

# Legal Commentary on the Right to Challenge the Lawfulness of Detention in Armed Conflict

ICJ Commentary on Elements of the UN Working Group on Arbitrary Detention *Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court* Pertaining to Detention in Armed Conflict

September 2015

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International Commission of Jurists  
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## UN Working Group on Arbitrary Detention Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before A Court

### ICJ Legal Commentary on Elements of the Basic Principles and Guidelines Pertaining to Detention in Armed Conflict

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#### BACKGROUND

Under its resolution 20/16 (2012), the UN Human Rights Council requested the Working Group on Arbitrary Detention (the Working Group) to prepare draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty (*habeas corpus*).<sup>1</sup> On 29 April 2015, at the conclusion of a two-year process of deliberations and open consultations, the Working Group adopted the “Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court” (the Basic Principles and Guidelines).<sup>2</sup>

The International Commission of Jurists (ICJ) has welcomed the Basic Principles and Guidelines as a means of assisting States to enhance, in law and in practice, respect for the right to *habeas corpus* or equivalent procedures.<sup>3</sup> Along with many other aspects of the Basic Principles and Guidelines, it has especially welcomed the attention given to the application human rights standards such as Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) alongside international humanitarian law and the related provisions of the document pertaining to detention in armed conflict.

In light of some recent State practices, including in the context of unlawful rendition and secret detention programmes, there is an especially important value in this aspect of the Basic Principles and Guidelines, including for the combating of incommunicado and secret detention, enforced disappearance and torture and other cruel, inhuman or degrading treatment.

This Commentary supports the general approach adopted by the Working Group in its formulation of the Basic Principles and Guidelines as they pertain to detention in armed conflict, and is aimed to provide further explanation and justification for the Working Group’s approach.

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<sup>1</sup> For the purposes of this Commentary, the term ‘*habeas corpus*’ is used to refer generally to remedies and procedures involving challenges to the lawfulness of detention, albeit that the points made herein will also generally apply to equivalent procedures (such as

<sup>2</sup> UN Doc A/HRC/30/37 (2015).

<sup>3</sup> See: ‘ICJ welcomes adoption of Basic Principles and Guidelines in habeas corpus’, 30 April 2015, at URL: <http://www.icj.org/icj-welcomes-adoption-of-basic-principles-and-guidelines-on-habeas-corpus/>.

## APPLICATION OF *HABEAS CORPUS* ALONGSIDE IHL

Principle 16, para 27, reaffirms the complementarity of international humanitarian law (IHL) and international human rights law.

**Principle 16, para 27:**

"All detained persons in a situation of armed conflict as properly characterized under international humanitarian law, or in other circumstances of public danger or other emergency that threatens the independence or security of a State, are guaranteed the exercise of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies. This right and corresponding procedural guarantees complement and mutually strengthen the rules of international humanitarian law."

The general position in situations where two bodies of law apply, reflected in the principle *lex specialis derogat lex generali*, is that the body of law that is more specialized or specific to the situation should be taken to qualify the more general body of law. The rationale is that "because special rules are designed for and targeted at the situation at hand, they are likely to regulate it better and more effectively than more general rules".<sup>4</sup>

That said, the exact meaning and effect of the *lex specialis* principle is contested.<sup>5</sup> The most radical conception of its application, concerning the relationship between IHL and international human rights law, is that of 'total displacement', under which it is argued that, in a situation of armed conflict, IHL is the *lex specialis* and displaces human rights obligations altogether.<sup>6</sup>

It is now well established, however, that the application of IHL does not displace the application of international human rights law. As early as 1970, the UN General Assembly affirmed that: "Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".<sup>7</sup> This principle has been subsequently affirmed in numerous judgments of the International Court of Justice.<sup>8</sup>

In its General Comment on the nature of obligations imposed on States parties to the ICCPR, the Human Rights Committee confirmed that:<sup>9</sup>

"...the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially

<sup>4</sup> As observed by Justice Leggatt in *Mohammed v. Ministry of Defence* (2014) ECWH 1369, para 270.

<sup>5</sup> See, for example: International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702 (2006); Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' and Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law', in Orna Ben-Naftali (Ed), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford Scholarship Online, 2011), chapters 3 and 4 respectively.

<sup>6</sup> This was in part argued, for example, by the United Kingdom in *Mohammed v. Ministry of Defence*, above, para 271.

