>36</sup> There is a need to have an independent and impartial oversight body to review detention and decisions on internment. In engaging armed groups, ICRC and other relevant bodies should include persuasion of armed groups to uphold principles of IHL and human rights law on the treatment of detainees. Imperative consideration should be made to help in identifying the inadequacies and lacuna of IHL in regulating detention by armed groups. There is a need to have a solid legal framework that clearly permits detention by armed groups, providing the grounds and procedures of detention.

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<sup>36</sup> ICRC “Internment in armed Conflicts: Basic Rules and Challenges,” Opinion Paper, 2014; available at <https://www.icrc.org/en/download/file/3223/security-dbetention-position-paper-icrc-11-2014.pdf%20>

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