UNIVERSITY OF TARTU

SCHOOL OF LAW

Department of Public Law

Yaroslav Halieiev

THE LEGAL REGIME OF DETENTION IN ARMED CONFLICT IN EASTERN UKRAINE UNDER INTERNATIONAL LAW

Master's Thesis

Supervisors:

PhD, Associate Professor, Merilin Kiviorg

Dr. iur., Associate Professor, René Värk

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ABBREVIATIONS

IAC	International Armed Conflict
NIAC	Non-International Armed Conflict
NGAGs	Non-Governmental Armed Groups
GC I-IV	Geneva Conventions I-IV
‘LPR’	‘Lugansk People’s Republic’
‘DPR’	‘Donetsk People’s Republic’
OHCHR	United Nations High Commissioner for Human Rights
ATO	Anti-Terrorist Operation
JFO	Joint Force Operation
IHL	International Humanitarian Law
HRL	Human Rights Law
CA 3	Common Article 3
II AP	Additional Protocol II
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ICC	International Criminal Court
ICTY	International Tribunal for Former Yugoslavia
ICRC	International Committee of Red Cross
ICTR	International Tribunal for Rwanda
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
ILC	International Law Commission
LoIAC	The Law of IAC
LoNIAC	The Law of NIAC
CCU	Criminal Code of Ukraine
CPCU	Criminal Procedural Code of Ukraine
LoCT	Law On Combating Terrorism
CIL	Customary International Law
CoE	Council of Europe
MOD	British Ministry of Defence
POW	Prisoner of War

INTRODUCTION

The armed conflict in Ukraine has brought to light many legal issues related to contemporary international law. The invasion of Ukraine on 24 February 2022 has encouraged scholars to explore the edges of international law and conduct a considerable number of studies. Meanwhile, the armed conflict in Ukraine started in 2014, and in 2022, it elevated in all possible senses.

Despite the broad attention to the events after 24 February 2022, this work will concentrate on the events from 2014 to 2022, when debates over the issue of the legal qualification of armed conflict as overall international or the existence of different armed conflicts were in place. For instance, in 2014, the ICRC submitted that armed conflict in Eastern Ukraine is a non-international armed conflict.[1] However, *in contrario*, from the moment Russian forces entered Ukrainian territory without Ukrainian consent, the situation constituted an international armed conflict.[2] Consequently, the factual complexity of the events presupposes the legal qualification. Thus, depending on the time, parties involved and localisation of the hostilities, different qualifications of armed conflict can be given.

I submit that the events of 2014 – 2022 can be divided into three primary periods. Firstly, the Revolution of Dignity (2013 – 2014) lays down the general ground for the change of political regime in Ukraine from pro-Russian to pro-European. Secondly, the occupation of Crimea indicates the start of aggression and the onset of armed conflict between Ukraine and the Russian Federation. This part is commonly referred to as an IAC between Ukraine and the Russian Federation. Thirdly, the armed conflict in Eastern Ukraine has a more sophisticated story from an international law point of view. It incorporates two armed conflicts. The armed conflict between Ukraine and NGAGs – 'LPR' and 'DPR', which is referred to as NIAC and the armed conflict between Ukraine and the Russian Federation, which is IAC. In this study, the event of NIAC between Ukraine and NGAGs 'LPR' and 'DPR' are under the loop. I do not aim to evaluate the IAC between Ukraine and the Russian Federation in Crimea or Eastern Ukraine.

I proceed with a small historic opening to draw the lines between the above-mentioned armed conflicts. The Revolution of Dignity is the first step to consider. On 21 November 2013, the first protests were gathered to show support for Ukrainian Eurointegration and the need to sign the European Union – Ukraine Association Agreement. However, on 29 November, the President of

[1] ICRC, 'News Release 14/125, International Committee of the Red Cross, Ukraine: ICRC calls in all sides to respect international humanitarian law' (23 July 2014), <https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm> last accessed 28 March 2024

[2] Laurie R Blank, 'Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict' (2020) 96 NDLR 260

Ukraine, due to '[…] the pressure from Russia and Ukraine's economic losses officially refused to sign the Association Agreement.'[3] Later, governmental attempts to scatter the protests ended with further escalation and spread of the Revolution around the State.[4] According to the OHCHR, 'the protests were characterised by violence and excessive use of force by police and other law enforcement agencies.'[5]

On 21 February, the Parliament of Ukraine officially removed President Yanukovych from exercising his Constitutional duties.[6] The fall of the pro-Russian political regime has forced Russia to act. On 23 February, the President of the Russian Federation gave an order to security agencies to start preparation for the 'return' of Crimea.[7] On 27 February, the 'green men' appeared on the territory of the peninsula, and aggression began.[8]

On 16 March, the illegal 'referendum' occurred.[9] On 14 March, the Constitutional Court of Ukraine officially declared that '[…] the Verkhovna Rada of the Autonomous Republic of Crimea, having adopted the Resolution 'On the Conduct of the All-Crimean Referendum' dated March 6, 2014, N1702-6/14, violated the Constitution of Ukraine.'[10]

Following the events in Crimea, massive separatist movements sparked in the Southeastern regions of Ukraine. According to OHCHR, 'from early April 2014, groups of armed people began to seize the buildings of government institutions across Donetsk and Luhansk regions, and after gaining control over some areas in these regions, NGAGs proclaimed independence from Ukraine and the creation of the 'DPR and 'LPR'.'[11] Following the general strategy, two referendums were conducted to 'declare the independence' of the territories under the control of the NGAGs from

[3] Katya Gorchinskaya, **'**With Yanukovych in charge, Ukraine leaves Vilnius empty-handed' (Kyiv Post, 29 November 2013) <https://archive.kyivpost.com/article/opinion/op-ed/with-yanukovych-in-charge-ukraine-comes-away-empty-handed-in-vilnius-332637.html> last accessed 28 March 2024

[4] BBC, 'Ukraine protests after Yanukovych EU deal rejection' (BBC, 30 November 2013) <https://www.bbc.com/news/world-europe-25162563> last accessed 28 March 2024

[5] OHCHR, 'Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine April 2014 – April 2020' (2020) 4 <https://www.ohchr.org/sites/default/files/2022-08/Ukraine-admin-justice-conflict-related-cases-en.pdf> last accessed 26 March 2024

[6] Resolution On self-removal of the President of Ukraine from the exercise of constitutional powers and appointment of extraordinary elections of the President of Ukraine, 2014

[7] Петро Козлов, Олеся Волкова, Олег Карп'як 'Крим: хроніка анексії в спогадах учасників подій' [Petro Kozlov, Olesya Volkova, Oleg Karpyak 'Crimea: the chronicle of the annexation in the memories of the participants of the events'] (BBC, 19 March 2019) <https://www.bbc.com/ukrainian/features-47619295> last accessed 28 March 2024

[8] *Ibid*.

[9] BBC, 'Crimea referendum: Voters "back Russia union"' (BBC, 16 March 2014) <https://www.bbc.com/news/world-europe-26606097> accessed 28 March 2024

[10] Decision, Constitutional Court of Ukraine, case N1-13/2014, N2-рп/2014, 14 March 2014 [5]

[11] OHCHR 2020 (n 5) 5

Ukraine.[12] Consequently, the Ukrainian Prosecutor General classified the self-declared 'DPR' and 'LPR' as terrorist organisations.[13]

The classification of 'DPR and 'LPR' as terrorist organisations opened the way for Ukraine to invoke the provision of the Anti-Terrorist Legislature. On 13 April, the ATO began.[14] In 2018, it was replaced by the JFO. The ATO and JFO constitute two separate emergency regimes under Ukrainian law and purported to tackle the NIAC with 'DPR and 'LPR'.

In light of NIAC with 'DPR and 'LPR' Ukraine introduced a few new legal instruments to assist ATO and JFO. Among others was preventive detention. Preventive detention was introduced in 2014 and allowed public prosecutors to detain individuals for more than 72 hours in the area where ATO, later JFO, was conducted.[15] Preventive detention is not an invention of Ukraine; this instrument generally originates from IHL, where it can be titled as internment, security detention, preventive detention, detention for security reasons, etc. Security detention or internment entails '[…] a deprivation of liberty ordered by the executive on the basis of future security threat without criminal charge.'[16] In IHL these terms are interchangeable and utilise identical meanings, yet the meaning in national law and HRL can differ.

However, the issue with internment is that it is well-regulated in IAC but not in NIAC. IHL possesses a broad scope of instruments which are specially designed to regulate the course of conduct by the States in terms of armed conflicts. Nevertheless, the number of tools that are designed to regulate the behaviour of the Parties in IAC is more extensive than for the NIAC. The course of conduct in IAC is regulated mainly by the Hague Regulations of 1907, I-IV Geneva Conventions and Additional Protocol I, while the course of conduct in NIAC is primarily regulated by CA 3 and II AP.

CA 3 indicates the duty of the Parties to maintain the minimum standard of treatment in terms of detention of persons taking no active part in the hostilities, including members of armed forces.

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[12] Shaun Walker, Oksana Grytsenko, Howard Amos, 'Ukraine: pro-Russia separatists set for victory in eastern region referendum' (The Guardian, 12 May 2014) <https://www.theguardian.com/world/2014/may/11/eastern-ukraine-referendum-donetsk-luhansk> last accessed 28 March 2024

[13] Interfax-Ukraine, 'Ukraine's prosecutor general classifies self-declared Donetsk and Luhansk republics as terrorist organisations' (Kyiv Post, 16 May 2014) <https://archive.kyivpost.com/article/content/war-against-ukraine/ukraines-prosecutor-general-classifies-self-declared-donetsk-and-luhansk-republics-as-terrorist-organizations-348212.html> last accessed 28 March 2024

[14] Decree On the decision of the National Security and Defense Council of Ukraine dated April 13, 2014 'On urgent measures to overcome the terrorist threat and preserve the territorial integrity of Ukraine', 2014

[15] Law On Preventive Detention of Persons in the Area of the Anti-Terrorist Operation, 2014 (hereinafter – Law On Preventive Detention)

[16] Hill-Cawthorne Lawrence, *Detention in Non-International Armed Conflict* (OUP 2016), 1; Pejic Jelena, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87 IRRC 376.

However, the question is whether CA 3 or II AP provide a legal ground for detention in the context of NIAC. In 2014, the case *Serdar Mohammed v Ministry of Defence*[17] reopened the matter of detention in NIAC. According to the arguments provided by the British Court, 'it is reasonable to assume that if CA3 and/or [II AP] had been intended to provide a power to detain, they would have done so expressly […].'[18] Hence, both instruments provide a minimum level of protection for the individuals who are detained or interned by any of the Parties. Nevertheless, considering the nature of NIAC and not-so-wide engagement of international law, the matter arises with regard to the basis of the Party's right to detain individuals.

The research problem of this study is the lack of an explicit legal basis for internment in the context of NIAC. The objective of the study is to establish the legal regime of security detention in the context of NIAC in Eastern Ukraine. To reach the objective, I will assess the role of three realms of law in light of the internment in NAIC in Eastern Ukraine, namely, international humanitarian law, international human rights law and domestic Ukrainian law. To achieve the objective of the Master's Thesis, I purport to determine (i) the legal regime of ATO and JFO; (ii) the legal regime of security detention in NIAC under the IHL (iii) the legal regime of internment under national law and its conformity with Human Rights obligations; (iv) the application of HRL to internment in NIAC; (v) the power of NGAGs to intern in NIAC. Lastly, I purport to map out the possible *lex ferenda* ways for the legal basis for internment in NIAC by States and NGAGs. Thus, the research question is: what realm of the law authorises State and NGAGs to intern in NIAC?

To answer the research question and to achieve the research objective several scientific methods will be used. Predominantly, the analytical method will be employed to conduct the legal research. Notably, it will be used to examine the relevant international law norms and provisions of the national legislature. Apart from that, I will contextualise the events and look at them in chronological order. The presence of judicial practice allows the employment of the case-study method in different jurisdictional regimes where the matter of detention in NIAC has been examined. For instance, *Serdar Mohammed v. Ministry of Defence* case (UK), *Hassan v. the United Kingdom* case (ECtHR), *Legality of the Threat or Use of Nuclear Weapons* case and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case (ICJ), as well as domestic Ukrainian cases.

The primary sources are the I-IV Geneva Conventions and Additional Protocols, the International Covenant on Civil and Political Rights, as well as other documents adopted by the United Nations

[17] *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB) (hereinafter - *Serdar Mohammed v. Ministry of Defence*)
[18] *Ibid* [242]

and its Agencies, and the ICRC. The study refers to a significant number of legal doctrinal studies in the relevant realms of international law. The conceptions and views presented by Lawrence Hill-Cawthorne, Bruce Oswald, Knut Dormann, Frederic Megret, Dapo Akande, Kubo Mačák, Ezequiel Heffes, Marco Sassoli and Sandesh Sivakumaran are of most relevance, however, are not limited only to them. Despite being discussed by scholars, the matter of the legal basis of internment in NIAC remains unresolved. This study provides an analysis of the key conceptual approaches towards the regulation of internment in NIAC by framing it within the NIAC in Eastern Ukraine. Thus, it offers a novel point of view on how the internment regime was established and regulated by Ukraine and NGAGs in NIAC in Eastern Ukraine.

Yet, I stress that the present research does not evaluate the legality of the use of force.

The structure of this Thesis is divided into three main Chapters. The first Chapter is designed to determine the qualification of armed conflict in Eastern Ukraine, from the perspective of IHL, as mixed. Also, I assess the emergency legal regime of ATO and JFO. In addition, I evaluate the legal provisions of the national legislature and amendments introduced concerning ATO and JFO. The second Chapter introduces the three major approaches towards determining the legal basis for internment in NIAC. I delve into the debate regarding the scope of Common Article 3 and its capacity to be seen as a legal basis for security detention in NIAC. Also, I determine the role of HRL in NIAC. Lastly, I establish whether the provisions of the national Ukrainian legislature may be seen as an only-begotten legal ground to detain individuals in terms of NIAC. In the third Chapter, I provide an evaluation of the power of NGAGs to intern in NIAC. In addition, I map out ways to underline the *lex feranda* for the legal regime of internment in NIAC.

Keywords: legal basis, internment, NIAC in Eastern Ukraine, IHL, HRL, domestic law.

I. ARMED CONFLICT IN EASTERN UKRAINE: THE LEGAL REGIME

In this Chapter, I analyse the legal qualification of armed conflict in Eastern Ukraine through the prism of IHL. In this context, I draw a distinction between IAC and NIAC and the dichotomy between them in Ukraine. Hence advancing the qualification of armed conflict in Eastern Ukraine as 'mixed'. Apart from that, I delve into the 'effective control test' and 'overall control test' concepts to tackle the notion of internationalised armed conflict. Lastly, since the armed conflict in Eastern Ukraine between NGAGs and the State is qualified as NIAC, Ukraine has adopted a special 'emergency law', namely ATO and JFO, system to deal with armed conflict and to legislate on particular matters of IHL, such as internment, namely preventive detention. Thus, I map out how Ukraine substituted IHL gaps with national provisions.

This Chapter lays down the framework for further examination of the research question. The qualification of armed conflict as mixed allows the tracking of the NIAC between Ukraine and NGAGs, hence testing the present international law (IHL, HRL) and domestic law (emergency) frame to authorise internment in NIAC. The following discussion frames my argumentation in the next Chapters with regard to the legal basis for internment.

1.1. The Qualification of the Armed Conflict in Eastern Ukraine

The armed conflict in Ukraine, since 2014, possesses a legal complexity due to the multiple actors involved: the Russian Federation, 'LPR' and 'DPR'. Prior to delving into the principal research topic, it is essential to provide the legal framework under which the armed conflict in Eastern Ukraine shall be seen.

IHL recognises only two types of armed conflict – IAC and NIAC. The case of armed conflict in Ukraine is a complex one, which requires drawing a distinction between a few simultaneous armed conflicts. I submit that from 2014 until 2022, there were three main armed conflicts: (i) IAC – between Ukraine and the Russian Federation in Crimea; (ii) IAC – between Ukraine and the Russian Federation in Eastern Ukraine; (iii) NIAC – between Ukraine and NGAGs 'LPR' and 'DPR'.

1.1.1. The idea of 'mixed' armed conflict

Beforehand, I address the concept of 'mixed armed conflict', which is discussed within the qualification of armed conflict in Ukraine. Then, I will start with a limited assessment of events in Crimea and Eastern Ukraine that led to the commencement of armed conflict between Ukraine and the Russian Federation. Lastly, I will turn attention to the primary object of the assessment – the non-international armed conflict between Ukraine and the NGAGs 'LPR' and 'DPR'.

In accordance with Common Article 2 of the Geneva Conventions, '[the Convention] apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.'[19] As stipulated in the second part of the Article, 'the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.'[20] In its practice, the ICC pointed out that 'an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.'[21]

The ambiguous definition of NIAC can be found in CA 3 of the Geneva Conventions. CA 3 provides that 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.'[22] This notion does not provide many criteria to identify the NIAC *per se*, but sets a general distinction between NIAC and IAC.

The II AP employs a more beneficial definition of NIAC. Article 1 of II AP states that '[armed conflict] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'[23]

I submit, that armed conflict in Ukraine does not fit into the ordinary qualification as IAC or NIAC due to the combination of characteristics both from IAC and NIAC. Thus, it shall be seen as a mixed armed conflict. The ICTY, in the *Tadic* case, acknowledged that '[...] the parties themselves considered at different times and places as either internal or international armed conflicts or as a mixed internal-international conflict.'[24] As has been pointed out by James G. Stewart, 'the rationale for the "mixed" approach is apparently that an act of internationalisation only renders international the conflict between the parties belonging to States rather than all conflicts in the

[19] 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 (hereinafter - IV GC)
[20] *Ibid*
[21] *The Prosecutor v. Jean-Pierre Bemba Gombo* (The Decision on the Confirmation of Charges), ICC-01/05-01/08 (15 June 2009) [223]
[22] Convention (III) relative to the Treatment of Prisoners of War. Geneva (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (hereinafter - III GC)
[23] 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 (hereinafter - II Protocol Additional to the Geneva Conventions)
[24] *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (October 1995) [73]

territory.'[25] I submit that a primary aim of 'mixed' conflict qualification is to distinguish the applicability of the LoIAC and the LoNIAC to different parties to the armed conflict.

