

Taking prisoners: reviewing the international humanitarian law grounds for deprivation of liberty by armed opposition groups

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Abstract

While detention by armed opposition groups in non-international armed conflict is a reality that is foreseen and not prohibited by international humanitarian law, the grounds upon which it may take place are not defined. This article looks more closely at the customary international humanitarian law prohibition on arbitrary deprivation of liberty, and how it can apply to armed opposition groups in a manner that makes compliance realistic. It focuses on the legal bases upon which armed opposition groups may detain persons who are taken into custody in order to remove

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them from hostilities or for security purposes. An approach to detention by armed opposition groups based on the principles of international humanitarian law applicable to international armed conflicts is explored and its limitations defined.

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The rebels here said they caught a spy in the court building . . . The response was swift. Prosecutors interrogated the man on Thursday, and the rebels said they planned to detain him, for now.¹ (Karim Faheem)

In a typical non-international armed conflict (NIAC) between a state and a non-state armed opposition group, it is inherent that the rules of international humanitarian law (IHL) – which in principle apply equally to all parties to a conflict – will in fact be applied to parties that are unequal in many ways. Nevertheless, whatever there is to be said about armed opposition groups’ factual compliance with IHL, most IHL rules can be applied to an armed opposition group without many problems. State armies and armed opposition groups are equally capable in theory of refraining from killing prisoners, using prohibited weapons, or attacking civilians. However, a small number of IHL norms may give rise to difficulties of legal interpretation when applied to armed opposition groups instead of states. One example is the IHL prohibition on arbitrary deprivation of liberty in NIACs.²

Armed opposition groups in NIACs do take prisoners – this is a reality that IHL foresees and does not prohibit (but does not expressly allow either). However, the grounds upon which this may take place are less clear. What is clear is that customary IHL prohibits the arbitrary deprivation of liberty, and that interpreting this rule in the same way when applied to armed opposition groups as when applied to states would realistically make it impossible for armed opposition groups to comply with the requirements.

Notwithstanding the situation in IHL, the domestic law of all states prohibits detention by armed opposition groups. If group members are to be punished for the mere fact of having detained an 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. This could have potentially devastating consequences for the persons detained and for the civilian population at large.

This article will look more closely at the IHL prohibition on arbitrary deprivation of liberty, and how it can be applied to armed opposition groups in a

- 1 Karim Faheem, ‘In the cradle of Libya’s uprising, the rebels learn to govern themselves’, in *New York Times*, 24 February 2011, available at: <http://www.nytimes.com/2011/02/25/world/africa/25benghazi.html> (last visited 30 April 2011). Quotes are used for illustrative purposes only, and do not reflect a position on the individual cases or situations to which they refer.
- 2 As set out in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, Rule 99: ‘Arbitrary deprivation of liberty is prohibited’.

manner that makes compliance realistic and promotes respect for the norms governing the treatment of detainees. The first section examines the general parameters of the IHL prohibition on arbitrary deprivation of liberty (with reference to the complementary rule in international human rights law (IHRL)) and confirms its applicability to armed opposition groups. The second section exposes problems that arise from applying this prohibition to states and armed opposition groups in an identical manner. The final section examines how the IHL prohibition on arbitrary deprivation of liberty could be applied more realistically to armed opposition groups, relying on the analogous provisions of the IHL applicable to international armed conflicts.

While situations may arise where armed opposition groups may (or even must) detain an individual on the basis of a criminal offence,³ this article focuses on situations where detention does not arise from suspicion or conviction of a criminal act, but on detention of enemy soldiers to remove them from hostilities (similar to detention of prisoners of war (POWs)), and detention of civilians for security reasons when the armed opposition group becomes the *de facto* authority in a territory.

An overview of the IHL prohibition on arbitrary deprivation of liberty in non-international armed conflicts

The customary IHL rule prohibiting arbitrary deprivation of liberty in NIACs⁴ has been affirmed on the basis of state practice – all states prescribe by law the grounds for detention during a NIAC; a substantial number have also specifically criminalized arbitrary detention in NIACs, and most military manuals prohibit this practice.⁵ States have additionally condemned arbitrary detention in NIACs through the United Nations General Assembly,⁶ the Security Council,⁷ and the United Nations High Commissioner for Human Rights.⁸

3 E.g. where members of an armed opposition group are suspected of war crimes and the commander must discharge his or her responsibility to investigate and punish such crimes. See Marco Sassoli, *Possible legal mechanisms to improve compliance by armed opposition groups with IHL and IHRL*, paper delivered at the Armed Opposition Groups Conference, Vancouver, 13–15 November 2003, available at: <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf> (last visited 22 November 2011); Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Art. 28(a)(i); ICRC, *Customary IHL*, Rule 153, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule153 (last visited 22 November 2011).

