

Selected articles on international humanitarian law

Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence

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Abstract

Deprivation of liberty for security reasons is an exceptional measure of control that may be taken in armed conflict, whether international or non-international. Administrative detention of persons believed to represent a threat to State security is also being more and more widely practised outside of armed conflict situations. This paper argues that both internment and administrative detention are insufficiently elaborated from the point of the view of the protection of the rights of the persons affected. Drawing on international humanitarian law and on human rights law and standards, the paper proposes a set of procedural principles and safeguards that should — as a matter of law and policy — be applied as a minimum to all cases of deprivation of liberty for security reasons.

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Internment or administrative detention is defined as the deprivation of liberty of a person that has been initiated/ordered by the executive branch — not the judiciary — without criminal charges being brought against the internee/administrative

* The views expressed in this article reflect the author's opinions and not necessarily those of the ICRC.

detainee.¹ Internment is an exceptional measure of control that may be ordered for security reasons in armed conflict, or for the purpose of protecting State security or public order in non-conflict situations provided the requisite criteria have been met.² The purpose of this text is to outline procedural principles and safeguards that govern internment/administrative detention in armed conflict and in other situations of violence as a matter both of law and of policy.³

In the text, the terms “internment” and “administrative detention” are interchangeably used.⁴ The definition of internment therefore does not include the lawful pre-trial detention of a person held on criminal charges, whether in or outside armed conflict. Also, for the purposes of this text, it does not include the internment of prisoners of war (POWs) in international armed conflicts, which is a specific and separate regime of deprivation of liberty.

Insofar as armed groups involved in non-international armed conflicts deprive persons of liberty in practice — regardless of the lawfulness of such conduct — they are bound by the applicable treaty-based and customary rules of international humanitarian law governing non-international armed conflicts summarized in this text. Where practically feasible, the other principles and safeguards set forth below should also be applied as a means of ensuring the protection of persons deprived of their liberty.⁵

The reason for outlining the procedural principles and safeguards that govern internment/administrative detention is that although this type of deprivation of liberty is often practised in both international and non-international armed conflicts and other situations of violence, the protection of the rights of the persons affected by it is insufficiently elaborated.⁶

Furthermore, it is fairly common that in practice people interned or held in administrative detention are not or are only vaguely informed of the reasons for their deprivation of liberty. There is often no mechanism in place to review, initially and periodically, the lawfulness of internment/administrative detention or, if there is one, its lack of independence prevents it from effectively examining cases. The question of legal assistance to internees/administrative detainees in challenging the lawfulness of their internment/administrative detention remains contentious, as do other issues, such as contact for internees/administrative detainees with their families, family visits to them, etc.

1 See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, “Commentary on Protocol I relative to international armed conflicts”, Art. 75 (3), para. 3063.

2 The relevant criteria, which are explained in greater detail below, are laid down in Article 4 of the International Covenant on Civil and Political Rights (ICCPR).

3 The term “other situations of violence” refers to situations below the threshold of armed conflict and includes situations of “internal disturbances or tensions” as specified in Article 1 (2) of Additional Protocol II.

4 The term “internment” is also intended to cover the notion of “assigned residence,” to which identical provisions of the Fourth Geneva Convention apply.

5 This should in no way be read as referring to (or legitimizing) the practice of hostage-taking, which is strictly prohibited by international humanitarian law. The ICRC’s position is that hostages must be immediately and unconditionally released.

6 For differences in the legal regulation of internment in international and non-international armed conflicts and in other situations of violence see section I, “Legal sources,” below.

Legal sources

The legal sources on which the present standards are based are the Fourth Geneva Convention; Article 75 of Additional Protocol I to the Geneva Conventions, which is considered to reflect customary international law; Article 3 common to the Geneva Conventions; Additional Protocol II thereto; and customary rules of international humanitarian law.

Even though internment in international armed conflicts is regulated by the Fourth Geneva Convention and Additional Protocol I,⁷ these treaties do not sufficiently elaborate on the procedural rights of internees, nor do they specify the details of the legal framework that a detaining authority must implement. In non-international armed conflicts there is even less clarity as to how administrative detention is to be organized. Article 3 common to the Geneva Conventions, which is applicable as a minimum standard to all non-international armed conflicts, contains no provisions regulating internment, i.e. administrative detention for security reasons, apart from the requirement of humane treatment. Internment is, however, 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 respectively, but likewise does not give details of how it is to be organized. Bearing in mind the principles of humanity and the dictates of public conscience (the Martens clause),⁸ the principles and rules of the Fourth Geneva Convention may, in practice, serve as guidance in non-international armed conflicts in resolving some of the procedural issues mentioned in this text.

