



International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
Istituto Internazionale di Diritto Umanitario

## **41<sup>st</sup> ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW**

*“Deprivation of liberty and armed conflicts: exploring  
realities and remedies”*

Sanremo, 6-8 September 2018

### **Contemporary challenges when applying IHL and IHRL to protect persons deprived of their liberty in relation to armed conflict, in particular NIAC**

*Blaise CATHCART*

Former Judge Advocate General, Canadian Armed Forces

Many thanks to the organizers of this 41st Sanremo Round Table, the IIHL and the ICRC. In particular, I thank Professor Pocar for his kind invitation. I make special mention of the behind-the-scenes workers, including the translators, for their heavy lifting, energy and ability to herd all the cats.

I am honoured and thrilled to be here to participate on this important panel. Thank you Ambassador, and fellow panellists Ana, Laurent and Camille. It is my first occasion to speak as “citizen” Cathcart at the Round Table since my recent retirement as the JAG.

This panel reflects the continuing and, I think, growing interest by many in the interaction of IHL and international human rights law (IHRL) during armed conflict, particularly NIACs.

This is truly a big topic with many layers of complexity and many lenses that can be used to analyze it. It is a lot to digest, especially in a brief presentation. This is not a complaint but rather an acknowledgement that it will be impossible to conduct a deep dive of the many issues and perspectives.

In light of time constraints, I will focus primarily on one contemporary legal challenge: the question of what is the legal basis to detain in NIAC. The debate

surrounding this issue today is seemingly endless and gives rise to much confusion for legal advisors, military commanders and decision-makers alike.

I think it is fair to say that prior to the armed conflicts against the Taliban and Al Qaeda in Afghanistan, there was very little doubt or concern about the authority of states to detain persons in armed conflict under the authority of IHL. However, after many years of conflict and experience with detainee operations in Afghanistan, Iraq and Syria, much debate and controversy have arisen about the legal authority to detain persons, particularly non-state actors, during a NIAC. The debate became squarely crystallized in the recent decision in the case of Serdar Mohammed in the United Kingdom Supreme Court (UKSC).

I believe the Mohammed case is well known to most stakeholders in IHL. It is no exaggeration to say the case, especially the decision of Mr. Justice Leggatt in the High Court, sent many shockwaves through the IHL and IHRL communities and states' militaries, especially those who interoperated closely with UK Forces. The Mohammed case, along with the Hassan case of the European Court of Human Rights (ECtHR), exemplifies the challenges presented with the interaction of IHL and IHRL in armed conflict. They also demonstrate contemporary struggles with the distinction between IACs and NIACs.

For those who may not be familiar with the Mohammed case:

Serdar Mohammed was captured by UK forces in Afghanistan on 7 April 2010 during a planned combat operation. He was held at a UK base in Helmand Province and detained for a period of three and a half months, when he was transferred to the Afghan authorities. He was subsequently convicted by the Afghan courts for offences relating to the insurgency and sentenced to ten years' imprisonment.

At trial at the first instance in the High Court, Mr. Justice Leggatt directed three preliminary issues to be determined. One of the preliminary issues concerned the relationship between Article 5 of the European Convention of Human Rights (ECHR) (which stipulates that no one shall be deprived of liberty save in the five exceptional circumstances listed in subparagraphs (a) to (f)) and IHL. In the result, Justice Leggatt held, quite astonishingly, that UK forces had no power, either under the relevant United Nations Security Council Resolutions (UNSCRs) or under customary international law (CIL), to detain prisoners for any longer than was required to hand them over to the Afghan

authorities, and then for no more than 96 hours. He also found that they had no greater power under the domestic law of Afghanistan. On that basis, he considered that in detaining Mr. Mohammed the UK was in breach of article 5(1) and (4) of the ECHR. The Court of Appeal, although differing from some aspects to the judge's reasoning, reached the same conclusion.

Most states and their militaries, especially those who had much experience and practice in detaining non-state actors during NIAC, were, to say the least, startled and disturbed by these decisions. The results were completely opposite to most states' understanding that there was clear and unambiguous authority pursuant to IHL to detain in both IACs and NIACs. State practice had consistently demonstrated that States believed they were authorized under IHL to detain and regulate the conditions of detention during NIACs.