4 J.-M. Henckaerts and L. Doswald-Beck, above note 2, Rule 99.

5 *Ibid.*, p. 347.

6 *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, UN General Assembly, UN Doc. A/RES/50/193 (1995), para. 16; *Situation of Human Rights in the Sudan*, UN General Assembly, UN Doc. A/RES/55/116 (2001), para. 2(b)(i).

7 *Bosnia and Herzegovina*, UN Security Council, UN Doc. S/RES/1019 (1995); *Burundi*, UN Security Council, UN Doc. S/RES/1072 (1996).

8 *Situation of Human Rights in the Sudan*, UN High Commissioner for Human Rights, UN Doc. E/CN.4/1995/77 (1995), para. 15.

However, IHL does not give a clear definition of the concept of arbitrary deprivation of liberty in NIACs, and does not expressly refer to any legal grounds for detention. It is thus necessary to find a legal standard to determine the meaning of ‘arbitrary deprivation of liberty’ in a NIAC context. Taking into account that a corresponding prohibition on arbitrary arrest and detention exists in IHRL,⁹ this would *prima facie* be the most logical starting point for interpreting and giving content to the concept of arbitrary deprivation of liberty in IHL.¹⁰ In this regard, it is worth noting that IHRL still applies during NIACs to the extent that the state has not made permissible derogations,¹¹ or that an IHRL rule has not been superseded by a more specific rule of IHL operating as *lex specialis*.¹² The International Committee of the Red Cross (ICRC) study on customary international humanitarian law agrees that some IHL concepts require interpretation in the light of IHRL,¹³ and follows this approach by using IHRL extensively to interpret the IHL prohibition on arbitrary detention, with regard to both substantive grounds and procedural requirements for detention in NIACs.¹⁴

International humanitarian rights law and the prohibition on arbitrary detention

Given this relationship between IHL and IHRL, and the fact that the concept of arbitrary deprivation of liberty has largely been imported from IHRL, it is important to examine the prohibition on arbitrary detention in IHRL in order to interpret the corresponding IHL prohibition.

In IHRL, the most universally accepted formulation of the prohibition on arbitrary detention is that in the International Covenant on Civil and Political Rights, which provides that: ‘No person may be deprived of liberty except on grounds and according to procedures established by law’.¹⁵ Regarding the substantive grounds for detention, no concrete parameters for acceptable grounds

9 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Art. 9 (1); African Charter on Human and Peoples’ Rights (ACHPR), 27 June 1981, 1520 UNTS 217, Art. 6; American Convention on Human Rights (ACHR), 22 November 1969, 1144 UNTS 123, Art. 7(3); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 222, Art. 5(1).

10 A situation such as that envisaged in Marco Sassòli, ‘Le droit international humanitaire, une *lex specialis* par rapport aux droits humains? (IHL, a *lex specialis* in respect of human rights?)’, in Andreas Auer, Alexandre Flückiger, and Michel Hottelier (eds), *Les droits de l’homme et la constitution: Études en l’honneur du Professeur Giorgio Malinverni*, Schulthess, Geneva 2007, p. 390.

11 ICCPR Art. 4(1); ACHR Art. 27(1); ECHR Art. 15(1); International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, para. 106.

12 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para. 2.

13 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. xxxi.

14 *Ibid.*, pp. 347–352.

15 ICCPR, Art. 9(1). Similar provisions exist in ACHR, Art. 7 and ECHR, Art. 5, although the ECHR does not use the criterion of arbitrariness, but sets out defined exceptions to the prohibition on deprivation of liberty.

are set – the main requirement is that they be enshrined in existing law. The United Nations Working Group on Arbitrary Detention – mandated to pronounce on general issues related to arbitrary detention so as to assist states in preventing this practice – gives some further guidance on this point by stating that detention may be considered arbitrary on substantive grounds if it is ‘clearly impossible’ to invoke a legal justification for the detention (e.g. the detainee’s sentence has been completed, or an amnesty law applies to him or her).¹⁶ Detention may also be arbitrary on substantive grounds if it is imposed as a result of the detained person’s exercise of the rights and freedoms established in the Universal Declaration of Human Rights (UDHR) or other international instruments.¹⁷ According to the African Commission on Human and Peoples’ Rights, detention may be arbitrary if the substantive grounds set out by law are too vague.¹⁸ Furthermore, even if there are valid grounds for the detention when it is imposed, the detention will be considered arbitrary if it continues after the grounds for it have expired (e.g. the detainee’s release has been ordered).¹⁹

On the other hand, detention may be considered arbitrary on procedural grounds if there is a failure to detain in accordance with procedures established by law.²⁰ This would include giving reasons for the detention²¹ and giving the accused the opportunity to challenge the legality of his or her detention before a regularly constituted, independent tribunal.²² The arrest should also be effected by a competent official or person authorized to do so.²³ Additionally, a grave failure to respect fair trial standards established in the UDHR or relevant international instruments may also render a detention arbitrary.²⁴ In the case of *Mukong v. Cameroon*, the United Nations Human Rights Committee (charged with the monitoring of the International Covenant on Civil and Political Rights) held the view that arbitrariness must be interpreted broadly ‘to include elements of inappropriateness, injustice, lack of predictability and due process of law’. Thus, even in cases where procedures set out in national law are strictly complied with, a detention may still be considered arbitrary if it does not conform to wider considerations of the rule of law.²⁵

16 UN Working Group on Arbitrary Detention, ‘Fact sheet No. 26, Annex IV, Revised methods of work’, Art. 8(a), available at: <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> (last visited 15 November 2011).