In addition to humanitarian law, the present analysis draws on human rights law, of both a binding and a non-binding nature (“soft law”), as a complementary source of law in situations of armed conflict or as an autonomous source of law outside of armed conflict. The complementary relationship between humanitarian and human rights law has most recently been confirmed by the International Court of Justice, the UN’s principal legal body. In a July 2004 Advisory Opinion, the Court stated that humanitarian and human rights law are by no means mutually exclusive. According to the Court, some rights are protected only by human rights law, some are protected only by humanitarian law, and “yet others may be matters of both these branches of international law.”⁹

The rights of persons interned for security reasons in armed conflict — whether international or non-international — may be said to fall into the category of rights that, in the ICJ’s wording, are “matters” of both branches

7 GC IV, Arts. 43 and 78; AP I, Art. 75 (3).

8 The Martens clause is, *inter alia*, included in Article 1 (2) of Additional Protocol I which reads: “In cases not covered by this Protocol or by other international instruments, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

9 ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, para. 106.

of law. Given the aforesaid absence of rules for the internment of individuals in non-international armed conflicts, it is necessary to draw on human rights law in devising a list of procedural principles and safeguards to govern internment in such conflicts. To a large extent the same may be said with regard to any effort to clarify the rights, and therefore the legal protection, that should be accorded to persons covered by the Fourth Geneva Convention or Additional Protocol I in international armed conflicts.

Recourse to human rights law as a legal regime complementary to humanitarian law is expressly recognized in both Additional Protocols to the Geneva Conventions.

According to Article 72 of Additional Protocol I: “The provisions of this Section [“Treatment of persons in the power of a party to the conflict”] are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, *as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict*” (emphasis added). This article allows recourse to human rights law as an additional frame of reference in regulating the rights of internees, who belong to “persons in the power of a party to the conflict.”¹⁰

There are two further indications — in Article 75 of Additional Protocol I, which is considered to reflect customary law — that human rights law may be drawn on to fill the gaps. First, and this must be stressed, Article 75 (1) states that persons falling within its scope shall enjoy the protection provided for by this article “*as a minimum*” (emphasis added). Given that Article 75 is a “safety net” meant to cover all persons who do not enjoy more favourable treatment under the Geneva Conventions or Protocol I, and when it is read in conjunction with Article 72, it necessarily follows that the “minimum” mentioned is supplemented by other provisions of humanitarian and human rights law.

Secondly, any possible doubt that Article 75 constitutes a minimum benchmark of protection is dispelled by the final clause thereof: “No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.”¹¹ The applicable rules of international law include human rights law.

In non-international armed conflicts the provisions of Common Article 3 and of Additional Protocol II articulate minimum standards that must be applied in internment. Where the parties to a non-international armed conflict bring into force, by means of special agreements, all or part of the provisions of the Fourth Geneva Convention, the provisions of such an agreement prevail.¹² It must be noted that preambular paragraph 2 of Additional Protocol II

10 See “Commentary on AP I”, *op. cit.* (note 1), paras. 2927–2935.

11 AP I, Art. 75 (8).

12 See Article 3 common to the Geneva Conventions, which also specifies that the conclusion of a special agreement “shall not affect the legal status of Parties to the conflict.” Special agreements can be effective particularly in high-intensity non-international armed conflicts which resemble inter-State armed conflict.

establishes the link between the Protocol and human rights law by stating that “international instruments relating to human rights offer a basic protection to the human person.” The Commentary on that Protocol specifies that the reference to international instruments includes treaties adopted by the UN, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture, as well as the regional human rights treaties.¹³

The right to liberty of person, which is the primary focus of this text, is *inter alia* provided for in Article 9 (1) of the ICCPR. A State Party may derogate from (suspend) its obligations under that treaty under very strict conditions, one of which is the existence of a public emergency threatening the life of the nation.¹⁴ Non-international armed conflict is an example of a public emergency in which measures of derogation — necessary for enabling internment — would be lawful under the Covenant provided the other requisite conditions have been met. In non-conflict situations States Parties to the ICCPR must likewise comply with the derogation clauses of the Covenant in order to institute measures affecting the right to liberty of person, such as administrative detention. The present analysis is based on the assumption that internment in non-international armed conflict and administrative detention implemented in non-conflict situations comply with the derogation criteria specified in the ICCPR.¹⁵

However, even in emergency situations the so-called “hard core” of human rights, which includes the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, cannot be derogated from under any circumstances.¹⁶ The jurisprudence of international and regional human rights bodies has determined which other human rights, apart from those expressly listed in the treaties, should also be considered non-derogable. Among them is the right of a person deprived of liberty to challenge the lawfulness of his or her detention (*habeas corpus*), which is an essential element of the right to liberty of person.¹⁷

Human rights soft law instruments and jurisprudence provide further standards that, it is submitted, should as a matter of policy and good practice be applied with respect to internment/administrative detention.

