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

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Grounds and procedures for deprivation of liberty in times of IAC and NIAC – existing law and policy proposals¹

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I am very pleased to be here and speak about the topic of grounds and
procedures for deprivation of liberty.

I would like to start by saying something which is obvious but maybe
overlooked nevertheless, which is that while most of IHL, particularly the
Geneva Conventions III and IV, deal with deprivation of liberty², there is
not a single definition for detention, internment, criminal detention, arrest.
Definitions do not exist and this is part of the reason why we are struggling
with some of the issues that I shall be talking about.

I will be speaking about internment, one of the obvious types of
deprivation of liberty mentioned in IHL treaties, or rather regulated and
even authorised by IHL treaties, which is the non-criminal detention of a
person for serious reasons of security. As we know, this is a particularly an

¹ This text has not been revised by the author and it is based on the transcript as well as
on the talking points presented during the Round Table.

² 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.

IHL-related form of detention, a non-criminal detention of a person who is believed to represent a security threat. It may occur, as we heard previously, in both international and non-international conflict, the difference being, that international conflict provides far more rules than NIAC.

By way of reminder, there are two types of armed conflicts under IHL. International armed conflicts are those waged between States³, or between a State and a national liberation movement⁴ provided the requisite conditions have been fulfilled⁵. 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 duration⁶. 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 still 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 groups⁷ or between such groups themselves⁸. 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 NIAC⁹. The most important sources of IHL governing non-international armed conflicts are Article 3 Common

³ 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.

⁴ *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).

⁵ *Ibid.*, art. 96(3).

⁶ 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.

⁷ 1949 Geneva Conventions, *supra* note 2, Common Article 3; *Protocol Additional to the Geneva Conventions of 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).

⁸ 1949 Geneva Conventions, *supra* note 2, Common Article 3.

⁹ See ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T (7 May 1997), para.s 561-568; ICTY, *The Prosecutor v. Limaj and others*, Judgment, IT-03-66-T (30 November 2005), para.s 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), para.s 199-203.

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 States, 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.

Let me just say a few words about international armed conflict (IAC). Prisoners of war are interned and are actually internees rather than detainees and the Third Convention provides an explicit legal basis for their detention in article 21 by saying “prisoners of war may be interned”, but it doesn’t say why. The Convention doesn’t say “it is because they represent a serious security threat”. It is status-based detention, which starts from the obvious notion that these are people who are *per se* security threats, who are POWs, captured combatants, members of the opposing armed forces in an international armed conflict; and, therefore, their detention is necessary until the end of active hostilities. Otherwise, they would go back to the fight. So, one of the specificities of POW detention is that there is no process as such. Their detention is considered lawful by the very fact of their representing and acknowledging to represent a security threat¹⁰.

With respect to civilians the situation is a little different. 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. The Fourth Geneva Convention also allows the

¹⁰ POWs 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 has “the right to participate directly in hostilities”.¹⁵ This means that he or she may use force 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.

internment of protected persons¹¹, for example, civilians, under certain circumstances. Geneva Convention IV (GC IV) also provides an explicit legal basis for such detention, and it provides the grounds as well as the process for detention of civilians.

As regards grounds, it is a standard that amounts to either absolute necessity or imperative reasons of security, depending on where the civilian may be interned. The absolute necessity and imperative reasons of security are generally understood to mean the same thing in terms of a legal standard.

Geneva Convention IV importantly leaves a wide space to states to determine what specific activity constitutes an imperative security threat or makes internment absolutely necessary. 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 IHL¹². Clearly, while the Convention, again, doesn't say what it is, direct participation in hostilities by a civilian is obviously a security threat to the detaining power. But it is not just direct participation in hostilities; other acts will need that standard too. So, it may be anything from, for example, financing combat operations, espionage and a range of other activities that the detaining state in an international armed conflict thinks that the civilian is conducting or belongs to the opposing side and for which a civilian may be interned for security reasons.

But there are procedures provided for civilian internment in IAC and they boil down to the fact that "any decision on internment must be reconsidered, as soon as possible, by a court or administrative board". Once again, depending on the territory on which a civilian is interned, the wording slightly differs but essentially means that civilian internment must be reconsidered initially, very quickly after a decision is made, and then periodically, at least every six months. Civilian internment must cease as

¹¹ Internment of civilians: Under the Fourth Geneva Convention, internment - and assigned residence - are the severest "measures of control" 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").