17 *Ibid.*, Art. 8(b).

18 ACHPR, *Amnesty International v. Sudan*, Communication Nos. 48/90, 50/91, 52/91, 89/93, ACHPR 13th Annual Activity Report, 1999, p. 124, para. 59.

19 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. 348. See e.g. the UN Human Rights Committee’s finding in *William Torres Ramirez v. Uruguay*, Communication No. R. 1/4, UN Doc. Supp. No. 40 (A/35/40), p. 121 (1980), para. 18.

20 ICCPR, Art. 9(1).

21 *Ibid.*, Art. 9(3).

22 *Ibid.*, Art. 9(4).

23 Body of Principles for the Protection of All Persons Under Any Form of Detention, UN General Assembly, UN Doc. A/RES/43/173 (1988), Principle 2.

24 UN Working Group on Arbitrary Detention, above note 16, Art. 8(c).

25 *Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991 (1994), para. 9.8.

The IHL prohibition on arbitrary deprivation of liberty in NIACs as applicable to armed opposition groups

Several legal explanations have arisen as to how armed opposition groups are bound by IHL norms. Some of these require recognition of the armed opposition group by states,²⁶ others require the armed opposition group's consent,²⁷ while yet others require neither of the above.²⁸ Two models that are the most pertinent in explaining the applicability of the prohibition on arbitrary deprivation of liberty (without requiring the armed opposition group's consent) are the direct application of customary IHL to non-state entities and the doctrine of 'legislative jurisdiction'. The former is in line with the concept of functional international personality advanced by the seminal International Court of Justice *Reparations* case.²⁹ The direct applicability of customary IHL to armed opposition groups has also been supported by the Special Court for Sierra Leone and the International Commission of Inquiry on Darfur.³⁰ The doctrine of 'legislative jurisdiction' similarly holds that international obligations are binding on non-state entities insofar as they are capable of holding them, by virtue of the state's capacity to legislate for and on behalf of its nationals and individuals in its territory, whether through domestic law or directly through obligations incurred at international level.³¹

Either way, it is clear that the customary prohibition on arbitrary deprivation of liberty is applicable to armed opposition groups. This is illustrated

- 26 E.g. traditional recognition of belligerency. See Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations', in *International Review of the Red Cross*, Vol. 88, No. 863, September 2006, p. 492.
- 27 E.g. special agreements envisaged by Common Article 3 of the 1949 Geneva Conventions (GCs); declarations under Additional Protocol I (AP I), Art. 96(3); the law of treaties pertaining to third-party obligations (i.e. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 35). See Antonio Cassese, 'The status of rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', in *International and Comparative Law Quarterly*, Vol. 30, April 1981, p. 423.
- 28 E.g. textual interpretation of Common Article 3 (applying to 'parties to a conflict'); contextual interpretation of Additional Protocol II (AP II) in the light of the territorial control requirement in Art. 1(1); the application of basic general principles of international law (ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, ICJ Reports 1986, para. 218); assumption of state responsibility through the fact of claiming to represent a territory (ICRC, *Commentary on the Geneva Conventions*, p. 51, available at: <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument> (last visited 21 November 2011)); succession to state responsibility (International Law Commission, *Draft Articles on State Responsibility for Internationally Wrongful Acts (with Commentary)*, 2001, Art. 10). On the concept of legislative jurisdiction, see Sandesh Sivakumaran, 'Binding armed opposition groups', in *International and Comparative Law Quarterly*, Vol. 55, April 2006, p. 369. See further Jann Kleffner, 'The applicability of international humanitarian law to armed groups', in *International Review of the Red Cross*, Vol. 93, No. 882, June 2011, pp. 443–461.
- 29 ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174; see also *Military and Paramilitary Activities in and against Nicaragua*, above note 28, p. 14, paras. 113–114.
- 30 Special Court for Sierra Leone, *Prosecutor v. Kallon & Kamara (Jurisdiction)*, Case No. SCSL-04-15-PT-060, 13 March 2004, para. 47; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 2005, para. 172.
- 31 A detailed discussion of the legislative jurisdiction theory, as well as a critical analysis of the above methods of binding armed opposition groups, is to be found in S. Sivakumaran, above note 28.