Nonetheless, the High Court and CA decisions seem to reflect a view held by some States and academics that IHL is silent with respect to the legal authority for detention. Such a view would acknowledge that detention is regulated by IHL but it is not authorised, even implicitly. Accordingly, the required legal basis must be found elsewhere in domestic law (host and/or sending state) or in a UNSCR.

In January of 2017, with a majority of 7 to 2, the UKSC allowed the Government's appeal in part. The majority held that British forces had implicit power pursuant to UNSCRs to take and detain prisoners for periods exceeding 96 hours if this were necessary for imperative reasons of security. However, it determined that the procedures for doing so did not comply with ECHR article 5(4) because they did not afford prisoners an effective right to challenge their detention. Notably, the majority found it unnecessary to express a concluded view on whether CIL authorized the detention of combatants in NIAC. Lord Reed, in his dissent, concluded that no such authority exists under CIL.

The UKSC's finding that authority to detain during a NIAC in UNSCRs is far more persuasive, realistic and practical than the decisions in the lower courts. To my mind, though, it is regrettable that the UKSC did not go further and determine that IHL, particularly the CIL of IHL, authorized detention during NIACs. Many states and the ICRC believed, pre and post Mohammed, that both customary and treaty IHL contain an inherent power to intern which provides 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 or

Additional Protocol II. This was a missed opportunity by the UKSC to bring greater legal and operational clarity to a critical dimension of modern armed conflict operations.

The Mohammed case was a kind of companion case that followed the Hassan case out of the ECtHR. Most here are familiar with the Hassan case which also addresses the interaction of IHL and IHRL in the form of the application of ECHR during armed conflict. Hassan case was, essentially, the first time the ECtHR addressed the convergence and conflict of IHL and the ECHR in the context of an IAC. It specifically did not consider the context of a NIAC. Importantly, the ECtHR in the Hassan case tried to reconcile the clear and narrow language of Article 5 of the ECHR regarding detention with the authority under IHL to detain in an IAC.

I believe the Court in the Hassan case rightly arrived at a realistic and practical decision that confirmed that IHL did indeed authorize detention in an IAC. It did so by determining that the international law of treaty interpretation requires that a treaty be interpreted in a manner capable of ensuring or accommodating its intended effect. The Court noted that Article 31(1) of the Vienna Convention on the Law of Treaties establishes that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” This approach to treaty interpretation is often described as the “implied powers” doctrine and emphasizes that a treaty must be interpreted in a way that makes it effective. The court also importantly determined that there was no need for a derogation from the ECHR based largely on state practice indicating that no state had derogated from the ECHR and, essentially, not from the ICCPR, when participating in an armed conflict.

While the Hassan and Mohammed cases have provided some clarity on legal authority to detain persons during IACs and NIACs, both leave many unanswered questions and, ultimately, uncertainty for military and civilian decision-makers and their legal advisors.

## **Summary**

Today, the interrelationship, convergence and conflict of IHL and IHRL in armed conflict are the most immediate and important challenges facing legal

advisors, especially those in the armed forces. While the two bodies of law promote the protection of humans and the preservation of humanitarian values, there are important differences, conceptually, legally and practically, between them. Often, the apparent convergence, or the desire for the convergence, of the two bodies is viewed as an important evolution of the humanization of armed conflict. However, such views or sentiments seem to ignore the real risks to the very goal and aspiration of human rights – the protection of humans.

In drawing together some threads from the preceding comments, the following conclusions can be made.

Firstly, contemporary armed conflicts, particularly NIACs, involve multiple legal frameworks under international and domestic laws. However, IHL is the *lex specialis* of armed conflict. This is a fact for military legal advisors and commanders. It is the primary body of law that they will apply during armed conflict. It is troubling that the relevant jurisprudence of the ECtHR (save for Hassan), the International Court of Justice (ICJ) and the commentaries of UN Committees have largely avoided detailed analyses of the *lex specialis* of IHL in their methodologies for reviewing human rights violations in the context of armed conflict. Consequently, the jurisprudence of the ECtHR, ICJ and the commentaries of UN Committees regarding the application of IHRL during armed conflict are often short-sighted, fragmented, ambiguous and unpersuasive.

Secondly, human rights law, particularly treaties, may or may not apply extra-territorially during armed conflict. The issue of the extra-territorial application of human rights instruments will continue to cause confusion and uncertainty. In particular, applying the expansive concept of ‘effective control of the person’ test to international military operations during NIAC, will be very problematic.

