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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 proposals

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I am very pleased to be here and speak on the topic of grounds and procedures for deprivation of liberty in armed conflict.

I would like to start by saying something that is obvious but may be overlooked nevertheless, which is that while most of IHL, particularly Geneva Conventions III and IV, deals with deprivation of liberty[1] the treaties do not contain a definition of what that is, but use various terms such as detention, internment, criminal detention, arrest, etc. This lack is perhaps 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 types of deprivation of liberty regulated and authorised by IHL treaties, which is the non-criminal detention of a person for serious reasons of security. It may occur, as we heard previously, in both international and non-international conflicts, the

[1] 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.

difference being that IHL provides far more rules on internment in IAC than in NIAC.

By way of reminder, there are two types of armed conflicts under IHL. International armed conflicts are those waged between States[2], or between a State and a national liberation movement[3] provided the requisite conditions have been fulfilled[4]. It is generally accepted that an international armed conflict is triggered when a "difference" between two States leads to the use of armed force by one against the other, regardless of the intensity of fighting or its duration[5]. IHL governing international armed conflict is comprised of a series of treaties, the most important of which are the 1949 Geneva Conventions for the protection of victims of war and the First Additional Protocol thereto of 1977. International armed conflicts were for centuries governed primarily by rules of customary IHL, which 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 groups[6]or between such groups themselves[7]. IHL does not specify the criteria that must be met for the threshold of non-international armed conflict to be reached, but they have been identified in practice, jurisprudence and doctrine. It is generally accepted that a certain intensity of hostilities and the requisite organization of the non-State armed group are conditions that must be fulfilled in order to classify a situation of violence as a NIAC[8]. The most important sources of IHL governing non-international armed conflicts are Article 3 Common to the 1949 Geneva Conventions, Additional Protocol II thereto of 1977, and customary IHL.

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

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

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

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

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

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

[8] See ICTY, *The Prosecutor v. DuskoTadic*, Judgment, IT-94-1-T (7 May 1997), para.s 561-568; ICTY, *TheProsecutor 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.

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 (POWs) are actually "internees" rather than "detainees". The Third Geneva Convention provides an explicit legal basis for their internment in article 21 by saying "prisoners of war may be interned", but it doesn't specify the reason. The Convention doesn't do so because combatants of the opposing side represent a serious security threat *ipso facto* and may be deprived of liberty upon capture. POW internment is status-based. This type of detention can last until the end of active hostilities because it is understood that POWs would otherwise go back to the fight and in many cases have a duty to do so. So, one of the specificities of POW detention is that there is no process to review the lawfulness of their internment as such. POW detention is considered lawful by the very fact of their representing and being acknowledged as representing a serious security threat for the detaining power[9].

With respect to civilians the situation is different. In contemporary warfare civilians are, for example, often not detained in direct combat, but on the basis of intelligence information suggesting that they represent a security threat. The purpose of a review process is to enable a determination of the security risk posed, including by evaluation of the reliability of available information, and to assess whether the person's activity meets the high legal standard that would justify internment under

[9]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.

the Fourth Geneva Convention.[10], The Fourth Geneva Convention provides an explicit legal basis for civilian internment and provides the grounds as well as the review process that must be applied.

As regards grounds, it is a standard that amounts to either "absolute necessity" or "imperative reasons of security", depending on where the civilian is interned (in a state's own or in occupied territory). Absolute necessity and imperative reasons of security are generally understood to mean the same thing.

The Fourth Convention leaves room for 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 (the "combatant's privilege"), civilians who do so can be prosecuted for having taken up arms and for all acts of violence committed during such participation, as well as for war crimes or other crimes under international law that might have been committed. This rule is the same in international and non-international armed conflict. Civilian direct participation is not a violation of IHL and is not a war crime *per se* under either treaty or customary IHL[11]. While the Convention doesn't define what constitutes civilian direct participation in hostilities, this activity obviously constitutes a serious security threat for the opposing side. But it is not just direct participation in hostilities that can give rise to civilian internment; other acts can meet that standard too. It may be, for example, financing combat operations, espionage, and a range of other activities that the detaining state in an international armed conflict believes the civilian is conducting for the opposing side and that are seriously prejudicial to its security.

In contrast to POW internment there are procedures which must be observed in all cases of civilian internment in IAC. These may be encapsulated as: any decision on internment must be reconsidered, as soon as possible, by a court or administrative board and then periodically reviewed. Depending on the territory on which a civilian is interned (own or occupied), the wording slightly differs but it essentially means that civilian internment must be reconsidered initially, very quickly after an internment decision is made, and then periodically, at least every six months. Civilian internment must cease as soon as the reasons which

[10]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").

[11] 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).

necessitated it no longer exist[12]. It must in any event end "as soon as possible after the close of hostilities"[13].

There are two issues related to civilian internment 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. I have not heard one from military legal advisers to whom this question has been posed. There is 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 there are situations, particularly in extra-territorial operations, where a person is picked up, transferred to another assisting country or to the host state, with the process taking some time. What is this detention? Is it internment or something else? If so, what? Not to belabour the point, the question remains as to when internment is deemed to begin.

The second question relates to the fact that some state doctrines or policy documents applicable in international armed conflict give a definition for civilian internees in accordance with the Fourth Convention and then include another category, that of "unprivileged belligerents".

