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

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

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I’m very pleased to be here to talk, in my personal capacity, about an issue of great operational importance which of course was the subject of litigation that both Lawrence and I were involved in.

There’s no denying the topic of this session has been a matter of thorny debate in IHL circles; a debate boiling down to whether or not IHL in NIACs merely regulates detention or whether it also authorises it. Even the mere concept of IHL authorisation within IACs is a bone of contention for some people, who see the whole of IHL as a purely restrictive body of law.

Obviously, I don’t take that view but I do stress the importance of recalling the fundamental distinction between *the jus ad bellum* and the *jus in bello* in internationalised NIACs – where this debate is perhaps at its most acute. So, when I or others speak of authorisations inherent in IHL those in no way displace states’ obligations under the *jus ad bellum* as to the legality of any resort to force internationally. I am speaking only to the legality of the underlying activity in the conduct of hostilities rather than international law questions around sovereignty.

At its core the debate is about the legality of in-theatre detention, in what is now the most common form of armed conflicts. More specifically, it is about determining the relevance of being able to do something as a matter of IHL for the purpose of law other than IHL. That might be for the

purpose of domestic tort law; or it could be for the purpose of IHRL which is potentially more troubling, especially in the ECHR context given the strictures of both article 5(1) and the criteria for derogation.

Before setting out the substantive arguments, I thought I'd start with two relatively recent developments which have a direct bearing on the debate.

Firstly, in its updated commentaries to the First and Second Geneva Conventions, the ICRC, whilst recognising the controversies of the on-going debate, has set out its clear institutional position on NIAC detention. The ICRC believes that IHL does indeed provide a power to detain in NIACs:

One view is that a legal basis for deprivation of liberty in non-international armed conflict has to be explicit, as is the case in the Third and Fourth Conventions for international armed conflict. Another view, shared by the ICRC, is that both customary and international humanitarian treaty law contain an inherent power to detain in non-international armed conflict. However, additional authority related to the grounds and procedure for deprivation of liberty in non-international armed conflict must in all cases be provided, in keeping with the principle of legality. (Commentary on Common Article 3 at paragraph 728 of GC1 commentary and paragraph 750 of GC2 commentary)

Note that the ICRC support is based both on the Geneva Conventions and also on customary international law.

Now representatives of the ICRC are here today so I'm not going to speak on their behalf. And whilst states do not simply accept ICRC views as gospel, I will say this: when the ICRC say there is a power to detain based on the Conventions, recall that they are the custodians of those very conventions.

And when the ICRC also say there is a customary international law basis to detain, recall that they are in a strong position to gauge the breadth of state practice - in terms of what's happening on the ground in armed conflicts across the world - as well as to appreciate the accompanying *opinio iuris*, not least from what states say in confidential discussions.

The ICRC has also conducted numerous regional workshops specifically to discuss approaches to NIAC detention and, lest we forget, have been conducting detainee visit for 140 years. In 2016 the ICRC conducted 33,000 visits of individual detainees across 98 countries.

The second development was at the 32nd International Conference of the International Red Cross and Red Crescent Movement in December 2015 – the supreme deliberative body of that Movement. Under

consideration at that Conference was a draft resolution on detention. The draft resolution was debated and specifically amended to address this very issue of IHL authorisation. All 169 States and 185 National Red Cross and Red Crescent Societies in attendance adopted by consensus the following wording in the first preambular paragraph to that resolution on detention, it affirmed that:

[...] mindful that deprivation of liberty is an ordinary and expected occurrence in armed conflict, and that under international humanitarian law (IHL) States have, in all forms of armed conflict [i.e. IACs and NIACs], both the power to detain and the obligation to provide protection and to respect applicable legal safeguards, including against unlawful detention for all persons deprived of their liberty.

Whatever academic leanings you may have, you cannot ignore that that is a compelling statement of what States - and the Red Cross movement - believe the position is under IHL. Whether that be in terms of what states consider the appropriate interpretation or application of the treaties to be (article 31(3)(a)/(b)), or in terms of state practice/*opinio juris* for the formulation of CIL, or, as per the ICRC perspective, in terms of both.

Substantive arguments

Against that backdrop, let's now consider the substantive arguments. Why have states and the ICRC said there is a power to detain in NIACs under IHL?

Ubiquitous

Firstly, detention in all forms of armed conflict is ubiquitous. The US Supreme Court in *Hamdi* described detention as a fundamental incident of armed conflict and UK's Supreme Court in *Al Waheed* cited with approval a statement of the ICRC President stipulating that:

Deprivation of liberty is a reality of war. Whether detention is carried out by states or by non-state armed groups, whether it is imposed on military personnel or on civilians, it is certain to occur in the vast majority of armed conflicts.

