Internment in Armed Conflict: Basic Rules and Challenges

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1. Introduction

Deprivation of liberty - detention - is a common and lawful occurrence in armed conflict that is governed by a large number of provisions of international humanitarian law (IHL). Like other bodies of law, IHL prohibits arbitrary detention.[1]

Provided below is an outline of the basic concepts and rules related to detention in both international and non-international armed conflict (IAC and NIAC) with, subsequently, a particular focus on internment, i.e. detention for security reasons in situations of armed conflict. The similarities and differences between IHL and the corresponding rules of international human rights law (HR) are also addressed where relevant.

By way of reminder, there are two types of armed conflicts under IHL. International armed conflicts are those waged between States,[2] or between a State and a national liberation movement[3] provided the requisite conditions have been fulfilled.[4] It is generally accepted that an international armed conflict is triggered when a "difference" between two States leads to the use of armed force by one against the other, regardless of the intensity of fighting or its duration.[5] IHL governing international armed conflict is comprised of a series of treaties, the most important of which are the 1949 Geneva Conventions for the protection of victims of war and the First Additional Protocol thereto of 1977. International armed conflicts were for centuries governed primarily by rules of customary IHL, which remains an important source of applicable rules to this day.

A non-international armed conflict is one waged between a State and one or more organized non-State armed groups[6] or between such groups themselves.[7] IHL does not specify the criteria that must be met for the threshold of non-international armed conflict to be reached, but they have been identified in practice, jurisprudence and doctrine. It is generally accepted that a certain intensity of hostilities and the requisite organization of the non-State armed group are conditions that must be fulfilled in order to classify a situation of violence as a NIAC.[8] The most important sources of IHL governing non-international armed conflicts are

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[1] See J-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, Cambridge University Press, Cambridge, 2005), Rule 99: "Arbitrary deprivation of liberty is prohibited".

[2] *Geneva Conventions of 12 August 1949* [hereafter "*1949 Geneva Conventions*"] (adopted on 12 August 1949, entered into force on 21 October 1950), Common Article 2.

[3] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict* [hereafter "*AP I*"] (adopted on 8 June 1977, entered into force on 7 December 1978), art. 1(4).

[4] Ibid., art. 96(3).

[5] J. Pictet (ed.), *Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, [hereafter "*Commentary to the Fourth Geneva Convention*"] (ICRC, Geneva, 1958) p. 23.

[6] *1949 Geneva Conventions, supra* note 2, Common Article 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict* [hereafter "AP II"] (adopted on 8 June 1977, entered into force on 7 December 1978), art. 1(1).

[7] *1949 Geneva Conventions, supra* note 2, Common Article 3.

[8] See ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T (7 May 1997), paras 561-568; ICTY, *The Prosecutor v. Limaj and others*, Judgment, IT-03-66-T (30 November 2005), paras 90 and 135-170; ICTY, *The Prosecutor v. Haradinaj and others*, Judgment, IT-04-84-T (3 April 2008), para 60; ICTY, *The Prosecutor v. Boskoski and others*, Judgment, IT-04-82-T (10 July 2008), paras 199-203.

article 3 Common to the 1949 Geneva Conventions, Additional Protocol II thereto of 1977, and customary IHL.

It should be noted that NIAC has become the prevalent type of armed conflict today and that the typology of NIACs has expanded over the past decade. In addition to “traditional” NIACs in which government armed forces fight against one or more organized non-State armed groups within the territory of a State, NIACs with an extraterritorial element have also emerged. These are, *inter alia*, armed conflicts in which the armed forces of one or more State, or of an international or regional organization, fight alongside the armed forces of a “host” State, in its territory, against one or more organized non-State armed groups.

2. IHL rules on detention

IHL rules on detention may, very broadly, be divided into four groups:

i) Rules on the treatment of detainees (in the narrow sense)

These are norms that aim to protect the physical and mental integrity and well-being of persons deprived of liberty, whatever the reasons may be. They include the prohibition of murder, torture and other forms of cruel, inhuman or degrading treatment, mutilation, medical or scientific experiments, as well as other forms of violence to life and health. All of the acts are prohibited under both IHL and human rights law.

ii) Rules on material conditions of detention

The purpose of these rules is to ensure that detaining authorities adequately provide for detainees' physical and psychological needs, which means food, accommodation, health, hygiene, contacts with the outside world, religious observance, and others. Treaty and customary IHL provide a substantial catalogue of rules pertaining to conditions of detention, as do “soft law” human rights instruments. A common catalogue of standards could even be derived from both bodies of law.