Similarly, ICJ treated the armed conflict in Nicaragua through the prism of 'mixed' qualification. According to the ICJ, 'the [armed] conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that [non-international] character, while the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.'[26]

I argue that due to its complexity, the armed conflict in Eastern Ukraine had elements of both IAC and NIAC. The LoIAC applied to the hostilities between Ukraine and Russia, and the LoNIAC applied to hostilities between Ukraine and non-governmental armed groups. As ICC framed it, 'an international armed conflict [was] in the context of armed hostilities in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.'[27]

1.1.2. 'Effective control' and 'overall control' tests

Apart from the possibility of qualifying the armed conflict in Eastern Ukraine as a mixed one, the ICC pointed out that '[…] armed conflict in Eastern Ukraine may be internationalised if Russia exercised overall control over armed groups in Eastern Ukraine.'[28] Since ICC raised the issue of internationalised armed conflict, which entails that Russia either (i) directly intervened in armed conflict on the side of NGAGs or (ii) exercised control over NGAGs to that extent, the actions of these entities can be attributed to Russia.[29] Hence, there is a need to examine the 'overall control' test and 'effective control' test. As ICC pointed out in *the Prosecutor v. Thomas Lubanga Dyilo* case, the difference between the two tests is explained by purpose: 'direct ['effective'] control is used to establish State responsibility, whereas overall control is used to establish a jurisdictional pre-condition to the exercise of international penal jurisdiction.'[30] Thus, the 'effective control' test is designed for establishing state responsibility, whereas the 'overall control' test is for the purposes

[25] James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 333
[26] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment)* [1986] ICJ Rep, 14[219] (hereinafter – 'Nicaragua v. United States of America')
[27] ICC, 'Report on Preliminary Examination Activities' (2016) [169] <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf> last accessed 15 February 2024 (hereinafter - Report on Preliminary Examination Activities)
[28] *Ibid* [170]
[29] James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 315; Sylvain Vite, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, (2009) 91 IRRC 71
[30] *The Prosecutor v. Thomas Lubanga Dyilo* (Prosecutor's Closing Brief) ICC-01/04-01/06 (01 June 2011) [39]

of determining whether ICL applies. However, Antonio Cassese did not support this opposition between tests.[31]

ICJ developed the 'effective control' test in the *Nicaragua* case, where the ICJ had '[…] to establish the degree of control of the contras by the United States Government to establish and attribute the state responsibility to the US.'[32] In ICJ's words, '[..] United States participation, even if preponderant or decisive, in the financing, organising, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.'[33] The ICJ emphasised 'that would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.'[34] Therefore, the ICJ requires the State to have effective control and to direct and or enforce any acts of agent. As Djemila Carron submits, '[…] the ICJ holds that if a person or group does not fulfil the test to become a *de jure de facto* organ of a State (complete dependence), it could only fall into the responsibility of a State if that person or organ were to be under the effective control of the State – an effective control that has to be fulfilled for each of the operations concerned.'[35]

Similarly, Stefan Talmon argued that ICJ in the *Nicaragua* case developed two tests – 'strict control based on complete dependence' and 'effective control in cases of partial dependence'.[36] According to Stefan Talmon, a complete dependence means that '[secessionist entity is] lacking any "real autonomy" and is "merely an instrument" or "agent" of the outside power through which the latter is acting.'[37] Furthermore, he submits that 'the Court applies the "effective control" test in cases where there is evidence of "partial dependency" of the secessionist entity on the outside power.'[38] He argues that 'such partial dependency may be inferred, inter alia, from the provision of financial assistance, logistic and military support, supply of intelligence, and the selection and payment of the leadership of the secessionist entity by the outside power.'[39] Marko Milanovic has supported this argument in his critique of the overall control test. According to him, 'test of complete

[31] Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 663
[32] *Nicaragua v. United States of America* (n 26)[113]
[33] *Nicaragua v. United States of America* (n 26) [115]
[34] *Ibid* [115]
[35] Djemila Carron, 'When is a conflict international? Time for new control tests in IHL' (2016) 98 IRRC 1024
[36] Stefan Talmon, 'The Responsibility of outside Powers for Acts of Secessionist Entities' (2009) 58 ICLQ 498
[37] *Ibid* 499
[38] *Ibid* 502
[39] *Ibid* 502

dependence, operating at a general level and seeking to attribute all of the acts of a non-State actor to a State, and that of effective control, seeking to attribute specific acts controlled by the State.' [40]

Therefore, the ICJ established an extremely high threshold for conduct committed by a non-state actor to be attributable to a state. The strict control test, according to Stefan Talmon, requires a non-state actor to have no autonomy and be in complete dependency on the state when the effective control test stipulates a partial dependency.

The ICTY has developed the overall control test in the *Tadic* case. The reason why ICTY faced the issue of establishing the control requirements is rooted in a conflict qualification. As A. Cassese pointed out, 'the Appeals Chamber, therefore had to determine whether the conflict was international […] for the purpose of establishing whether the Trial Chamber could exercise its jurisdiction over those alleged grave breaches.'[41]

According to the ICTY, 'one situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State, in such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a de facto State agent.'[42] As Antonio Cassese argues, 'instructions concerning the performance of each action were required in order to attribute the action to the instructing state, or else subsequent public approval of each specific action or conduct was required.'[43] From his perspective, it fulfils the effective control test developed by the ICJ.

The ICTY emphasised that 'one should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels, consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.'[44] As Djemila Carron submits, '[…] the ICTY holds that it is important to distinguish between the control for individual persons (effective control) and the control for militarily organized groups (overall control).'[45]

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[40] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 ILS 318
[41] Cassese, (n 31) 655
[42] *Prosecutor v. Dusko Tadic* (Appeal Judgement) IT-94-1-A (15 July 1999) [118] (hereinafter – *Tadic* Appeal Judgement)
[43] Cassese (n 31) 657
[44] *Tadic* Appeal Judgement (n 42) [120]
[45] Carron (n 35) 1025

Consequently, the overall control test provides a lower threshold for attribution, which is based on the material support to non-government actors and involvement in general planning. In contrast, the effective control test requires directing or enforcing the policy decision-making of non-government actors. No judicial body had employed either the effective (or strict) control test or the overall control test concerning the armed conflict in Eastern Ukraine. In addition, in light of the decision on the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*, the ICJ acknowledged firstly, that '[…] [submissions] do not contain sufficiently specific and detailed evidence to give the Russian Federation reasonable grounds to suspect that the accounts, bank cards and other financial instruments listed therein were used or allocated for the purpose of committing the offences under Article 2 of the ICSFT [by 'DPR' and 'LPR'], and secondly '[…] the Russian Federation had no reasonable grounds to suspect that the funds in question were to be used for the purpose of terrorism financing [by 'DPR' and 'LPR'] and, accordingly, was not required to freeze those funds.'[46] This decision indirectly affects the further possibility to utilise the 'effective control' test or 'overall control' test because financing remains a vital part of the control exercised.

However, the ECtHR, in the case *Ukraine and the Netherlands v. Russia*, found plausible that Russia had 'effective control' over NGAGs. The ECtHR established '[…] the Russian Federation had effective control over the relevant parts of Donbass controlled by the subordinate separatist administrations or separatist armed groups [which] means that the acts and omissions of the separatists are attributable to the Russian Federation in the same way as the acts and omissions of any subordinate administration engage the responsibility of the territorial State.'[47] Even though ECtHR confirmed that 'acts and omissions' of NGAGs can be attributed to Russia under the ECHR, it does not entail that this level of control satisfies ICJ's or ICTY's (ICC) control tests. In addition, I stress the difference in legal regimes under which these tests were established.[48]

1.1.3. The IAC in Crimea

At this point, I proceed with a limited assessment of the events in Crimea and Eastern Ukraine in light of IAC. The intervention and further occupation of Crimea fall under the scope of Common Article 2 of the Geneva Conventions. The ICC Prosecutor confirmed, 'on 27 February 2014,

[46] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgement [2024] [97] <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> last accessed 05 April 2024

[47] *Ukraine and the Netherlands v. Russia* (App no8019/16, 43800/14 and 28525/20, ECtHR Grand Chamber, 30 November 2022) [697] (hereinafter - ECtHR, *Ukraine and the Netherlands v. Russia*)

[48] For instance: *Ilaşcu and Others v. Moldova and Russia* (App no48787/99, ECtHR Grand Chamber, 08 July 2004)

reportedly armed and mostly uniformed individuals wearing no identifying insignia ["little green man"[49]] seized control of government buildings in Simferopol, including the Crimean parliament building.'[50] As stated further, 'the Russian Federation later admitted that its military personnel had been involved in taking control of the Crimean peninsula, justifying the intervention *inter alia* on the basis of alleged threats to citizens of the Russian Federation, the alleged decision of residents of Crimea to join the Russian Federation and an alleged request for Russian intervention by (former) President Yanukovych, whom the Russian Federation considered to remain the legitimate leader of Ukraine.'[51] The President of the Russian Federation, on 17 April, admitted that Russian forces had been active in Crimea in order to support local defence forces.[52] It is clear that 'the Russian Federation has displaced the Ukrainian government as the governmental authority in Crimea through a military invasion.'[53]

Following the further occupation of the Crimean Peninsula by the Russian Federation, the law of occupation under IHL came into force. As the Hague Convention (IV) stipulates, 'territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'[54] On 6 March 2014, the Verkhovna Rada of the Autonomous Republic of Crimea decided to hold a referendum concerning the status of the Crimean Peninsula. The decision adopted by the Verkhovna Rada of the Autonomous Republic of Crimea did not comply, firstly, with the Ukrainian legislature, which prescribes that any matter in relation to the territorial integrity of Ukraine can be decided only by Law and national referendum.[55] Secondly, the occupying power cannot compel the inhabitants of the occupied territory to swear allegiance to the hostile Power.[56]

The occupation of Crimea sparked the IAC between Ukraine and Russia. The referendum, which cannot be called either legal or legitimate, does not legalise Crimea as a part of the Russian Federation, and the law of occupation applies.

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[49] As the forces were named by local population;
[50] Report on Preliminary Examination Activities (n 27) [155]
[51] *Ibid*
[52] Reuters, 'Putin admits Russian forces were in Crimea' (Reuters, 17 April 2014) <https://www.reuters.com/article/russia-putin-crimea/putin-admits-russian-forces-were-deployed-to-crimea-idUSL6N0N921H20140417/> last accessed 28 March 2024
[53] Shane R Reeves and David Wallace, 'The Combatant Status of the 'Little Green Men' and Other Participants in the Ukraine Conflict' (2015) 91 ILS 380
[54] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277
[55] Art.73 of the Constitution of Ukraine
[56] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277

1.1.4. The armed conflict in Eastern Ukraine

In addition to Crimea, the IAC between Ukraine and Russia had a second allocation – Eastern Ukraine. The ICC Prosecutor pointed out that '[…] reported shelling by both States of military positions of the other, and the detention of Russian military personnel by Ukraine, and vice-versa, points to direct military engagement between Russian armed forces and Ukrainian government forces that would suggest the existence of an international armed conflict in the context of armed hostilities in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.'[57] In June 2014, the U.S. State Department stated that 'three T-64 tanks, several rocket launchers and other military vehicles had crossed the border from Russia into Ukraine.'[58]

According to a report presented by the OHCHR concerning the Ilovaisk events in August 2014, 'representatives of the Russian troops were present near Ilovaisk.'[59] The ECtHR in *the Netherlands and Ukraine v. Russia* confirmed, 'reports by NGOs which similarly refer to Russian involvement in Ilovaisk are also based on witness interviews with separatists or statements made by Russian soldiers in press interviews.'[60] Further, the ECtHR concluded that 'Russian soldiers fought in the armed groups and senior members of the Russian military were present in command positions in the separatist armed groups and entities from the outset, from at the latest August 2014 in the context of the battle of Ilovaisk, there was a large-scale deployment of Russian troops.[61]

To sum up, I argue that in the summer of 2014, the IAC between Ukraine and Russia in Eastern Ukraine began. It is clear that in the context of the Ilovaisk tragedy, the involvement of Russian regular armed forces is out of the question.

1.1.5. The NIAC in Eastern Ukraine

The last part of the armed conflict in Eastern Ukraine to address is the NIAC between Ukraine and NGAGs. I elaborate on the thresholds of NIAC, namely the intensity of the conflict and the level of organisation of armed groups.

In the Four Geneva Conventions, only one article is devoted to NIAC. CA 3 provides that 'in the case of armed conflict not of an international character occurring in the territory of one of the High

[57] Report on Preliminary Examination Activities (n 27) [169]
[58] Kevin Rawlinson and Paul Lweis, 'Ukraine Rebels Shoot Down Military Plane' (THE GUARDIAN, 14 June 2014) <https://www.theguardian.com/world/2014/jun/14/russian-tanks-enter-ukraine> last accessed 28 March 2024
[59] OHCHR, 'Human rights violations and abuses and international humanitarian law violations committed in the context of the Ilovaisk events in August 2014' (2018) [71] <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/ReportOnIlovaisk_EN.pdf> last accessed 26 March 2024
[60] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [603]
[61] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [611]

Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum.'[62] The definition is framed in a negative way, without listing any particularities of NIAC. However, it is clear that at least one party to NIAC must be an NGAG. Yoram Dinstein observed that 'the two rudimentary ingredients [(i) armed conflict and (ii) that is of non-international character] do not cobble together a viable legal construct of an NIAC.'[63]

The II AP stipulates a more elaborative definition of the NIAC. Article 1 of II AP provides that 'non-international armed conflict takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'[64] The II AP stresses that 'Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'[65]

Hence, there is a need to draw a distinction between a NIAC and internal disturbances as the first threshold of NIAC, also known as intensity requirement. NIAC has a lower threshold of violence than IAC, but it does not entail that a state cannot take action to suppress internal disturbances which may threaten the government. For instance, Yoram Dinstein argues '[…] events may be large-scale and rife with violence, perhaps inflicting incalculable human fatalities and/or colossal damage to property, but they do not become an NIAC as long as they are isolated and sporadic, i.e. they are not coordinated and sustained over a stretch of time.'[66]

1.1.6. 'Protracted' and 'intense' violence

In its practice, ICTY defined NIAC as '[…] [a] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'[67] Similarly, the Rome Statute defines NIAC as 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.'[68] In both definitions, the term 'protracted' appears as essential.

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[62] ICRC Database, Convention (III) relative to the Treatment of Prisoners of War,, Commentary of 01.01.2020, Article 3 - Conflicts not of an international character <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3?activeTab=undefined> last accessed 28 March 2024

[63] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2021) 23

[64] II Protocol Additional to the Geneva Conventions

[65] ICRC Database, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Commentary of 01.01.2020, Article 1 - Material field of application, <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-1?activeTab=undefined> last accessed 28 March 2024

[66] Dinstein (n 63) 25

[67] *Tadic* Appeal Judgement (n 42) [70]

[68] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

According to ICTY, 'protracted' entails '[...] as referring more to the intensity of the armed violence than to its duration. […] the indicative factors [to establish the intensity] include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones, the involvement of the UN Security Council may also be a reflection of the intensity of a conflict.'[69] Yet, 'protracted violence' and 'intensity' are not interchangeable but more complementary elements.

For instance, in the *Katanga* case, 'the Chamber finds that the armed conflict was both protracted and intense owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory.'[70] In *Bemba* case, 'the Chamber notes that the concept of 'protracted conflict' has not been explicitly defined in the jurisprudence of this Court, but has generally been addressed within the framework of assessing the intensity of the conflict. When assessing whether an armed conflict not of an international character was protracted, however, different chambers of this Court emphasised the duration of the violence as a relevant factor.'[71]

Therefore, to be determined as a NIAC, the situation must meet the requirement of intensity. The intensity of armed conflict, from the perspective of ICTY and ICC, is linked to the notion of 'protracted violence', which aims to assist in establishing the intensity threshold. However, 'protracted violence' may not be seen as an alternative requirement to intensity but shall be considered as its integral part.

According to the ICC Prosecutor, 'the intensity of hostilities in eastern Ukraine increased rapidly in April and May 2014, and included on 2 May the shooting down of two Ukrainian military helicopters over the eastern city of Sloviansk by anti-government armed elements, intense battles for control of Donetsk International Airport at the end of May and on 14 June the shooting down of a Ukrainian military transport plane as it approached Luhansk Airport.'[72] The Prosecutor refers to the 'intensity of hostilities' to demonstrate the required intensity threshold of NIAC.

1.1.7. The requirements of II AP

Yet, to trigger the application of II AP, a few additional requirements must be met due to the difference between the threshold established by CA 3 and the threshold under II AP. The II AP

[69] *Prosecutor v. Haradinaj et al.* (Trial Judgment) IT-04-84-T (3 April 2008) [49]
[70] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) [1217]
[71] *The Prosecutor v. Jean-Pierre Bemba Gombo* (Judgment pursuant to article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) [139]
[72] Report on Preliminary Examination Activities (n 27) [163]

requires a much higher threshold to activate its provisions, whereas CA 3 has a relatively low threshold.

II AP requires the level of organisation of armed groups to be established. The ICTY confirmed that 'an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority.'[73] In ICTY's words, 'for an armed group to be considered organised, it would need to have some hierarchical structure, and its leadership requires the capacity to exert authority over its members.'[74] However, the ICTY stressed that '[…] the warring parties do not necessarily need to be as organised as the armed forces of a State.'[75] Hence, NGAGs ought to have a structure with hierarchy and leadership, yet it does not need to meet the armed forces level of organisation. I will discuss the 'DPR' and 'LPR' levels of organisation in the last Chapter.

In addition, II AP requires 'armed groups to exercise such control over a part of its territory to enable them to carry out sustained and concerted military operations.'[76] It is clear that '[NGAGs in Eastern Ukraine] controlled significant parts of the territory in Donbass (six districts in the Donetsk region and five districts in the Luhansk region).'[77]

Therefore, the level of organisation of armed groups is a separate requirement established by the II AP. Following the practice of ICTY, five principal elements shall be determined to demonstrate the level of organisation: a command structure, an ability to carry out organised military operations, a level of logistics, a level of discipline and engagement in law-making, capacity to interact with different actors. In addition, the NGAGs have to possess effective control over the occupied territory.

1.2. Emergency law in Eastern Ukraine: ATO and JFO (2014 – 2022)

In the previous subchapter, I discussed the qualification of armed conflict in Eastern Ukraine, which determines the scope of IHL applicable. In this subchapter, I aim to address the 'emergency law' introduced in Ukraine in 2014. This assessment lays down the legal framework under which preventive detention, which I discuss in the next Chapter, has been introduced and which allowed Ukraine to derogate from ECHR and ICCPR. The primary discussion on preventive detention and derogations is left for the second Chapter.

[73] *Tadic* Appeal Judgement (n 42) [120]
[74] *The Prosecutor v Ljube Boškoski and Johan Tarčulovski*, (Judgment) IT-04-82-T (10 July 2008) [195]
[75] *Ibid* [197]
[76] II Protocol Additional to the Geneva Conventions
[77] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [233]

1.2.1. The notion of 'emergency law'

In this study, the term 'emergency' is understood 'as an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.'[78] Emergency law allows the State (i) to introduce a special legal regime to tackle a threat and (ii) to derogate from international obligations, thus limiting human rights. In this Chapter, I discuss only special legal regimes, whereas derogations are left to the next Chapter.

According to the current legislature, there are three major emergency legal regimes: martial law, state emergency and environmental emergency. Martial law requires the highest threshold. Accordingly, 'martial law is a special legal regime that may be introduced on the whole territory or some part of the territory in the event of armed aggression or threat of attack, danger to the state independence of Ukraine, its territorial integrity […].[79] This emergency regime is designed to tackle armed aggression against the state. This regime has been invoked twice, firstly in 2018 due to an incident in the Kerch Strait[80], and secondly in 2022 as a reaction to the Russian invasion of Ukraine.

State emergency is the second by gravity special regime that 'is designed to cope with emergency situations of man-made or natural nature not lower than the national level, which have led or may lead to human and material losses, pose a threat to the life and health of citizens, or in the event of an attempt to seize state power or change the constitutional system of Ukraine […].'[81] State emergency regime, apart from environmental and man-made disasters, purports to deal with massive insurrections and riots, which may be, by the intensity, a threat to constitutional order as such. The national emergency law was invoked on 23 February 2022, prior to the invasion on 24 February 2022.[82] State Environmental emergency regime has a particular purpose – to prevent negative changes in the natural environment.[83]

When Ukraine faced the spark of NGAGs, the state authority did not invoke the provisions of martial law or state emergency law. In fact, a totally different branch of regulation has been enforced – antiterrorist law, as a separate emergency law realm. Among the reasons to opt for

[78] *Lawless v. Ireland* (no. 3) (App no332/57, ECtHR, 1 July 1961) [24]
[79] Law On the Legal Regime of Martial Law, 2015
[80] Decree On the decision of the National Security and Defense Council of Ukraine 'Regarding emergency measures to ensure the state sovereignty and independence of Ukraine and the introduction of martial law in Ukraine', 2018; Andrew Roth, 'Kerch strait confrontation: what happened and why does it matter?' (The Guardian, 27 November 2018) <https://www.theguardian.com/world/2018/nov/27/kerch-strait-confrontation-what-happened-ukrainian-russia-crimea> last accessed 28 March 2024
[81] Law On the Legal Regime of the State of Emergency, 2000
[82] Decree On the introduction of a state of emergency in certain regions of Ukraine, 2022
[83] Law On the Zone of Emergency Ecological Situation, 2000

antiterrorist law was that it allows the holding of elections, in contrast to martial law or state emergency. After the collapse of Yanukovich's regime, there was a pressing need to elect a new president. In addition, the LoCT provisions were utilised to legislate on some IHL gaps, in particular with regard to NIAC. As Sandesh Sivakumaran points out, 'during times of [NIAC], states may issue domestic legislature on matters of [IHL].'[84] Also, the assessment of domestic law is vital in NIAC since the regulation of NIAC is partially left for the States to legislate due to occurrents within the State's jurisdiction and lack of regulation under IHL. As Yoram Dinstein observes, 'when detained by government forces, insurgents are subject to prosecution and punishment for their criminal conduct by the domestic courts (military or civilian).'[85]

1.2.2. The legal regime of ATO and JFO in Eastern Ukraine

ATO is not an 'ordinary' emergency regime, yet it has been one of the most longstanding in Ukraine. Three normative acts lay down the general framework of ATO in Eastern Ukraine: (i) the Law On Combating Terrorism, (ii) the Law On Temporary Measures for the Anti-Terrorist Operation Period, (iii) the Decree On Urgent Measures to Overcome the Terrorist Threat and Preserve the Territorial Integrity of Ukraine.[86]

1.2.2.1. The notion of 'terrorism'

In accordance with the LoCT, the term terrorism entails 'socially dangerous activity, which consists of the deliberate, purposeful use of violence by taking hostages, arson, murder, torture, intimidation of the population and authorities or committing other attacks on the life or health of innocent people or threatening to commit criminal acts with the aim of achievement of criminal goals.'[87] The definition is linked to the provisions of the CCU. The cliche 'socially dangerous activity' refers to the notion of crime under Article 11 of CCU.[88] Additionally, the LoCT lists the number of criminal acts that may be committed as terrorist attacks under the CCU.

