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

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Argument against IHL providing a legal authority for deprivation of liberty in relation to NIAC

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Thank you John Swords for your very eloquent presentation of the UK Government position.

I would like to clarify one or two points about the scope of the argument I'll be making, because I think there is a lot of misunderstanding within this area.

So, the first point to note is that I'm not arguing that preventative security detention or internment is unlawful in non-international armed conflict (NIAC). Instead, I'm simply arguing that neither international humanitarian law (IHL) nor customary international law explicitly provide a legal basis for detention in NIAC.

And it's worth keeping in mind why we are asking whether there is a legal basis or not. The reason why we're asking for a legal basis, and we are trying to figure out where any such a legal basis might lie, is because international human rights law (IHRL) requires a legal basis for any detention to be lawful. And equally there is an argument, that even IHL itself also requires such a legal basis, but that is a little more controversial.

The starting point for me, and I think this starting point perhaps helps to explain my rebuttal to John, is that international law and IHL need not be logical, nor need it be helpful. It's quite possible to have problems with the

law and it's precisely identifying those problems that then allows us to think about how to revise the law.

So simply highlighting logical irregularities in the law is insufficient to make an argument about a particular legal rule. In international law we need to be able to point either to a clear treaty based norm – that says you can detain in NIAC –, or a clear rule of customary international law, based on the practice of States and based on. And my argument is that, neither in treaty nor custom can we find their *opinio juris* any such legal basis for detention in NIAC.

Now I should point out that customary law is such that it is susceptible to change. So what I'm saying now, I may decide in five years' time is no longer true simply because as States engage in practice, as States express their *opinio juris* over time, new customary norms can form. And this is perhaps one area where we can potentially see that happening. But I am of the view that it hasn't yet happened.

This point was made in the Serdar Mohammed litigation. Earlier Blaise Cathcart very usefully summarized the Serdar Mohammed case as it went through the UK Courts. As he said, the Supreme Court itself didn't take a position on the IHL issue, at least the majority judgement didn't take a position on that. Lord Sumption, who spoke for the majority, did hint fairly heavily that he was inclined to agree with the dissent on this point, with Lord Reed's position. And in the majority judgment, he makes a similar point to the one I just made about customary law potentially developing over time, and I quote him as saying: «There is no doubt that practice in IAC and NIAC is converging».

It's likely that this would actually eventually be reflected in *opinio juris*. It is, however, clear from the materials before us, that a significant number of States participating in NIAC, including the UK, do not yet regard detention as being authorized in such conflicts by customary international law. So, there is nothing inconsistent with saying that customary law can change in this area. And there is certainly pressure to do that, because I can see that there is a very strong need to say that there is a single legal basis that applies to all States to detain.

So with that, I want to address the substantive points that John made and then also respond to these kinds of update: the new ICRC's commentary and resolution from the 32nd International Conference.

The main argument that the UK takes here, is that States detain all the time in NIAC. As John said, it is almost inherent in the very nature of armed conflict that preventative security detention will happen. And that's absolutely true and that's common both in IAC and NIAC. This, however,

doesn't mean that international law provides a legal basis for that detention that would satisfy the principle of legality under IHRL. That could only be the case if we can point to a treaty rule or a customary rule that indicates such a legal basis.

John said that in treaty law, we have plenty of references to detention. Common article 3 and APII, both of which were designed specifically for NIAC, refer explicitly to detention. And the argument made by the UK in the cases concerning Serdar Mohammed and Abd Al-Wahid, was that these references indicated an implicit legal basis to detain. But this simply isn't true. These references in the treaty indicate that there is certainly no prohibition for detention. IHL doesn't prohibit States from detaining in an NIAC, and that's reflected in practice where States have been detaining for a long period of time. But what it doesn't show is that, there is legal basis under those treaty provisions to detain.

The reason why it doesn't show that is because in international law there is a fundamental difference between regulating a particular issue and explicitly authorizing it. IHL actually, as a body of law, illustrates this phenomenon perfectly. It regulates pretty much every aspect of armed conflict, but in no way does it speak to the legality of armed conflict. It doesn't say that armed conflict is lawful or unlawful; it doesn't say that if a State participating in armed conflict complies with IHL, its initial use of force in that armed conflict was then lawful. That's regulated by an entire separate body of law. So, simply regulating a particular issue doesn't mean that it's thereby authorized. In that sense we can see that there is no obvious consequence of saying that IHL regulated detention in NIAC. It does not necessarily mean that it then creates a legal basis to detain.

The position under customary international law requires us to ask whether there is a sufficient practice and *opinio juris*. And as I said, the UK government argues that States detain all the time in NIAC. So, that's our State practice. And that seems like quite a persuasive argument. The issue is that with custom, of course, you also need to show *opinio juris* and in this context, *opinio juris* would have to take the form of a clear indication that States are not only detaining in NIAC, but they are doing so because they consider themselves explicitly authorized to do so by IHL. In other words they are relying on IHL, or I should say customary international law, as granting them the legal basis to detain in NIAC.

Until recently that simply has not been the case. Traditionally, of course, NIAC being internal conflict, was regulated by domestic law and States would historically develop a specific internment regime to regulate that issue. So, we saw that, for example, in Colombia, in Nepal and in Sri

Lanka and in none of these instances did the States say : this is an NIAC and, therefore, we have a legal basis under customary law or IHL treaty law for that matter, that allows us to detain in this situation. In other words, domestic law was relied on.

Of course, the problem now is dealing with extraterritorial NIAC. There is no reason why domestic law couldn't act as a legal basis for detention in those types of NIAC. So, States have tended not to rely on them so much. The US, however, has relied on the authorization for the use of military force and on domestic statutes as providing it with the legal basis to detain in its conflict with Al-Qaeda. Again, it didn't rely explicitly on IHL, or at least if it did, then, at the same time, it seemed to rely on its own domestic statute.