iii) Fair trial rights

Persons detained on suspicion of having committed a criminal offence related to an armed conflict are guaranteed fair trial rights. The list of such rights is almost identical under IHL and human rights law. Unlike the fair trial provisions of the Third and Fourth Geneva Conventions, Common Article 3 applicable in NIAC does not provide specific judicial guarantees, but it is generally accepted that article 75 (4) of Additional Protocol I - which was drafted based on the corresponding provisions of the 1966 International Covenant on Civil and Political Rights (ICCPR) - may be taken to reflect customary law applicable in all types of armed conflict. Additional Protocol II contains a largely identical list of fair trial rights (art. 6 (5)).

IHL reinforces the relevant human rights provisions as it allows no derogation from fair trial rights in situations of armed conflict. While criminal trials usually take place before domestic courts (with the exception of proceedings before international criminal courts and tribunals), it is a given that national trials must conform to the relevant international fair trial standards. These may be deemed to be sufficiently clear and elaborate under both IHL and human rights law.

Fair trial rights, rules on the material conditions of detention and those on the treatment of detainees - the first three groups above - will not be further elaborated below.

iv) Grounds and process for internment

For the present purpose, internment in armed conflict is defined as the non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in relation to an armed conflict.[9] It is in the area of the regulation of these aspects of internment that differences emerge between IHL applicable to IACs and NIACs, and between IHL and the corresponding rules of human rights law, and where the question of the interplay between the two branches of international law arises.

Outside armed conflict deprivation of liberty should, in the great majority of cases, occur because a person is suspected of having committed a criminal offense. Additionally, in guaranteeing the right to liberty of person the ICCPR and equivalent provisions of regional human rights treaties[10] provide that anyone detained, for whatever reason, has the right to challenge the lawfulness of his or her detention[11] (also known in some legal systems as the right to *habeas corpus*). While this right is not explicitly included as non-derogable in the ICCPR,[12] it is being increasingly viewed as such.[13]

Situations of armed conflict often constitute a different reality from peacetime, due to which IHL provides for specific rules related to non-criminal detention for serious security reasons. The focus of the rest of this text is on the group of rules related to internment in armed conflict and their rationale.

3. Internment in armed conflict

a) IAC

In IAC, IHL permits the internment of prisoners of war (POWs) and, under certain conditions, of civilians. As the *lex specialis* crafted specifically for situations of armed conflict, IHL applicable in IAC is the interpretive tool by means of which the interplay between this body of norms and HR law may be determined.

POW internment. POWs[14] include combatants captured by the adverse party in an international armed conflict. As a term of art, "combatant" denotes a legal status that, as such, exists only in this type of conflict. Under IHL rules on the conduct of hostilities, a combatant is a member of the armed forces of a party to an international armed conflict who

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[9] Not every deprivation of liberty incidental to the conduct of military operations - for example, stops at checkpoints or restrictions on movement during searches - will amount to internment. But when deprivation of liberty reaches a certain temporal threshold, or is motivated by a decision to detain an individual on account of the serious security threat they pose, the risk of arbitrariness must be mitigated by clarity on the grounds for internment and the required procedures.

[10] *European Convention for the Protection of Human Rights and Fundamental Freedoms* [hereafter "*ECHR*"] (adopted on 4 November 1950, entered into force on 18 May 1954), art. 5(4); *American Convention on Human Rights* (adopted on 22 November 1969, entered into force on 18 July 1978), art. 7(6); *African Charter on Human and People's Rights* (adopted 27 June 1981, entered into force on 21 October 1986), art. 6.

[11] *International Covenant on Civil and Political Rights* (adopted on 16 December 1966, entered into force on 23 March 1976) [hereafter "*ICCPR*"], art. 9(4).

[12] See Article 4(2) ICCPR, which does not include Article 9 in the list of non-derogable rights. In addition, Article 5(4) *ECHR* is not among the non-derogable rights under Article 15 *ECHR*. Under the jurisprudence of the Inter-American Court of Human Rights, the right to habeas corpus is itself non-derogable in order to protect non-derogable rights (see Advisory Opinion OC 8/87 of 30 January 1987, "Habeas corpus in emergency situations" available at: http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf ; and Advisory Opinion OC 9/87 of 6 October 1987, "Judicial guarantees in states of emergency" available at: http://www.corteidh.or.cr/docs/opiniones/seriea_09_ing.pdf). The African Charter on Human and Peoples' Rights is silent on the issue of derogation.