As a basic regulation to combat terrorism, LoCT provides the legal regime of ATO. ATO means '[…] a complex of coordinated special measures aimed at preventing and stopping terrorist activity, releasing hostages, ensuring the safety of the population, neutralising terrorists, and minimising the consequences of terrorist activity.'[89] However, LoCT does not stipulate that ATO belongs to or is a part of three major emergency regimes (martial law, state emergency or environmental emergency) *per se.* Hence, that's why it is hard to call the ATO an 'ordinary

[84] Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (OUP 2012) 139
[85] Yoram Dinstein, 'Concluding Remarks on Non-International Armed Conflicts' (2012) ILS 88 407
[86] Decree On the decision of the National Security and Defense Council of Ukraine dated April 13, 2014 'On urgent measures to overcome the terrorist threat and preserve the territorial integrity of Ukraine', 2014
[87] Law On Combating Terrorism, 2003
[88] Criminal Code of Ukraine (amended), 2001
[89] Law On Combating Terrorism, 2003

emergency'. The definition and regime prescribed by LoCT imply that ATO, by its nature, constitutes a separate special legal regime. As LoCT provides, the legal regime of ATO may be introduced in areas where any of the predicated acts listed in the definition of ATO occur.[90]

As follows from LoCT, only terrorists, terrorist groups or/and terrorist organisations may be targeted by ATO in the context of combating terrorism. Thus, apart from committing a predicated act listed, individuals must be legally 'labelled' as terrorists. The definition of a terrorist organisation is highly linked to a criminal organisation under CCU. According to LoCT, 'a terrorist organisation is a permanent association of three or more individuals which was created for the purpose of carrying out terrorist activities, […], an organisation is recognised as a terrorist if at least one of its structural units carries out terrorist activities with the knowledge of at least one of the leaders (management bodies) of the entire organisation.[91]

In 2014, the Office of the Prosecutor General of Ukraine confirmed that '[two] "people's republics" in Donetsk and Luhansk regions are two terrorist organisations with a rigid hierarchy, financing channels and supply of weapons.'[92] However, the 'devil is in the details'. LoCT determines the procedure for recognising the organisation as a terrorist. In accordance with Art.24, 'an organisation responsible for committing a terrorist act and recognised as a terrorist by a court decision is subject to liquidation, and its property is confiscated.'[93] To render such a decision, 'the court shall receive a request from the Prosecutor General, prosecutors of the Autonomous Republic of Crimea, oblasts, cities of Kyiv and Sevastopol.'[94] There were some indications that the Prosecutor General was eager to submit the relevant claim to the court.[95] However, no information about such a recognition or the legal request can be found. Hence, for the moment, it is impossible to establish that 'DPR' and 'LPR' were recognised as terrorist organisations under national law.

Nonetheless, there is a case law concerning an individual's affiliation with NGAGs. For instance, in case № 490/6729/16-к, the Mykolaiv Court of Appeal confirmed that, 'in March-April 2014, a stable hierarchical association (numbering more than three people) – ['DPR'] - was created on the territory of the city of Donetsk and the Donetsk region for the purpose of carrying out terrorist

[90] *Ibid*
[91] *Ibid*
[92] Interfax-Ukraine, 'Ukraine's prosecutor general classifies self-declared Donetsk and Luhansk republics as terrorist organisations' (Kyiv Post, 16 May 2014) <https://archive.kyivpost.com/article/content/war-against-ukraine/ukraines-prosecutor-general-classifies-self-declared-donetsk-and-luhansk-republics-as-terrorist-organizations-348212.html> last accessed 28 March 2024
[93] Law On Combating Terrorism, 2003
[94] Law On Combating Terrorism, 2003
[95] Radio Free Europe/RadioLiberty, 'ГПУ, СБУ і Мін'юст готують позови про визнання «ДНР» та «ЛНР» терористами' [The GPU, the SBU and the Ministry of Justice are preparing lawsuits to recognize the "DPR" and "LPR" as terrorists] (Radio Free Europe/RadioLiberty, 19 January 2015) < https://www.radiosvoboda.org/a/26801594.html> last accessed 28 March 2024

activities by planning, organising, preparing and implementing terrorist acts, violence against individuals, organisations, destruction of movable and immovable property, organisation of illegal armed formations for the commission of terrorist acts, participation in them, recruitment, arming, training and use of terrorists, propaganda and dissemination of the ideology of terrorism, financing and other support for terrorism.'[96] To maintain its interpretation, the Mykolaiv Court of Appeal advanced the argument that the Parliament of Ukraine, in its Resolution №129-VIII, recognised 'LPR' and 'DPR' as terrorist organisations.[97]

In contrast, the Zaporizhzhia Court of Appeal, in its reasoning concerning the case of participation of individuals in NGAGs, argued that the Parliament of Ukraine, in its Resolution №129-VIII,[98] did not recognise 'LPR' and 'DPR' as terrorist organisations *per se*, because the procedure of such recognition is stipulated by law. It's the Court's power to do so. According to the judges 'no provisions of the current legislation contain norms that would provide a mandatory prerequisite for bringing an individual to criminal liability for participation in a terrorist organisation, recognising such an organisation as a terrorist organisation based on a separate decision of a court or other authorised body.'[99] Lastly, judges argued, 'since the current legislation does not provide for any other procedure for bringing members of a terrorist organisation to criminal liability, the recognition of a certain group or organisation as a terrorist is the competence of the court when considering a specific criminal proceeding.'[100] Yet, LoCT governs this procedure. *Per contra,* the Donetsk Court of Appeal sustained that recognition of an organisation as a terrorist does not require a separate request from the responsible agent or decision of the court; the recognition is based on the provision of CCU.[101]

These decisions illustrate the contradictions within the judiciary concerning the recognition of an organisation as a terrorist. The presented case law has shown the different approaches towards the interpretation of requests from responsible agents. In addition, it shows the presence of different approaches towards Resolution №129-VIII made by the Parliament of Ukraine.

As the matter concerns the application of LoCT provisions in criminal law, the standards of criminal law must be sustained. The ECtHR affirmed that 'an individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation

[96] Mykolaiv Court of Appeal, case No490/6729/16-к, 30 October 2020
[97] Resolution On the recognition of the Russian Federation as an aggressor state, 2015
[98] *Ibid*
[99] Zaporizhia Court of Appeal, case No326/195/16-к, 27 July 2017
[100] *Ibid*
[101] Donetsk Court of Appeal, case No234/11703/15-к, 6 December 2016

of it what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission.'[102]

1.2.2.2. The regulation of ATO (2014 – 2018)

The ATO began in accordance with the Decree on Urgent Measures. However, the Decree On Urgent Measures by itself does not introduce the legal regime of ATO *per se* since it is an executive act. The primary purpose of the Decree on Urgent Measures was to list measures that responsible agents can use to tackle terrorist activity. To regulate the ATO, the Government and Parliament have passed a few legislative and executive acts to fulfil the requirements established by LoCT. It is essential to note that the legal framework is extensive. For that reason, I will articulate only the primary legislative acts.

To begin with, the Parliament has adopted a Law On Temporary Measures. Law On Temporary Measures is designed to regulate civil and administrative procedures in the area where the ATO has been enforced. According to the Law On Temporary Measures, the period of the anti-terrorist operation is the time between the date of entry into force of the Decree On Urgent Measures and the date of enactment of the Decree of the President of Ukraine on the completion of the anti-terrorist operation or military actions within the territory of Ukraine.[103] In 2018, in accordance with Decree №116/2018, the ATO was officially terminated and substituted by the adoption of JFO.[104] However, the Law On Temporary Measures does not determine the area of ATO. The obligation to establish the area has been put on the Government. Later, the Government passed two Orders in 2014[105] and 2015[106], which settled the areas of ATO. Thus, in the areas determined, the detention under LoCT could have been utilised.

To conclude, the ATO is a special legal regime which does not fit the three main emergency regimes. ATO is designed to be enforced by the antiterrorist realm of national law and can be executed only against the terrorist groups recognised by judicial decisions. The LoCT mostly regulates ATO. LoCT provides general terms for conducting the ATO, actors involved, and possible restrictions and allows them to detain individuals within the criminal law scheme.

[102] *Kafkaris v. Cyprus* (App no 21906/04, ECtHR Grand Chamber, 12 February 2008), [140]
[103] Law On Temporary Measures for the Anti-Terrorist Operation Period, 2014
[104] Decree On the decision of the National Security and Defense Council of Ukraine 'On a large-scale anti-terrorist operation in the Donetsk and Luhansk regions', 2018
[105] Order On approval of the list of settlements on the territory of which an anti-terrorist operation is conducted, 2014
[106] Order On approval of the list of settlements on the territory of which an anti-terrorist operation is conducted, 2015

1.2.2.3. The legal regime of JFO in Eastern Ukraine (2018 – 2022)

In accordance with Decree №116/2018, the ATO was officially ended, and a new format for tackling the armed conflicts was introduced. In contrast to ATO, JFO has not been purely based on an antiterrorist legal regime, a new law has been developed with the purpose of regulating JFO.

The Parliament has passed a Law On the Peculiarities of the State Policy. The adoption of Law On the Peculiarities of the State Policy transformed ATO, which had a more security-based approach towards measure, into JFO with a military-based approach and direct involvement of armed forces at all levels of planning, preparation and execution. I stress that the passed Law On the Peculiarities of the State Policy is not as detailed as the regulation of ATO, and many additional normative acts were passed by the agents involved.

Similarly to ATO, JFO does not fall under 'ordinary' emergency law, as it has been developed specifically for armed conflicts, both NIAC and IAC, in Eastern Ukraine. However, there is no clear definition of JFO in Law On the Peculiarities of the State Policy. Yet, it is possible to define JFO as a complex of coordinated special measures aimed at tackling the armed conflict in Eastern Ukraine. The definition is similar to the meaning of ATO introduced earlier.

Law On the Peculiarities of the State Policy provides that JFO operates in two zones: firstly, in the security zones that are adjacent to areas of active hostilities and secondly, in hostilities areas.[107] In these zones, individuals involved in the JFO could have exercised their powers under the Law On the Peculiarities of the State Policy, including detention.

In addition, by presenting JFO, the main responsible body was changed from the Security Service of Ukraine[108], which was responsible for the ATO, to the General Staff of the Armed Forces of Ukraine.[109] Apart from that, the Commander of the joined forces can exercise its power not only on members of the Ukrainian Armed Forces but also on any military, paramilitary, security or civil unit involved in the JFO. Also, the area where the legal regime of JFO was applied differs from the area of ATO. The ATO must take place in the area where the terrorist threat is present as such. The JFO has been enforced on the temporarily occupied territories in Donetsk and Luhansk regions.[110] The President of Ukraine has approved the list of temporarily occupied territories in Donetsk and Luhansk regions.[111]

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[107] Law On the Peculiarities of the State Policy To Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in the Donetsk and Luhansk Regions, 2018 (hereinafter – Law On the Peculiarities of the State Policy, 2018)
[108] Law On Security Service of Ukraine, 1992
[109] Law On the Peculiarities of the State Policy, 2018
[110] Law On the Peculiarities of the State Policy, 2018
[111] Decree On the boundaries and list of districts, cities, towns and villages, parts of their territories, temporarily occupied in the Donetsk and Luhansk regions, 2019

Therefore, the JFO is an advanced version of ATO and a combination of martial law and emergency law regimes, but still a separate legal regime. JFO is a complex of special measures aimed at tackling the armed conflict in Eastern Ukraine. However, in contrast, with ATO, JFO is based on a military paradigm of conducting the operation and coordinated solely by the military command and is no longer a measure of combating terrorism. Apart from that, JFO has been operating only in the regions which were defined as temporally occupied territories of Donetsk and Lugansk regions. In the area where the JFO was operated, the body involved in it had a right to detain individuals on the basis of Law On the Peculiarities of the State Policy, but in accordance with criminal procedure, similarly to ATO.

1.2.2.4. Detention in ATO and JFO areas

Both ATO and JFO authorized the detention of individuals in accordance with LoCT and criminal procedure. Hence, state officials in the ATO and JFO could have detained individuals if they had been involved in terrorist activity.[112] Accordingly, detention under the LoCT cannot be longer than 72 hours, as well as under Law On the Peculiarities of the State Policy, and criminal charges must be brought within this time limit. For instance, OHCHR has demonstrated that in areas of ATO, '[…] volunteer battalions (often in conjunction with the Security Service of Ukraine (SBU) were frequent perpetrators, information from late 2015 and early 2016 mostly implicate SBU.'[113] Later, under the JFO, the OHCHR reported that from 16 November 2019 to 15 February 2020, 'the 75 cases showed a consistent pattern of arbitrary detention or procedural violations at the initial stages of detention (reported by 54 individuals, 72 per cent of the total) with the SBU being mainly responsible.'[114]

Furthermore, in parallel to the 'ordinary' detention under LoCT, Ukraine introduced 'preventive detention' in the areas of conducting ATO and later JFO.[115] Preventive detention extended the length of time limit for more than 72 hours. By virtue of adopting preventive detention, Ukraine has modified the legal grounds and procedure of detention in the areas of ATO and, later, JFO. However, I leave the primary discussion on it for the next chapter.

[112] Law On Combating Terrorism 2003

[113] OHCHR, 'Report on the human rights situation in Ukraine 16 February to 15 May 2016' (2016) [31] <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf> last accessed 15 February 2024

[114] OHCHR, 'Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020' (2020) [60] <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/29thReportUkraine_EN.pdf> last accessed 01 April 2024

[115] Law On Preventive Detention

Moreover, it was noted by the OHCHR that both NGAGs and Ukrainian authorities intern individuals in the area of ATO.[116] Thus, NGAGs adopted their 'legislature' to detain individuals. According to OHCHR, both NGAGs had '[…] the practice of 30-day "administrative arrest" and "preventive arrest" in territory controlled by ["DPR" and "LPR"] respectively.'[117] Later, 'OHCHR identified and further confirmed a consistent pattern of arbitrary detention, often amounting to enforced disappearance, torture and ill-treatment of conflict-related detainees in both [NGAGs].'[118] Jelena Plamenac also points out that both 'DPR' and 'LPR' employed 'preventive detention' identical to what Ukraine introduced.[119] The indicated practice of 'preventive detention' illustrates how Ukraine and NGAGs tried to extend the present legal basis for conflict-related detention.

1.3. Conclusions for Chapter I

To conclude, I submit that the complexity of the armed conflict in Eastern Ukraine is caused by the number of actors involved, a sharp intensification of hostilities and a lack of clarity on matters of control and interdependence among actors. The armed conflict in Ukraine shall be seen as a mixed armed conflict, which possesses features of both IAC and NIAC, with three avenues: IAC between Ukraine and Russia in Crimea, IAC in Eastern Ukraine, for instance, the battle of Ilovaisk; and the NIAC between Ukraine and 'DPR' and 'LPR', which met the thresholds established by Common Article 3 and II AP.

It was pointed out that Russia might exercise control over 'DPR' and 'LPR'; hence, the conduct of these entities can be attributed to Russia under effective or overall control tests. ICJ developed the effective control test in the Nicaragua case. It requires that the State directed or enforced the possible violations of IHL by NGAGs. The threshold is extremely hard to meet. According to ICTY, overall control requires engagement in general planning and preparation, which is a lower threshold. However, these tests are designed for different purposes: effective control – for establishing State responsibility and overall control test – for purposes of ICL. Neither of these

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[116] OHCHR, 'Report on the human rights situation in Ukraine 16 February to 15 May 2016' (2016) [30] < https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf> last accessed 15 February 2024

[117] OHCHR, 'Report on the human rights situation in Ukraine 16 February to 15 May 2019' (2019) [49] <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/ReportUkraine16Feb-15May2019_EN.pdf> last acceded 01 April 2024

[118] OHCHR, Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020 [64] <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/29thReportUkraine_EN.pdf> last accessed 01 April 2024

[119] Jelena Plamenac, *Unravelling Unlawful Confinement in Contemporary Armed Conflicts: Belligerents' Detention Practices in Afghanistan, Syria and Ukraine* (BRILL, 2022), 157,159

tests has been applied to establish the level of control by ICJ or ICC. Thus, I submit that there was a NIAC between Ukraine and NGAGs.

CA 3 provides a basic definition of NIAC and the first threshold. II AP gives a more comprehensive understanding of NIAC and a higher threshold of application. The NIAC can meet the threshold of CA 3 but not the threshold of II AP. The NIAC in Eastern Ukraine meets both thresholds. The NIAC in Eastern Ukraine has met the requirement of intensity and protractedness, so it cannot be considered an internal insurgency.

To tackle the NIAC, Ukraine utilised domestic law to provide legal instruments to cope with NGAGs and remedy gaps in IHL. Ukrainian legislature has three principal emergency regimes – martial law, national emergency law and environmental emergency law. Yet, none of the above-mentioned regimes was invoked when the armed conflict in Eastern Ukraine started. To deal with the rise of NGAGs in Eastern Ukraine, the provisions of anti-terrorist law were enforced, and ATO was introduced in 2014. The LoCT allows the detention of individuals in ATO areas if any of the predicated acts are suspected to be committed or have been committed. Later, ATO was substituted with JFO. JFO is a complex of military and organisation measures to reestablish control over the occupied territories of Ukraine. By its nature, JFO lies in a military paradigm; it was planned and directed by military command, in contrast to ATO.

Both in ATO and JFO, State officials were entitled to detain individuals on the basis of LoCT. Furthermore, Ukraine introduced preventive detention, which extended the timeframe of detention for more than 72 hours. In a similar vein, both NGAGs enacted similar practices to detain individuals for more than 72 hours. Thus, Ukraine utilised domestic law to remedy gaps in IHL provisions when NGAGs employed their ‘practice’ to achieve an identical effect.

II. THE LEGAL BASIS OF THE DETENTION IN NON-INTERNATION ARMED CONFLICT

In the previous Chapter, I demonstrated that armed conflict in Eastern Ukraine possesses characteristics of both IAC and NIAC. This qualification impacts the rules applicable to the parties. While the I-IV Geneva Conventions and I AP cover the hostilities between Ukraine and Russia, the hostilities between Ukraine and NGAGs are governed by the CA 3 of Geneva Conventions and II AP, which Ukraine has ratified.[120]

This Chapter is designed to reflect upon the principal research objective, which is to establish the legal regime of detention in the context of NIAC in Eastern Ukraine. In the following parts, I aim to allocate the legal basis for security detention in NIAC in Eastern Ukraine by assessing three primary realms of law: IHL, HRL and domestic legislation.

To achieve the purpose of this Chapter, it is structured as follows. The first part purports to determine the place of IHL, both treaty-based and customary law, in authorising parties to NIAC to detain individuals and in regulating detention for security reasons in NIAC. The second part elaborates on the role of HRL in NIAC and its relation with IHL, and whether it can serve as a legal ground for internment in NIAC. The third part analyses the stand of the national legislature in terms of providing a legal basis for internment in NIAC. The NGAG's power to intern is discussed in the next Chapter.

2.1. International Humanitarian Law as a Legal Basis for the Detention in Non-International Armed Conflict

IHL is designed to regulate the conduct of hostilities between parties to armed conflict. While it is not a secret that IHL does not provide equal regulation for IAC and NIAC. This inequality causes many issues in terms of governing hostilities in NIAC. To highlight the issue, I will demonstrate the difference, firstly, between the authorisation of security detention under the LoIAC and the LoNIAC, and secondly, between the regulation of internment under LoIAC and LoNIAC.