<sup>7</sup> General Assembly resolution 2675(XXV) (1970), para 1.

<sup>8</sup> See, for example, *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, discussed below.

<sup>9</sup> Human Rights Committee, General Comment No. 31, 'Nature of the general legal obligation imposed on states parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 11.

relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”

The Human Rights Committee has further expressed that: “the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including Article 4 which covers situations of public emergency which threaten the life of the nation”.<sup>10</sup> The International Court of Justice has confirmed this position, stressing that: “the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.<sup>11</sup>

The prevailing view, therefore, is that of complementarity between IHL and international human rights law rather than the displacement of one set of laws in favour of the other. As indicated, the Human Rights Committee has acknowledged that more specific rules of IHL may act as the *lex specialis*, but that both spheres of law are nevertheless “complementary, not mutually exclusive”.<sup>12</sup> The International Court of Justice has explained that this means that the relationship between IHL and international human rights law presents three possible situations:<sup>13</sup>

“...some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”

**Principle 16, para 27, of the Basic Principles and Guidelines thus accurately reflects the prevailing view, including that of the UN General Assembly, the International Court of Justice and the UN Human Rights Committee, among other authoritative sources, as related to the application of habeas corpus alongside IHL.**

## EXTRATERRITORIAL APPLICATION OF THE RIGHT TO HABEAS CORPUS

Principle 16, para 29, reaffirms the extraterritorial application of human rights treaty obligations, as related to the application of *habeas corpus* in the case of persons detained in situations of armed conflict.

**Principle 16, para 29:**

“A State that detains a person in a situation of armed conflict as properly characterized under international humanitarian law, or in other circumstances of public danger or other

<sup>10</sup> Human Rights Committee, *Concluding Observations: Second Periodic Report of Israel*, UN Doc CCPR/CO/78/ISR (2003), para 11.

<sup>11</sup> *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion (1996) ICJ Reports, para 24. See also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Reports, para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits (2005) ICJ Reports, paras 216-220; and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections (2011) ICJ Reports, paras 109 and 149.

<sup>12</sup> Human Rights Committee, General Comment 31, above, para 11.

<sup>13</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above, para 106.

emergency that threatens the independence or security of a State, has by definition that person within its effective control, and thus within its jurisdiction, and shall therefore guarantee the exercise of the right of the detainee to bring proceedings before a court to challenge the arbitrariness or lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies..."

Under general international human rights law, the human rights obligations of States necessarily extend beyond their borders, extraterritorially, although the nature and scope of certain extraterritorial obligations may not always be exactly coterminous with those obtaining within the territory of a State. Numerous judicial and quasi-judicial authorities have affirmed this principle.<sup>14</sup>

Notwithstanding this overriding consensus, a very small number of States do not accept that their obligations under human rights treaties, including under the ICCPR,<sup>15</sup> apply to the conduct of their agents, including their armed forces, when acting beyond the boundaries of the State's territory. The issue here rests with the interpretation of the jurisdictional provisions of human rights treaties.<sup>16</sup> Under Article 2(1) of the ICCPR, each State party "undertakes to respect and ensure to all individuals *within its territory and subject to its jurisdiction*" the rights recognized in the ICCPR (emphasis added). Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) requires states parties to take effective measures to prevent acts of torture "in any territory under its jurisdiction".

The Human Rights Committee and Committee against Torture have both clarified that the obligation under Article 2 of each treaty means that the obligations under the ICCPR and CAT apply to anyone within the "power or effective control" of the State, even in places not situated within the territory of the State.<sup>17</sup> The Committee against Torture has recognised that reference to "any territory" in Article 2(1) of the CAT includes "all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control... and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control".<sup>18</sup> The Human Rights Committee has similarly clarified that: "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent or a State Party assigned to an international peace-keeping or peace-enforcement action".<sup>19</sup>

The International Court of Justice has likewise repeatedly affirmed the extraterritorial application of human rights treaties.<sup>20</sup> The Inter-American

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<sup>14</sup> See, for example, 'Commentary to the Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', (2012) 34 *Human Rights Quarterly* 1084-1169.

<sup>15</sup> This remains the position of the United States – see: Human Rights Committee, *Concluding Observations: Fourth Periodic Report of the United States of America*, UN Doc CCPR/C/USA/CO/4 (2014), para 4.