13 “Commentary on P II”, *op. cit.* (note 1), paras. 4428 – 4430.

14 The full text of Article 4 of the ICCPR reads: “1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

15 In cases where a State is not a party to the ICCPR or similar regional human rights treaties, it is submitted that the procedural principles and safeguards listed below should be followed as a matter of policy.

16 ICCPR, Art. 4 (2).

17 ICCPR, Art. 9 (4).

The commentary to the procedural principles and safeguards outlined in this text mentions the different legal sources governing deprivation of liberty for security reasons in international armed conflicts, non-international armed conflicts and other situations of violence. It is precisely the similarity in content of the various legal sources reviewed that guided the specific formulation of the procedural principles and safeguards listed, and which allows the conclusion that they can be considered a minimum applicable in all cases of deprivation of liberty for security reasons.¹⁸

General principles applicable to internment/administrative detention

Internment/administrative detention is an exceptional measure

The Fourth Geneva Convention makes it explicitly clear that internment (and assigned residence) are the most severe measures of control that a detaining authority or Occupying Power may take with respect to protected persons against whom no criminal proceedings have been initiated. In both cases it is stipulated that recourse to these measures may be had only if the security of the State makes it “absolutely necessary” (GC IV, Article 42) or for “imperative reasons of security” (GC IV, Article 78). The exceptional nature of internment lies in the fact that it allows the detaining authority to deprive persons of liberty who are not subject to criminal process, but are nevertheless considered to represent a real threat to its security in the present or in the future. As the Commentary on the Fourth Geneva Convention explains, “It did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.”¹⁹ While this may be the case it is clear, for example, that internment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.²⁰

That internment is an exceptional measure is also true in non-international armed conflicts and other situations of violence, based on the general principle that personal liberty is the rule, and on the assumption that the criminal justice system is able to deal with persons suspected of representing a danger to State security.

18 It should again be noted that this text does not deal with the internment of prisoners of war in international armed conflicts, which is governed by the Third Geneva Convention. As already mentioned, it is assumed that the right to liberty of person has been derogated from in keeping with Article 4 of the ICCPR.

19 See *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Art. 42, p. 257. See also the Commentary on Article 78, at page 368, which reiterates that: “In any case such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.”

20 Similarly, internment or administratively detaining persons for the purpose of using them as “bargaining chips” is also not justifiable as a reason for internment. Such deprivation of liberty would in fact amount to hostage-taking, which is prohibited.

Internment/administrative detention is not an alternative to criminal proceedings

Internment/administrative detention is a measure of control aimed at dealing with persons who pose a real threat to State security, currently or in the future, in situations of armed conflict, or to State security or public order in non-conflict situations; it is not a measure that is meant to replace criminal proceedings. A person who is suspected of having committed a criminal offence, whether in armed conflict or other situations of violence, has the right to benefit from the additional stringent judicial guarantees provided for in humanitarian and/or human rights law for criminal suspects, which include the right to be tried by a regularly constituted, independent and impartial court. Unless internment/administrative detention and penal repression are organized as strictly separate regimes there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country's legislature and courts. The rights of criminal suspects would thus be gravely undermined.²¹

Internment/administrative detention can only be ordered on an individual case-by-case basis, without discrimination of any kind

A civilian can be interned in international armed conflict only on the basis of an individual decision taken in every specific case. The notion that internment cannot be a collective measure is established under the Fourth Geneva Convention in situations of occupation.²² *En bloc* internment of enemy nationals in a State's own territory is also prohibited, as it would amount to, and violate the general prohibition of, "collective punishments" under Article 75 (2) (d) of Additional Protocol I. This does not mean that a detaining authority cannot intern a large number of persons, but that both the initial decision on internment and any subsequent decision to maintain it, including the reasons for internment, must be taken with respect to each individual involved.