Similarly, States will rely on Security Council resolutions, as the majority judgment in the Abd Al-Wahid Serdar Mohammed case concluded. It is a permissible basis for providing a legal basis to detain. But in these instances States have relied very well on customary law and in that sense, though we may have practice suggesting that States are detaining in NIAC; there is no *opinio juris* that requires that practice to be legally relevant, for making the claim that under customary international law provides us a basis to detain.

The UK government did point to various examples of *opinio juris* in the Serdar Mohammed Abd Al-Wahid case. I won't go into details on that because we didn't raise them. The Court of Appeal went through the fairly slim pile of examples of *opinio juris* and the Court of Appeal rejected them because again, in all but one of those instances the States did not rely on customary law or a treaty provision as the legal basis for their detention in the NIAC. They relied on Security Council resolutions predominantly, or in the case of the US, a domestic law/statute. So, again we don't have any *opinio juris* that supports this particular claim.

What's more, until recently, this wasn't the *opinio juris* of the UK Government, or if it was, they kept it remarkably secret, because the UK government until very recently didn't invoke IHL or custom as a legal basis for their detention operations in NIAC. For example, in the Al-Jedda case they relied on Security Council resolution 1546 to justify their detentions in Iraq. The reason why the UK Government didn't rely on IHL or custom until recently, I can only surmise because internally there had been a lot of discussion that suggested the opposite argument to the one John has now made. So, for example, in a briefing note in 2017, in the Ministry of Defence, it read, and I quote: «There is no power for any ISAF forces to

intern individuals in Afghanistan. This would require an express UN SC resolution authorization and preferably a power in Afghan law as well».

So, there were a number of these statements that indicated within the UK Government itself that, until very recently, there was no clearly established *opinio juris* on this point. Now, as I said custom can change and it may be that as more and more States express an *opinio juris* on this point, we can start to see a new customary rule forming here. But as yet, I'm not convinced that any such rule has crystalized.

And that brings me to the two recent examples that John pointed out to support his points. The first one that I'll refer to is the 32nd International Conference resolution. The quote up on the board, namely the preamble paragraph of the resolution, specifies that: «The participating States took the view that IHL treaty and customary law provides a legal basis to detain, or I should say, provides a power to detain in all armed conflicts».

Now this could be seen as kind of a clear indication of *opinio juris*. But there are a few responses to this, which help to explain why it wasn't accepted by Lord Reed, for example, in the Supreme Court, and it looks like it wasn't accepted by the majority either.

The first point is that, this resolution uses the language of a “power to detain”. One of the big problems in this area is the obvious scatterly language that's often use. What we are looking for is whether there is a legal basis to detain under IHL that would satisfy the principle of legality in IHRL. So, references to a power to detain could even be reconciled with the view that though IHL doesn't authorize detention, it doesn't prohibit it. So, States are permitted at least under IHL to detain. But that doesn't have any consequence for other bodies of international law such as Human Rights Law.

Even if the language had clearly stated that there is a legal basis to detain under custom, I still have certain misgivings about relying on this specific preamble paragraph within a resolution, as suddenly demonstrating and evidencing the existence of *opinio juris* here.

First of all, the notion of widespread *opinio juris* in this area being illustrated by just a preamble paragraph, within a resolution that wasn't actually about the legality of detention, but was rather about safeguarding detainees, makes it unclear whether we should draw such strong normative conclusions from such a statement.

In addition, there is a bigger question in international law about whether you can indeed draw normative conclusions like this from these kinds of resolution. So we know that that resolution alone is not an expression of

opinio juris, if that's what it is, and couldn't create a new rule of customary international law. It would have to be accompanied by States practice.

John's response I imagine to that, correct me if I'm wrong, would be: Well, we have loads of States practice, States detain all the time. Against this point, States have always been detaining in NIAC.

The problem with this claim, as I said, is that those States didn't, until recently, and only a few of them recently, rely on IHL as providing the legal basis to detain. They relied on other sources, mainly of domestic law, occasionally of international law.

We can't in my view take this practice, which, before the 32nd International Conference was therefore legally irrelevant and suddenly make it relevant so as to form a new rule of customary international law. We would have to see States continuing with detention and expressing a clear view in doing so, that that detention is explicitly authorized by custom. It's also undermined by the fact that there is inconsistent practice. As I said, the UK has only recently taken this specific view with respect to the legal basis for detention in NIAC.

The final point I'll note relates to the comment that John made about the ICRC commentary, or the revised commentary, which as you saw, takes this view of an inherent power to detain in a NIAC.

There are two points I would like to make in response to this, the first is that the reference to that inherent power to detain in NIAC is then followed by the sentence, as you saw: «However, additional authority relating to the grounds and procedures for deprivation of liberty in NIAC, must in all cases be provided in keeping with the principle of legality».

But that leaves me with the question of what is the point of saying that there is a legal, an inherent power to detain in a NIAC if we then still need to find grounds and procedures in law that comply with the principle of legality? That implies that we need to have an instrument qualifying as law, providing grounds and procedures before the detention is lawful.

I'm quite happy with that and I don't see that saying there is an inherent power to detain under IHL in anyway helps us there. It may be that the ICRC was taking the view that non-legal policy documents could contain those grounds and procedures. The problem with that is that I don't see how such a policy document, a non-legal document could then comply with the principle of legality, which in the ICRC's view is the reason for needing a set of grounds and procedures for detention.

I'm going to leave it there, because then we'll hopefully have some time for questions and rebuttal.