¹² 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).

soon as the reasons which necessitated it no longer exist¹³. It must in any event end “as soon as possible after the close of hostilities”¹⁴. Unjustifiable delay in the repatriation of civilians is also a grave breach of Additional Protocol I¹⁵.

Therefore, there are two issues related to civilian detention in international armed conflict that I would like to raise. One is: when does internment begin? I have no answer and don't know if there is one, so, I quote the treaty: «Any decision on internment must be reconsidered, as soon as possible, by a court or administrative board». I shall come to the Court and Board later. But the question is: When is the decision made and when does internment begin? I have posed this question to legal advisers of the militaries and they look at me and say “What?”. There's not a huge amount of thinking about this, but it's not a capricious question in any shape or form.

The question arises because in practice we have situations, particularly now in extra-territorial operations, where a person is picked up, transferred to another country, transferred to the original country. Nobody has decided his or her status, so, is this internment, or what is it at the end of the day? When is he or she going to be transferred into criminal detention? So, the question: When does internment begin? still remains and by internment, I mean a situation of long-term detention which requires procedural grounds and procedural safeguards¹⁶.

The ICRC has its own idea of when it begins, but it's not a matter of public records, and this is something that we will be doing and thinking about further. I think it is an open question. It didn't used to be, but because

¹³ *Fourth Geneva Convention*, supra note 24, art. 132(1); AP I, supra note 3, art. 75(3).

¹⁴ *Fourth Geneva Convention*, supra note 24, art.s 46(1) and 133(1).

¹⁵ 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.

¹⁶ 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 treaties¹⁰ provide that anyone detained, for whatever reason, has the right to challenge the lawfulness of his or her detention¹¹ (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.

of what we're seeing on the ground and the number of people who don't know, who have no process and yet are being shunted around, the need to consider the issue has been raised.

The second open question is that some state doctrines or policy documents related to international armed conflict give a definition for civilian internees under GC IV and then another category refers to "Unprivileged belligerents, also civilians".

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 is 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 sufficient legal basis for internment, which means that States do not have to enact additional domestic legislation to provide for a legal basis¹⁷.

Now, again, I don't want to go into the unprivileged belligerent versus civilian, I'm just talking about the issue of review and my question is the following: I understand, of course, that unprivileged belligerents are persons who take a direct part in hostility or may conduct other pernicious activities against the security of the detaining State but then, who are civilian internees, outside that category? If the standard for everyone is imperative reasons of security, then why is there a separate civilian internee category? And whenever we've asked, "Who are these folks?" – given the fact that, as we know, you cannot have collective internment of civilians, it always has to be an individual assessment. Therefore, there's always and has to be an individual assessment of whether a person represents a security threat – this remains unclear to me. Again, I'm not going into the politics of civilians versus unlawful belligerents, I'm talking about what the definition means in terms of internment or not.

Grounds and procedures in non-international armed conflicts, leaving aside the issue of legal authority to detain, are not explicitly provided for in the law. However, the fact and the possibility as well as the authorisation for internment are mentioned in both Common Article 3 and Additional Protocol II.

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,

¹⁷ 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.

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 reflect customary IHL as well - also governs deprivation of liberty in NIAC. Article 4 (1) of the Protocol lists fundamental guarantees for all persons who do not take direct part in hostilities or who have ceased to take a direct part, “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 conflict¹⁸. 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”¹⁹. 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 restricted²⁰. 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”²¹. Additional Protocol II contains further references to deprivation of liberty for reasons related to the armed conflict as well²².

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

¹⁸ *AP II*, supra note 6, art. 5(1).

¹⁹ Commentary on the Additional Protocols, supra note 18, para. 4568.

²⁰ *AP II*, supra note 6, art. 5(2).

²¹ Commentary on the Additional Protocols, supra note 18, para. 4582.

²² See *AP II*, supra note 6, art. 5(3) and (4) and art. 6

to the paucity of IHL, there are also unresolved issues related to the application of human rights law²³, some of which are mentioned below. It is thus submitted that the legal 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.