2.1.1. The difference in authorisation

The LoIAC provides a number of rules which tackle the matter of internment of combatants and civilians. The LoIAC explicitly authorised the parties to armed conflict to detain individuals. Respectively, Art. 21 of the III GC stipulates that 'the Detaining Power may subject prisoners of war to internment'[121], and Art. 42 of IV Geneva Convention provides that 'the internment or placing in assigned residence of protected persons may be ordered only if the security of the

[120] Decree On the ratification of the Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the protection of victims of armed conflicts of a non-international nature (Protocol II) 1989
[121] III GC

Detaining Power makes it absolutely necessary.'[122] In addition to clear authorisation, both conventions guide parties to armed conflict through requirements and standards of treating detained individuals (combatants or civilians). For instance, Section II in III GC for combatants and Section IV in IV GV for civilians. Consequently, the language of III and IV GC does not give an assumption that parties to the IAC cannot detain individuals for security reasons. Parties to IAC under IHL may legally intern individuals, and IHL explicitly grants this power to parties. The reason for such a precise regulation is the nature of IAC.[123] As Lawrence Hill-Cawthrone and Dapo Akande observe, '[…] only an explicit norm of international law can provide the legal authority for targeting, detention, etc. Without such a rule of international law, these actions would be unlawful as a matter of international law since states do not have authority to take such action on the territory of another state and have obligations to other states with respect to how they treat nationals of those other states.'[124]

However, the armed conflict in Ukraine is qualified as mixed. Thus, the scope of IHL and HRL applications is different depending on the primary actors involved. The hostilities between Ukraine and NGAGs constitute the NIAC, which was within the territory of Ukraine and under its jurisdiction. Consequently, Ukraine relied heavily on domestic law rather than provisions of international law. Nonetheless, Ukraine had to comply with its international obligation under IHL and HRL.

In contrast, the situation with NIAC is not that apparent. The detention for security reasons of individuals in NIAC and, consequently, in NIAC in Eastern Ukraine is regulated by CA 3 and II AP. The CA 3 provides that 'persons taking no active part in the hostilities, […] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.'[125] As Kubo Mačák submits, '[…] the law contemplates that detention will take place during such conflicts. Common Article 3 mandates humane treatment and prohibits certain acts with respect to several categories of persons including those placed hors de combat by

[122] IV Geneva Convention
[123] Manuel Brunner, 'Detention for Security Reasons by the Armed Forces of a State in Situations of Non-International Armed Conflict: the Quest for a Legal Basis' in Björnstjern Baade, Linus Mührel, Anton O. Petrov (eds.) in *International Humanitarian Law in Areas of Limited Statehood: Adaptable and Legitimate or Rigid and Unreasonable?* (Nomos, 2018), 91
[124] Lawrence Hill-Cawthrone and Dapo Akande, 'Locating the Legal Basis for Detention on Non-International Armed Conflicts: A Rejoinder to Aurel Sari', (EJIL: Talk!, 2 June 2014) <http://www.ejiltalk.org/locating-the-legal-basis-fordetention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari/> accessed 03 January 2024
[125] 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

detention.'[126] This position reflects a broad consensus on the general 'humanitarian sense' of CA 3 and is supported by judicial practice. For instance, ICJ in the *Nicaragua* case stresses that 'article 3, which is common to all four Geneva Conventions of 12 August 1949, defines certain rules to be applied in the armed conflicts of a non-international character. […] and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" […].'[127] ICTR, among others, affirms that 'it is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3 […].'[128] The ICRC's study on Customary IHL repeats this position.[129] Yet, CA 3 says nothing about the possibility of interning; it articulates the word 'detain' without adding 'for security reasons', as can be seen in LoIAC. Hence, CA 3 is more regulative-oriented than authoritative-oriented. The rule does provide explicit power for parties to detain. Yet, CA 3 aims to safeguard basic humanitarian concerns.

The continuation of the humanitarian approach is seen in II AP. Art.5 of the II AP states that '[…] the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', supported by Art.6.[130] II AP utilises both possibilities 'interned or detained', thus as Lawrence Hill-Cawthorne observes, '[…] AP II recognizes that internment will occur in non-international conflicts by specifying minimum treatment standards for internees.'[131]

Therefore, the language of the LoNIAC is distinctive from LoIAC. LoNIAC does not explicitly entail parties to the armed conflict to detain individuals for security reasons, as it is done in LoIAC. LoNIAC elaborates mostly on the guaranteed level of treatment, admitting that internment may happen. Consequently, the question remains whether it is possible to locate the legal basis for detention in NIAC. Jelena Pejic says that 'internment is, […] clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of Additional Protocol II, which mentions internment in Articles 5 and 6 but likewise does not give details of how it is to be organized.'[132]

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[126] Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 IYHR 89
[127] *Nicaragua v. United States of America* (n 26) [218]
[128] *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) [608–609]
[129] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2009) xxxvi
[130] II Protocol Additional to the Geneva Conventions
[131] Hill-Cawthorne (n 16) 84
[132] Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87 IRRC 377

2.1.2. Reconsidering 'authorisation': (i) *travaux préparatoires*

There are three possible ways to guide through the lack of clarity. The first way is to argue that the *travaux préparatoires* provide the intention of the drafters to include the power to detain for security reasons in NIAC. Kubo Mačák argues that in favour of *travaux préparatoires*, '[…] a number of State representatives expressly mentioned detention by non-State actors in connection to the safeguards provided by the eventual Articles 5 and 6 of Protocol II'.[133] On the contrary, Lawrence Hill-Cawthrone points out that '[…] such references do not take the argument any further, for all that this confirms is that detention in non-international conflicts is not prohibited by IHL; it was simply recognised as a matter of fact, rendering it necessary to regulate such actions.'[134] Additionally, Lawrence Hill-Cawthrone claims '[…] there is nothing in the *travaux* of common Article 3 or Additional Protocol II that expresses a view that the legal basis to intern in such situations is to be found in IHL.'[135] At this point, the findings deduced in the *Serdar Mohammed v Ministry of Defence* case by Justice Leggatt are important to take into consideration. The case deals with the role of CA 3 and II AP in NIAC and the detention for security reasons of individuals. The facts are as follows, 'Mr Serdar Mohammed was captured by UK armed forces during a military operation in northern Helmand in Afghanistan on 7 April 2010. He was imprisoned on British military bases in Afghanistan until 25 July 2010, when he was transferred into the custody of the Afghan authorities. Mr Serdar Mohammed claims that his detention by UK armed forces was unlawful (a) under the Human Rights Act 1998 and (b) under the law of Afghanistan.'[136]

In his findings, Justice Leggatt provides five arguments to conclude that CA3 and/or II AP cannot serve as a ground for internment in NIAC. The arguments are as follows:

Firstly, '[…] if CA3 and/or [II AP] had been intended to provide a power to detain they would have done so expressly – in the same way as, for example, Article 21 of the Third Geneva Convention […].'[137] Secondly, '[…] all that seems to me to be contemplated or implicit in CA3 and [II AP] is that during non-international armed conflicts people will in fact be detained.'[138] Thirdly, '[…] the clear purpose of CA3 and Article 5 of [II AP] is inconsistent with the notion that they are intended to provide a legal power to detain […] .'[139] Fourthly, '[…] CA3 applies to "each Party to the conflict" and [II AP] applies to organised armed groups who are able to implement it,

[133] Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 IYHR 100
[134] Hill-Cawthorne (n 16) 70
[135] *Ibid*
[136] *Serdar Mohammed v Ministry of Defence* (n 17) [1]
[137] *Ibid* [242]
[138] *Ibid* [243]
[139] *Ibid* [244]

providing a power to detain would have meant authorising detention by dissident and rebel armed groups […] .'[140] Fifthly, '[…] I do not see how CA3 or [II AP] 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 […] neither CA3 nor [II AP] specifies who may be detained, on what grounds, in accordance with what procedures, or for how long.'[141]

Consequently, I agree with the submission by Lawrence Hill-Cawthrone that it is not possible to establish from *travaux préparatoires* of II AP or CA 3 the intention to provide a legal basis for internment in NIAC. Also, it is hard to disagree with Justice Leggatt's thoughtful consideration and relevant judicial practice, particularly on the humanitarian purpose of CA 3 and II AP.

2.1.3. Reconsidering 'authorisation': (ii) CIL and (iii) principle of analogy

The second way to determine the authorisation to intern in NIAC is to demonstrate the existence of CIL if it cannot be found in treaty-based IHL. To establish the existence of CIL, two requirements ought to be met simultaneously – a common state practice and *opinion juris.* The ICJ in the *Nicaragua* case determined that '[…] in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule […].'[142]

It is evident that States detain individuals in NIAC. For instance, with regard to NIAC in Eastern Ukraine, the OHCHR reported in December 2014, 'by the beginning of September, […] several hundred members of the armed groups and "pro-federalism" supporters were being detained by the Ukrainian authorities […].'[143] The OHCHR observes 'the Government's efforts to safeguard Ukraine's territorial integrity and to restore law and order in the conflict zone have been accompanied by arbitrary detentions […], most of such human rights violations reported since May appear to have been conducted by certain voluntary battalions or by the SBU […].'[144] In another report in February 2015, the OHCHR submitted, 'Ukrainian law enforcement agencies continued to report on the detention of people suspected of separatism and terrorism.'[145] In the following report in July 2015, the OHCHR highlighted, 'on 14 March, the SBU Head reported that

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[140] *Ibid* [245]
[141] *Serdar Mohammed v Ministry of Defence* (n 17) [246]
[142] *Nicaragua v. United States of America* (n 26) [186]
[143] OHCHR, 'Report on the human rights situation in Ukraine 15 December 2014' (2014) [40] < https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf> last accessed 26 March 2024
[144] *Ibid* [43]
[145] OHCHR, 'Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015' (2015) [38] <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/9thOHCHRreportUkraine.pdf> last accessed 26 March 2024

during the whole conflict, the Government had released 1,553 "detained traitors, spies and subversives" so as to secure the release of people held by the armed groups […].'[146]

It is not hard to prove that States intern individuals in NIACs; the crux is on what basis they are permitted to do so. The state practice demonstrates that detention occurs, but Lawrence Hill-Cawthrone argues, '[...] this practice demonstrates no more than the fact that IHL does not prohibit internment.'[147] In the ICRC's Study, Rule 99 provides that 'arbitrary deprivation of liberty is prohibited.'[148] According to the Study, 'the prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law.'[149] However, the Study stresses that 'arbitrary deprivation of liberty is prohibited'; it entails that deprivation of liberty – detention – can be lawful in NIAC if it meets, among others, the requirement of legality. I discuss the 'arbitrariness' in next subchapter. Yet, CIL does not provide the legal basis for detention in NIAC, and as Lawrence Hill-Cawthrone correctly observes, '[…] states generally rely on sources other than treaty-based IHL or customary international law, primarily domestic law, for providing the legal basis to intern in non-international conflicts.'[150] This position is also supported by Jelena Plamenac, who argues that '[…] arbitrary detention is an [HRL] concept that IHL treaty law does not incorporate *in toto* as it does other [HRL] provisions such as those on torture or judicial guarantees.'[151]

In terms of NIAC, the State usually acts within its jurisdiction; consequently, it does not need to seek authorisation for action from international law. However, it seeks compliance with its obligation. I agree with Lawrence Hill-Cawthrone that '[…] the *opinio iuris* of states does not support the view that IHL, under either treaty or custom, provides a legal basis for internment in non-international conflicts.'[152] This position is also advanced by ICRC in the Concluding Report, 'while treaty IHL also envisages internment in NIAC, neither existing treaties nor customary law expressly provide grounds or procedures for carrying it out.'[153]

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[146] OHCHR, 'Report on the human rights situation in Ukraine 16 February to 15 May 2015' (2015) [41] <https://reliefweb.int/report/ukraine/report-human-rights-situation-ukraine-16-february-15-may-2015-enruuk> last accessed 26 March 2024
[147] Hill-Cawthorne (n 16) 70
[148] Henckaerts and Doswald-Beck (n 129) v.1 344
[149] *Ibid* 347
[150] Hill-Cawthorne (n 16) 70
[151] Plamenac (n 119) 43
[152] Hill-Cawthorne (n 16) 71
[153] ICRC, Concluding Report, 'Strengthening international humanitarian law protecting persons deprived of their liberty', (2015) 15 <https://rcrcconference.org/app/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf > last accessed 02 April 2024

The third way to overcome the lack of legal basis is to apply the principle of analogy. That entails, the rules of IAC can be used in NIAC. ICRC, in its 2012 Background Paper, made an assumption that '[…] "imperative reasons of security" is an appropriate standard for internment in NIAC.'[154] Nonetheless, I will return to this approach in the later *Lex Ferenda* part.

To sum up this part, I conclude that neither treaty-based IHL nor CIL can be seen as a legal basis for detention in NIAC. CA 3 and II AP regulate acts of internment, yet they do not authorise parties to the conflict to intern.

2.2. International Human Rights Law as a Legal Basis for the Detention in Non-International Armed Conflict

In its Study, ICRC reflects upon the prohibition of arbitrary detention in armed conflict. Putting Rule 99 in the context of NIAC, the authors of the Study utilise human rights instruments to highlight the role of HRL in armed conflict. The Study provides, 'the International Covenant on Civil and Political Rights, […] the European and American Conventions on Human Rights provide that no one may be subjected to arbitrary arrest or detention. The European Convention on Human Rights spells out the grounds on which a person may be deprived of his or her liberty.'[155] Nonetheless, prior to delving into a discussion regarding the place of HRL in providing a legal basis for internment in NIAC, I proceed with determining the interplay between HRL and IHL in NIAC due to longstanding debate over the simultaneous application of both realms in armed conflict.

2.2.1. IHL and HRL in armed conflict

In *academia,* there are three principal theories about the interplay between HRL and IHL. The first theory is 'separation' or 'exclusivity', which claims that HRL and IHL were created and designed for different purposes and cannot be applied simultaneously.[156] The following case law will demonstrate the obsoleteness of this approach. Yet, the ICJ frames this theory as follows 'it was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.'[157] This approach can be found in the Isralian submission to ICJ in Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

[154] ICRC, 'Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict' (2013) 13 <https://www.icrc.org/en/doc/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf> last accessed 02 April 2024

[155] Henckaerts and Doswald-Beck (n 129) v.1 348

[156] Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (AIL-Pocket 2011), 126; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 83

[157] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep, 239 (hereinafter – *Nuclear Weapons* Case)

Territory.[158] The second theory is 'complementarity' or 'convergence'; it stands that HRL and IHL are not mutually exclusive and can interact with and complement each other.[159] This way is the most balanced, and as it will be shown, this doctrine has the biggest support from practice. The third theory is 'fusion' or 'integration'; representatives of this way of thinking claim that HRL and IHL constitute '[…] indistinguishable parts of a normative whole.'[160] This approach is a product of opposition to the 'separation' or 'exclusivity' doctrine of IHL and HRL. Yet, it remains a more aspirational way of thinking than reality.

ICJ, HRC under the ICCPR and ECtHR under ECHR have experienced interaction with armed conflicts and, consequently, with IHL. This intercommunication produced a number of cases which absorbed and showed different ways of interplay between IHL and HRL.[161] There are three major precedents from ICJ, where the Court faced the matter of interconnection between HRC, namely ICCPR, and IHL.

The first case is the *Nuclear Weapons* case. The Court was asked to suggest '[whether] the threat or use of nuclear weapons [is] in any circumstance permitted under international law'.[162] ICJ elaborated on its position regarding the applicability of HRL to armed in one paragraph. The Court pointed out that '[…] the protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.'[163] Despite being affirmative in the first passage, the Court introduces its precise view in the following passages. The Court submitted 'the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.'[164] Therefore, the ICJ concluded that 'whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.' The whole position of the ICJ was packed in one, not that

[158] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)* [2004] ICJ Rep, 177 (hereinafter –*Wall* Case)
[159] Thürer (n 156) 127; Oberleitner (n 156) 105
[160] *Ibid* 126; *Ibid* 122
[161] *Al-Jedda v. the United Kingdom* (App no27021/08, ECtHR [GC], 7 July 2011); *Al-Skeini and Others v. the United Kingdom* (App no 55721/07, ECtHR [GC] 7 July 2011); *Hassan v. the United Kingdom* (App no29750/09, ECtHR [GC] 16 September 2014); *Georgia v. Russia (II)* (App no38263/08, ECtHR [GC], 21 January 2021); *Ukraine and The Netherlands v. the Russian Federation*; *Ram Maya Nakarmi v. Nepal* (Comm no 2184/2012, HRC, 8 May 2017); HRC, 'ICCPR General Comment No. 29: states of emergency (article 4)' (31 August 2001) CCPR/C/21/Rev.1/Add.11; HRC, 'ICCPR General Comment No. 35: Article 9: Liberty and Security of person' (16 December 2014), CCPR/C/GC/35
[162] *Nuclear Weapons* Case (n 157) 228
[163] *Ibid* 240
[164] *Ibid* 240

lengthy, paragraph, which sparked more questions than answers. It is important to highlight that in the *Nuclear Weapons* case, the Court was not asked to guide through the interaction between HRL and IHL in particular circumstances (armed conflict), and the matter was more theoretical and abstract. Thus, I believe that in the present moment, the findings in the *Nuclear Weapons* case must be read in conjunction with two other cases. Otherwise, there is a high probability of being misguided by one paragraph.

The second case, where the ICJ had to deal with HRL in armed conflict in a particular context in contrast to the *Nuclear Weapons* case, was the Advisory Opinion in the *Wall* case. The question was as follows: 'what are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory […], considering the rules and principles of international law, including the Fourth Geneva Convention of 1949 […]?'.[165] Firstly, in the Wall case, ICJ rejected the argument that HRL (ICCPR) is not applicable in armed conflict.[166] Therefore, as Gerd Oberleitner suggests, '[…] the Advisory Opinion of the ICJ in the *Nuclear Weapons* case must not be read so as to suggest that international humanitarian law prevails as a regime over international human rights law.'[167] Secondly, the Court provides three possible ways of interaction between IHL and HRL, '[…] some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.'[168] In addition, there is a vital difference between the *Nuclear Weapons* case and the *Wall* case. In the *Wall* case, the Court was specifically asked to address the issue of interconnection between two realms of international law or, as the Court framed it, 'in order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.'[169] Lastly, in its conclusions, the Court points out that 'the construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.'[170] This finding confirms that HRL and IHL can apply simultaneously and are not mutually exclusive. Consequently, depending on the context of the particular case, some of the norms of HRL can complement IHL or even replace it if IHL provides no rule to follow.

The last case is *Armed Activities on the Territory of the Congo*. The case concerns the principle of non-use of force in international relations and the principle of non-intervention by the Republic of

[165] *Wall* Case (n 158) 141
[166] *Ibid* (n 158) 178
[167] Oberleitner (n 156) 96
[168] *Wall* Case (n 158) 178
[169] *Ibid* (n 158) 178
[170] *Ibid* (n 158) 194

Uganda by engaging in military activities against the Democratic Republic of the Congo on the latter's territory.[171] In the context of armed conflict, ICJ concluded that '[…] that Uganda was the occupying Power in Ituri at the relevant time.'[172] Thus, 'this obligation [of Occupying Power] comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.' Consequently, the Court submits that '[…] Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.'[173] Therefore, the Court finds that '[Uganda troops] committed acts of killing, torture and other forms of inhumane treatment of the civilian population […] and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.'[174] In addition, among the listed legal instruments applicable to the *Democratic Republic of Congo v. Uganda* case, ICJ recalls ICCPR.[175] Hence, the ICJ formed its position towards interaction between HRL and IHL as complementary but not mutually exclusive.

Nonetheless, there are two subsequent issues which I aim to address. The first is the interpretation through *lex specialis*, which appears to be a bone of contention among scholars. The second issue is the possibility of derogating from HRL instruments in times of emergencies, which can deter the application of HRL in NIAC.

2.2.2. The doctrine of *lex specialis*

The notion of lex *specialis* appeared in both advisory opinions presented earlier. However, the question is: how exactly the ICJ utilized this doctrine? Particularly when in the *Wall* case, the Court affirms that '[some rights] may be matters of both these branches of international law'[176], which leads to a conclusion that IHL and HRL complement each other rather than separate.