(Statement, 27 April 2015)

Of course ubiquity, in its own right, is not to be confused with authority, but ubiquity can indicate that something is also inherent in armed conflicts and, as such, woven into the fabric of the accompanying legal framework.

Thus viewed, the various explicit references to detention/internment in CA3 and AP2 might be taken to imply the power to detain [POWERPOINT]; a power which is not – of course - in question in IACs. This is the treaty-based argument in support of the power - an argument also endorsed by Professor Sandesh Sivakumaran in his seminal book “The Law of Non-International Armed Conflict”.

What the critics say, however, is that whilst detention might be a common feature in NIACs it is not an inherent power in IHL. Yes, detention happens and IHL recognises that, but any authorisation comes from elsewhere. IHL merely regulates the practice of detention in NIACs.

As you’ll hear more eloquently from Lawrence, the argument rests on the absence of any express authorisation in the CA3 and AP2 – in stark contrast to the provisions governing detention in IACs - in conjunction with an “object and purpose” interpretation of those treaties.

Essentially, states were reluctant to allow international law to overly prescribe internal conflicts out of sovereignty concerns, and were particularly eager to avoid empowering or legitimising insurgents. Authority to detain - so the argument goes - was deliberately omitted from the express and implied framework and those same concerns continue to be a barrier to the formulation of CIL today.

To put it another way, one cannot simply invoke the Lotus principle of international law to equate the permissibility of non-prohibited action within IHL with positive authority for such action beyond IHL because of this deliberate and glaring hole in IHL.

A fortiori

The typical rejoinder from the likes of me is the “*a fortiori*” argument. That if you can kill in NIACs as a matter of IHL, you must surely be able to detain.

Now some sceptics accept the force of this argument at least insofar as it applies to the killing or detention of fighters. Whilst that is a significant concession some still protest the broader argument is undermined because the category of persons who are detainable in accordance with IHL is wider than the category of persons who are targetable.

To my mind, that rests on an unduly literal reading of the argument. If you accept the power to use lethal force as a matter of IHL you accept the

underlying authorising (as well as limiting) nature of military necessity. It is that same military necessity which underpins the detention of civilians posing an imperative threat in IACs notwithstanding they are not targetable.

Other sceptics, like the UK Court of Appeal, accepted the logical force of the “*a fortiori*” argument but rejected the idea that international law is logical because of the sovereignty concerns previously mentioned. It’s a logical but not legal *sequitur*.

And a third category of sceptics like, if I’m not mistaken, Lawrence, reject the fundamental premise of the “*a fortiori*” argument that if you can kill you can detain. They reject the idea that IHL even accords states the right to kill in NIACs. Like detention, they say, IHL merely regulates force.

Military necessity

That is, I think, the most coherent objection but it is a remarkably bold assertion given the intrinsic role of offensive operations in NIACs. Let’s not forget, by way of context, that the legal test for a non-international armed conflict obviously requires there to be intensity of hostilities.

But more importantly to this debate it is a point of view which turns on its head the customary international law principle of military necessity that runs through IHL – both in IACs and NIACs.

The permissive – as well as limiting - nature of military necessity was set out by the United States Military Tribunal at Nuremberg in the Hostages case and runs through the Tablada judgment of the Inter-American Commission on Human Rights:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger. [...] The Commission believes that petitioners misperceive the practical and legal consequences that ensued with respect to the application of these rules to those MTP members who participated in the Tablada attack. Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack to the same extent as combatants [...]. The Commission wishes to emphasize,

however, that the persons who participated in the attack on the military base were legitimate military targets only for such time as they actively participated in the fighting. Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence.

Within IHL's constraints "military necessity permits force and the killing of enemies; it sanctions measures necessary to protect one's forces; it allows capture; it confers legitimacy and legality upon attacks". Military necessity, in other words, is more than simply an expression of what is and isn't prohibited as a matter of IHL, it is an expression of what is authorised within the conduct of hostilities in armed conflicts as a matter of IHL.

Humanity

But I also think Lawrence's viewpoint has significant implications for the principle of humanity, sometimes understood as the dialectical counterpart of military necessity.

A prohibition on refusing quarter, in effect a positive obligation to accept surrender under IHL, surely envisages the detention of such insurgents. The clear implication of that must be that there's a power to hold such insurgents under IHL. IHL cannot be agnostic about authority to detain if detention is required under IHL.

Let's take it a step further and consider a scenario familiar to many operators in the room. Most people accept that once you have someone in your custody – like the overpowered insurgent – there is some sort of *non-refoulement* obligation (whether as a matter of IHL or IHRL).

But if we are operating in war-torn countries, there are very often real risks of mistreatment or flagrant denials of justice associated with transferring detainees to the host state. These create legal barriers to transfer – which would put states in a catch 22 situation if they could neither transfer nor detain themselves. Of course, states can't simply release dangerous insurgents who pose a considerable risk to local populations and to states' own personnel for obvious military and humanitarian reasons - the so-called revolving door scenario. And if states did release them nonetheless, the absurdity would be laid bare as functional members of organised armed groups would shortly revert to being targetable under IHL in most people's view. IHL's power to detain resolves this.