by the United Nations Commission on Human Rights calling upon ‘parties to the hostilities’ (that is, not only the government) in Sudan to protect all civilians from violations of IHL, including arbitrary detention.³² Parties to the conflict who have a duty to protect civilians from arbitrary deprivation of liberty are evidently prohibited from engaging in this practice themselves. This is further supported by the Inter-American Commission on Human Rights, which has stated in the context of detentions by armed opposition groups that it considers the prohibition on arbitrary detention to be one of the international norms applicable in NIAC,³³ and that such norms ‘apply equally to and expressly bind all the parties to the conflict’.³⁴

The IHL prohibition on arbitrary deprivation of liberty as applied to states cannot be applied in the same way to armed opposition groups

The general interpretation of the IHL prohibition on arbitrary deprivation of liberty as outlined above cannot, however, be applied to armed opposition groups in a realistic manner. Applying the prohibition to these groups in such a way would raise a legal issue for them regarding the substantive basis for detention, as existing national law would never authorize detention by armed opposition groups, nor would it permit them to make laws that would serve as a basis for detention. Armed opposition groups could also not meet procedural requirements, as they would lack the authority under national law to arrest, to issue warrants, or to set up tribunals to review the legality of the detention. While this may be in line with states’ domestic law, IHL does not prevent detention or other warlike acts by armed opposition groups (regardless of their status in domestic law): the basic IHL principle of necessity merely dictates that these acts must be strictly limited to those necessary for a party to achieve the aim of weakening the enemy’s military potential (in the case of an armed opposition group, this would be limited to acts necessary to overcome government control).³⁵ By implication, IHL cannot prohibit a party from overcoming the enemy by means of acts that fall within these limits.³⁶

Indeed, experience has shown that the principle of equality of belligerents is an important factor in inducing armed opposition groups’ compliance with IHL (although ‘equality’ is necessarily a more limited concept in NIACs, as at least one

32 *Situation of Human Rights in Sudan*, UN Commission on Human Rights, CHR Res. 1993/66 (1993), para. 15.

33 Inter-American Commission on Human Rights (IACHR), Press Release No. 5/98, 1 April 1998, available at: <http://www.cidh.org/Comunicados/English/1998/Press3-9.htm> (last visited 15 November 2011).

34 IACHR, *Third Report on the Human Rights Situation in Colombia*, 26 February 1999, Chapter 4, para. 13, available at: <http://www.cidh.oas.org/countryrep/colom99en/chapter-4.htm> (last visited 15 November 2011).

35 Antoine Bouvier and Marco Sassòli, *How Does Law Protect in War? Vol. I*, ICRC, Geneva, 2006, p. 81 and n. 12.

36 *Ibid.*, p. 82.

party is not a sovereign state).³⁷ Indeed, in the absence of the formal recognition of belligerency, observance of customary IHL has generally been based on *de facto* reciprocity: for example, rebels who accord captured members of government forces the same treatment as POWs have been more likely to receive the same treatment in return.³⁸ Conversely, an armed opposition group is unlikely to comply with the prohibition on arbitrary deprivation of liberty if it almost totally precludes the group from detaining individuals legally, as such an application of the rule would deny any reciprocity and put them in such an unequal position that it would largely negate any possibility of weakening the enemy's military.

In such a situation, the armed opposition group may see no reason to commit itself to IHL and turn to more devastating methods of overcoming enemy fighters, including those that constitute war crimes, such as killing captured persons or fighting on the basis that no prisoners will be taken.³⁹ Alternatively, such groups will continue to detain prisoners regardless of legality, the drawback being that, in this situation, the group will also have no incentive to feel constrained by IHL as to whom it may detain and under what circumstances, not to mention how the group is expected to treat detainees. When detention of enemy fighters in order to remove them from hostilities is painted with the same brush as hostage-taking and kidnapping, there is little incentive to comply with the prohibition on the latter two.⁴⁰ Being placed outside the bounds of IHL may also make armed opposition groups more reluctant to submit to monitoring of conditions in their detention facilities. In all of these scenarios, those detained will be the ones to pay the price.

The above dilemma highlights the fact that, although IHRL is important in interpreting IHL rules (especially in a case such as the present where IHL of NIACs seems to offer little in the way of defining the concept of 'arbitrary deprivation of liberty'), caution should be exercised in importing rules directly from one system to another without taking into account the differences in the IHL and IHRL systems, as well as the contexts in which they operate.⁴¹ IHRL standards were mainly designed to be applied by states, while IHL is a system specifically conceived to apply between

37 Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict', in *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 686.

38 Deidre Willmott, 'Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court', in *Melbourne Journal of International Law*, Vol. 5, 2004, p. 200.