I don't want to go into the unprivileged belligerent versus civilian debate, but my question is as follows: if unprivileged belligerents are persons who take a direct part in hostilities and if under IHL civilians may be interned for other activities seriously harmful to security, then who are the additional "civilian internees", who will also meet the absolute necessity or imperative reasons of security standard? In other words, if the standard is the same for everyone, what is the basis for the two separate categories? It should be recalled that the ICRC does not share the view that IHL in IAC permits this dichotomy. For the ICRC, there is no gap between GC 3 and GC 4 and thus all persons captured in international armed conflict who do not enjoy POW status must be treated as civilians.

The grounds and procedures for detention/internment are not explicitly provided for in the IHL of NIAC.

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

[12] *Fourth Geneva Convention*, *supra* note 24, art. 132(1); AP I, *supra* note 3, art. 75(3).
[13] *Fourth Geneva Convention*, *supra* note 24, arts 46(1) and 133(1).

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 conflict[14]. 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"[15]. It should also be noted that article 5 (2) provides for further obligations of "those who are responsible for the internment or detention" of persons whose liberty has been restricted[16]. 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"[17]. Additional Protocol II contains further references to deprivation of liberty for reasons related to the armed conflict as well[18].

As is evident, Common Article 3 is silent on the grounds or procedural safeguards for persons interned in NIAC, even though internment is practiced by both States and non-State armed groups. Additional Protocol II explicitly mentions internment, thus confirming that it is a form of deprivation of liberty inherent to NIAC, but likewise does not refer to the grounds for internment or the procedural rights. Lack of sufficient rules in IHL has become a legal and protection issue over time given that, as already mentioned, NIAC is the prevalent type of armed conflict today and that the typology of NIACs has expanded over the past decade. In addition to the paucity of IHL, there are also unresolved issues related to the application of human rights law[19]. It is thus submitted that the legal

[14] *AP II*, *supra* note 6, art. 5(1).
[15] *Commentary on the Additional Protocols*, *supra* note 18, para. 4568.
[16] *AP II*, *supra* note 6, art. 5(2).
[17] *Commentary on the Additional Protocols*, *supra* note 18, para. 4582.
[18] See *AP II*, *supra* note 6, art. 5(3) and (4) and art. 6
[19] 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

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.

As a result of the IHL gap, and of operational issues we were faced with some years ago and since then, we issued an institutional position on the grounds for detention in NIAC and the process that should be applied (in 2005). Regarding the grounds, allow me to reiterate that states do have a large margin of appreciation in terms of what specific activity will be considered as an imperative security threat. However, it is also clear, and I think widely recognised (although not in practice), that internment, long-term detention, cannot be imposed based exclusively on the intelligence value a person may have. So, if a person does not represent a security threat himself or herself, the fact that he or she may know something does not *per se* make me them "internable". It does not mean they cannot be questioned – but they cannot be interned. In fact even the US Supreme Court (I cannot recall if it was in the Hamdi or Rasul case) cautioned that internment under the laws of war is not allowed for purely for intelligence gathering purposes.

The second observation is that internment should not be used as punishment for past activity, without any indication that such activity will be repeated.

The third observation is that internment should not be used as a general deterrent for others.

I would 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 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,

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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.

continue to apply; there are, however, differing views on whether this obligation may be derogated from[20].

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, what happens in many instances in practice is that States will channel the non-state armed group affiliated actors into the criminal justice system. If the system functioned, that would be perfectly fine. However, in many cases, it does not function, or functions poorly, and as a result there are people languishing in detention for months and sometimes years, either without knowing the charges against them or without any charge at all.

What also happens sometimes is that *habeas corpus* is available in a traditional NIAC. There is a court, the State brings a "militant" before the court, but the lawyers and judges are simply too frightened to process the case. The judges know that if they don't release the person, their family or they themselves may be in grave danger. What happens as a result? The military holds on to detainees and does not bring them before a court, effectively disappearing persons because, they claim, the court will invariably order release.

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[20] 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&L ang=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.

What I'm trying to say is that there are many specific scenarios of detention in NIAC, and that in certain limited cases it may be useful to have provided in the law the grounds and process for administrative review. One may need to pragmatic in order to be protective. Parallel review systems should function in NIAC. Administrative review can be one, *habeas corpus* another and criminal justice a third.

Finally, a few words about 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 NIAC[21]. One view is that a legal basis for internment would have to be explicit, as it is in the Fourth Geneva Convention; in the absence of such a rule, IHL cannot provide it implicitly[22]. 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. However, in order to satisfy the principle of legality, the grounds and process for internment need to be included either in: an agreement between the detaining and host state, in binding standard operating procedures of the detaining state(s) of which the relevant parts are publicly available, or in the host state's domestic law (and in some cases in the assisting state's domestic law). This must be part of the "package".

In practice there is a patchwork of domestic law provisions and practices in extraterritorial NIAC. The grounds and procedural safeguards afforded to detainees will depend on which state in a multinational coalition is holding them.

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[21] 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

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

This has become a real issue for some States as you heard this morning because of domestic litigation, or because of the "threat" of the European Court of Human Rights. And yet, as ICRC Director of Law and Policy Dr.Helen Durham said this morning, regardless of the fact that collective thinking and international standards on grounds and process for detention in NIAC (and not just extraterritorial NIAC) appear necessary, there does not currently seem to be a will by states to do so, which is regrettable.