<sup>16</sup> See Alex Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) *Journal of Conflict & Security Law*, pp. 3-9.

<sup>17</sup> Human Rights Committee, General Comment 31, above, para 10; and Committee against Torture, General Comment No 2, 'Implementation of article 2 by States parties', UN Doc CAT/C/GC/2 (2008), para 7.

<sup>18</sup> Committee against Torture, General Comment 2, *ibid*, para 16.

<sup>19</sup> Human Rights Committee, General Comment 31, above, para 10.

<sup>20</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above, para 109; *Armed Activities on the Territory of the Congo*, above, para 216; and

Commission on Human Rights has similarly affirmed the extraterritorial application of the American Convention on Human Rights, indicating that jurisdiction is engaged where there is “authority and effective control”, irrespective of territorial boundaries.<sup>21</sup>

In the context of detention, it cannot be doubted that a State which detains persons in a situation of armed conflict by definition has those persons within its effective control, and thus within its jurisdiction, such that international human rights law is applicable. The European Court of Human Rights has laid to rest contrary claims, holding that the European Convention on Human Rights (ECHR) was applicable to the situation where United Kingdom forces arrested and detained a suspected combatant during the international phase of the armed conflict in Iraq;<sup>22</sup> and, during the later non-international phase of the armed conflict in Iraq, where British forces had effective control over the operation of a detention facility in Basrah, and over persons held in that facility.<sup>23</sup>

In its recent General Comment No 35 on the right to liberty, the Human Rights Committee further affirmed that: “Given that arrest and detention bring a person within a State’s effective control, States parties must not arbitrarily or unlawfully arrest or detain individuals outside their territory”.<sup>24</sup>

***Principle 16, para 29, of the Basic Principles and Guidelines in this respect reflects unambiguous international and regional jurisprudence pertaining to the extraterritorial application of human rights, and specifically the right to habeas corpus, as applicable in the context of persons detained in armed conflict.***

## **APPLICATION OF HABEAS CORPUS TO CIVILIANS DETAINED DURING AN INTERNATIONAL ARMED CONFLICT**

Principle 16, para 29, and Guideline 17, para 94, reflect procedures for review of internment and assigned residence of ‘protected persons’ (civilians) in an international armed conflict (IAC), as set out in Articles 42 and 78 of Geneva Convention IV and complemented by international human rights law.

### **Principle 16, para 29:**

“...Reconsideration, appeal or periodic review of decisions to intern or place in assigned residence alien civilians in the territory of a party to an international armed conflict, or civilians in an occupied territory, shall comply with the present Basic Principles and Guidelines, including Basic Principle 6 on the court as reviewing body.”

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*Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, above, paras 109 and 149.

<sup>21</sup> See, for example, *Victor Saldano v. Argentina*, Report No. 38/99, Inter-American Commission on Human Rights, OEA/Ser.L/V/II 95 Doc.7 Rev., paras 17 and 19.

<sup>22</sup> *Hassan v United Kingdom* (2014) ECHR 1162, para 80.

<sup>23</sup> *Al-Jedda v. The United Kingdom* (2011) ECHR 1092, para 86. See also *Al-Skeini and Others v. The United Kingdom* (2011) 53 EHRR 18, para 88.

<sup>24</sup> Human Rights Committee, General Comment No 35, ‘Article 9 (Liberty and security of the person)’, UN Doc CCPR/C/GC/35 (2014), para 63. See also: Human Rights Committee, General Comment 31, above, para 10; Human Rights Committee, Communication 52/1979, *Saldías de López v. Uruguay*, UN Doc Supp No 40 (A/36/40) at 176 (1981), paras 12.1–13; Human Rights Committee, Communication 56/1979, *Celiberti de Casariego v. Uruguay*, UN Doc CCPR/C/OP/1 at 92 (1984), paras 10.1–11; and Human Rights Committee, Communications 623, 624, 626 and 627/1995, *Domukovsky et al. v. Georgia*, UN Doc CCPR/C/62/D/623, 624, 626 & 627/1995 (1998), para 18.2.