In non-international armed conflicts — in which collective punishments are also prohibited²³ — and in other situations of violence, both the initial

21 The argument that administrative and criminal detention are two distinct regimes is — at first glance — undermined by Article 68 of the Fourth Geneva Convention which deals with petty offences committed by protected persons in occupied territory. The Commentary on Article 68, however, rectifies any possible perception of overlap between the regimes of administrative and criminal detention that the wording of the provision suggests. It reads: "Internment is a preventive administrative measure and cannot be considered a penal sanction. It is nevertheless mentioned here under the same head[ing] as simple imprisonment, because the authors of the Convention wished to make it possible for the military courts of the Occupying Power to give persons guilty of minor offences the *benefit of conditions of internment* (emphasis added) provided for in Article 79 *et seq.* The provision was a humane one and was intended to draw a distinction between such offenders and common criminals." *Commentary on GC IV, op. cit.* (note 19), pp. 343–344.

22 *Ibid.*, Art. 78, p. 367.

23 AP II, Art. 4 (2) (b).

decision on internment/administrative detention and any subsequent decision to maintain it must be taken on an individual basis. Even though humanitarian law governing non-international armed conflicts is silent as to the procedural rights of internees, under human rights law any measure derogating from the right to liberty of person must be “strictly required by the exigencies of the situation” of public emergency necessitating the derogation;²⁴ it may be taken only to the extent required thereby, and must thus be in accordance with the principle of proportionality.

A State’s *en bloc*, non-individual detention of a whole category of persons could in no way be considered a proportional response, regardless of what the circumstances of the emergency concerned might be. The idea of collective measures of any kind is antithetical to the rules, spirit and purpose of human rights law.

Decisions on internment/administrative detention must also not be taken on a discriminatory basis. The principle of non-discrimination is a basic tenet of both humanitarian and human rights law.

Internment/administrative detention must cease as soon as the reasons for it cease to exist

One of the most important principles governing internment/administrative detention is that this form of deprivation of liberty must cease as soon as the individual ceases to pose a real threat to State security, meaning that deprivation of liberty on such grounds cannot be indefinite. In view of the rapid progression of events in armed conflict, a person considered to be a threat today might not pose the same threat after a change of circumstances on the ground. In other words, the longer internment lasts, the greater the onus on a detaining authority to prove that the reasons for it remain valid. The rationale of the principle is thus to facilitate the release of a person as soon as the reasons justifying the curtailment of liberty no longer exist. The principle that internment must cease as soon as the reasons for it cease to exist is clearly enunciated in the Fourth Geneva Convention (Article 132) and in Article 75 (3) of Additional Protocol I, which is considered to reflect customary international law in international armed conflicts.

In non-international armed conflicts and other situations of violence this principle must, if anything, be even more stringently observed, particularly as human rights jurisprudence rejects the notion of indefinite detention.²⁵ In order to ensure that a deprivation of liberty is not arbitrary, which would be the case if the reasons for it do not or no longer exist, the ICCPR (Article 9 (4)) pro-

²⁴ ICCPR, Art. 4 (1).

²⁵ See e.g. Report of the Working Group on Arbitrary Detention, UN Doc. E/CN. 4/2004/3, 15 December 2003, para. 60 (“in no event may an arrest based on emergency legislation last indefinitely”), and Inter-American Commission on Human Rights — Annual Report, 1976, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1 of 7 June 1977, Section II, Part I (“the declaration of a state of emergency or a state of siege cannot serve as a pretext for the indefinite detention of individuals, without any charge whatever. It is obvious that when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom”).

vides that anyone deprived of liberty has the right to challenge the lawfulness of his or her detention — file a petition for habeas corpus or the equivalent — in order that a court may decide “without delay” whether he or she is being held lawfully or not. While the right to liberty is not among the non-derogable rights listed in the ICCPR,²⁶ the jurisprudence of both universal and regional human rights bodies has confirmed that the right to habeas corpus must in fact be considered non-derogable.

Internment/administrative detention must conform to the principle of legality

In the context of internment/administrative detention, the principle of legality means that a person may be deprived of liberty only for reasons (substantive aspect) and in accordance with procedures (procedural aspect) that are provided for by domestic and international law.