39 On the killing of captured persons, see Common Article 3(d); Rome Statute of the International Criminal Court, Art. 8(2)(c). On the denial of quarter, see AP II, Art. 4(1); ICRC, *Customary IHL*, Rule 46, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule46 (last visited 19 November 2011); Rome Statute of the International Criminal Court, Art. 8(2)(e)(x).

40 For an example of an armed opposition group differentiating between hostage-taking and other types of detention, in writing at least, see the statement of the Moro Islamic Liberation Front (MILF), 'Resolution to reiterate MILF policy of strongly and continuously condemning all kidnap for ransom activities in Mindanao and everywhere, and to take drastic action against the perpetrators of this heinous crime in all MILF areas', 26 February 2002, available at: <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2002-26feb-milf.htm> (last visited 4 May 2011).

41 M. Sassòli, above note 10, p. 391.

parties to a conflict (in the case of IHL of NIACs, for a conflict where at least one party applying the rules will not be a state). Thus, the differences in the addressees of the rules and their relationships with each other must be taken into account.⁴² Zegveld advocates caution in applying human rights norms to armed opposition groups for the reason that these norms often presume the existence of a government.⁴³ It can be said, in light of the human rights standards for the basis of detention (e.g. requiring detention to be based on legislation), that the norms relating to arbitrary detention belong in this category.

Regarding differences in context, it is worth remembering that the International Court of Justice envisaged adjustments in IHRL for situations of armed conflict in the relationship between IHL and IHRL by holding that IHL applies as *lex specialis* in conflicts.⁴⁴ IHRL itself also foresees such an eventuality by including derogations clauses,⁴⁵ which allow for adaptation of obligations in a conflict situation. On a more practical level, and keeping in mind the previously discussed considerations of encouraging compliance by armed opposition groups, it should be borne in mind that, even for human rights actors working in a conflict situation, the fact that IHL was specifically designed to limit human rights violations in wartime (as well as the fact that most military commanders are trained in IHL rather than IHRL, and the sense of fairness that IHL gives to the parties involved) often makes IHL a more persuasive basis on which to work. Again, reciprocity is a prominent factor in ensuring compliance.⁴⁶

The importance of a realistic approach to human rights in armed conflict has been stressed by Abresch, who states (in the context of the right to life in internal armed conflict) that:

It is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible . . . Human rights law must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once.⁴⁷

It is submitted that a strict application of human rights standards to interpret the IHL prohibition on arbitrary deprivation of liberty in NIACs as applied to armed opposition groups creates just such a situation where compliance and military success are mutually exclusive.

42 Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 53–54.

43 *Ibid.*, p. 152.

44 ICJ, above note 12, para. 26.

45 ICCPR, Art. 4; ECHR, Art. 15; ACHR, Art. 27.

46 United Nations Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring*, Professional Training Series No. 7, United Nations, New York/Geneva, 2001, p. 329, available at: <http://www.ohchr.org/Documents/Publications/training7part1618en.pdf> (last visited 3 May 2011).

47 William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya.', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 750.

Circumstances under which IHL may permit detention by armed opposition groups: drawing an analogy with IHL of international armed conflicts

How, then, can the prohibition on arbitrary deprivation of liberty be applied in such a way that it induces compliance by armed opposition groups, while bearing in mind that parties will not (and are not expected to) comply with a system that completely precludes them from weakening their opponent militarily? According to Zegveld, ‘under Common Article 3 and Protocol II, armed opposition groups are not prohibited from restricting the liberty of persons’.⁴⁸ In fact, Common Article 3 applies to ‘members of armed forces taking no active part in hostilities, including those placed *hors de combat* . . . by detention’, and Article 5 of Additional Protocol II to ‘persons deprived of their liberty for reasons related to the armed conflict’. In Zegveld’s opinion, the fact that these instruments prescribe standards of treatment for certain detainees – in terms that are addressed to both parties to the conflict – serves as evidence that IHL of NIACs does envisage detention by armed opposition groups in some circumstances. The only type of deprivation of liberty specifically prohibited by Common Article 3 and Additional Protocol II is hostage-taking,⁴⁹ which requires the specific intent to coerce someone to take action or refrain from so doing.⁵⁰ In substantiating the view that the IHL of NIACs does not preclude detention by armed opposition groups, Zegveld points to the example of the former United Nations Commission on Human Rights urging armed opposition groups in Afghanistan to release all prisoners detained without trial,⁵¹ and is of the opinion that this did not express a blanket prohibition on detentions by armed opposition groups but merely a prohibition on detaining persons without trial within a reasonable time.⁵² The Institute of International Humanitarian Law’s manual on the law of NIAC similarly does not identify a ban on detention by armed opposition groups, but only states that kidnapping or abduction of civilians is prohibited.⁵³

The question remains, however: under what circumstances may an armed opposition group detain an individual in the first place? This will be examined further below, focusing on situations where an individual is not detained on a purported criminal charge, but rather in circumstances comparable to a POW in an international armed conflict (i.e. in order to remove an enemy fighter from hostilities), or in circumstances comparable to a civilian under occupation being

48 L. Zegveld, above note 42, p. 65.

49 Common Article 3(1)(b); AP II, Art. 4(2)(c).

50 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. 336.