**Guideline 17, para 94:**

"Where civilians are detained in relation to an international armed conflict, the following conditions are to be ensured:

- (a) "Reconsideration of a decision to intern or to place in assigned residence alien civilians in the territory of a party to an international armed conflict, or civilians in an occupied territory, or appeal in the case of internment or assigned residence, must be undertaken "as soon as possible" or "with the least possible delay". While the meaning of these expressions must be determined on a case-by-case basis, any delay in bringing a person before the court or administrative board must not exceed a few days and must be proportional in the particular context;
- (b) "Although the particular procedures for reconsideration or appeal are to be determined by the detaining or occupying Power, such proceedings must always be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards;
- (c) "Where decisions to intern or to place a civilian in assigned residence are maintained in accordance with the latter proceedings, internment or residential assignment must be periodically reviewed, at least twice a year. Such a review is to be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards;"

**Authority to detain civilians during an IAC**

Although the Basic Principles and Guidelines do not set out the grounds upon which civilians may be lawfully detained in an IAC, it is important to recall these grounds since they are relevant to the question of determining, under procedures for review, the legality of the deprivation of liberty.

Authority for the detention of civilians in an IAC is found in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV). The detention of a civilian, through internment or placing in assigned residence, is authorized in two contexts.

1. The first concerns alien civilians in the territory of a party to the international armed conflict, permissible under Article 42 of Geneva Convention IV "only if the security of the Detaining Power makes [internment or placing in assigned residence of a civilian] absolutely necessary", or if the civilian voluntarily demands this and his or her situation "renders this step necessary".

The International Criminal Tribunal for the former Yugoslavia has interpreted Article 42 as permitting internment only if there are "serious and legitimate reasons" to think that the interned persons may seriously prejudice the security of the Detaining Power by means such as sabotage or espionage.<sup>25</sup>

2. The second situation in which civilians may be interned under Geneva Convention IV concerns civilians in an occupied territory, in which case Article 78 allows the Occupying Power, at the most, to subject civilians to internment or assigned residence within the frontiers of the occupied country "if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons".

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<sup>25</sup> *Prosecutor v. Zejnil Delalić and Others*, Case No: IT-96-21-T, Trial Chamber, 16 November 1998, para 1132.



Where civilians directly participate in hostilities, such civilians may be classified as persons posing a serious threat to security within the meaning of Articles 42 and 78.<sup>26</sup> As noted by the International Committee of the Red Cross (ICRC), such persons “are colloquially called ‘unprivileged belligerents’ (or, incorrectly referred to as ‘unlawful combatants’)”.<sup>27</sup>

The ICRC Pictet Commentary suggests that the internment of protected persons in occupied territories should be even more exceptional than in the case of internment of protected persons within the territory of a party to the conflict.<sup>28</sup>

#### Determining when detention is to end

The internment of civilians in an IAC must cease, according to Article 133(1) of Geneva Convention IV, “as soon as possible after the close of hostilities”. Most importantly, Article 132(1) of Geneva Convention IV provides that an interned civilian must be released “as soon as the reasons which necessitated his internment no longer exist”. This is reinforced by Article 75(3) of the First Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), which includes – as a fundamental guarantee applicable to all persons who are in the power of a party to an IAC – the right to be released “as soon as the circumstances justifying the arrest, detention or internment have ceased to exist”.

Whereas, due to their privileged status, combatants may only be prosecuted for violations of IHL and not for other forms of participation in hostilities, civilians, including those who directly participate hostilities, may be prosecuted for domestic crimes such as acts of violence during hostilities, and should be prosecuted for war crimes and other crimes under international law that might have been committed.<sup>29</sup> For civilians who have been convicted and sentenced to imprisonment, or against whom criminal, non-disciplinary, proceedings are pending, Article 133(2) of Geneva Convention IV acts as an exception to the obligation under Article 133(1) to release interned civilians after the close of hostilities. Such persons may be detained until the close of pending proceedings and until completion of the sentence. This remains a wide discretionary power in the hands of the Detaining or Occupying Power.<sup>30</sup>

#### Unlawful detention as a grave breach of Geneva Convention IV

It should be noted that Article 147 of Geneva Convention IV establishes the “unlawful confinement of a protected person” as a grave breach of Geneva Convention IV. Unjustifiable delay in the repatriation of civilians also constitutes a grave breach of Protocol I.<sup>31</sup> Grave breaches of the Geneva Conventions

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<sup>26</sup> International Committee of the Red Cross, ‘Internment in Armed Conflict: Basic Rules and Challenges’, Opinion Paper, November 2014, URL <<https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>>, p. 4.

<sup>27</sup> Ibid.