The Geneva Conventions and their Additional Protocols, as well as human rights law, provide the international legal standards that are to be applied to internment/administrative detention in armed conflict and other situations of violence. In terms of reasons for internment, the Fourth Convention specifies that a protected person may be interned or placed in assigned residence only if “the security of the Detaining Power makes it absolutely necessary” (Article 42) or, in occupied territory, for “imperative reasons of security” (Article 78). In addition to specifying the reasons for internment, the Fourth Convention lays down certain procedures that must be followed for internment to be lawful both in the territory of a party to conflict and in occupied territory. In the latter case, for example, Article 78 of the Fourth Convention stipulates that decisions regarding assigned residence or internment “shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention.” Deprivation of liberty that is not in conformity with the various rules provided for in the Convention may constitute “unlawful confinement.”²⁷

Human rights standards applicable in non-international armed conflicts and other situations of violence provide even more detailed provisions aimed at ensuring respect for the principle of legality. Under the ICCPR (Article 9 (1)), for example, persons may not be deprived of their liberty “except on such grounds and in accordance with such procedure as are established by law.” Where a State decides to derogate from the right to liberty, such a decision must, *inter alia*, be officially proclaimed²⁸ so as to enable the affected population to know the exact material, territorial and temporal scope of application of that emergency measure.

26 ICCPR, Art. 4 (2).

27 GC IV, Art. 147.

28 ICCPR, Art. 4 (1).

Procedural safeguards

Right to information about the reasons for internment/administrative detention

Any person interned/administratively detained must be informed promptly, in a language he or she understands, of the reasons why that measure has been taken so as to enable the person concerned to challenge the lawfulness of his or her detention. The right of a person to know why he or she has been deprived of liberty may be said to constitute an element of the obligation of human treatment, as a person's uncertainty about the reasons for his or her detention is known in practice to constitute a source of acute psychological stress.

Neither the Fourth Geneva Convention nor humanitarian law applicable in non-international armed conflicts contain explicit provisions on the duty to provide information about the reasons for which a person has been deprived of liberty. The foregoing procedural safeguard is, however, one of the "Fundamental Guarantees" laid down in Article 75 (3) of Additional Protocol I. It is moreover provided for in most of the relevant human rights treaties and is spelt out in soft law instruments as well.²⁹

The information given must also be sufficiently detailed for the detained person to take immediate steps to challenge, and request a decision, on the lawfulness of the internment/administrative detention (see below). Information on the reasons for internment/administrative detention must be conveyed promptly,³⁰ so as to enable the person in question to also promptly request a decision on the lawfulness of detention, and must be conveyed in a language he or she understands. Where an initial decision on detention is maintained on review, the reasons for continued detention must be provided as well.

Right to be registered and held in a recognized place of internment/administrative detention

Any person interned/administratively detained must be registered and held in an officially recognized place of internment/administrative detention. Information that a person has been taken into such custody and on any transfers between places of detention must be available to that person's family within a reasonable time,³¹ unless he or she has expressed a wish to the contrary; the family should also be notified of the place of custody. The same information must be supplied to the ICRC when humanitarian law or specific agreements so require.

Humanitarian law applicable to international armed conflicts contains numerous provisions and extensive requirements concerning the registration

29 ICCPR, Art. 9 (2); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10; 11 (2); 12 (1) (a) and (2); 14; UN General Assembly resolution 43/173 of 9 December 1988 (hereinafter "Body of Principles").

30 AP I, Art. 75 (3), Body of Principles, Principle 14.

31 GC IV, Arts. 106 and 138.

of protected persons deprived of their liberty and notification of their own country's authorities,³² visits to places of detention³³ and the transmission of information about such persons to their next of kin, among others.³⁴ The entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC. Human rights jurisprudence and soft law instruments contain similar explicit provisions on the obligation to register detainees and the prohibition of unacknowledged detention³⁵ which are relevant in non-international armed conflicts and other situations of violence.³⁶

Foreign nationals in internment/administrative detention

The national authorities of a person interned/administratively detained must be informed thereof unless a wish to the contrary has been expressed by the person concerned. The relevant diplomatic or consular authorities — provided diplomatic or consular relations exist — must be allowed to communicate with and visit their nationals. This is a rule of public international law that remains applicable in armed conflicts and other situations of violence.³⁷

A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention

With regard to international armed conflicts the Fourth Geneva Convention, in Article 43 applicable to the internment of persons in the territory of a party to the conflict, stipulates that any protected person interned or placed in assigned residence is “entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.” Under Article 78 of the Fourth Convention, applicable to the internment of persons in occupied territory, decisions regarding assigned residence or internment “shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay.”

32 *Ibid.*, Art. 136.

33 *Ibid.*, Art. 143.

34 *Ibid.*, Arts. 106, 107, 137 and 138.

35 Body of Principles, *op. cit.* (note 29), Principles 12 and 16 (1).

36 See also UN Declaration on the Protection of All Persons from Enforced Disappearance, Art. 10 (1), and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by UN Economic and Social Council, Principle 6.