Thirdly, there is growing concern particularly amongst military legal advisors that the application of IHRL in armed conflict will make activity, which is lawful under IHL, unlawful under IHRL or HR norms. There may be no better contemporary example than the issue of detention in armed conflict. Any doubt that IHL, both conventional and customary, provides authorization to detain persons during armed conflict, especially NIACs, must be challenged and eliminated. This will be a daunting, difficult and complex undertaking but it needs to be accomplished. To conclude and accept that there is neither

express nor implicit authorisation under IHL to detain in NIACs undermines and weakens the very object and purpose of IHL's detention-related provisions, namely the regulation of detention by States and non-State organized armed groups.

Fourthly, the jurisprudence of the ECtHR and the commentaries of UN Committees will likely have a distracting effect on the conduct of multinational military operations involving European Forces who are subject to the ECHR. In the absence of an UNSCR, it will be difficult for such European Forces to reconcile their obligations under the ECHR with those non-European allies who will be largely regulated by IHL (conventional or customary law).

### **The way ahead**

1. A NIAC is an armed conflict. States must acknowledge that they have moved beyond peacetime-policing paradigms and IHL applies.
2. States need to reassert their roles and responsibilities for detention during NIAC, particularly in the area of developing consistent and universal IHL standards for regulating conditions of detention. While there is sufficient law to reasonably establish detention authority and regulation, there is a clear need to better ensure application of universal standards and compliance by state and non-state actors.
3. Better compliance can be achieved by militaries and organized armed groups by training, educating and operationalizing the legal obligations in all aspects of the planning and execution of detention operations. Importantly, this will include dealing with vulnerable groups such as women, children, elderly, disabled, foreign nationals, persons with infectious diseases or terminal illnesses, members of minority groups, indigenous persons, and persons likely to be discriminated against on the basis of gender and sexual orientation. It is essential for militaries and organized armed groups to ensure compliance with IHL by "training as you fight".

In this regard, the ICRC's ongoing Strengthening IHL Protecting Persons Deprived of their Liberty Initiative and the Strengthening Compliance with IHL Initiative; the Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations (2012); and The Chatham House Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict (2008) are very practical, realistic and credible sources in assisting states and non-state actors in establishing standards in regulating detention during NIAC.

As most States have provisions for creating Prisoner-of-War Status Determination Tribunals pursuant to Article 5 of GC III, consideration must be given to applying an analogous process in NIACs. This will mean acceptance of status-based determinations for detention of members of OAGs. A civilian internment framework analogous to the process under GC IV must also be developed. Here, I must note the courageous work of organizations like Geneva Call in assisting OAGs to comply with IHL.

4. Importantly, States need to consider the concept of applying a single IHL to every armed conflict, whether IAC or NIAC. In this respect, States will need to afford better recognition and incentives to non-state actors, particularly OAGs. If OAGs comply with the law they should benefit from it. This will require a major shift in how states consider the illegality or criminality of members of OAGs when they rebel against state authority. This would comply with the equal or, more accurately, the equitable application of IHL to all parties in an armed conflict. This view, of course, runs counter to most states' concern that applying IAC IHL principles to NIACs may result in legitimatizing and encouraging the conduct of rebels and criminals. This is a very understandable and valid concern. However, the long history of NIACs seems to indicate that most rebel OAGs will seek to comply with the law within their resources and capabilities. Moreover, at the end of most NIACs, amnesties are generally granted to the "foot soldiers" of the OAGs. A good recent example may be the Peace Accords between Colombia and the FARC wherein Colombia has granted amnesties save for the commission of war crimes.

5. All real and perceived impunity for those who violate IHL rules concerning detention in NIACs must end. Here, states can promote the use of fair, transparent and credible military justice systems to better ensure the prevention of impunity.
6. Lastly, these are complex and sensitive issues that will not be resolved solely by militaries. Too much is at stake. The breath, weight and emotionalism of such issues are simply too great for just militaries to resolve, even for major powers like the US. It will take a comprehensive multi-disciplinary civil-military effort and approach to ensure that appropriate, transparent, fair, consistent and humane detention operations are implemented by state and non-state actors.

This concludes my remarks. I thank you for your time and attention.