We had operational issues fifteen years ago, as a result of which we issued an institutional position which expressed the grounds for detention in NIAC, the imperative reasons of security, and what the process should be. Regarding our grounds, allow me to say that, while yes, States do have a large margin of appreciation in terms of what specific activity will be considered as an imperative security threat, it is pretty clear to us, and I think it is internationally recognised today, although not in practice, and that's a huge problem, that internment, long-term detention, cannot be decided on based exclusively on the intelligence value a person may have. So, if I don't represent a security threat myself, because I'm unlikely to do something to the detaining power, civilians or whoever else, the fact that I may know something *per se* does not make me internable. It doesn't mean I cannot be taken aside and questioned – but not interned.

The second thing is that internment should not be used entirely as a punishment for past activity, without any indication that that activity will be repeated, and we have situations like that.

Finally, internment should not be used as a general deterrent for the non-participation of other people. Therefore, it should not be used against the person being interned but used to deter others.

In fact with regards to the non-intern aspect of things the US Supreme Court, in either the *Rasoul* or the *Hamdi* judgement, also confirmed that you cannot have internment under the laws of war, purely for intelligence gathering reasons.

In any case, I'd like to raise two more points. One is the issue of traditional NIAC, and our colleague from Niger this morning raised a very important question. In a "traditional" NIAC occurring in the territory of a

²³ 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 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.

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 from²⁴.

While it is, of course, understood that domestic law will provide the legal grounds and process for detention in a situation of traditional non-international conflict, non-state armed group and a State, although I'm not saying this is the Niger case, what happens in many instances that we see, is that States dump the non-state armed group actors or members or whoever they may be, into the criminal justice system. If it functioned, that would be perfectly fine. However, in many cases, it does not function at all and so, you have people languishing for weeks, sometimes years, either without knowing the charges against them or without any charge at all.

What happens alternatively is that, you have *habeas corpus* available in traditional NIACs. We have had situations, where the court system is

²⁴ 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.

functioning. There is a court, the State brings a militant before the court and the judges and the lawyers are simply too frightened to take the case. They know that if they don't release the person, their family or themselves will be in grave danger. What happens as a result? The military holds on to these people, they never bring them out of the dark, because they say, "If we bring them to the courts, the courts release them".

What I'm trying to say is that there are many, many specific situations of detention that can happen in relation to armed conflicts, and that even for States that otherwise think that criminal justice may be the only avenue – and it should be an avenue – and, of course, *habeas corpus* must remain an avenue – it may be useful in certain circumstances to have within the military, domestic law or military regulations, or whatever, grounds and process for administrative review by the military. At the end of the day, this is non-security, non-criminal detention. People can only be held if constant and periodic review shows that they need to be, otherwise criminal detention may mean that they be put away for a very long period of time. It can ease the pressure on huge prison overcrowding in many countries and it can ease the pressure on the criminal justice system itself.

So, on very few occasions we have actually been in a position to say to the States that are overwhelmed, "Why don't you try this?". There are some cases where we actually had the military bring people out from the dark, because they don't want to bring them to the courts. But after administrative review, they have realized, for example, that in sweeps they have captured a huge number of people or a significant number of people who should never have been there in the first place.

So, I guess what I'm saying is one needs to be pragmatic about this. There are parallel review systems that should function in NIAC. Administrative review can be one, *habeas corpus* is another and criminal justice is the third.

Finally, as regards extra-territorial NIAC, 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 States, 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 NIAC²⁵. One view is that a legal

²⁵ 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>

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 implicitly²⁶. 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.

Therefore, *vis-à-vis* legal basis there is a patchwork of different opinions and as regards grounds and process there's even more of a patchwork. Quite frankly, it looks unacceptable. Because if you are a detainee in a host country, and you're a national of the host country, and you have an intervening or assisting force or forces, the treatment and rather the procedural safeguards of that person will depend entirely on national law.

For NATO States, for example, armed detention is a national prerogative and that any guidance that may exist – and it's good that it's coming out – is nevertheless non-legally binding. So, as the ICRC visits various places of extra-territorial multinational detention, we've been faced with various systems. Some have person-in-person review, with a body doing the review and personal representatives; others have file review and no access of the detainee to the body that is actually undertaking the internment review.