[13] See, e.g., Report of the United Nations Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, para. 47, at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf

[14] *Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949* (adopted on 12 August 1949, entered into force on 21 October 1950) [hereafter "*Third Geneva Convention*"], art. 4.

has “the right to participate directly in hostilities”.[15] This means that he or she may use force against, i.e. target and kill or injure other persons taking a direct part in hostilities and attack military objectives. Because such activity is obviously prejudicial to the security of the adverse party, the Third Geneva Convention provides that a detaining State “may subject prisoners of war to internment”.[16] However, a POW may not be prosecuted by the detaining State for lawful acts of violence committed in the course of hostilities (“combatant privilege”), but only for violations of IHL, in particular war crimes, or other crimes under international law such as genocide or crimes against humanity.

In case of doubt about the entitlement to POW status of a captured belligerent, article 5 of the Third Convention provides that such person shall be protected by the Convention until his or her status has been determined by a competent tribunal.[17] This provision is sometimes understood as requiring judicial review. That is not the case, as article 5 tribunals are meant to operate in or near the zone of combat; they only determine status, and not any other issue.[18]

It is generally uncontroversial that the Third Geneva Convention provides a sufficient legal basis for POW internment and that an additional domestic law basis is not required. The detaining State is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing because POWs are considered to pose a security threat *ipso facto.* POW internment must end and POWs must be released without delay after the cessation of active hostilities,[19] unless they are subject to criminal proceedings or are serving a criminal sentence.[20] They may also be released earlier on medical grounds[21] or on their own cognizance.[22] Unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities is a grave breach of Additional Protocol I.[23]

Internment of civilians. Under the Fourth Geneva Convention, internment - and assigned residence - are the severest “measures of control"[24] that may be taken by a State with respect to civilians whose activity is deemed to pose a serious threat to its security. It is undisputed that the direct participation of civilians in hostilities falls into that category, as do other acts that meet the same threshold. Civilians who take a direct part in hostilities are colloquially called "unprivileged belligerents" (or, incorrectly referred to as "unlawful combatants").

The Fourth Convention provides different standards in terms of permissible grounds for internment depending on whether an internee is detained in a State party's own territory (“if the security of the Detaining Power makes it absolutely necessary”)[25] or is held in occupied territory (“imperative reasons of security”).[26] It has been suggested that the difference in

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[15] *AP I*, *supra* note 3, art. 43(2). This excludes medical and religious personnel.
[16] *Third Geneva Convention*, *supra* note 14, art. 21.
[17] Ibid., art. 5(2).
[18] See Commentary to article 45 (1) of AP I on the nature of a “competent tribunal” under article 5 of the Third Geneva Convention in: Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* [hereafter “*Commentary on the Additional Protocols*”] (ICRC, Martinus Nijhoff Publishers, Geneva, 1987), para 1745.
[19] *Third Geneva Convention*, *supra* note 14, art. 118(1).
[20] Ibid., art. 119(5).
[21] Ibid., arts. 109(1) and 110.
[22] Ibid., art. 21(2).
[23] *API*, *supra* note 3, art. 85(4)(b). Proceedings before a court could be taken under the domestic law of the detaining State to obtain the release of a POW who is detained despite the end of active hostilities.
[24] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, (adopted on 12 August 1949, entered into force on 21 October 1950) [hereafter “*Fourth Geneva Convention*”], art. 27; arts. 41 and 78.
[25] *Fourth Geneva Convention*, *supra* note 24, art. 42(1).
[26] Ibid., art. 78(1).

wording only indicates that internment by an occupying power should in practice be more exceptional than in the territory of a party to the conflict.[27]

The internment review process in the two IAC scenarios would also appear to differ somewhat. In a State party's own territory internment review is to be carried out by an "appropriate court or administrative board",[28] while in occupied territory the Convention refers to a "regular procedure" that is to be administered by a "competent body".[29] Despite these and other textual differences the rules are in essence the same. A person interned in IAC is entitled to have the decision on internment reconsidered expeditiously,[30] either by a court or an administrative board, and periodic review is thereafter to be automatic, on a six-monthly basis.[31] The Fourth Convention is silent on the issue of legal assistance.