51 *Situation of Human Rights in Afghanistan*, UN Commission on Human Rights, CHR Res. 1993/66 (1993), para. 8.

52 L. Zegveld, above note 42, p. 65.

53 Michael Schmitt, Charles Garraway, and Yoram Dinstein, *Manual on the Law of Non-international Armed Conflicts with Commentary*, International Institute of Humanitarian Law, San Remo, 2006, Rule 1.2.4(g) and (h).

detained for imperative security reasons. However, some general conditions should be observed first in all cases.

General conditions

First and foremost, detention by armed opposition groups can only be considered if IHL is applicable to the situation, namely an ‘armed conflict’ in the sense of Common Article 3. This must be distinguished from mere internal disturbances, tensions, or riots, as well as organized criminal activity, where ordinary criminal law – as well as the full spectrum of IHRL – would apply to prohibit detentions by non-state groups entirely. Detention by armed opposition groups also remains absolutely prohibited where this amounts to hostage-taking, as per the customary IHL definition, which requires the intent to coerce someone to take action or refrain from doing so.⁵⁴ This is entirely different from a situation where the intention of detaining an individual is in order to remove them from hostilities (in the case of a member of the armed forces) or for security reasons (in the case of a civilian living under the armed opposition group’s territorial control). Should a detention be effected with a coercive motive, this would be excluded from the ambit of the permissible detention and would amount to an act of hostage-taking prohibited by both Common Article 3 and customary IHL.

Regarding minimum standards of treatment of detainees, the armed opposition group would have to apply the Common Article 3 standards in all cases, regardless of the purported reasons for the detention, as these standards must be applied ‘in all circumstances’. In addition, if the conflict falls within the scope of Additional Protocol II (i.e. the armed opposition group has reached the level of organization and control required by Article 1 of that instrument), the standards of treatment in Article 5 of the Protocol must be applied. Pejic also highlights the requirement that the minimum guarantees for persons under detention in NIAC should be applied by armed opposition groups as far as ‘practically feasible’, regardless of the legality of detention.⁵⁵ Whenever access can be obtained, supervision by a body such as the ICRC is particularly important in ensuring that humane conditions of detention are maintained – the ICRC has already undertaken such activities in respect of persons detained by armed opposition groups in, *inter alia*, Djibouti,⁵⁶ Côte d’Ivoire,⁵⁷ Mali,⁵⁸ Somalia,⁵⁹ and Sudan.⁶⁰

54 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. 336.

55 Jelena Pejic, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of armed violence’, in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, p. 376.

56 ICRC, *Annual Report*, ICRC, Geneva, 1992, p. 53.

57 ICRC, *Annual Report*, ICRC, Geneva, 2002, p. 114.

58 ICRC, ‘Mali: two soldiers freed under the auspices of the ICRC’, Press Release 08/159, 25 August 2008, available at: <http://www.icrc.org/eng/resources/documents/news-release/mali-news-250808.htm> (last visited 19 November 2011).

59 ICRC, *Annual Report*, ICRC, Geneva, 1992, p. 48.

60 *Ibid.*, p. 51.

Detention of members of state armed forces

*Rebels said they arrested two pro-Qaddafi fighters, accusing one of them of being a sniper because he was wearing a flak-jacket and his car was stocked full of bullets.*⁶¹ (Abeer Tayel)

Zegveld holds that, where detention by armed opposition groups has been deemed acceptable, the standards for determining when this may take place have been imported from the law of international armed conflict into the law of NIACs.⁶² The application of the IHL of international armed conflicts by analogy to detentions in NIACs is also suggested and elaborated by Sassòli and Olson.⁶³ In legal terms, it could be said that the approach applied in order to deem detention by armed opposition groups acceptable was to interpret the IHL prohibition on arbitrary deprivation of liberty in light of Common Article 3, which apparently envisages detention by armed opposition groups in some circumstances; these circumstances were then defined using the analogous IHL of international armed conflict (i.e. the standards of Geneva Convention III). Detention by armed opposition groups in a situation analogous to those prescribed by the law of international armed conflict would therefore not be considered arbitrary for want of a legal basis, since Common Article 3 (and, in certain cases, Article 5 of Additional Protocol II) serves as the pre-existing legal grounds for detention. This would also mean that the problem of basing detention on retroactive laws would not come to the fore. In such a case, Geneva Convention III would then be used for guidance in interpretation of what it means to detain in connection with hostilities. This could be considered a type of ‘quasi-POW’ detention (i.e. imprisonment of enemy fighters for the purpose of placing them *hors de combat*).