<sup>28</sup> International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949. Volume IV* (Geneva: International Committee of the Red Cross, 1958), p. 367.

<sup>29</sup> ICRC Opinion Paper, above, p. 5.

<sup>30</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, above, pp. 515-516.

<sup>31</sup> Additional Protocol I, Article 85(4)(b).

constitute war crimes under Article 8 of the Rome Statute of the International Criminal Court.<sup>32</sup>

### Review of detention of civilians during an IAC

The ICRC Commentary on Articles 42 and 78 of Geneva Convention IV emphasizes that both internment and assigned residence are of an exceptional character and represent the most severe measures that a Detaining or Occupying Power may resort to with respect to protected persons.<sup>33</sup> It is against this background that procedures are established under Articles 43 and 78 to review the internment or assigned residence of protected persons in an IAC. It is those procedures, as complemented by international human rights law, that are reflected in Principle 16, para 29, and Guideline 17, para 94.

The point of such review is to ensure that a protected person is made subject to measures of internment or assigned residence only where this is strictly required, pursuant to the principles of necessity and proportionality, and, in the words of the ICRC Commentary, that “no protected person should be kept in assigned residence or in an internment camp for a longer time than the security of the Detaining State demands”.<sup>34</sup> Concerning internment, the latter point is reflected within Geneva Convention IV and the ICRC’s catalogue of rules of customary IHL. Article 132 obliges a Detaining Power to release all interned civilians “as soon as the reasons which necessitated his internment no longer exist”. It also calls on parties to an IAC to endeavour to conclude agreements for the release, repatriation or accommodation in a neutral country of certain classes of civilian internees, including children, wounded and sick and those that have been detained for a long time. Rule 128(B) of the ICRC’s catalogue of rules of customary international humanitarian law similarly provides that: “Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities”.

#### Review of detention: alien civilians in the territory of a party to the IAC

For alien civilians in the territory of a party to an IAC, who have been interned or placed in assigned residence, Article 43 of Geneva Convention IV sets out a procedure which, as described in the ICRC Commentary, is designed to ensure that parties to an IAC do not go beyond the limits of authorised resort to measures of internment or assigned residence.<sup>35</sup> Article 43 entitles such persons “to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose”.

If the internment or assigned residence is maintained, Article 43 explains that “...the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit”. ***This aspect of Article 43 is reflected in Guideline 17, para 94(c).***

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<sup>32</sup> See also Article 2(g) of the Statute of the International Criminal Tribunal for the former Yugoslavia.

<sup>33</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, above, pp. 257, 260-261 and 368. See also the ICRC’s Opinion Paper, above, p. 4.

<sup>34</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, *ibid*, p. 261.

<sup>35</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, *ibid*, p. 260.

### Timing of the review

Reconsideration under Article 43 of an alien civilian's internment or assigned residence is to be undertaken, in the first instance, "as soon as possible" after the act of internment or assigned residence, and thereafter review of a such decision must take place on a periodic basis (at least twice each year). The expression "as soon as possible" is not defined within Article 43, nor is a specific number of days from the lodging of a petition offered by the Commentary to Geneva Convention IV, although the Commentary notes that the reconsideration must undertaken "at the earliest possible moment" and that the Detaining Power "must never forget that the Convention describes internment and placing in assigned residence as exceptionally severe measures which may be applied only if they are absolutely necessary for the security of the State".<sup>36</sup>

Since Geneva Convention IV is silent on the meaning of the expression "as soon as possible", guidance should be taken from international human rights law. In particular, one can point to the jurisprudence of the Human Rights Committee concerning the meaning of the right in Article 9(3) of the ICCPR to be brought "promptly" before court. Noting that this expression is also not defined, the Human Rights Committee has stated that, while the meaning of the term must be determined on a case-by-case basis, delays in bringing a person before the court must not exceed "a few days".<sup>37</sup> Bearing in mind the protected status of civilians, and the repeated reference to the exceptional nature of civilian internment or assigned residence (throughout Geneva Convention IV, its Commentary and the rules of customary IHL), the same swift approach should apply to initial reconsiderations under Article 43.