Lex specialis, as a legal term, sparks not less debates than the interplay between IHL and HRL as such. The full name is l*ex specialis derogat legi generali* or special law repeals general laws, 'it suggests that, if a matter is regulated by a general standard as well as by a more specific rule, then the latter should take precedence over the former.'[177] Martti Koskenniemi suggests, 'there are two

[171] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment,* [2005] ICJ Rep, 280 (hereinafter - *Democratic Republic of the Congo v. Uganda*)
[172] *Democratic Republic of the Congo v. Uganda* 231
[173] *Ibid* 231
[174] *Ibid* 241
[175] *Ibid* 243
[176] *Ibid* 178
[177] ILC, 'Report of the Study Group on Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law', (29 July 2005) UN Doc. A/CN.4/L.676 [56]

ways in which law may take account of the relationship of a particular rule to a general one. A particular rule may be considered an application of a general standard in a given circumstance. […] Alternatively, it may be considered as a modification, an overruling or a setting aside of the latter.'[178] Following the ILC Report, Cordula Droege argues that '[*lex specialis*] understood not as a principle to solve conflicts of norms but as a principle of more specific interpretation, the principle of *lex specialis* in itself incorporates the complementarity approach […].'[179] A similar approach is advanced by Lawrence Hill-Cawthorne. According to him, '[…] it must be remembered that *lex specialis* plays no normative role itself but, rather, simply points to certain factual elements to be taken into account in approximating the common intentions of the states parties.'[180] Thus, *lex specialis* shall be seen as an interpretive tool in specific circumstances rather than a principle of norm coordination or norm separation. In addition, in the *Democratic Republic of the Congo v. Uganda* case, when the Court conducted its analysis regarding the violation of human rights obligation and IHL obligations simultaneously, it did not invoke lex specialis either as the principle of law or as an interpretive tool. This can be seen as a change of approach. However, there is no additional practice to develop this submission.

2.2.3. The Power to Derogate

The second subsequent issue, namely, the power to derogate, I will discuss in light of the primary objective of this part – the legal basis to intern in NIAC. Both ICCPR and ECHR provide that 'everyone has the right to liberty and security of person.'[181] The primary objective now is to establish to what extent Art.9 of ICCPR and Art.5 of ECHR apply in NIAC.[182]

2.2.3.1. Art.9 of ICCPR and derogations

The HRC is a monitoring body which developed practice regarding the interplay between IHL and ICCPR. In General Comment No 35, the HRC submits, '[…] security detention (sometimes known as administrative detention or internment) [is] not in contemplation of prosecution on a criminal charge [and] such detention would normally amount to arbitrary detention.'[183] The

[178] *Ibid* [88]
[179] Cordula Droege, 'Elective affinities? Human rights and humanitarian law' (2008) 90 IRRC 501
[180] Hill-Cawthorne (n 16) 156
[181] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art.9 (hereinafter – ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (4 November 1950), ETS 5, Art.5 (hereinafter – ECHR)
[182] Art.9 (1) of ICCPR 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'; Art.5 (1) of ECtHR, 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law […].'
[183] HRC, 'ICCPR General Comment No. 35: Article 9: Liberty and Security of person' (16 December 2014), CCPR/C/GC/35 [15] (hereinafter – General Comment No. 35)

Committee explains, 'if, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.'[184]

Yet, when it comes to the interplay between HRL and IHL, the HRC concludes '[…] like the rest of the Covenant, article 9 also applies in situations of armed conflict [both IAC and NIAC] to which the rules of international humanitarian law are applicable.'[185] In addition, the Committee observes that 'while rules of [IHL] may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive.'[186] For instance, in *Ram Maya Nakarmi v. Nepal* case, 'the individual was detained by the Royal Nepalese Army, with suspicion of being part of a non-governmental armed group of Maoists'.[187] The HRC affirms that guarantees provided by Art.9 do not cease to exist in times of NIAC.[188] Therefore, the Committee affirms, 'security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary.'[189] Consequently, it is possible to intern individuals in NIAC, from the perspective of ICCPR, when it reads in light of IHL.

Article 9 of ICCPR demands any detention to be 'lawful' and 'non-arbitrary'. To be 'lawful', the detention must be '[…] imposed on such grounds and in accordance with such procedure as are established by law.'[190] According to the HRC 'the notion of "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, as well as elements of reasonableness, necessity and proportionality.'[191] Thus, ICCPR demands States to frame legal grounds for the detention of individuals to meet the lawfulness requirement and introduce guarantees which ensure 'non-arbitrariness'.

Nonetheless, ICCPR in Art. 4 allows States to derogate from their obligations under the Covenant '[…] public emergency which threatens the life of the nation […]'[192]. In General Comment No 29, the HRC certifies that 'during armed conflict, whether international or non-international […]'

[184] *Ibid* [15]
[185] *Ibid* [64]
[186] *Ibid* [64]
[187] *Ram Maya Nakarmi v. Nepal* (Comm no 2184/2012, HRC, 8 May 2017)
[188] *Ibid* [11.9]
[189] General Comment No. 35 (n 183) [64]
[190] *Ibid* [11]
[191] *Ibid* [12]
[192] ICCPR

State can invoke Art. 4 of the ICCPR.[193] In addition, the Committee stresses that '[ICCPR] requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law.'[194] Even when the State derogates from Art.9 it cannot hamper '[…][the] right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention […],'[195] because this part of the rights is non-derogable.[196] Thus, in General Comment No 24, the HRC affirmed that the prohibition of arbitrary arrest or detention is a CIL.[197] According to derogations submitted by Ukraine to ICCPR in 2015, Ukraine derogated from Art.9.[198] Nonetheless, following the HRC's line of argumentation, ICCPR provides a right to challenge the lawfulness of detention under the Covenant even considering derogations submitted.

However, ICCPR does not aim to provide a legal basis for detention for security reasons as such. The requirement of lawfulness presupposes that either the State introduced a legal basis for detention in times of emergency (for instance, NIAC) or this ground to intern is rooted in IHL, in ICCPR's words, '[…] on such grounds and in accordance with such procedure as are established by law'. However, because IHL does not provide a legal ground for NIAC, the only option with domestic law seems to be realistic. Also, considering that ICCPR provides guarantees for detainees, thus, ICCPR cannot be seen as a source of a legal basis for detention for security reasons in NIAC.

2.2.3.2.Art.5 of ECHR and derogations

ECtHR submits that '[…] no deprivation of liberty will be lawful unless it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5 § 1.'[199] In the context of NIAC grounds, 'b' and 'c'[200] can be utilised by the State. Additionally, the ECHR requires detention to be 'in accordance with a procedure prescribed by law', which entails that '[…]

[193] HRC, 'ICCPR General Comment No. 29: states of emergency (article 4)' (31 August 2001) CCPR/C/21/Rev.1/Add.11[3] (hereinafter - General Comment No. 29)
[194] General Comment No. 29 [9]
[195] General Comment No. 29 [16]
[196] William A. Schabas, *The Customary International Law of Human Rights (*OUP, 2021) 150
[197] HRC, 'ICCPR General Comment No. 24 - Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' (4 November 1994), CCPR/C/21/Rev.1/Add.6
[198] Resolution On Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, 2015
[199] *Khlaifia and Others v. Italy* (App no16483/12, ECtHR Grand Chamber, 15 December 2016) [88]
[200] Art. 5 (b) of ECHR: 'the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law'; Art.5 (c) of ECHR: 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'

national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law [are in force].'[201]

Concerning the armed conflict, the ECtHR had the opportunity to demonstrate the role of Art.5 in NIAC in the *Al-Jedda v UK* case. As the ECtHR established, 'the applicant was held on the basis that his internment was necessary for imperative reasons of security in Iraq, [due to its alleged relation with terrorist groups and hostilities].'[202] The ECtHR affirms that 'no deprivation of liberty will be compatible with Article 5§1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 […]'.[203] Additionally, the Court recalls 'that the list of grounds of permissible detention in Article 5§1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time'.[204] However, in the context of IAC, the ECtHR confirmed that internment can be legal as long as it is based on IHL (III GC and IV GV).[205]

In 2015, Ukraine submitted derogations to the ECHR, including Art.5.[206] To be lawful, derogations must meet the requirements established by Art.15, namely to be introduced 'in time of war or other public emergency threatening the life of the nation', to be 'strictly required by the exigencies of the situation', and measures must be 'consistent with its other obligations under international law.'[207] *Ireland v. the United Kingdom*, the Court confirms that the State can derogate from the provisions of Art.5.[208] However, the ECtHR points out that it has the power to establish 'whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis, […] the domestic margin of appreciation is thus accompanied by a European supervision.'[209] Thus, if the State complied with the requirements of the Convention regarding derogations, the safeguards of Art.5, which are not considered to be CIL or *jus cogens,* can be waived. However, post-factum control exercised by the ECtHR can demostrate the opposite. The possibility to derogate also proves that the ECtHR cannot be seen as a legal ground for internment in NIAC, particularity considering that the Court affirmed the absence of this ground in the ECHR as such. Nonetheless, the ECHR can be utilised to safeguard the rights of individuals in times of armed conflict.

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[201] *Medvedyev and Others v. France* (App no3394/03, ECtHR Grand Chamber, 29 March 2010) [79]
[202] *Al-Jedda v. the United Kingdom* (App no27021/08, ECtHR Grand Chamber, 7 July 2011) [11]
[203] *Ibid* [99]
[204] *Ibid* [100]
[205] *Hassan v. the United Kingdom*, (App no29750/09, ECtHR Grand Chamber, 16 September 2014) [110]
[206] Resolution On Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, 2015
[207] CoE, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (4 November 1950), ETS 5
[208] *Ireland v. the United Kingdom* (App no5310/71, ECtHR Plenary, 18 January 1978) [224]
[209] *Ibid* [207]

In addition, the application of the system of antiterrorist legislature to cope with the NIAC in Eastern Ukraine, can be seen as a fulfilment of positive obligations under the ECHR. Considering that ECtHR confirmed that '[…] Article 2 of the Convention may imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'[210] Thus, the Court submitted that 'such a positive obligation may apply not only to situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act, but also in cases raising the obligation to afford general protection to society.'[211]

Therefore, I conclude that HRL does not provide a legal ground for detention in NIAC. Nonetheless, HRL provides fundamental guarantees for individuals detained in times of NIAC, such as a non-derogable right to challenge the ground for detention.

2.3. Domestic Law as a Legal Basis for the Detention in Non-International Armed Conflict

As I demonstrated above, neither IHL nor HRL provides a legal basis for internment in NIAC; thus, the last realm that remains is domestic law. The presumption that domestic law is the only valid field to provide the basis for detention in NIAC is rooted in the nature of NIAC. The classical NIAC occurs on the territory of the 'Contracting Party' and, consequently, is under the jurisdiction of the State. However, I admit the possibility of spill over effect and simultaneous application of a few domestic regimes.[212] Nonetheless, the NIAC in Eastern Ukraine occurred solely on the territory of Ukraine.

I submit that the legal basis for detention for security reasons in NIAC in Eastern Ukraine is based on a specially adapted legal regime, which consists of a few normative acts. In the first Chapter, I discussed the legal regime of the ATO and JFO, and I demonstrated that measures taken originated from specific legal regulations and were designed to cope NGAGs. The domestic detention regime in NIAC in Eastern Ukraine was framed within the general requirement to bring criminal charges within 72 hours. Yet, in the context of hostilities, it cannot be guaranteed that criminal charges are brought within 72 hours. Consequently, the detention may become unlawful and arbitrary. To cope with this, apart from general regulation of the ATO and the JFO, Ukraine introduced a number of acts to regulate detention in zones of ATO and JFO.

[210] *Osman v. the United Kingdom* (App no87/1997/871/1083, ECtHR Grand Chamber, 28 October 1998) [115]
[211] *Mastromatteo v. Italy* (App no37703/97, ECtHR Grand Chamber, 24 October 2002) [69]
[212] For instance, when State A is invited to assist in NIAC to another State B, hence there is a simultaneous application of domestic law of State A (military manuals and procedures, including internment) and domestic law of State B.

2.3.1. Preventive detention in Ukraine

Firstly, Ukraine presented a new type of detention – preventive detention – in zones of ATO and JFO. According to the Law On Preventive Detention, '[…] preventive detention of persons involved in terrorist activities may be carried out for a period of more than 72 hours, but cannot exceed 30 days […]'.[213] Law On Preventive Detention stipulates that an individual can be detained on the basis of 'reasonable suspicion in engaging in terrorist activities.'[214] The 'reasonable suspicion' can be seen as a form of 'security detention', which has been discussed earlier in the context of the analogy of LoIAC to LoNIAC. Apart from that, HRC already confirmed that 'security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary.'[215]

Law On Preventive Detention provides that 'preventive detention is carried out by reasoned decision of the head of […] department of the Security Service of Ukraine or the head of the […] department of the Ministry of Internal Affairs of Ukraine, with further approval by the Prosecutor in a respected region.' Law On Preventive Detention waives the requirement to obtain a judicial decision to detain an individual for more than 72 hours without bringing criminal charges.[216] Yet, the Prosecutor is obliged to submit to the respected court a request to determine measures to ensure criminal proceedings, which, among others, includes pre or trial detention as well. However, here is the question to pose, whether preventive detention amounts to security detention under IHL. As it has been discussed earlier, internment does not require bringing criminal charges because internment is based on security grounds within the context of armed conflict. Thus, preventive detention is not a 'book' example of internment under IHL. However, preventive detention has been related to NIAC in Eastern Ukraine since it was introduced with regard to ATO. Also, considering that it reserves the necessity to bring criminal charges, I submit that preventive detention under national law was an attempt to combine IHL and HRL obligations and comply with them.

Secondly, Ukraine introduced a 'special regime of pre-trial investigation under martial law, in state of emergency or in the anti-terrorist operation area', which has been added to the Criminal Procedural Code of Ukraine.[217] The Law stipulates that 'within the territory (administrative area) where martial law or an emergency is in effect or an anti-terrorist operation conducted, where an investigating judge is not able to exercise his/her powers within the time provided for by Articles

[213] Law On Preventive Detention
[214] *Ibid*
[215] General Comment No. 35 (n 183) [64]
[216] Law On Preventive Detention
[217] Law On Special Regime of Pre-Trial Investigation under Martial Law, State of Emergency or in the Area of Anti-Terrorist Operation, 2014 (hereinafter – Law On Special Regime of Pre-Trial Investigation)

163, 164, 234, 247, and 248 of this Code, as well as the powers as to imposing the measure of restraint in the form of 30 days of custody on persons who are suspected of having committed any of the offences under Articles 109–114-1, 258–258-5, 260–263-1, 294, 348, 349, 377–379, 437–444[218] of the Criminal Code of Ukraine, such powers are exercised by a respective public prosecutor.'[219] Law On Special Regime of Pre-Trial Investigation allows Prosecutor to determine a measure of ensuring criminal procedure, if the judge cannot do so due to reasons of hostilities. Yet, Law On Special Regime of Pre-Trial Investigation speaks nothing about preventive detention, but about custodial detention within criminal procedure. Consequently, the CPCU has nothing to say with regard to preventive detention as well.

Following the logic of legislative changes introduced, the extension of the timeline for more than 72 hours, but not more than 30 days, purports to allow the prosecution to submit a request to determine a measure of ensuring criminal procedure. The matter is that the Prosecutor cannot request to apply any measure to ensure the criminal proceedings without notice of suspicion in accordance with Art.276 of the CPCU. Hence, there must be open a criminal procedure in accordance with the CPCU, and an individual must be informed about it and notice of suspicion is delivered.

Furthermore, the regulative scope of these provisions is different. Law On Preventive Detention stipulates preventive detention as a legal institute which does not originate from the CPCU. Preventive detention is rooted in the LoCT. Thus, preventive detention is not a measure of ensuring the criminal procedure. Law On Special Regime of Pre-Trial Investigation extends the authority of the Prosecutor in particular circumstances, when the judge is not available and when it concerns particular criminal offences, by allowing the Prosecutor to determine a measure of ensuring criminal procedure. However, both legal acts circulate the requirement of 'reasonable suspicion' implicitly or explicitly.

To regulate the application of preventive detention, Order № 872/88/537 puts in place Instruction regarding the procedure of preventive detention adopted. This Instruction sheds light on the meaning of 'reasonable suspicion'. According to Instruction, 'the basis for preventive detention is the existence of a reasonable suspicion that a person has committed terrorist activity, including the commission of a criminal offence provided for in Articles 109 - 114-1, 258 - 258-5, 260 - 263-1, 294, 348, 349, 377 - 379, 437 - 444 of the Criminal Code of Ukraine.'[220] Thus, reasonable suspicion in preventive detention means that the individual committed a criminal offence related

[218] Mostly, crimes indicated are crimes against the state and terrorism
[219] Law On Special Regime of Pre-Trial Investigation
[220] Instruction On the Order of Preventive Detention, 2014

to 'terrorist activity', but under Articles 109–114[-1], 258–258[-5], 260–263[-1], 294, 348, 349, 377–379, 437–444 of the Criminal Code of Ukraine and preventive detention cannot be applied to other crimes. However, reasonable suspicion involves '[…] notifying a person of suspicion in accordance with the procedure specified in Chapter 22 of the [CPCU].'[221] In addition, the detained individual is allowed to challenge preventive detention.[222] Consequently, preventive detention does not fit the ordinary definition of internment and remains a tool of criminal procedure, but with conflict-related adjustments.

2.3.2. The compliance with international law obligations in emergency

Some representatives of civil society highly criticized these changes.[223] Preventive detention has been characterized as 'artificial and extra systemic' and 'separated from the general system of the criminal process.'[224] There was even a constitutional submission to the Constitutional Court of Ukraine to interpret the changes in light of the constitutional requirement to present charges or free detained individuals within 72 hours.[225] However, no information about the fate of the submission is available.

CoE delivered its comments on both normative acts. Regarding preventive detention, the expert expressed many concerns. Among others, there was a question of the definition of preventive detention, which at some point would differentiate this legal tool from others.[226] The expert points out the issues with the legal ground of preventive detention, which has been discussed above as well. According to the recommendation, 'in order for someone to be subjected to preventive detention […], it is required that (a) the person concerned is someone 'implicated in terrorism', (b) there is a reasonable suspicion that he or she carried out 'terrorist activity' and (c) there has been a substantiated decision to impose it by one of several specified persons'[227], yet the expert concludes that Law On Preventive Detention links preventive detention to particular criminal

[221] Leonid Loboyko, Oleksandr Banchuk, *Criminal Procedure: Study Guide* (Waite 2014) 135; Andriy Khytra, Ruslan Shehavtsov, Vasyl Lutsyk, *Criminal procedure: a textbook* (Lviv 2019) 454
[222] Instruction On the Order of Preventive Detention 2014
[223] Boris Malyshev, 'ATO as a basis for the adoption of anti-constitutional laws' (LB.ua, 14 August 2014) <https://lb.ua/blog/boris_malyshev/276192_ato_yak_pidstava_uhvalennya.html> last accessed 19 January 2024
[224] Ihor Usenko, Yevhen Rominsky, 'Misconceptions or a relapse of repressive mentality?' (Zakon&Business, 06 May 2014) <https://zib.com.ua/ua/83968-preventivne_zatrimannya_v20_nedomislennya_chi_recidiv_repres.html> last accessed 19 January 2024
[225] Constitutional submission of Kyselyov Andrii Oleksandrovuch, regarding the official interpretation of the provisions of the first part of Article 29 of the Constitution of Ukraine (25 November 2014) < https://ccu.gov.ua/sites/default/files/ndf/18-2513.pdf > last accessed 19 January 2024
[226] Jeremy McBride, Comments on the Law of Ukraine on amendment of the Law of Ukraine on combating terrorism and the Law of Ukraine on amendment of the Criminal Procedure Code with regard to special regime of pre-trial investigations under martial law, state of emergency and in the region of anti-terrorist operation, (CoE, 2014) [13] <https://rm.coe.int/16806f235e>, accessed 19 January 2024 (hereinafter – Jeremy McBride, Comments)
[227] Jeremy McBride, Comments (n 226) [14]

offences, as it has been discussed earlier. The Expert highlights the lack of revision process and the matter of renewal of preventive detention.[228]

Apart from that, Ukraine submitted derogations to ICCPR and ECHR on 5 June 2015, when preventive detention had already been in force for almost a year. The ECtHR in the *Al-Jedda* case clearly affirms 'that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time'. [229] I submit that preventive detention cannot be framed within the ordinary scope of internment in IHL because it applies to particular criminal offences and requires bringing criminal charges. Preventive detention in the Ukrainian legislature does not fit the definition of internment, which does not require bringing criminal charges. Also, at some point, it can be seen as a violation of human rights obligation due to a clear clash between Laws On Preventive Detention and On Special Regime of Pre-Trial Investigation with the Constitution of Ukraine, as it was explained above. The matter of compliance with the ECHR is also highlighted in the Comments prepared by CoE.[230] As it was concluded, '[…] both the uncertain constitutional status of the preventive detention law and the inadequacy of arrangements for judicial control and other safeguards regarding its use give serious grounds for doubting that the latter could occur compatibly with the Convention.'[231]

Yet, I reinforce my submission that domestic law is a primary legal basis for internment in NIAC, and it has to comply with the requirements established by HRL, even under derogations. As it was claimed in the *Serdar Mohammed v Ministry of Defence* case, '[…] it is unnecessary to rely on international law in such conflicts [NIAC], as states can rely on their domestic law to arrest and detain members of organised armed groups who engage in armed conflict within their territory.'[232] The way how Ukraine attempted to establish internment in NIAC in Eastern Ukraine has demonstrated the validity of this submission, despite the fact that the attempt has been implemented with many issues and remained within the scope of criminal procedure.