It must be noted that this type of analogous interpretation cannot render detention by armed opposition groups a formal POW detention in the sense of Geneva Convention III, with all its attendant safeguards such as compulsory ICRC supervision and detailed rules of treatment.⁶⁴ Since the detainees would not automatically benefit from such safeguards, such an analogy should only regulate the circumstances under which detention is permissible, but should not be taken to mean that detention should be permitted without procedural guarantees.⁶⁵ As a minimum, these should correspond to those granted to POWs in an international armed conflict who dispute their status as combatants: that is, the detainee should have the right to have the legality of detention checked by an independent and

61 Abeer Tayel, ‘Rebel head urges all Libyans to join revolt as rebels attack pro-Qaddafi Tripoli hideout’, in *Al Arabiya*, 25 August 2011, available at: <http://www.alarabiya.net/articles/2011/08/25/164050.html> (last visited 19 November 2011).

62 L. Zegveld, above note 42, pp. 65–66.

63 Marco Sassòli and Laura Olson, ‘The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts’, in *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 423–424.

64 M. Sassòli, above note 10, p. 387.

65 *Ibid.*

impartial body.⁶⁶ ‘Quasi-POW’ detention would also confer no general legal capacity or recognition of status on armed opposition groups, as it is merely an application of Common Article 3, whose application has no effect on the legal status of parties to the conflict.⁶⁷

Detention of civilians

*To be very honest, we didn't find any weapons in their houses or on them, but they arrived into the country illegally and during a very sensitive time . . . This led us to believe they were working for the enemy.*⁶⁸ (Othman bin Othman)

Common Article 3, in prescribing standards of treatment for persons in detention, does not indicate whether such detained persons are civilians or fighters; thus it does not appear to prohibit detention of civilians. Similarly, Article 4 of Additional Protocol II provides for the treatment of persons detained for reasons related to the conflict, without specifying whether these persons would have been taking part in hostilities or not. As for the circumstances under which such detentions could take place, Zegveld is of the opinion that, again, international bodies have drawn on the IHL of international armed conflicts; in the case of civilians, the relevant provisions are to be found in Geneva Convention IV.⁶⁹

However, as far as civilians are concerned, caution should be exercised in loosening the IHRL-based concept of ‘arbitrary detention’, requiring a basis for detention in state law, in favour of the IHL-based *lex specialis* interpretation. In the case of detention of state soldiers, such an approach may be necessary, owing to the inappropriateness and impracticability of the IHRL-oriented interpretation, as well as the need to increase reciprocity in order to encourage IHL compliance by armed opposition groups. Such a modification of the IHRL rule by IHL as *lex specialis* is justifiable in this specific case because, in IHL, detaining fighters to remove them from hostilities is a permissible method of warfare – an alternative to killing. In the case of civilians, this consideration does not come into the equation.

Allowing armed opposition groups to detain civilians would not have an effect on encouraging compliance with IHL, as detention of civilians (unlike that of fighters) is not a legitimate method of warfare, even in international armed conflicts (hence the fact that, in international armed conflicts, civilians may only be detained for reasons connected to the conflict in the very limited circumstances set out in Geneva Convention IV, Articles 42 and 78, i.e. in a party's own territory or in a

66 GC III, Art. 5 indicates that POWs whose status is in doubt should have their status determined by a competent tribunal. This is rephrased in a more universally applicable manner by Pejic, who holds that, as a minimum, all persons under any type of administrative detention should have their detention checked by an independent and impartial body. J. Pejic, above note 55, pp. 386–387. ‘Quasi-POW’ detention would still qualify as a form of administrative detention, as POW status would not apply *de jure*.

67 Common Article 3(2).

68 Othman bin Othman (Libyan rebel commander), quoted in Hadeel Al-Shalchi and Karin Laub, ‘Foreigners claim harassment by Libya rebels’, in *Associated Press*, 4 September 2011, available at: http://www.msnbc.msn.com/id/44393896/ns/world_news-mideast_n_africa/t/foreigners-complain-harassment-libya-rebels/ (last visited 16 November 2011).

69 L. Zegveld, above note 42, p. 69.

situation of occupation where it exercises a high degree of control over a territory). Therefore, it cannot be justified as a means of creating greater reciprocity between the parties. Banning armed opposition groups from detaining civilians during open conflict will not render military success impossible, and thus a more equality-targeted interpretation need not be applied in order to promote compliance by armed opposition groups with IHL.