37 See Art. 36 of the Vienna Convention on Consular Relations. In international armed conflicts, the official Information Bureaux and the Central Tracing Agency are mechanisms through which the adverse party is informed of the internment of its nationals (GC IV, Arts. 136–141). In non-international armed conflicts the ICRC is also available to facilitate contact between a person deprived of liberty and the State of which he or she is a national, provided that person consents to such notification.

While the Convention does not specifically speak of these actions as challenges to the lawfulness of detention, that is what they essentially are. The purpose of the “reconsideration” or “appeal” is to enable the competent body to determine whether the person was deprived of liberty for valid reasons and to order his or her release if that was not the case. The authority that initially deprived a person of liberty and the body authorized to conduct the review on appeal must not be the same if the right of petition is to be effective. The characteristics of the latter body and the existence of other procedural safeguards, mentioned below, are the crucial factor.

The right of a person to challenge the lawfulness of his or her detention in non-international armed conflicts and in other situations of violence is a key component of the right to liberty of person under human rights law. Even though the right to liberty may be derogated from in situations of emergency, human rights soft law and jurisprudence have established that the right to challenge the lawfulness of one’s detention before a judicial body must be preserved in all circumstances.³⁸ It may in particular not be diminished where the challenge to lawfulness of detention serves, *inter alia*, to protect non-derogable rights, such as the right to life or freedom from torture and other cruel, inhuman or degrading treatment or punishment.³⁹

As may be concluded from the sources above, a review of the lawfulness of internment/administrative detention within a short time is required by both humanitarian and human rights law.

Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body

Article 43 of the Fourth Geneva Convention stipulates that an “appropriate court or administrative board” shall be charged with reconsidering the initial decision on the internment of a civilian in the territory of a party to the conflict. According to Article 78 applicable in occupied territory, a decision on internment must be made pursuant to a “regular procedure” prescribed by the Occupying Power in accordance with the Convention. Article 78 adds that the periodic review envisaged must be undertaken by a “competent body set up” by the Occupying Power. Despite the difference in language — “court or administrative board” in Article 43 versus “regular procedure” in Article 78 — the commentary on the latter article states that the Occupying Power “must observe the stipulations in Article 43” and that it is up to the Occupying Power “to entrust the consideration of appeals either to a ‘court’ or a ‘board.’”⁴⁰

A State’s freedom to choose between a “court or administrative board” as provided for in Article 43 (and Article 78 by analogy) is explained in the

38 Body of Principles, *op. cit.* (note 29), Principle 32. See also Human Rights Committee, General Comment No. 29, para. 11.

39 Human Rights Committee, *ibid.*, para. 15.

40 *Commentary on GC IV, op. cit.* (note 19), Art. 78, pp. 368–369.

Commentary as allowing “sufficient flexibility to take into account the usage in different States.” The Commentary adds that “where the decision is an administrative one, it must not be made by one official but by an administrative board offering the necessary guarantees of independence and impartiality.”⁴¹ It may be presumed that judicial supervision of internment would more likely comply with the requirements of independence and impartiality. It is therefore submitted that judicial supervision would be preferable to an administrative board and should be organized whenever possible. The reviewing body must at the very least, as stated in the Commentary, be constituted and function in a way that allows it to be independent and impartial. An element of the required independence of such a body is that it must have the authority to render final decisions on internment or release.

While the Fourth Geneva Convention allows the State to choose between a court and an administrative board in international armed conflicts, human rights law and jurisprudence applicable to situations of non-international armed conflict or other situations of violence unequivocally require that challenges to the lawfulness of internment/administrative detention be heard by a court. Under the ICCPR, anyone deprived of liberty is entitled to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁴²

As has already been stressed above, even though the right to liberty of person may be derogated from in situations of emergency, such as non-international armed conflict, human rights soft law and jurisprudence have established that the right to challenge the lawfulness of one’s detention before a judicial body must be preserved in all circumstances.⁴³ It may in particular not be diminished where the challenge to lawfulness of detention serves, *inter alia*, to protect non-derogable rights, such as the right to life or freedom from torture and other cruel, inhuman or degrading treatment or punishment.⁴⁴

It should be reiterated that the reason for challenges to the lawfulness of internment/administrative detention is to put an end to the deprivation of liberty if it is not justified. This means that an internee must be informed without delay of any decision taken on appeal and be immediately released if the petition is upheld. Even though the obligation of speedy information and release is not explicitly mentioned in either humanitarian or human rights law, any deprivation of liberty without a legal basis is considered to be a violation of the general legal principle prohibiting arbitrary detention. If a person is kept in internment/administrative detention despite a final release order, that is a clear case of arbitrary detention.