So, this has become a real humanitarian issue for some States as you heard this morning because of domestic cases, and for the European Court of Human Rights it has become a legal issue as well. And yet, as our director, Helen Durham, said this morning, regardless of the fact that it's fairly clear that international collective thinking and results on standards on grounds and process on detention are obviously necessary, there does not seem to be a will to do so and that is incredibly regrettable.

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 Detention²⁷ in Armed Conflict and Other

²⁶ See, e.g., Judgment of a UK High Court in *Mohammed v Ministry of Defence & Ors* [2014] EWHC 1369 (QB), 2 May 2014, para.s 22-293, at: <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf>

²⁷ 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.

Situations of Violence”²⁸ (hereafter “ICRC guidelines”). The rules formulated are based on law and policy²⁹, and are meant to be implemented in a manner that takes into account the specific circumstances at hand³⁰. 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 violence³¹, including NIAC. This policy 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, is 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 Convention³². 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 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

²⁸ 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

²⁹ 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.

³⁰ The guidelines are also meant to be contextually applied, if and when a non-State armed group non-criminally detains/interns persons for security reasons related to the armed conflict.

³¹ The guidelines do not cover POW detention, outlined above.

³² *Fourth Geneva Convention*, supra note 24, art. 78.

the imperative reasons of security standard are high, and careful evaluation of whether it has been met must take place in relation to each person detained.

In relation to the process regarding procedural safeguards for detention, we essentially try to be very pragmatic. Its guidelines are based on law and policy, mainly IHL, and I will just mention the three or four main ones.

Firstly, for internment, of course, a person needs to be told as promptly as possible about the reasons for his/her internment, in a language that he/she understands. An internee likewise has the right to challenge, with the least possible delay, the lawfulness of his or her detention³³.

Secondly, the initial internment review needs to be done promptly by an independent or impartial body³⁴ – we deliberately said independent or impartial body, we didn't say court. It will depend on the circumstances whether we will operationally tell a State that a court should or should not be involved– there will be cases where courts don't exist or it's not feasible and an extra-territorial detention will most often be the case. 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 attention³⁵. Assistance should be provided whenever feasible, but other modalities to ensure expert legal assistance may be considered as well.

Thirdly, there must be a periodic review, at least twice yearly, of the initial review decision to maintain detention. Our sense is also that people – detainees, internees – should be able to come before any administrative body in person and that, wherever feasible, they should be able to have some access to some form of legal advice, including personal representatives. 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 reviews are also to be applied for periodical reviews.

³³ For the legal sources and rationale of the ICRC's formulation of this principle see ICRC Guidelines, supra note 47, pp. 385-386.

³⁴ For the legal sources and rationale of the ICRC's formulation of this principle see ICRC Guidelines. Ibid., pp. 386-387.

³⁵ See supra note 16.

So, these are guidelines that we put out some time ago and I'm happy to say that there have been States who have incorporated some of them into their doctrines or military manuals. But I repeat this all remains policy at a national level so it is not legally binding at the national level as far as we know and there are no guidelines at the international level of a similar nature that would regulate this issue. Yes, the Copenhagen guidelines exist related to security detention. A rather small group of States were involved and it did not go hugely far in terms of acceptance, or even awareness.

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 in Geneva in November 2011. Based on Resolution 1 of the Conference, the organization is undertaking a process of research and consultations³⁶ with States, and other relevant actors, and was tasked with presenting the 32nd International Conference³⁷, 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.

So, if there's one point that I would like to end on it is simply to say that, on the one hand, planning for detention – and by that I mean for grounds and process in detention – is necessary before any armed conflict erupts or occurs because there is no chance that there will not be detainees, and on the other hand, detention must not be too complicated. We know

³⁶ 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>

³⁷ 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.

more than anecdotally, what John Swords mentioned as a “may happen” – which is where the State simply uses kinetic force and kills rather than detains. And it’s not a good policy to constrain States in armed conflict not to detain.

In fact, a balance needs to be found between on the one hand, the exigency of detention in armed conflict, in particular, non-international armed conflict, and on the other hand, the detainee’s rights through procedural safeguards. However, the procedure should not be so complicated that States would be entirely put off organizing detention.