In short, while exceptional justifications exist for applying IHL as *lex specialis* in the case of detained state fighters (namely the need for greater reciprocity and compliance, and the availability of detention as a method of warfare), this does not exist in the case of civilians, and therefore their protections under IHRL should remain unaffected as a general rule. Nevertheless, continuing the analogy to the IHL of international armed conflicts, one possible exception does present itself: in the case where an armed opposition group is a *de facto* authority controlling an area where state influence is limited or non-existent – a situation analogous to occupation – the question could then be raised as to whether an armed opposition group could legally intern civilians for security reasons.⁷⁰ In order for such a detention to be lawful, the basis for detention could be determined through the analogous application of the IHL of international armed conflicts (specifically, the rules relating to the grounds for internment of civilians under occupation).⁷¹ Therefore, a civilian could validly be detained for imperative reasons linked to the security of the armed opposition group authority, until such time as those imperative reasons no longer exist.⁷²

However, as Geneva Convention IV would not be applicable *de jure*, it would be necessary for the armed opposition group to base such security detentions on some existing law in order to satisfy the principle of legality – usually the existing law of the state. As for the possibility of the group's own 'laws' providing the basis for detention, this is controversial and indeed likely to be rejected by the territorial state. Nevertheless, international practice exists to indicate some pragmatic acceptance of such laws by international observers, in the interests of eliciting the armed opposition group's compliance with IHL or human rights standards.⁷³ Even so, in such a case it would be appropriate to at least continue the analogy

70 Sivakumaran raises a similar question with regard to the establishment of courts, and indicates that, at a minimum, armed opposition groups must hold territorial control to meet the requisite standards to constitute a court. Sandesh Sivakumaran, 'Courts of armed opposition groups: fair trials or summary justice?', in *Journal of International Criminal Justice*, Vol. 7, No. 3, 2009, pp. 489–513.

71 While security detention of civilians (particularly of enemy aliens) is also possible in a party's own territory in international armed conflicts (GC IV, Art. 42), this would not be an appropriate analogy for non-international armed conflicts. This is because an armed opposition group cannot be said to have its 'own' sovereign territory with a differentiation between its own nationals – towards whom it would have clear legal obligations – and aliens who require extra protection through IHL when they fall into the group's hands. An armed group can only be in control of territory that it has captured (occupied) from the territorial state. In such a case, all persons living under the group's control are subject to the exercise of power by an entity other than their state of nationality, and should thus be considered as equally requiring international legal protection from that entity, as would occur in a situation of occupation by another state.

72 In parallel with GC IV, Arts 78 and 132.

73 For example, rather than stating that laws promulgated by the Farabundo Marti National Liberation Front in El Salvador were invalid, the UN Observer Mission in El Salvador scrutinized these for compliance with

and apply the same limitations on the application of 'laws' of armed opposition groups as are applied to penal laws made by an occupying power under Geneva Convention IV (especially regarding subject matter and retroactivity).⁷⁴

As far as procedural guarantees are concerned, these should at least meet the standards set in Geneva Convention IV for the internment of civilians, namely a regular and fair procedure, which is subject to appeal and is reviewed at least every six months,⁷⁵ as well as the right to visits by the ICRC (or another monitoring body).⁷⁶ Further procedural safeguards should also be implemented as far as the armed opposition group is capable of doing so.⁷⁷ As such a group acting as a *de facto* government may also be bound by additional human rights obligations, *inter alia* insofar as it exercises government functions,⁷⁸ these standards should be seen as a minimum.

Conclusion

The strong influence of IHRL on the interpretation of 'arbitrary deprivation of liberty' in customary IHL is only natural, considering the relationship between the two bodies of law, as well as the fact that interpretation of the concept by international bodies has so far been more extensive in the field of IHRL owing to the mandate of these bodies. However, as shown above, the IHL prohibition on arbitrary deprivation of liberty cannot exclude armed opposition groups from detaining members of state armed forces as 'quasi-POWs', and possibly, in some limited circumstances, placing civilians living under their *de facto* territorial control under administrative detention.

It has therefore been submitted in this article that the requirement of a basis for detention be informed by the analogous provisions of the IHL of international armed conflicts. The protection and humane treatment of detainees (and the monitoring thereof) should remain paramount, and detention of these categories of persons should not be conflated with hostage-taking or kidnapping.

Application of this approach may be difficult, as the principal means of implementing it during hostilities requires consensus of the parties. Nevertheless, the legal characterization of armed opposition groups' actions under international law makes a difference as far as the position of third states is concerned, as this will determine whether third states may recognize these actions as legal or not, with implications in the fields of international criminal law and refugee law, among others. Ultimately, it should also help to serve the aim of protecting those taken prisoner by encouraging compliance with IHL in a pragmatic fashion.

IHL. See S. Sivakumaran, above note 70, where this example is discussed and a convincing argument given that IHL does not exclude the possibility of armed opposition groups applying their own law.

74 See GC IV, Arts 64 and 65.

75 *Ibid.*, Art. 76.

76 *Ibid.*

77 A range of such basic safeguards is outlined in J. Pejic, above note 55.

78 See A. Clapham, above note 26, pp. 498–508.