41 *Ibid.*, Art. 43, p. 260.

42 ICCPR, Art. 9 (4).

43 Body of Principles, *op. cit.* (note 29), Principle 32. See also Human Rights Committee, General Comment No. 29, para. 11.

44 Human Rights Committee, *ibid.*, para. 15.

An internee/administrative detainee should be allowed to have legal assistance

Neither humanitarian nor human rights treaty law explicitly provide for the right to legal assistance for persons interned or administratively detained (that right is guaranteed to persons subject to criminal charges).

It must be noted, however, that legal assistance to internees in international armed conflicts is not prohibited. The Commentary on Article 43 of the Fourth Geneva Convention in fact states that the “procedure provided for in the Convention is a minimum”⁴⁵ and that “it will be an advantage, therefore, if States Parties to the Convention afford better safeguards.”⁴⁶ It may be said that nowadays the right to effective legal assistance is not just an “advantage”, but a basic procedural safeguard.

Human rights soft law and the jurisprudence of human rights bodies provide extensive standards that fill the gaps in treaty law applicable in non-international armed conflicts and other situations of violence.⁴⁷ The right to effective legal assistance is thus considered to be an essential component of the right to liberty of person. The relevant soft law standards provide for the right of persons in custody to legal counsel regardless of the type of detention involved. They also contain provisions on the modalities of communication with a lawyer.⁴⁸

Where necessary, reasonable security arrangements may be made, such as requiring security clearance for an internee’s/administrative detainee’s legal counsel.

An internee/administrative detainee has the right to periodical review of the lawfulness of continued detention

Periodical review of administrative detention if the initial decision on detention is confirmed after “reconsideration” (Article 43), or on “appeal” (Article 78), is a basic component of the procedure laid down in the Fourth Geneva Convention. Article 43 specifies that periodical review shall take place “at least twice yearly,” while Article 78 provides that such review shall take place “if possible every six months.”

The purpose of the periodical review is to ascertain whether the detainee continues to pose a real threat to the security of the detaining power and to order release if that is not the case. All the safeguards that apply to the initial review must apply to the periodical review(s) as well, which, among other things, means that the review has to be effective and must be conducted by an independent and impartial body.

⁴⁵ *Commentary on GC IV, op. cit.* (note 19), p. 261.

⁴⁶ *Ibid.*

⁴⁷ See, *inter alia*, Body of Principles, *op. cit.* (note 29), Principles 17 and 18.

⁴⁸ *Ibid.*, Principle 18.

There is no specified periodicity of review available to persons detained in non-international armed conflicts or other situations of violence, because human rights law does not limit the frequency of challenges that may be submitted by an interned/administratively detained person to the lawfulness of detention (habeas corpus petitions).⁴⁹ Internment/administrative detention will in practice be regulated by the domestic law of the State involved in a non-international armed conflict or other situation of violence, meaning that a person's ability to challenge the lawfulness of his or her internment/administrative detention will be regulated by those norms.

If the relevant domestic law makes no such provision, it is submitted that at least six-monthly reviews of internment/administrative detention should be provided for, similar to the rules applicable in international armed conflicts.

An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person

An internee/administrative detainee and his or her legal representative should, as a general rule, be able to be present at the initial review of the lawfulness of internment, as well as at periodical reviews, in order to be able to present the internee's/administrative detainee's position and contest the claims made against him or her. Where necessary, reasonable arrangements for the preservation of classified information may be made, such as requiring security clearance for the internee's/administrative detainee's legal representative.

While neither humanitarian nor human rights treaty law expressly mention the right of internees/administrative detainees and of their legal representative to be present at proceedings related to internment/administrative detention, it has been observed in practice that their absence often leads to hearings in which their case is given inadequate attention. Because such proceedings result in decisions on the continuation of internment/administrative detention, it is submitted that the internee/administrative detainee and his or her legal representative should be allowed to be present at the proceedings. If they do not understand the language of the court, they will need to be provided with an interpreter.