It is sometimes asked why IHL provides procedural safeguards to civilians interned in international armed conflict and not to POWs. The simple answer is that, in reality, there is far less certainty as to the threat a captured enemy civilian actually poses than is the case with a combatant who is, after all, a member of the adversary's armed forces. In contemporary warfare civilians are, for example, often detained not only in direct combat, but also on the basis of intelligence information suggesting that they represent a security threat. The purpose of the review process is to enable a determination of whether such information is reliable and whether the person's activity meets the high legal standard that would justify internment and its duration.

Unlike combatants, who may not be prosecuted by a capturing State for direct participation in hostilities (combatant privilege), civilians who do so can be prosecuted for having taken up arms and for all acts of violence committed during such participation, as well as for war crimes or other crimes under international law that might have been committed. This rule is the same in international and non-international armed conflict. Civilian direct participation is not a violation of IHL and is not a war crime *per se* under either treaty or customary IHL.[32]

Civilian internment must cease as soon as the reasons which necessitated it no longer exist.[33] It must in any event end "as soon as possible after the close of hostilities".[34] Unjustifiable delay in the repatriation of civilians is also a grave breach of Additional Protocol I.[35]

There is some debate among experts whether, on its own, the Fourth Geneva Convention constitutes a sufficient legal basis for the internment of civilians in IAC or whether it must be accompanied by domestic law of a statutory nature (legislation). It not clear why this question is posed only in relation to the Fourth Convention and not the Third Convention, for there is no reason to conclude that the treaties differ in the legal authority provided or in the level of elaboration of rights granted. It is submitted that the Fourth Convention constitutes a

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[27] *Commentary to the Fourth Geneva Convention*, *supra* note 5, p. 367.
[28] *Fourth Geneva Convention*, *supra* note 24, art. 43(1).
[29] Ibid., art. 78(2).
[30] Ibid., arts. 43(1) and 78(2).
[31] Ibid. See also *Commentary to the Fourth Geneva Convention*, *supra* note 5, pp. 261, 368-369.
[32] See, e.g., the list of War Crimes under Article 8 of the ICC Statute: *Rome Statute of the International Criminal Court*, (adopted on 17 July 1998, entered into force on 1 July 2002).
[33] *Fourth Geneva Convention*, *supra* note 24, art. 132(1); AP I, *supra* note 3, art. 75(3).
[34] *Fourth Geneva Convention*, *supra* note 24, arts. 46(1) and 133(1).
[35] *AP I*, *supra* note 3, art. 85(4)(b). Proceedings before a court could be taken under the domestic law of the detaining State to obtain the release of a civilian who is detained despite the close of hostilities.

sufficient legal basis for internment, which means that States do not have to enact additional domestic legislation to provide for a legal basis.[36]

b) NIAC

Common Article 3 to the 1949 Geneva Conventions, which is recognized as reflecting customary IHL, expressly provides for protections that must be afforded to persons taking no active part in hostilities, including members of the armed forces who have laid down their arms, as well as to those placed *hors de combat* "by sickness, wounds, detention, or any other cause". Detention is thus explicitly mentioned as one of the "causes" that will give rise to the application of the protections of Common Article 3. These protections are meant to apply to any form of detention related to the armed conflict, and will therefore also apply to detention for serious security reasons, i.e. internment.

Additional Protocol II to the Geneva Conventions, adopted in 1977 - most provisions of which are widely considered to also reflect customary IHL - likewise governs deprivation of liberty in NIAC. Article 4 (1) of the Protocol lists fundamental guarantees for all persons who do not or have ceased to take a direct part in hostilities "whether or not their liberty has been restricted". Article 5 is entitled: "Persons whose liberty has been restricted", and specifies that its provisions (additional to those of Article 4), apply whether persons are "interned or detained" in relation to the armed conflict.[37] According to the Commentary to Article 5 (1): "[I]t is appropriate to recall its far-reaching scope. It covers both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law. However, there must be a link between the situation of conflict and the deprivation of liberty; consequently prisoners held under normal rules of criminal law are not covered by this provision".[38] It should also be noted that article 5 (2) provides for further obligations of "those who are responsible for the internment or detention" of persons whose liberty has been restricted.[39] According to the Commentary, this expression "relates to persons who are responsible *de facto* for camps, prisons, or any other places of detention, independently of any recognized legal authority".[40] Additional Protocol II contains further references to deprivation of liberty for reasons related to the armed conflict as well.[41]