***The approaches of the Human Rights Committee and the ICRC Commentary are reflected within Guideline 17, para 94(a), of the Basic Principles and Guidelines.***

### Nature of the reviewing body

Article 43 of Geneva Convention IV refers to reconsideration and periodic review undertaken by "an appropriate court or administrative board". The same expression is used in Article 35, concerning the review of any decision refusing to allow a civilian to leave the territory. A Detaining Power is thereby left with a choice concerning Article 43 reviews, namely whether to authorise a 'court' or an 'administrative board' to undertake such reviews.

It should be emphasised that this is a choice as to the nomenclature and composition of the reviewing authority, but not as to its character. The ICRC Commentary on Article 43 clarifies: "The existence of these alternatives provides sufficient flexibility to take into account the usage in different States". The Commentary continues to explain that, even in the case of an 'administrative' decision under Article 43, such a decision "must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality".<sup>38</sup>

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<sup>36</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV, ibid, pp. 260-261.*

<sup>37</sup> General Comment 35, above, para 33.

<sup>38</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV, above, p. 260.*

This interpretation is consistent with the approach of drawing guidance from international human rights law as to the meaning of IHL, in this case drawing from the requirement in Article 14(1) of the ICCPR that the determination of a person's rights and obligations shall be made by a "competent, independent and impartial tribunal established by law". All determinations under Article 43 must therefore be made by a body, whether a court or administrative board, that satisfies the essential requirements of competence, impartiality and independence, and its processes must include and respect fundamental procedural safeguards.<sup>39</sup>

***The approaches of the Human Rights Committee, the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Court of Human Rights and the ICRC Commentary are reflected within Principle 16, para 29, and Guideline 17, para 94(b), of the Basic Principles and Guidelines.***

#### Review of detention: civilians in an occupied territory

With respect to civilians in an occupied territory who have been interned or placed in assigned residence, Article 78 of Geneva Convention IV provides that:

"Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay...".

If a decision to intern or place in assigned residence is upheld, this "...shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power". ***This aspect of Article 78 is reflected in Guideline 17, para 94(c).***

#### Timing of the appeal

As to the timing of any appeal against a decision regarding assigned residence or internment, Article 78 demands that the appeal is to be decided "with the least possible delay".

The Inter-American Commission on Human Rights, in *Coard et al v United States*, considered the application of Article 78 to the arrest and detention of 17 claimants by United States forces during the first days of a military invasion of Grenada in 1983. The petitioners were held in US custody for a total of nine to 12 days after the cessation of hostilities without access to any review of their detention. The Commission referred to the language of Article 78 as reflecting minimum safeguards against arbitrary detention.<sup>40</sup>

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<sup>39</sup> See for instance: Human Rights Committee, *Vuolanne v. Finland*, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), paras 7.2 and 9.6; European Court of Human Rights (Grand Chamber), *D.N. v. Switzerland*, App No 27154/95 (29 March 2001), para 42; Inter-American Court of Human Rights, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Series C No 170 (21 November 2007), paras 128-130; African Commission on Human and Peoples' Rights, *Constitutional Rights Project v. Nigeria*, No 153/96, 13th Activity Report (15 November 1999) paras 15-18. See also Human Rights Committee, General Comment No 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial', UN Doc CCPR/C/GC/32 (2007), paras 19-24; African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principles A(4) and A(5).

<sup>40</sup> *Coard et al v. United States*, Report No. 109/99 - Case 10.951 (1999), para 54.

Applying the approach of interpreting IHL provisions consistently with international human rights law, it found that:<sup>41</sup>

“This delay, which is not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention”.

***The approach of the Inter-American Commission is reflected within Guideline 17, para 94(a), of the Basic Principles and Guidelines.***

*Nature of the reviewing body*

The right of a civilian to appeal against a decision regarding residential assignment or internment does not expressly state, within Article 78, the nature of the body that is to consider the appeal.

Unlike Article 43 concerning alien civilians in the territory of a party to the conflict, Article 78 does not refer to the options of appeal by a ‘court’ or ‘administrative body’. Article 78 is in this way more vague than Article 43 and thus even more reliant upon international human rights law for guidance as to its meaning. The ICRC Commentary explains that it is for the Occupying Power to decide on the procedure to be adopted under Article 78, but notes that it must observe the stipulations in Article 43.<sup>42</sup> As mentioned earlier, the Commentary speaks of the Article 43 procedure as requiring decisions by a body that offers the necessary guarantees of independence and impartiality, supplemented by Articles 9(4) and 14(1) of the ICCPR to require that the body must satisfy the essential requirements of competence, impartiality and independence, and its processes must include and respect fundamental procedural safeguards.