An internee/administrative detainee must be allowed to have contacts with — to correspond with and be visited by — members of his or her family

The preservation of family life and contacts is one of the basic aims of international humanitarian law and may be said to constitute an element of the broader obligation that persons deprived of their liberty in both international and non-international armed conflicts must be treated humanely. This safeguard, as well as the two listed immediately below, belong to those aimed at ensuring proper conditions and treatment in detention, which is not the

49 *Ibid.*, Principle 32.

subject of this text. They have been included here because of their importance for enabling the other procedural safeguards dealt with in this text to be implemented.

The Fourth Geneva Convention contains provisions facilitating contact between internees and their families that are too numerous to repeat here. In brief, the general presumption is that family contacts — correspondence and visits — must be allowed within a reasonable time frame⁵⁰ in all but very exceptional circumstances.⁵¹ In no case may a detainee's contact with his or her family be made dependent on his or her "cooperativeness" with the detaining authority or be used as a form of incentive or reward for other behaviour.

Additional Protocol II also contains provisions designed to maintain family contacts⁵² and numerous non-treaty human rights standards have the same aim.⁵³

An internee/administrative detainee has the right to the medical care and attention required by his or her condition

The right to medical care and attention is a component of the essential obligation that all persons deprived of their liberty must be treated humanely. Medical care and attention serve among other things to prevent ill-treatment and also to refute the admissibility of evidence against a person that has been obtained by torture or other forms of ill-treatment. They are mentioned in this context because a person's health is obviously a prerequisite for his or her ability to claim most of the procedural rights outlined in this text.

The general rule laid down in the Fourth Geneva Convention (Article 81) stipulates that: "Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health." More specific rules on hygiene and medical attention are contained in Articles 91 and 92.

In non-international armed conflicts, Article 5 (1) (b) of Additional Protocol II stipulates that internees "shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict." Provisions on access to a doctor and medical attention are also contained in the relevant human rights non-treaty instruments (Body of Principles, Principles 24 and 26).

It must be stressed that access to medical care that might be required by a person's condition cannot in any circumstances be made dependent on his or her "cooperativeness" with the detaining authority or be used as a form of incentive or reward for other behaviour.

50 See, *inter alia*, GC IV, Arts. 106, 107 and 116.

51 See GC IV, Art. 5, and *Commentary* on GC IV, *op. cit.* (note 19), p. 56.

52 AP II, Art. 5 (2) (b).

53 Body of Principles, *op. cit.* (note 29), Principle 19.

An internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention

Both international humanitarian law (Article 101 of the Fourth Convention)⁵⁴ and human rights soft law stipulate that internees/persons subject to administrative detention have the right to make submissions to the detaining authority regarding their treatment and conditions of detention.⁵⁵ The purpose of this safeguard is to enable the detaining authority to prevent and stop possible violations of the law. The authorities are thus obliged to put in place a procedure that allows the submission and speedy as well as effective examination of petitions or complaints. The submission of such representations must not have any adverse consequences for the petitioner.

Access to persons interned/administratively detained

ICRC access to persons interned in international armed conflicts is provided for in the Fourth Geneva Convention (Article 143), which also lays down the conditions and procedure for ICRC visits and establishes the duty of a detaining authority to grant access and to respect the said conditions and procedure.

In non-international armed conflicts⁵⁶ and in other situations of violence⁵⁷, the ICRC may offer its services and conclude agreements with the detaining authority on visits to persons deprived of their liberty for security reasons, and to other persons. The ICRC's right of access in these situations is widely recognized.

By means of visits to persons deprived of their liberty the ICRC, which is an independent, impartial and neutral humanitarian organization, seeks to ensure that they are treated humanely in all circumstances and that their fundamental rights are respected. It is thus concerned essentially with their conditions of detention and their treatment, including respect for fundamental procedural guarantees at all stages of detention.

Certain international and regional human rights treaties, too, provide for on-site visits to such persons by visiting mechanisms established under those treaties.⁵⁸ There are likewise a number of non-treaty mechanisms created under the auspices of the UN Commission on Human Rights that may carry out visits to places of detention.⁵⁹

54 Under Art. 102 of the Fourth Geneva Convention, Internee Committees also have the right to make representations to, *inter alia*, the ICRC.

55 It should be noted that under human rights soft law the legal counsel, a family member or another person who has knowledge of the case may also make submissions regarding the treatment of a person in administrative detention. See Body of Principles, *op. cit.* (note 29), Principle 33 (1) and (2).

56 See Art. 3 common to the four Geneva Conventions.

57 See Art. 5 (3) of the Statutes of the International Red Cross and Red Crescent Movement (1986).

58 E.g. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment set up by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

59 E.g. the UN Commission on Human Rights Working Group on Arbitrary Detention.