As is evident, Common Article 3 is silent on the grounds or procedural safeguards for persons interned in NIAC, even though internment is practiced by both States and non-State armed groups. Additional Protocol II explicitly mentions internment, thus confirming that it is a form of deprivation of liberty inherent to NIAC, but likewise does not refer to the grounds for internment or the procedural rights. Lack of sufficient rules in IHL has become a legal and protection issue over time given that, as already mentioned, NIAC is the prevalent type of armed conflict today and that the typology of NIACs has expanded over the past decade. In addition to the paucity of IHL, there are also unresolved issues related to the application of human rights law,[42] some of which are mentioned below. It is thus submitted that the legal

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[36] But regulations elaborating on the internment review process would in practice be necessary, as evidenced by art. 78 of the Fourth Geneva Convention, which provides that the Occupying Power will establish a "regular procedure" for decisions related to internment.

[37] *AP II*, *supra* note 6, art. 5(1).

[38] *Commentary on the Additional Protocols*, *supra* note 18, para 4568.

[39] *AP II*, *supra* note 6, art. 5(2).

[40] *Commentary on the Additional Protocols*, *supra* note 18, para 4582.

[41] See *AP II*, *supra* note 6, art. 5(3) and (4) and art. 6

[42] It should be recalled that the other party to a NIAC is one or more organized non-State armed groups. The suggestion, sometimes made, that domestic and/or human rights law must be relied on when IHL is silent on a particular issue - such as grounds and procedural safeguards for internment - does not take into account the legal framework that binds the non-State party in a NIAC. Domestic law does not provide a legal basis for detention of any kind by non-State armed groups and States are free to criminalize and punish such activity under national legislation. Human rights law also does not provide a legal basis for detention by non-State armed groups. In addition, the great majority of such groups would not be able to provide *habeas corpus*, as required by human

framework governing internment in NIAC should be determined on a case-by-case basis, i.e. taking into account the relevant legal obligations in each context.

In a "traditional" NIAC occurring in the territory of a State between government armed forces and one or more non-State armed groups, domestic law, informed by the State's human rights obligations, and IHL, constitutes the legal framework for the possible internment by States of persons whose activity is deemed to pose a serious security threat. A careful examination of the interplay between national law and the applicable international legal regimes will be necessary. The right to judicial review of detention under human rights law will, of course, continue to apply; there are, however, differing views on whether this obligation may be derogated from.[43]

Identifying the legal framework governing internment becomes particularly complicated in NIACs with an extraterritorial element, i.e. those in which the armed forces of one or more State, or of an international or regional organization, fight alongside the armed forces of a host State, in its territory, against one or more organized non-State armed groups.

The fact that Article 3 common to the Geneva Conventions neither expressly mentions internment, nor elaborates on permissible grounds or process, has become a source of different positions on the legal basis for internment by States in an extraterritorial NIAC.[44] One view is that a legal basis for internment would have to be explicit, as it is in the Fourth Geneva Convention; in the absence of such a rule, IHL cannot provide it implicitly.[45] Another view, shared by the ICRC, is that both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC. This position is based on the fact that internment is a form of deprivation of liberty which is a common occurrence in armed conflict, not prohibited by Common Article 3, and that Additional Protocol II - which has been ratified by 167 States - refers explicitly to internment.

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rights law, in practice. (The possible exception are cases in which a group, by virtue of stable control of territory has the ability to act like a State authority, and where its human rights responsibilities may be recognized *de facto*.) There is, however, no doubt that IHL binds non-State armed groups that are party to a NIAC, as evidenced by the relevant treaty provisions, and customary IHL.