To demonstrate the role of domestic law in the context of NIAC in Eastern Ukraine, I offer a few decision from Ukrainian courts to detain individuals related to NIAC in Eastern Ukraine. In the first case, No225/3701/16-к, the individual was accused of creation of a terrorist group or terrorist organization (Art. 258-3) and his affiliation with the non-governmental armed (terrorist) group

[228] Jeremy McBride, Comments (n 226) [30]
[229] *Al-Jedda v. the United Kingdom* (App no27021/08, ECtHR Grand Chamber, 7 July 2011) [100]
[230] Jeremy McBride, Comments (n 226) [124]
[231] Jeremy McBride, Comments (n 226) [154]
[232] *Serdar Mohammed v Ministry of Defence* (n 17) [230]

'DPR'; the court held the individual detained on the basis [CPCU].[233] In the second case, No235/4140/17, the individual was charged with creation of a terrorist group or terrorist organization (Art. 258-3). The individual was 'appointed' as 'head of the central bank of DPR', but the court rejected the request submitted by the Prosecutor to detain the individual on the basis of the [CPCU].[234] In the last case No 225/6583/16-к, the individual was accused of creation of a terrorist group or terrorist organization (Art. 258-3). The individual joined the non-governmental armed (terrorist) group 'DPR' and participated in hostilities in Eastern Ukraine. The court held the individual in detention on the basis of the [CPCU].[235] All the cases presented indicate a general pattern that Ukraine has not invoked any provision of CIL or treaty-based IHL to detain individuals related to NIAC in Eastern Ukraine between the national government and the non-governmental armed (terrorist) group 'DPR'. Only provisions of the national legislature have been utilised.

Therefore, I argue that domestic law remains the only valid realm of law from a *lex lata* perspective to safeguard the internment in NIAC, if it is in compliance with international obligations. The nature of NIAC allows States to employ national jurisdiction and does not require engagement with international law, apart from derogations and following CIL rules. The preventive detention in Ukraine, despite the name, does not originate from IHL or HRL and is a product of domestic criminal procedure to modify national law in light of NIAC. Preventive detention in Ukraine cannot be seen as an internment due to the requirement to bring criminal charges, which is not necessary for an internment.

2.4.Conclusions for Chapter II

To conclude, I reiterate that the principal objective of this Chapter was to establish the legal basis of detention for security reasons in NIAC in Eastern Ukraine. Three realms of law were under the loop: IHL, HRL and domestic legislature, due to their intersection in the matter concerned.

IHL is the realm of international law specially designed to guide parties to armed conflict in hostilities. However, as I have shown, there is a clear difference between how IAC and NIAC are regulated, specifically with regard to internment. LoIAC authorises parties to IAC to detain individuals (combatants and civilians) for security reasons in texts III and IV GC. Apart from that, III and IV GC provide guidance for parties on how to treat detainees. LoNIAC, that is, CA 3 and II AP, do not employ the language of direct authorisation. Consequently, neither CA 3 nor II AP can be used to justify utilising internment. The primary purpose of CA 3 and II AP is humanitarian – to ensure the minimum level of treatment. Thus, I submit that treaty-based IHL is not a legal

[233] Decision, Dzerzhyn City Court of Donetsk region, case No225/3701/16-к, 16 June 2016
[234] Decision, Krasnoarmii City Court of Donetsk region, case No235/4140/17, 7 February 2019
[235] Decision, Dzerzhyn City Court of Donetsk region, case No225/6583/16-к, 30 November 2016

basis for internment, but it regulates internment in NIAC in Eastern Ukraine. CIL cannot serve as the legal basis for security detention. Firstly, CA 3 is regarded as CIL; however, as it has been determined, it does not authorise parties to intern. Secondly, the prohibition of arbitrary detention in NIAC does not preclude Parties to NIAC from employing internment. Such internment must have valid legal grounds, yet this legal ground is not rooted in IHL as a field of law.

Another realm of law to consider is HRL. Both ICCPR and ECHR guarantee the right to liberty and security. ICJ, HRC and ECtHR affirmed in their practice that HRL is applicable to situations of armed conflict, either IAC or NIAC and does not cease its application. Yet, HRL shall be read through the prism of IHL. ICCPR and ECHR require any detention to have legal grounds and be non-arbitrary. ICCPR allows security detention in armed conflict if it is in compliance with IHL. In contrast, the ECtHR affirmed that security detention is not in compliance with ECHR in the context of NIAC. However, it can be in accordance with the Convention in IAC since the legal basis comes from IHL, not domestic law. Nonetheless, States may derogate from their obligations under the ICCPR and ECHR in case of emergency complying with the treaty. Ukraine submitted its first derogation in 2015, including the right to liberty and security. HRC confirmed that the State may derogate from this right, yet the right to challenge the legal ground for detention in court is CIL under ICCPR. ECtHR concluded that a State may derogate from Art.5; however, the Court 'reserves its right' to decide whether the measures taken were necessary. Therefore, I argue that HRL cannot be seen as a legal ground for detention in NIAC in Eastern Ukraine, yet Ukraine is obliged to comply with ICCPR and ECtHR.

The last field of law to remain is domestic. The nature of NIAC suggests that the State exercises its jurisdiction on its territory. Consequently, it may adopt and amend legislature to regulate internment. Ukraine, in 2014, within general NIAC-related legislature, introduced preventive detention. Preventive detention expanded the custody time from 72 hours to 30 days, subsequently bringing criminal charges. Nonetheless, preventive detention cannot be considered internment in the meaning of IHL. According to the Law adopted, the Prosecutor was obliged to bring criminal charges related to terrorism. Additionally, preventive detention could have been utilised concerning a limited number of criminal offences. Thus, I submit that preventive detention following the logic of national legislators was a measure to reflect the reality of NIAC in Eastern Ukraine. Lastly, the detention of individuals related to NIAC in Eastern Ukraine has been conducted based on national law. Consequently, I conclude that domestic law is a ground for internment in NIAC in Eastern Ukraine from *lex lata* perspective. However, even under derogations, the State is obliged to comply with the requirements established by the HRL.

III. THE LEGAL REGIME OF DETENTION [INTERNMENT] IN THE ARMED CONFLICT IN EASTERN UKRAINE: NON-STATE ACTORS AND *LEX FERENDA*

In this Chapter, I aim to address two substitutive issues, which are a logical continuation of the discussion in previous Chapters. The first issue is related to the power of NGAGs to intern in NIAC and the scope of obligations which NGAGs have to bear under IHL. The second issue is about the ways to tackle the present legal lacuna in LoNIAC regarding security detention.

3.1. The power of Non-Governmental Armed Groups under International Humanitarian Law to Intern

In August 2014, the OHCHR reported that '[…] some 1,026 people have been abducted or detained by armed groups since mid-April, and of these, 468 people were still missing.'[236] Later, in October 2014, the OHCHR stated 'on 8 October, the head of the "commission on issues of prisoners of war and refugees" of the "[DPR]" publicly declared that "about 600 Ukrainians" were held by the "[DPR]".'[237] In May 2019, the OHCHR expressed its concern regarding '[…] the practice of 30-day "administrative arrest" and "preventive arrest" in territory controlled by "[DPR]" and "[LPR]" respectively.'[238] These reposts demonstrate the pattern of utilising security detention by the NGAG within the NIAC in Eastern Ukraine. Hence, the primary question to ask is on what basis these 'entities' possess the power to intern.

3.1.1. The power to intern in NIAC

Firstly, it brings the main finding of the previous part back. I concluded that neither CA 3 nor II AP provides a legal basis for internment by the parties to NIAC. The identical conclusion goes to HRL. Thus, I submitted that only domestic law can be seen as a legal basis for internment in NIAC from *lex lata* perspective. Yet, as OHCHR observed, 'parallel bodies established by the "[DPR]" and "[LPR]" to develop their own systems of law enforcement and administration of justice ("legislation", "police", "prosecutors" and "courts") are contrary to international law.'[239] Consequently, NGAGs attempted to establish their own 'system of law'.

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[236] OHCHR, 'Report on the human rights situation in Ukraine 17 August 2014' (2014) [49] Available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UkraineReport28August2014.pdf> last accessed 15 February 2024

[237] OHCHR, 'Report on the human rights situation in Ukraine 15 November 2014' (2014) [40] Available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHR_sixth_report_on_Ukraine.pdf> last accessed 15 February 2024

[238] OHCHR, 'Report on the human rights situation in Ukraine 16 February to 15 May 2019' [49] Available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/ReportUkraine16Feb-15May2019_EN.pdf> last accessed 15 February 2024

[239] OHCHR, 'Report on the human rights situation in Ukraine 15 December 2014' [42] Available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf> last accessed 15 February 2024

However, these conclusions must be assessed separately with regard to the States and to NGAGs 'DPR' and 'LPR' in this case. NGAGs cannot rely on domestic legal systems as States do. Hence, they have to employ other sources of law. Such a submission comes from a systemic reading of CA 3 and provisions of II AP.

CA 3 is a customary international norm, as it has been established in a previous Chapter and '[…] each Party to the conflict shall be bound to apply […].' Thus, it is 'undisputed that the substantive provisions of [CA 3] bind all such armed groups when they are party to an armed conflict.'[240] Yet, it is clear that 'the exact mechanism by which [CA 3] becomes binding on an entity that is not a High Contracting Party to the Geneva Conventions is the subject of debate.'[241] Consequently, CA 3 provides a system of minimum guarantees, which all the parties must maintain. However, the mechanism for enforcement of such standards is not established for NGAGs.

3.1.2. The organisation of NGAG

The II AP is more elaborative on the standards of internment, and II AP requires a much higher threshold to be applied. To be bound by II AP, apart from ratification by the State, the NGAGs must be '[…] under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'[242]

In *Boškoski & Tarčulovski* case, the ICTY provided five factors when assessing the organisation of an armed group (i) the presence of a command structure, (ii) the group could carry out operations in an organised manner have been considered (iii) a level of logistics, (iv) an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, (v) that the armed group was able to speak with one voice.[243]

I submit, that 'DPR' and 'LPR' have met the criteria of organisation. Both NGAGs have a presence of a command structure; from the beginning of the armed conflict, these entities formed their 'governments'[244] to exercise military and civil control over the people and territory occupied. Examples of the ability to carry out military operations in an organised manner can be found in *the Netherlands and Ukraine v. Russia* case. According to the ECtHR, 'hostilities […], typically involving the exchange of fire between government forces and separatists armed with small arms,

[240] ICRC Database, Convention (III) relative to the Treatment of Prisoners of War Commentary of 01.01.2020, Article 3 - Conflicts not of an international character [542] <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020?activeTab=undefined> last accessed 28 March 2024
[241] *Ibid* [541]
[242] II Protocol Additional to the Geneva Conventions
[243] *The Prosecutor v Ljube Boškoski and Johan Tarčulovski*, (Judgment) IT-04-82-T (10 July 2008) [199-203]
[244] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [693]

grenade launchers, mortars and MANPADS (portable air defence systems).'[245] The ECtHR emphasised, 'there were multiple separatist attacks on government border points to keep open the supply routes for weapons from the Russian Federation.'[246] This also illustrates the ability of armed groups to carry out sustained and concerted military operations as a separate condition established by II AP.

Concerning the level of logistics, there were numerous reports stating that representatives of the 'DPR' have undergone military training provided by Russia.[247] The fourth requirement in this particular context is linked to the first one, considering the formation of a hierarchical chain of command and its own system of 'legislature'. For instance, OHCHR notes that 'members of the armed groups seem to enjoy a high level of impunity for a wide range of human rights violations targeting local residents and Ukrainian servicemen, including illegal detention, torture and ill-treatment.'[248] According to the OHCHR report, 'a parallel "legislative framework" has been developed, mixing Ukrainian legislation and decrees issued by the ['DPR'] or ['LPR'] and a parallel "judicial system" has been operational since 2014.'[249] Regarding the ability 'to speak with one voice', the brightest example is the Minsk Protocol, which '[…] was signed by representatives of the Trilateral Contact Group and, without any official recognition of their status, by the then leaders of the "DPR" and "LPR".'[250]

Also, the II AP requires the ability of NGAGs 'to implement this Protocol'. Respectively, the ICTY pointed out that 'so long as the armed group possesses the organisational ability to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict.'[251] The II AP preconditions that armed groups must 'exercise such control over a part of its territory.' It is out of the debate that 'the forces of [NGAGs] controlled significant parts of the territory in Donbass (six districts in the Donetsk region and five districts in the Luhansk region).'[252] Therefore, fully II AP applies to 'DPR' and 'LPR'.

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[245] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [203]
[246] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [203]
[247] BBC, 'Ukraine crisis: Rebel fighters "trained in Russia"' (BBC, 16 August 2014) <https://www.bbc.com/news/world-europe-28817347> last accessed 28 March 2024; Maria Tsvetkova, 'Pro-Russian rebels train for more fighting despite Ukraine truce' (Reuters. 2 March 2015) <https://www.reuters.com/article/us-ukraine-crisis-rebels-training-idUSKBN0LY1QY20150302/> last accessed 28 March 2024
[248] OHCHR 'Report on the human rights situation in Ukraine 16 November 2015 to 15 February 2016' (2016) <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf> last accessed 26 March 2024
[249] *Ibid* [80-81]
[250] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [233]
[251] *The Prosecutor v Ljube Boškoski and Johan Tarčulovski*, (Judgment) IT-04-82-T (10 July 2008) [205]
[252] ECtHR, *Ukraine and the Netherlands v. Russia* (n 47) [233]

3.1.3. The idea of 'asymmetrical operation of law'

However, as it has been established, II AP is not an authorisation tool; it is a regulative tool, as well as CA 3. As Frédéric Mégret argues, 'the ambiguous character of CA3 and II AP when it comes to detention by any party is, in fact, designed to simultaneously not grant a power of detention to members of NSAGs, whilst not taking it away from States.'[253] Thus, the doctrine of 'asymmetrical operation of the law' is introduced and can be upheld.[254] As I demonstrated in the previous Chapter, States do not need to invoke any provision of international law to intern individuals in NIAC within its borders. States rely on domestic law. Ukraine utilised domestic legislature to detain individuals for security reasons in ATO and JFO. The United Kingdom approach the basis for internment from a similar position '[in NIAC], [Armed Forces] may intern civilians for imperative reasons of security. This power is usually derived from a UNSCR, from the Law of Armed Conflict, or from host nation law (with host nation consent).'[255] This line is advanced by the ICRC as well, '[…] States see a risk that regulation [of internment] would imply the lawfulness of armed groups' detention activities, or accord them a legal status under international law.'[256]

Yet, the 'asymmetrical operation of the law' undermines the principle of equality of the parties to armed conflict. CA 3 stipulates, '[…] each Party to the conflict shall be bound to apply […].' As well as II AP, which says that '[This Protocol] shall apply to all armed conflicts which are not covered by [I AP] [and which occur] between [State's] armed forces and dissident armed forces or other organized armed groups […].' Consequently, two primary legal instruments regulating NIAC advance the principle of equality of obligations of the Parties.

3.1.4. The principle of equality

Ezequiel Heffes argues in favour of maintaining the principle of equality cause CA 3 clearly affirms that the application of its provisions '[…] shall not affect the legal status of the Parties to the conflict.'[257] Whilst he submits that 'to the extent that the parties are equal, there are more chances that [NGAGs] will show a willingness to conduct their actions in accordance with the

[253] Frédéric Mégret, 'Detention by Non-State Armed Groups in Non-International Armed Conflicts: International Humanitarian Law, International Human Rights Law and the Question of Right Authority' in Ezequiel Heffes, Marcos D. Kotlik, Manuel J. Ventura (eds) *International Humanitarian Law and Non-State Actors* (T.M.C. Asser Press, 2020) 177

[254] *Ibid* 178

[255] UK MOD, Joint Doctrine Publication 1-10 Captured Persons (2020) [1.49]

[256] ICRC, 'Strengthening international humanitarian law protecting persons deprived of their liberty: Concluding report' (2015) Conf. Doc 32IC/15/19.1 32 <https://rcrcconference.org/app/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf> accessed 04 January 2024

[257] Ezequiel Heffes, 'Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law' (2015) 20 (2) JCSL 236

rules of IHL.'[258] He concludes that '[…] the equality of belligerents principle could be useful if we consider that all the parties to the conflict are supposed to have the same rights and obligations under IHL, and not in any kind of domestic law.'[259] Nonetheless, I believe that there is a need to separate the legal and policy dimensions of the matter. The most evident question to pose concerning equality is why states would erode their inherent power in NIAC to intern. For instance, Ukraine labelled NGAGs as 'terrorists' not only for policy reasons but for legal as well. The most prominent legal reason was to wreck the legitimacy and legality of these entities. Hence, all activities conducted by 'DPR' and 'LPR' are doomed to be illegal. Therefore, as Andrew Clapham argues, 'even if armed groups may not necessarily be entitled or empowered under international law to detain or try anyone, once they do engage in these activities, it seems incontrovertible that such groups have explicit and detailed obligations under international law.'[260] This conclusion also reflects the finding of the previous Chapter that IHL does not necessarily authorise internment, yet it recognises that it happens. Consequently, when any party to NIAC interns individuals, they ought to follow the scope of obligations advanced by the instruments.

3.1.5. Internment by 'DPR' and 'LPR': hostage paradigm and guarantees

As numerous reports demonstrate, 'DPR' and 'LPR' employed security detention of individuals and attempted to establish their own system of 'legislature', including judiciary. When 'DPR' and 'LPR' intern individuals, they are bound by CA 3 and II AP, as well as Ukraine.