Status

What is needed is an alternative explanation that reconciles the undoubted concerns states have had about affording legitimacy or powers to NSAs in NIACs with what are surely the inherent features of IHL without diluting the rigour of both military necessity and humanity.

One explanation is perhaps offered by the fact that IHL is without prejudice regarding the legal status of the parties to NIACs; and recalling that it is legality or authority which we are ultimately concerned with in this debate. «The application of the preceding provisions shall not affect the legal status of the Parties to the conflict» (Common Article 3).

It's pretty clear that the equality principle of IHL does not override that express provision nor require that states consider themselves as equally unprivileged as NSAs, to level down, so to speak.

So, instead of interpreting states' concerns with NSAs as necessitating a deliberate omission of any authority or status from IHL, some have suggested that they can instead be understood as preserving their own legal rights under international law - as states - a status that is obviously not afforded to NSAs.

This brings us back to the International Conference. Recall the deliberate construction of the detention resolution, referring only to states powers' to detain under IHL in all forms of armed conflict. That neatly avoids the controversy of legitimising or empowering NSAs in NIACs whilst recognising the inherent powers of IHL.

Convergence

And for those not convinced of the historical, logical or textual arguments, it's worth recalling Tadic and the wider trend of convergence that has been taking place between the laws of IACs and NIACs. Note that the adoption from GC4 of the test for internment on imperative grounds of security would represent not "a full and mechanical transplant" as Tadic warns against doing, but would be a measured reflection of the shared essence between the two forms of armed conflict (Tadić at §126). Note again that a CIL rule would only be exercisable by states, thereby overcoming those sovereignty concerns.

Note also, that even if historically states had deliberately decided that international law should not provide authorisation for detention in what were envisaged to be purely internal armed conflicts, that same rationale would not necessarily apply today in an era of internationalised NIACs –

factually occurring overseas yet legally still considered under the NIAC IHL framework. Moreover, the *jus ad bellum* might be thought by some to plug that sovereignty deficit in that internationalised context.

Points for rebuttal?

What Lawrence and others say is that the authority to use offensive force or to detain comes from elsewhere – namely specific provisions from domestic law or certain UNSCRs.

But many domestic authorities – like the Royal Prerogative or certain executive orders – are primarily constitutional authorities to deploy the armed forces (whether to armed conflicts or peacekeeping operations), without prejudice to specific provisions as to lethal force or detention. It is only when they are interpreted in light of prevailing IHL (in the context of armed conflicts), and what are understood as the authorities and permissions of IHL, that we get targeting directives and offensive rules of engagement. If IHL was agnostic as to authority to kill we'd surely be having the same debate about open-ended domestic authority as we are here about IHL.

But IHL is not understood to be agnostic. That's why coalitions involving dozens of countries, with completely different domestic laws, routinely operate under the same offensive ROE, including ROE with provisions for status-based targeting. Multinational organisations like NATO will have offensive ROE - indeed standing ROE - irrespective of domestic legal bases or the possibility of UNSCRs. What does one coalition partner know of another's domestic authority to use offensive force or to detain? In Lawrence's view, might they even risk aiding or assisting an internationally unlawful act of allies, under IHRL, absent that domestic authority?

Moreover, the possibility of authority from UNSCRs, whilst welcome, does not address all those international operations under article 51 of the Charter.

Legal policy issues

There are practical difficulties of classification between different forms of armed conflict. If domestic law had the role Lawrence envisages would this lead to further fragmentation of law and practice and would that be desirable? Would that discourage detention? Would that encourage more

kinetic approaches? There are difficulties of reconciling Lawrence's approach with IHRL.

ECHR objections

In this context IHL authority to detain is to the IHRL requirement of legality what mere regulation is to the prohibition on arbitrariness.

Under the ECHR, the exhaustive grounds for detention exclude internment. Whilst the Grand Chamber recognised that those categories are capable of being modified by international law and specifically IHL, it would only work to the extent it is agreed that IHL provides for such detention (see Hassan).

A domestic authority, as noted by Lawrence, is not capable of modifying article 5(1) under that analysis which in part relies on a harmonious interpretation of the international legal landscape (article 31(3) Vienna Convention on the Law of Treaties (VCLT)).

Whilst any such domestic power could be accompanied by derogation, the threshold for derogation is high and the UK House of Lords and Supreme Court expressed doubt that it could be invoked in respect of armed conflicts overseas not posing a threat to the life of the UK. It might not be available for all forms of NIAC detention so it wouldn't be a complete answer, besides no signatory of the ECHR has ever derogated in respect of overseas operations.