[43] As noted above, Article 9 (4) of the ICCPR is not explicitly included in the list of non-derogable rights under Article 4 of that treaty. In its General Comment 35 on Article 9, the Human Rights Committee elaborated on the limits to States parties' ability to derogate from Article 9. It reiterated, with respect to habeas corpus, that "in order to protect non-derogable rights, including those in articles 6 and 7, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by measures of derogation". (See Human Rights Committee, "General Comment No. 35, Article 9: Liberty and security of person, Advance Unedited version, para 67, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en.) Pursuant to certain other views the right to judicial review can never be derogated from, an approach, it is submitted, that is appropriate in peacetime, but cannot always accommodate the reality of armed conflict. Under still other views, domestic law cannot allow non-criminal detention in armed conflict without derogation from the ICCPR even if the relevant State provides judicial review as required under article 9 (4) of the Covenant. It should, however, be noted that nothing in the wording of Article 9 of the ICCPR excludes the possibility of non-criminal detention *per se*, as recognized by the Human Rights Committee in General Comment 35 (see generally para 15, and para 64 as regards security detention under IHL). The situation is different under Article 5 ECHR, which specifically spells out the possible grounds for detention, without including security detention. It should be noted, however, that in its Judgment in the *Hassan v the UK* case, the European Court of Human Rights recognized that derogation from Article 5 is not obligatory in IAC: see *Case of Hassan v. The United Kingdom*, App. No. 29750/09, Grand Chamber, 16 September 2014, paras 101-103, 107, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501. The Court has not yet had an occasion to state its opinion as regards situations of NIAC.

[44] See ICRC, "Report on the ICRC-Chatham House Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict," London, 22-23 September 2008. Available at: http://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf

[45] See, e.g., Judgment of a UK High Court in *Mohammed v Ministry of Defence & Ors* [2014] EWHC 1369 (QB), 2 May 2014, paras 22-293, at: http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf

Whichever view one adopts, it is submitted that in the absence of specific provisions in common Article 3 or Additional Protocol II, additional authority related to the grounds for internment and the process to be followed needs to be obtained, in keeping with the principle of legality. Thus, an international agreement between an international force(s) and a host State should be concluded to this end. Alternatively, domestic law should be adopted, specifying the grounds and process for internment. In the latter case the domestic law basis should be provided by the host State or, in exceptional circumstances, by the State(s) to which the international force(s) belong. Grounds and process for internment may also be provided for in the Standard Operating Procedures of the international force(s), or other equivalent document binding on the force(s).

In this context it should be recalled that a UN Security Council resolution adopted under Chapter VII of the UN Charter would also provide a legal basis for internment in an extraterritorial NIAC. Legal experts differ as to whether such a resolution must expressly authorize internment or whether the standard formula of authorization to use "all necessary means" (to accomplish a mission) is sufficient. It is submitted that specificity as to the authorization for internment is preferable. The grounds and process for internment would then still need to be identified by reference to one of the sources mentioned above.

In addition to the challenges that have already been briefly noted, others arise, related to the application of human rights law in situations of NIAC with an extraterritorial element: State(s) composing the relevant international force(s) may not all be bound by the same human rights treaties; the extent of the extraterritorial reach of human rights law obligations is evolving (and remains disputed by some States), and the question of whether the assisting States must derogate from their human rights obligations in order to intern persons abroad with or without judicial review is unresolved in practice (no State has done so to date).

4. Procedural principles and safeguards for internment

The paucity of IHL treaty rules on grounds and procedural safeguards in NIAC, and the human rights law-related issues mentioned above, led the ICRC to try and bridge the uncertainty by means of institutional guidelines issued in 2005, entitled "Procedural Principles and Safeguards for Internment/Administrative Detention[46] in Armed Conflict and Other Situations of Violence"[47] (hereafter "ICRC guidelines"). The rules formulated are based on law and policy,[48] and are meant to be implemented in a manner that takes into account the specific circumstances at hand.[49] The guidelines are relied on by the ICRC in its operational dialogue with States, international and regional forces, and other actors. Only two issues of relevance addressed in the guidelines will be briefly summarized here: grounds for internment and the review process to determine the lawfulness of internment.

The guidelines rely on "imperative reasons of security" as the minimum legal standard that should inform internment decisions in all situations of violence,[50] including NIAC. This policy

[46] The terms "internment" and "administrative detention" are used interchangeably in the guidance. It encompasses, in addition to armed conflict, other situations of violence, as the ICRC has observed in practice that non-criminal detention for security reasons is a common occurrence in peacetime practice as well.

[47] The institutional position is entitled: "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence". It was published as Annex 1 to an ICRC Report on "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts" presented to the 30th International Conference of the Red Cross and Red Crescent held in Geneva in 2007. See: http://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf

[48] The purpose of the commentary is only to provide an overview of the various legal sources, primarily IHL, but also international human rights law, on the basis of which the rules were formulated.