The first layer of obligations is stipulated by CA 3. In the previous Chapter, I discussed the 'protective scope' of CA 3 and its 'humanitarian aim'. Thus, the principal obligation under CA 3 is '[…] [treat] humanely [individual detained].' In the meantime, CA 3 stipulates an important prohibition of 'taking of hostages.' For instance, in the beginning of NIAC in Eastern Ukraine, some Ukrainian officials utilised the term 'hostages' to demonstrate the illegality of detention by 'DPR' and 'LPR'.[261] Some authors have already argued that if NGAGs do not have a legal ground to detain, hence such detention *may* be seen as the taking of hostages. [262] Yet, all of them agree upon that, firstly, 'if group members are to be punished for the mere fact of having detained an

[258] *Ibid* 239
[259] *Ibid* 241
[260] Andrew Clapham, 'Detention by Armed Groups under International Law' (2017) 93 ILS 12
[261] Tyzhden.ua, 'У СБУ припускають, що "ДНР" і "ЛНР" не контролюють усіх заручників на Донбасі' [The SBU assumes that the "DPR" and "LPR" do not control all the hostages in Donbas] (Tyzhden.ua, 20 December 2014) <https://tyzhden.ua/u-sbu-prypuskaiut-shcho-dnr-i-lnr-ne-kontroliuiut-usikh-zaruchnykiv-na-donbasi/> last accessed 28 March 2024; Ukrinform, Звільнення заручників на Донбасі: Київ готовий до компромісів [Release of hostages in Donbas: Kyiv is ready for compromises] (Ukrinform, 18 October 2017) <https://www.ukrinform.ua/rubric-ato/2327201-zvilnenna-zarucnikiv-na-donbasi-kiiv-gotovij-do-kompromisiv.html> last accessed 28 March 2024
[262] Ezequiel Heffes, 'Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law' (2015) 20 (2) JCSL 245; Andrew Clapham, 'Detention by Armed Groups under International Law' (2017) 93 ILS 13; Deborah Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 IRRC 744

individual – tarred with the same brush as hostage-takers and kidnappers, regardless of the reason for detention they will have less of an incentive to comply with the prohibition on hostage-taking in future, or with the rules on humane treatment of detainees.'[263] Secondly, if someone argues that the individuals are hostages taken by NGAGs, there is a need to establish a specific *mens rea* element from the perspective of ICL. As ICRC Commentary explains, 'hostage-taking can be defined as the seizure, detention or otherwise holding of a person (the hostage) accompanied by the threat to kill, injure or continue to detain that person in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release, safety or well-being of the hostage.'[264]

The presence of *mens rea* element to 'compel a third party to do or to abstain' is vital. The primary *mens rea* element of internment is to decrease a threat from individuals by means of eliminating the ability to take part in hostilities. The Special Court for Sierra Leone emphasised, 'as a matter of law, the requisite *intent* may be present at the moment the individual is first detained or may be formed at some time thereafter while the persons were held. In the former instance, the offence is complete at the time of the initial detention (assuming all the other elements of the crime are satisfied); in the latter, the situation is transformed into the offence of hostage-taking the moment the intent crystallises (again, assuming the other elements of the crime are satisfied).'[265] Thus, each case of the internment by 'DPR' and 'LPR' shall not be seen as hostage-taking, yet it does not presuppose that it cannot occur.

In addition, CA 3 requires parties 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.' Hence, it raises a matter of 'regularly constituted court' by 'DPR' and 'LPR'. However, there is a difference in wording between CA 3 and II AP. Art.6 (2) of II AP replaces 'by a regularly constituted court' with '[…] court offering the essential guarantees of independence and impartiality.' Consequently, lowering the qualitative requirement of such 'courts'. As Mark Klamberg argues, '[…] with the adoption of Additional Protocol II, rebel courts are tolerated under international humanitarian law under the condition that they offer the essential guarantees of independence and impartiality but there is no requirement that they are regularly constituted by the state.'[266] Respectively, Art.6 lays down the

[263] Deborah Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 IRRC 744

[264] ICRC Database, Convention (III) relative to the Treatment of Prisoners of War, Commentary of 01.01.2020, Article 3 - Conflicts not of an international character [650] < https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020?activeTab=undefined> last accessed 28 March 2024

[265] *Prosecutor v. Sesay et al*. (Appeal Judgment) SCSL-04-15-A (26 October 2009) [597]

[266] Mark Klamberg, 'The Legality of Rebel Courts during Non-International Armed Conflicts' (2018) 16 JICJ 243

system of judicial guarantees, which has to be followed by NGAGs. These provisions constitute a second layer of the obligation of parties under the IHL in NIAC with regard to internment.

Lastly, I would like to reiterate, the observations regarding the place of CIL in regulating internment. CIL cannot be seen as a 'way out' from a legal lacuna of legal basis to intern by States or by NGAGs, as has been stressed in the previous Chapter from a *lex lata* perspective. However, CIL prohibits arbitrary detention in NIAC as such.

To conclude this part, I submit that 'DPR' and 'LPR' interned individuals in NIAC in Eastern Ukraine. Yet, the legal basis for security detention, consequently, the power of NGAGs to detain, remains unclear. Neither CA 3 nor II AP provide a clear authorisation to intern. However, States utilising security detention can rely on domestic law, whereas NGAGs do not possess this 'back-up' option. Hence, it sparks a matter of belligerent equality, which requires both parties to enjoy the same scope of obligations. There are two possible approaches towards belligerent equality. The first one is to recognise the inequality of the parties, with States having more rights and NGAGs carrying more obligations. This approach is more policy-oriented and reflects the current standing of the States, yet it reduces the possibility of enforcing IHL by NGAGs. The second one is law-oriented and maintains the belligerent equality principle by stressing that equal obligations do not presuppose any legal recognition of NGAGs. Thus, it can enhance compliance with IHL by NGAGs.

Lastly, it is clear that parties will intern in NIAC. Therefore, CA 3 and II AP provide a system of obligations, which have to be carried out by all the parties, including the prohibition of taking hostages. However, a lack of clear authorisation to intern by NGAGs can lead to the matter of hostage-taking. Yet, it must be assessed case-by-case due to the presence of special *mens rea.* To maintain the guarantees provided, CA 3 and II AP require the establishment of judicial bodies, however, with different qualitative characteristics.

3.2. *Lex Ferenda* of Internment in Non-International Armed Conflict;

The last part of my thesis is devoted to the ways which can be utilised to cope with the lack of a clear legal basis for internment in NIAC by parties. I proceed with four possible solutions to remedy the legal gap: (i) the application of analogy, (ii) concluding special agreements between parties, (iii) re-approaching CIL and (iv) reconciling domestic law and NGAG's practice.

3.2.1. The application of analogy

The first 'way out' is to apply the principle of analogy between LoIAC and LoNIAC. The analogy approach entitles some provisions concerning the internment in LoIAC to be applied to LoNIAC. In the *Serdar Mohammed v Ministry of Defence* case, the British MOD argued that '[…] the ability

to detain insurgents, whilst hostilities are ongoing, is an essential corollary of the authorisation to kill them [,…] those engaged in a military operation must be able to accept the surrender of somebody who poses a threat to them and their mission and must be able to engage an adversary without necessarily having to use lethal force.'[267] Thus, the MOD attempted to draw an analogy between killing as an essential right in armed conflict and detention. This analogy also came through the prism of clear authorisation to intern in IAC.

Marco Sassoli, Antoine Bouvier and Anne Quintin submitted that 'in some cases the precise rule resulting from a common principle or from combining principles with a provision of the law of non-international armed conflicts or with simple legal logic can be found by analogy in rules which have been laid down in the much more detailed texts of the Conventions and Protocol I for international armed conflicts.'[268] Similarly, Sandesh Sivakumaran says that 'it has been suggested that this framework could also be applied in situations of non-international armed conflict.'[269] As well as Kubo Mačák argues that analogy '[…] is sufficiently flexible to allow for adjustment on the basis of specific operational reality in a particular conflict.'[270] Thus, there are two primary sources to build the analogy: either III GC, which regulates the detention and internment of POWs or IV GC, which governs the detention and internment of civilians in IAC.

As Art.21 of III GC stipulates, 'the Detaining Power may subject prisoners of war to internment.'[271] ICRC Commentary of the III GC provides, that 'internment is a preventive measure; interning prisoners of war for the duration of active hostilities aims to ensure that captured enemy personnel are not able to participate again in the hostilities, which would pose a military threat to the Detaining Power.'[272] Yet, as it is stressed by the ICRC '[…] the authority to intern [covers] captured military personnel.'[273] Thus, as Lawrence Hill-Cawthrone notes, '[III GC] internment regime could not appropriately be transplanted to non-international conflicts, [because, firstly] internment on the basis of status and [secondly] for the duration of hostilities pose significant problems when applied to non-international conflicts.'[274]

III GC is designed to be applied to individuals who, at some point, belong to the armed forces and fall under Art.4 of III GC. Consequently, the first question to raise is how to transmit the essential

[267] *Serdar Mohammed v Ministry of Defence* (n 17) [252]
[268] Marco Sassoli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?* (ICRC 2011) VII, 21
[269] Sivakumaran (n 89) 302
[270] Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 IYHR 98
[271] III GC
[272] ICRC, Convention (III) relative to the Treatment of Prisoners of War, Commentary of 01.01.2020, Article 21 - Restriction of liberty of movement and release on parole, [1932] <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-21/commentary/2020?activeTab=undefined#_Toc42439037> last accessed 28 March 2024
[273] *Ibid* [1936]
[274] Hill-Cawthorne (n 16) 231

category of combatants from IAC to NIAC. LoNIAC does not operate in a classical IAC-oriented two-dimensional approach to divide individuals into combatants and civilians. There is no combatant status in NIAC. For instance, individuals captured in NIAC in Eastern Ukraine were detained by Ukraine on the basis of Ukrainian national law and prosecuted for the different crimes related to terrorism, as has been shown in previous Chapters.

In addition, the second concern expressed by Lawrence Hill-Cawthrone regarding the duration of internment highlights a striking issue. III GC provides that '[it] shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.'[275] Hence, POWs can be released or repatriated before or after the end of hostilities. To illustrate, the NIAC in Ukraine has been ongoing from 2014 until 2022. Thus, if the provisions of III GC were applied by analogy towards the duration of internment, the individuals detained in 2014 could have been in detention for eight years in total. Such an application would undermine the protective scope of IHL and would raise questions about the reasonability of such an implementation.

The second way is to apply IV GC. Art.78 of IV GC stipulates, 'if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.'[276] Thus, this approach of applying analogy means employing 'imperative reasons of security' as a ground for internment in NIAC. Jelena Pejic submits that such an approach '[…] strikes a workable balance between the need to protect personal liberty and the detaining authority's need to protect against activity seriously prejudicial to its security.'[277] As Marco Sassoli, Antoine Bouvier and Anne Quintin observed, 'the most detailed rules concern the treatment of civilians interned in connection with the conflict, in both the enemy's own and occupied territories, for imperative security reasons and not in view of a trial.'[278]

In 2008, ICRC's Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict approached the perspective of applying IV GC to the legal regime of internment in NIAC. Accordingly, Experts agreed, 'there was prevailing agreement that any party to a NIAC has an inherent power or "qualified right" to intern persons captured.'[279] This interpretation also supports the principle of equality between Parties to armed conflict, which is at

[275] III GC
[276] IV GC
[277] Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' (2011) 93 IRRC 21
[278] Sassoli, Bouvier and Quintin (n 268) 8, 2
[279] Chatham House and ICRC, Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict, (December 2009) 864 <https://international-review.icrc.org/sites/default/files/irrc-876-expert-meeting.pdf> last accessed 15 February 2024 (hereinafter - Chatham House and ICRC)

peril due to the lack of clear authorisation of internment in NIAC. To demonstrate the existence of the power to intern, Experts claimed that the 'legal basis [is] explicit authorization to intern in art. 41, para 1, art. 78, para. 1, GC IV.'[280]

Later, in 2014, ICRC, in its Paper, also approached internment in NIAC from the perspective of the analogy of IV GC to LoNIAC. According to ICRC, '[…] "imperative reasons of security" as the minimum legal standard that should inform internment decisions in all situations of violence, including NIAC. It seems also to be appropriate in NIACs with an extraterritorial element, in which a foreign force, or forces, are detaining non-nationals in the territory of a host State, as the wording is based on the internment standard applicable in occupied territories under the Fourth Geneva Convention.'[281]

Yet, in *Serdar Mohammed v Ministry of Defence case,* Justice Leggatt observes, '[…] on this approach detention is justified as long as such "imperative reasons of security" continue to exist. Even if this approach were to become generally accepted, it would still be necessary to identify procedures by which such determinations are to be made.'[282] As Sandesh Sivakumaran submits with regard to this approach, 'should resort be had to the law of international armed conflict as a basis from which to proceed, it would be important to appreciate the differences between the situations in which that body of law applies and non-international armed conflict.'[283]

However, Lawrence Hill-Cawthrone argues that there is a need to distinguish between two security standards advanced by IV GC. Respectively, he notes that 'in light of this, the Article 42(1) GCIV standard, permitting internment "only if the security of the Detaining Power makes it absolutely necessary", seems more appropriate than the Article 78(1) GC IV standard, which, […] is partly subjective, in that it permits internment where the "Occupying Power considers it necessary, for imperative reasons of security".'[284] According to him, if Art. 42(1) is read in conjunction with Art.27(4), there is a clear requirement '[…] that measures of security (eg internment) *actually* [emphasis added] be necessary as a result of the conflict.'[285]

Nonetheless, the term 'security', which is utilized in both cases, remains abstract. Hence, Parties can exercise a broad power to interpret it. Attempting to narrow down Parties' discretion, ICRC Experts in 2008 offered a test to determine the legality of internment in NIAC. According to them,

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[280] *Ibid*
[281] ICRC, Opinion Paper, Internment in Armed Conflict: Basic Rules and Challenges (25 November 2014) <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges> last accessed 15 February 2024
[282] *Serdar Mohammed v Ministry of Defence* (n 17) [249]
[283] Sivakumaran (n 89) 302
[284] Hill-Cawthorne (n 16) 235
[285] Hill-Cawthorne (n 16) 235

'the first element of the test is whether, on the basis of [individual's] activity, it is "highly likely" or "certain" (the threshold is unclear) that [individual] will commit further acts that are harmful (directly and/or indirectly, the threshold is unclear) to the interning Power and/or to those whom the interning Power is mandated to assist or protect, such as the host nation, the civilian population or public order (the threshold is again unclear).'[286] The first requirement already leaves a matter of a few thresholds to be established. Thus, a way to employ different interpretations can gradually increase security elements. The next element of the test, offered by the ICRC Experts in 2008, '[…] is whether internment is necessary to neutralize the threat posed.'[287] Once again, the concern is similar – the extension of the 'security' element. However, considering the presence of CIL prohibition of 'arbitrary detention', the too broad approach towards 'security' can be remedied. In addition, the analogical application of IV GC to NIAC includes the implementation of procedural safeguards stipulated by the IV GC as well. Therefore, this solution can be seen as a valid one, yet I must stress concerns. Firstly, it is hard to find a reason for parties to armed conflict, particularly states, to diffuse the boundaries between LoIAC and LoNIAC by creating a precedent of simultaneous application of rules. Secondly, national law provides more stable and predictable legal ground for detaining individuals in NIAC. Thirdly, the State does not need any source of international law to detain individuals within its jurisdiction; however, for NGAGs, this approach can solve the matter of legal basis for internment.

3.2.2. Special agreements

The second path to reconcile the lack of an explicit legal basis for internment in NIAC is agreements between Parties to NIAC. CA 3 states, 'the Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.' Hence, it lays down the ground for the Parties to utilise agreements to govern particular situations with no prejudice treaty- or CIL-based IHL. Nelleke van Amstel argues that '[CA 3] clearly considers armed groups capable, and even encourages them and States, to enter into agreements incorporating articles of the Conventions.'[288] ICRC considers that 'a special agreement can provide a plain statement of the law applicable in the context — or of an expanded set of provisions of IHL beyond the law that is already applicable — and secure a clear commitment from the parties to uphold that law.'[289]

[286] Chatham House and ICRC (n 279) 865
[287] *Ibid* 865
[288] Nelleke van Amstel, 'In Search of Legal Grounds to Detain for Armed Groups' (2012) 3 JIHLS 183
[289] ICRC, Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts, (February 2008) 16 <https://www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf> last assessed 11 February 2024

There is a practice of conducting special agreements. ICRC itself usually refers to the Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia. This special agreement upheld the application of the Four Geneva Conventions to armed conflict between Croatia and the Socialist Federal Republic of Yugoslavia.[290] A similar agreement was concluded with Bosnia and Herzegovina in 1992.[291] Yet, any of these special agreements provided were meant to provide a legal basis for security detention and aimed to uphold the general application of IHL.

There are a few more examples of these agreements, for instance, the San José Agreement on Human Rights, which was signed between the Government of Salvador and the Frente Farabundo Marti para la Liberación Nacional.[292] However, this agreement combines both realms – IHL and IHRL. Therefore, it is not a classic example of agreement under CA 3.

I agree, that special agreements under CA 3 can be a useful tool to regulate. However, it is questionable whether it can be a proper response to the lack of explicit authorisation to intern at NIAC. As Nelleke van Amstel notes, 'obligations will vary in scope depending on the conflict or group, which generates the impression that the legal regime applicable to non-international armed conflict is a pick-and-chose system, endangering certainty of legal protection.'[293] Kubo Mačák stresses that 'the possibility of [concluding] such agreements does not amount to a systematic response to the problem at the heart of this discussion.'[294] In addition, I would like to stress that in the context of the NIAC in Ukraine – Minsk Agreements do not fall under the scope of CA 3. The Protocol contains only one provision related to detentions, which requires the 'immediately release all hostages and unlawfully detained persons.'[295] Also, it is hard to find Minsk Agreements effective and more importantly, creating legal obligations.[296]

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[290] ICRC, Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia (1991) <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts> assessed 11 February 2024

[291] ICRC, Agreement No1, Bosnia and Herzegovina (1992) <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts> assessed 11 February 2024

[292] San Jose Agreement on Human Rights between the Government of El Salvador and the Frente Farabundo Martí para La Liberación Nacional signed on 26 July 1990 (UN doc A/44/971– S/21541, 16 August 1990)

[293] Nelleke van Amstel, 'In Search of Legal Grounds to Detain for Armed Groups' (2012) 3 JIHLS 186

[294] Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 IYHR 90

[295] UNSC, 'Letter dated 24 February 2015 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council' (25 February 2015) S/2015/135

[296] Lidia Powirska, 'Through the Ashes of the Minsk Agreements' (Epicenter, 18 May 2022) <https://epicenter.wcfia.harvard.edu/blog/through-ashes-minsk-agreements> last accessed 04 April 2024; Duncan Allan, 'The Minsk Agreements Rest on Incompatible Views of Sovereignty' (Chatham House, 15 July 2019) <https://www.chathamhouse.org/2019/07/minsk-agreements-rest-incompatible-views-sovereignty> last accessed 04 April 2024; Marie Dumoulin, 'Ukraine, Russia, and the Minsk agreements: A post-mortem' (The European Council on Foreign Relations, 19 February 2024) < https://ecfr.eu/article/ukraine-russia-and-the-minsk-agreements-a-post-mortem/> last accessed 04 April 2024

3.2.3. Re-approaching CIL

The third approach to provide a clear power to detain in NIAC is to maintain the position that CIL authorises such conduct. This assumption is logical and has already been utilised to provide a legal basis. In the *Serdar Mohammed v Ministry of Defence* case, the MOD argued, '[…] even if there is no power to detain in a non-international armed conflict implicit in CA3 and [II AP], such a power exists as a matter of customary international law.'[297] Even though the British court rejected the argument advanced by the MOD, the position expressed by ICRC yet supports it.

According to Experts, 'as a party to an armed conflict a non-State armed group also has an inherent authorization to intern. This is a direct consequence of the principle of equality of rights and obligations of the parties under IHL and has to be the starting point of the discussion.'[298] Hence, Experts argue that 'as equality of belligerents provides an incentive for non-State actors to respect IHL, it would be unhelpful to depart from this principle in the context of internment.'[299] I agree that invoking the principle of equality of belligerents as the primary customary rule, which is a part of CA 3, to map out the NGAG's 'inherent authorization to intern' is a valid approach. It also provides a clear link to the obligations which have to be carried out by NGAGs. For instance, as the Special Court for Sierra Leone affirmed, '[…] a convincing theory is that they are bound as a matter of international customary law to observe the obligations declared by Common Article 3, which is aimed at the protection of humanity.'[300]

In 2014, ICRC once more came back to address the matter of internment in NIAC. Respectively, ICRC submitted that 'another view, shared by the ICRC, is that 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 […].'[301] Indeed, CA 3 does not prohibit internment as such, yet it contains minimum guarantees, which both parties to NIAC have to safeguard by following the principle of equality. This approach is also in line with the CIL Study on IHL, which provides that 'arbitrary deprivation of liberty is prohibited.'[302] Thus, Deborah Casalin argues, '[…] the IHL prohibition on arbitrary deprivation of liberty cannot exclude armed opposition groups from detaining members of state armed forces as

[297] *Serdar Mohammed v Ministry of Defence* (n 17) [254]
[298] Chatham House and ICRC (n 279) 870
[299] *Ibid*
[300] *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber) SCSL-2004-15- AR72(E) and SCSL-2004-16-AR72(E) (13 March 2004) [47]
[301] ICRC, Opinion Paper, Internment in Armed Conflict: Basic Rules and Challenges (25 November 2014) <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges> last accessed 15 February 2024
[302] Jean-Marie Henckaerts and Louise Doswald-Beck (n 129) v.1, 344

'quasi-POWs', and possibly, in some limited circumstances, placing civilians living under their de facto territorial control under administrative detention.'[303] To satisfy the legal part of non-arbitrariness, the deprivation of liberty must be (i) legal, hence be based on some legal provisions, and (ii) must be in accordance with the law in force.