[49] The guidelines are also meant to be contextually applied, if and when a non-State armed group non-criminally detains/intern persons for security reasons related to the armed conflict.

[50] The guidelines do not cover POW detention, outlined above.

choice was adopted because it emphasizes the exceptional nature of internment and is already in wide use when States resort to non-criminal detention for security reasons. It seems also to be appropriate in NIACs with an extraterritorial element, in which a foreign force, or forces, are detaining non-nationals in the territory of a host State, as the wording is based on the internment standard applicable in occupied territories under the Fourth Geneva Convention.[51] On this and other issues, the guidelines take into account and attempt to reflect a basic feature of IHL, which is the need to strike a balance between the considerations of humanity on the one hand, and of military necessity on the other.

While activity that meets the "imperative reasons of security" standard may warrant internment, it is conversely clear that internment may not be resorted to for the sole purpose of interrogation or intelligence gathering, unless the person in question is otherwise deemed to represent a serious security threat. Similarly, internment may not be resorted to in order to punish a person for past activity, or to act as a general deterrent to the future activity of another person. As a general matter, internment should not be used in lieu of criminal prosecution in individual cases when criminal process is in fact feasible. It must in any event be recognized that the imperative reasons of security standard is high, and careful evaluation of whether it has been met must take place in relation to each person detained.

As regards the review process to determine the lawfulness of internment, the twelve specific guidelines provide that a person must, among other things, be informed promptly, in a language he or she understands, of the reasons for internment. An internee likewise has the right to challenge, with the least possible delay, the lawfulness of his or her detention.[52] The review of lawfulness of internment must be carried out by an independent and impartial body.[53] It should be noted that, in practice, mounting an effective challenge will presuppose the fulfilment of several procedural and practical steps, including: i) providing internees with sufficient evidence supporting the allegations against them, ii) ensuring that procedures are in place to enable internees to seek and obtain additional evidence, and iii) making sure that internees understand the various stages of the internment review process and the process as a whole. Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review body will require particular attention.[54] Assistance of counsel should be provided whenever feasible, but other modalities to ensure expert legal assistance may be considered as well.

The right to periodical review of the lawfulness of continued internment is also provided for in the guidelines. Periodical review obliges the detaining authority to ascertain whether the detainee continues to pose an imperative threat to security and to order release if that is not the case. The safeguards that apply to initial review are also to be applied at periodical review.

5. Strengthening legal protection for persons detained in NIAC

It should be noted that the ICRC presented an overview of the humanitarian and legal problems observed in detention, particularly in NIAC, to the 31st International Conference of the Red Cross and Red Crescent held Geneva in November 2011. Based on resolution 1 of the Conference, the organization is undertaking a process of research and consultations[55] with States, and other relevant actors, and was tasked with presenting the 32nd International

[51] *Fourth Geneva Convention*, *supra* note 24, art. 78.
[52] For the legal sources and rationale of the ICRC's formulation of this principle see ICRC Guidelines, *supra* note 47, pp. 385-386.
[53] For the legal sources and rationale of the ICRC's formulation of this principle see ICRC Guidelines. Ibid., pp. 386-387.
[54] See *supra* note 43.
[55] More information on the process, as well as the relevant documents, are available on the ICRC's website at: http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm

Conference,[56] to be held in 2015, with a range of options and recommendations on how to strengthen IHL to better address these issues. The consultations have focused on whether and how the rules of IHL protecting detainees in NIAC should be strengthened, in four priority areas identified by the ICRC: (1) conditions of detention; (2) vulnerable categories of detainees; (3) grounds and procedures for deprivation of liberty; and (4) transfers of detainees from one authority to another. The consultation process will inform the ICRC's draft report and resolution for the 32nd International Conference, at which a decision on further steps is expected to be taken by the participants.The desired goal is to produce an outcome instrument that would elaborate and thus strengthen the standards applicable to detention in NIAC. Although the exact nature of such an instrument is still to be determined, States participating in the consultation process so far have generally expressed a preference for a text of a non-binding nature. The process to develop such an outcome instrument would likely begin after the 32nd International Conference.

[56] The quadrennial International Conference of the Red Cross and Red Crescent gathers components of the International Red Cross and Red Crescent Movement (National Red Cross and Red Crescent Societies, the ICRC, and the International Federation of Red Cross and Red Crescent Societies), and all States parties to the 1949 Geneva Conventions. The Conventions have been universally ratified.