Ezequiel Heffes, with regard to the legality of internment, submits that 'the reference to the principle of legality in [IRCR's] institutional documents is worth noting. This is because it will necessarily affect what is needed on the part of NSAGs (and States) to conduct internments in a lawful manner.'[304] Hence, he argues that 'parties to NIACs must actually provide with a legal authority so as to prevent that a detention is arbitrary, which is also in line with the rule as enshrined in IHRL.'[305] Once more, he stresses the equality of the parties to NIAC, evidently, with no prejudice to the recognition, as CA 3 provides.

3.2.4. Reconciling domestic law and NGAG's practice

The last option to discuss is domestic law and NGAGs practice of internment as a remedy. In this study, I stressed many times that domestic law remains the main source for States to intern individuals in NIAC from a *lex lata* perspective. At the same time, it opens a matter of how to place the power of NGAGs to intern, as it obviously happens. In the previous Chapter, I demonstrated that Ukraine introduced preventive detention under national law as a hybrid of internment and criminal law custody, which is not necessarily in compliance with human rights obligations under ICCPR and ECHR, yet is an example of how the domestic law can be utilized in NIAC. In a similar vein, NGAGs introduced preventive detention. Therefore, as ICRC concludes, 'in a "traditional" NIAC occurring in the territory of a State between government armed forces and one or more non-State armed groups, domestic law, informed by the State's human rights obligations, and IHL, constitutes the legal framework for the possible internment by States of persons whose activity is deemed to pose a serious security threat.'[306] The Group of Experts also affirmed their concern regarding the compatibility of such internment with human rights obligations, 'any domestic legal basis relied upon by a State to intern in NIAC (whether in its own territory or in another country) must be in accordance not only with IHL but also with the State's IHRL obligations.'[307] Whilst ICRC emphasizes the role of domestic law, it also draws attention to human rights obligations. Yet, I argue that in case the State submits derogations to ICCPR and

[303] Deborah Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 IRRC 757
[304] Ezequiel Heffes, Geneva Call, *Detention by non-state armed groups under international law*, (CUP, 2022) 163
[305] *Ibid* 164
[306] ICRC, Opinion Paper, Internment in Armed Conflict: Basic Rules and Challenges (2014) Available at: <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges> last accessed 15 February 2024
[307] Chatham House and ICRC (n 279) 867

ECHR, as Ukraine did, the scope of obligations to carry out gradually reduces. Thus, only non-derogable rights and CIL norms last.

However, it raises a matter about the role of domestic law in extraterritorial NIAC. For instance, the ICRC considers the possibility of exterritorial application of domestic law. Respectively, 'alternatively, domestic law should be adopted, specifying the grounds and process for internment. In this case, the domestic law basis should be provided by the host State or, in exceptional circumstances, by the State(s) to which the international force(s) belong.'[308] Thus, the argument regarding domestic law as a remedy in extraterritorial NIAC remains valid.

Nonetheless, there is a need to address a consequent 'elephant is a room' – the practice of NGAGs. If the argument regarding the role of domestic law is sustained and considering CA 3 stipulates the equality of parties, the practice of NGAGs must be assessed as a possible solution for providing a legal basis to intern and a further complement to CA 3.

A few reports by the OHCHR displayed that the 'DPR' and 'LPR' massively detained individuals for security reasons on the basis of their own 'laws'. For instance, the ICRC affirmed that 'the application of this rule [equality] in common Article 3 to "each Party to the conflict" would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the "laws" of the armed group.'[309] In a similar vein, Marco Sassoli argues, '[…] armed groups that have territorial control and therefore *de-facto* control over persons who are not their members in those territories, must determine the rights and obligations of such persons by some sort of "legislation".'[310] Advancing this argument Frédéric Mégret stresses 'it seems plausible that recognizing a certain authority to detain would considerably sweeten the humanitarian deal for [NGAGs] […].'[311]

This approach is controversial and hits the basic principle of state prerogative power to legislate, which is why, from a political perspective, it is unrealistic. Yet, from a policy perspective, it can enhance the enforceability of, at least, IHL and, perhaps, HRL. Marco Sassoli frames it, '[this approach] is more innovative and less explored than State responsibility and individual criminal responsibility, is to enforce IHL directly and through international mechanisms against the armed

[308] ICRC, Opinion Paper, Internment in Armed Conflict: Basic Rules and Challenges (2014) Available at: <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges> last accessed 15 February 2024
[309] ICRC Database, Convention (III) relative to the Treatment of Prisoners of War Commentary of 01.01.2020, Article 3 - Conflicts not of an international character [728] <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020?activeTab=undefined> last accessed 28 March 2024
[310] Marco Sassoli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1 IHLS 33
[311] Mégret (n 253) 188

group as a group.'[312] From a legal perspective, this way is valid because it originates from the meaning of CA 3, but it does not affect the legal recognition of such entities. Even if NGAGs are allowed to 'legislate', it does not entail their recognition or legality.

To conclude this part, I submit that there are four possible solutions to overcome the lack of legal basis to intern in NIAC. The first way is to apply the principle of analogy between LoIAC and LoNIAC. There are two major instruments which can be utilised for internment in NIAC – III GC and IV GC. Yet, it has been argued that provisions of III GC are too deeply attached to the combatant status and permit internment till the end of hostilities, thus, for years. IV GC is more rigid in that regard because it stresses the conduct of the internment itself and provides a stricter threshold than III GC. However, the threshold still allows discretion for parties. Nonetheless, the logical counterargument is blurring the line between IAC and NIAC, which the States are not willing to accept due to political concerns.

The second way is to conduct special agreements between Parties to NIAC, as it is stipulated by the CA 3. Special agreements allow the adjustment of the set rules for the particular NIAC. However, the practice of conducting such agreements does not demonstrate a general solution but rather a sporicidal remedy to some NIACs.

The third approach is to argue that CIL permits internment, as it prohibits 'arbitrary deprivation of liberty.' This assumption is based on the principle of equality, which is enshrined in CA 3. Thus, if States can detain, NGAs can intern as well, as both are equal parties to NIAC. In addition, for detention to be legal, it must have a legal basis and be in accordance with relevant law. Hence, this approach allows NGAGs to intern and obliges them to follow, at least, IHL standards.

The last approach is to agree that domestic law provides a legal basis for internment in NIAC for States. Yet, it requires distinguishing between NIAC within one State, where this presumption undoubtedly works and extraterritorial NIAC, when there is a need to provide extra legislation to allow the extraterritorial application of domestic law. Nonetheless, when this approach faces the principle of equality under CA 3, it entails that NGAGs can 'legislate' as well and provide a legal basis to detain by themselves.

3.3. Conclusions for Chapter III

To finalise the Chapter, I draw a few conclusions. Firstly, NGAGs are the party to NIAC; hence, they carry out similar powers and obligations as States do, as it originates from CA 3. Approaching obligations and powers of NGAGs from 'asymmetric application of the law' does not enhance the

[312] Sassoli (n 310) 9

enforceability of IHL, in contrast reducing it. Thus, I agree that the principle of belligerent equality has to be followed. Secondly, I argue that NGAGs in Eastern Ukraine fulfil the requirements of both thresholds under CA 3 and II AP; therefore, they can maintain their obligation under IHL. Thirdly, approaching NGAG's power to intern, it is hard to support the position that they cannot intern. As I demonstrated, NGAGs in Eastern Ukraine interned individuals and developed their own 'legislature' to regulate it.

To overcome the lack of explicit authorisation to intern in NIAC, there are four solutions to consider. To apply IV GV by analogy, which provides a strict yet broad understanding of 'security reasons.' Consequently, parties to NIAC can utilise this analogy to build an explicit legal basis and a system of guarantees. To conclude a special agreement can be a proper way to manage the legal lacune, as well as enhance the enforceability of guarantees provided by IHL. To agree that CIL provides an 'inherent power to intern', thus eliminating any distinctions between parties to NIAC. Lastly, to acknowledge that NGAs can 'legislate' their internment regime, whilst states adopt special domestic legislature to tackle the issue. In NIAC in Eastern Ukraine, Ukraine utilised 'preventive detention' as a tool by introducing special legislation, while NGAGs introduced their own 'legislature'.

Finally, I stress that none of the approaches offered is perfect. Each of them has its own advantages and disadvantages. Nonetheless, it is obvious that internment in NIAC occurs, and the NIAC in Eastern Ukraine is a proper example of it. Hence, any of the offered solutions can be utilised. However, I submit that some approaches are more comprehensive in their ability to solve the issue, in particular, the application of analogy. This way offers not just a proper legal basis but a set of regulative rules as well. Another comprehensive path is to acknowledge the existence of CIL to intern (detain) in IHL, with a proper application of CA 3 and II AP. Special agreements are proper *ad hoc* solutions, yet they cannot be concluded in each NIAC. The diffusion of the legislative power of the State in NIAC is a reality because NGAGs 'legislate' their activity. Nonetheless, it is unlikely that States will endure this approach.

SUMMARY

Before drawing final conclusions, I recall that the primary research problem of this study is the lack of an explicit legal basis for internment in the context of NIAC. Thus, in this work, I aimed to establish the legal regime of security detention in the context of NIAC in Eastern Ukraine. By virtue of determining (i) the legal regime of ATO and JFO; (ii) the legal regime of security detention in NIAC under the IHL; (iii) the legal regime of internment under national law and its conformity with Human Rights obligations; (iv) the application of HRL to internment in NIAC; (v) the power of NGAGs to intern in NIAC. Therefore, I was able to formulate *lex ferenda* solutions and answer the main research question: what realm of the law authorises State and NGAG to intern in NIAC?

The armed conflict in Eastern Ukraine (2014-2022) possesses the characteristics of IAC and NIAC. Hence, I submit that it shall be qualified as a 'mixed' one, with parallel tracks of hostilities. LoIAC regulates the IAC between Russia and Ukraine and is out of the scope of this study. The NIAC between Ukraine and NGAGs 'DPR' and 'LPR' is regulated by LoNIAC and is under primary attention in the study. The LoNIAC applies to NIAC in Eastern Ukraine fully. The level of hostilities was higher than internal disturbances to activate CA 3. The protracted and intense armed violence between governmental authorities triggered the application of II AP. In addition, NGAGs 'DPR' and 'LPR' have met the requirements of the organisation provided by II AP. Even though there were claims that Russia could have exercised a sufficient level of control over NGAGs, it remains legally unclear. Neither the 'effective control' test, where the State directed or enforced the possible violations of IHL of NGAGs to attribute state responsibility, nor the 'overall control' test, where the State engages in general planning and preparation, for attributing individual criminal responsibility has been applied to NIAC in Eastern Ukraine. Therefore, it reinforces the qualification of armed conflict in Eastern Ukraine as a 'mixed' one.

I demonstrated in the I Chapter that Ukraine activated the provisions of 'emergency' law to remedy the gaps of LoNIAC and lay down a framework to cope with NIAC in Eastern Ukraine. Yet, Ukraine did not utilise the 'classical' emergency regimes – martial law or state of emergency – considering the need to hold elections and sustain the functions of public administration. The antiterrorist emergency regime was put in force, namely – ATO and, later, JFO. ATO is a special emergency regime, which had a complex of legal and non-legal measures to tackle the NIAC in Eastern Ukraine. Importantly, the LoCT provided extra authorisation for the law enforcement engaged in ATO to detain individuals in the area where terrorist activity was present. JFO was a continuation of ATO, but within a military paradigm, not within law enforcement. JFO was planned

and directed by military command. The legal regulation of JFO provided clear authorisation to detain individuals but within criminal procedure.

Even though the security detention in NIAC is regulated by the intersection of IHL, HRL and domestic law, I argue that only the domestic law of the State can be seen as an authoritative tool for internment in NIAC from the perspective of *lex lata* for the following reasons. For NGAGs, it has been demonstrated that 'DPR' and 'LPR' utilised their 'practice' to 'legislate' and regulate internment.

LoNIAC has two legal instruments to regulate hostilities between governmental forces and NGAGs, namely, CA 3 and II AP. Neither the language of CA 3 nor II AP explicitly authorises parties to NIAC to intern individuals. If to compare the language of LoIAC, where Art. 21 of the III GC stipulates that 'the Detaining Power may subject prisoners of war to internment' or Art. 42 of IV Geneva Convention provides that 'the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary,' it is out of the question that Parties to IAC can intern. CA 3 is seen as a reincarnation of 'elementary considerations of humanity.' Hence, CA 3 is more regulative-oriented than authoritative-oriented. CA 3 does not provide explicit power for parties to detain. CA 3 aims to safeguard basic humanitarian concerns. In a similar vein, II AP establishes the system of judicial guarantees for the individuals whom the Parties intern, yet it does not provide authorisation. Similar conclusions were reached in *the Serdar Mohammed v Ministry of Defence* case.

There was an attempt to argue that *travaux préparatoires* can demonstrate the intention of the drafters to include the power to detain for security reasons in NIAC. However, this position is not widely accepted. It is opposed by the fact that CA 3 and II AP acknowledge the possibility of internment, yet there was no intention to regulate it in NIAC by means of treaty-based IHL. Some argued that the legal ground for internment lies not in treaty-based IHL but in customary IHL. Arguably, it provides the 'inherent power to intern'. Yet, it has been demonstrated that neither a common state practice nor *opinion juris* can support this assumption as *lex lata.* However, customary IHL indeed stipulates that 'arbitrary deprivation of liberty is prohibited'. Consequently, internment – can be lawful in NIAC if it meets the requirement of legality. In addition, NIAC usually occurs on the territory of the State, where the State has its jurisdiction. Hence, practice proves that States employ another realm of law, namely, domestic law or 'practice', to authorise internment in NIAC, as well as NGAGs.

The customary IHL prohibition of 'arbitrary deprivation of liberty' is based on the human rights instruments, in particular, ICCPR and ECHR. The first subsequent issue is the place of HRL in

NIAC since there is a longstanding discussion of how IHL and HRL interact. There are three primary doctrines: 'separation' or 'exclusivity', 'complementarity' or 'convergence' and 'fusion' or 'integration'. Two of them were addressed by the ICJ in (the *Nuclear Weapons* case), where the Court advanced the idea of separation on the basis of the *lex specialis* approach. Later, in the *Wall* case, the Court utilised the *lex specialis* approach to demonstrate the 'complementarity' of IHL and HRL. In the *Democratic Republic of Congo v. Uganda* case, ICJ once more affirmed the 'complementarity' theory yet did not employ the notion of *lex specialis.* The frequent usage of *lex specialis* sparked a discussion over its normative value as a principle of norm coordination or separation. Yet, it remains more an interpretative toll than a principle of norm coordination.

The second subsequent issue with HRL in armed conflict is the ability to derogate from some HR obligations under ICCPR and ECHR. Both ICCPR and ECHR allow derogation from the right to liberty and security of person. HRC acknowledged that internment is legal if it is permitted and in compliance with IHL. However, to be legal, the internment must have a legal basis provided by law. If IHL does not provide this basis, only domestic law or 'practice' can remedy this gap. Also, internment must be 'reasonable, necessary and proportionate' to comply with the requirement of 'non-arbitrariness'. In addition, HRC stresses, that the right to challenge the legal ground of detention before the court is customary, hence derogation does not limit this right.

ECHR is stricter with regard to the legal basis of detention since it must fit one of the grounds enumerated in Art.5. Internment does not fit any ground provided since, *per se*, it is illegal in NIAC, yet not in IAC, since it originates from IHL. However, it does not entail that the State cannot employ internment. Under the derogation and in compliance with any non-derogable obligation or it is provided by another realm of international law, security detention can be introduced. Hence, I submit that neither ICCPR nor ECHR provides a legal ground for internment in NIAC, yet both HR instruments advance procedural guarantees for individuals detained. The derogation submitted by Ukraine in 2015 Ukraine to Art.9 of ICCPR and Art.5 of ECHR allowed Ukraine to introduce new legislation to tackle the armed conflict in Eastern Ukraine and to remedy the gaps in IHL, particularly concerning the basis of internment in NIAC. In addition, the State is under a positive obligation to protect human rights when there is a foreseeable threat. Thus, the State is legally bound to adopt necessary measures to prevent the threat.

In the context of NIAC, Ukraine introduced preventive detention, which allowed to detain individuals for more than 72 hours, but not more than 30 days. Similarly, NGAGs employed preventive detention and 'legislate' it by means of their 'practice'. The possibility of preventive detention has been linked to criminal offences which are committed against the state or within the 'terrorist activity' frame. In addition, the primary power to employ preventive detention belongs

to the prosecutor. The guarantee to challenge the legal ground for detention was preserved. However, preventive detention still requires bringing criminal charges, which is not necessary under IHL. Thus, it is a particular modification made by Ukraine to sustain legal clarity, yet it raises further questions about its place within the IHL framework. Nonetheless, considering that preventive detention was not in compliance with the Constitution of Ukraine, which does not allow detention without criminal charges to be more than 72 hours and as the CoE has highly criticised it, it most likely would have failed the ECtHR's proportionality test. Yet, it proves that Ukraine relied on national law to intern individuals in NIAC, not on IHL or HRL.

Moreover, NGAGs interned individuals as well as Ukraine. The legal power of NGAGs to intern is another 'apple of discord'. Firstly, I affirm that NGAGs in Eastern Ukraine have met all the necessary requirements provided by CA 3 and II AP to be bound by them. Secondly, 'DPR' and 'LPR' 'adopted legislature to authorise and govern the detention' of individuals. However, since Ukraine does not recognise these entities, all acts of detention shall be seen as illegal. Yet, it raises the concern regarding the equal application of IHL provisions. Some argued that the States are more lenient towards the 'asymmetrical operation of the law' paradigm, which gives more prerogatives to the State but less to NGAG. Logically, this is a policy-oriented decision, which undermines the principle of equality of the parties to armed conflict, originated in CA 3 and II AP. The principle of equality stipulates that both States and NGAGs have equal rights and obligations under IHL. However, if IHL does not provide a clear authorisation to intern in NIAC, but clearly it happens, how can NGAGs legally intern? At some point, Ukraine argued that 'DPR' and 'LPR' do not intern or detain but take hostages contrary to obligations under CA 3. This assumption can be true only if there is a clear indication of fulfilment of *mens rea* element 'to compel'. Hence, the NGAGs carry out the same scope of obligations as States do in NIAC.

Lastly, I discussed possible *lex ferenda* solutions. The first solution which I offer is to apply the principle of analogy between LoIAC and LoNIAC. Since LoIAC clearly permits internment under III GC and IV GV, it is possible to apply it by analogy. This approach has been argued, for instance, by the MOD in *the Serdar Mohammed v Ministry of Defence case,* as well as promoted by scholarship. However, the legal regime of internment under III GC is linked to the POW status, which does not exist under LoNIAC. Thus, it is more convenient to apply the 'imperative reasons of security' as a ground for internment, which IV GC stipulates, since it is not linked to a particular status under IHL. ICRC argued in a similar vein. Yet, I admit, that there is a big downside of this approach, namely, the will of the States to blur the distinction between LoIAC and LoNIAC and defuse the power of domestic law to regulate acts within its jurisdiction. The second solution is to advance the possibility of conducting special agreements between parties to NIAC, as indicated in

CA 3. Yet, this solution is *ad hoc* since the Parties have not widely used it to NIACs; therefore, it is not a comprehensive and systematic approach.

The third way to reconcile the lack of clear legal ground for internment in NIAC is to acknowledge the role of CIL and advance the 'inherent authorization to intern'. This solution is in line with the principle of equality of the parties established by CA 3. It allows both States and NGAGs to intern and maintain a legality requirement of detention. This interpretation was widely supported in the context of the Chatham House discussion and by ICRC.

The last approach to provide the legal basis for internment is to recognise domestic law and the 'practice' of NGAGs as a valid legal ground. Ukraine widely utilised domestic law to safeguard the internment regime, as well as 'DPR' and 'LPR', which adopted their own 'legislature' to conduct detention. This solution recognises the principle of equality under CA 3, and it provides a safe way for States to ensure the rights of individuals detained by NGAGs because CA 3 precludes any formal recognition of NGAGs. Indeed, the approach is controversial, yet it remains a way out to solve the legal lacuna.

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