Consistent with this approach is the decision of the Inter-American Commission in *Coard et al v United States*, referred to earlier. The Commission considered that the decision to detain must “not be left to the sole discretion of the state agent(s) responsible for carrying it out”.<sup>43</sup> It expressed this requirement to be fundamental and reflecting the rationale of the right to *habeas corpus*, such that it is not capable of being overlooked in any context.<sup>44</sup> The Commission noted that compliance with this requirement did not have to be through recourse to the Grenadian court system but could have been accomplished through the establishment of an expeditious judicial or quasi-judicial review process, and emphasised that the appeal mechanism must have the authority to order release where warranted.<sup>45</sup>

***The approaches of the Inter-American Commission and the ICRC Commentary are reflected within Principle 16, para 29, and Guideline 17, para 94(b), of the Basic Principles and Guidelines.***

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<sup>41</sup> Ibid, para 57.

<sup>42</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, above, p. 368.

<sup>43</sup> *Coard et al v. United States*, above, paras 55 and 59.

<sup>44</sup> Ibid, para 55.

<sup>45</sup> Ibid, paras 58 and 60 respectively.

## APPLICATION OF *HABEAS CORPUS* TO PRISONERS OF WAR

Principle 16, para 30, and Guideline 17, para 95, provide a practical and complementary approach to ensuring compliance with provisions of Geneva Convention III, Protocol I and norms of customary international humanitarian law pertaining to the detention of combatants.

### **Principle 16, para 30:**

"Prisoners of war should be entitled to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies, where the detainee (a) challenges his or her status as a prisoner of war; (b) claims to be entitled to repatriation or transfer to a neutral State if seriously injured or ill; or (c) claims not to have been released or repatriated without delay following the cessation of active hostilities."

### **Guideline 17, para 95:**

"The right of persons detained as prisoners of war to bring proceedings before court without to delay to challenge the arbitrariness and lawfulness of their detention and to receive appropriate and accessible remedy is to be respected, in order to:

- (a) "Determine whether a person falls within the category of prisoner of war;
- (b) "Act as a check to ensure that a seriously injured or ill prisoner of war is repatriated or transferred to a neutral State;
- (c) "Act as a check to ensure that prisoners of war are released and repatriated without delay after the cessation of active hostilities."

## Authority to detain combatants during an IAC

Although the Basic Principles and Guidelines do not set out the grounds upon which combatants may be detained in an IAC, it is important to recall these grounds since they are relevant to the question of determining, under procedures for review, the lawfulness of the deprivation of liberty.

The detention of persons as prisoners of war (POWs) is governed by the Third Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III). Article 4 of Geneva Convention III provides that persons may be held as POWs if they "have fallen into the power of the enemy" and if they fall within one of the six categories specified in Article 4(A) including, for example members of armed forces of a party to the international armed conflict, members of other armed forces who profess allegiance to a party to the conflict, members of militias fulfilling certain conditions, and persons who accompany the armed forces, such as civilian contractors and war correspondents.

Once the trigger under Article 4 of Geneva Convention III is established, a Detaining Power is authorised under Article 21 to detain a POW subject to internment in a POW camp, or to close confinement in certain circumstances.

### Determining when detention is to end

#### *Cessation of active hostilities*

The entitlement to hold a POW captive lasts until the cessation of active hostilities in the international armed conflict. Article 118 of Geneva Convention III requires that POWs "shall be released and repatriated without delay after the cessation of active hostilities". The rule in Article 118 is a norm of customary international humanitarian law, reflected in

Rule 128(A) of the ICRC's catalogue of rules of customary IHL (which uses almost identical language to Article 118).<sup>46</sup>

Article 75 of Protocol I reinforces Article 118 of Geneva Convention III. It sets out a series of fundamental guarantees applicable to persons interned for reasons related to an IAC, which includes the right in Article 75(3) to be released as soon as the circumstances justifying detention or internment have ceased to exist.

Unjustifiable delay in the repatriation of POWs constitutes a grave breach of Protocol I.<sup>47</sup>

*Seriously injured or seriously sick POWs*

Additional to the requirement that prisoners of war must be released and repatriated after the cessation of hostilities, Articles 109 and 110 of Geneva Convention III impose obligations on a Detaining Power where a POW is sick or wounded. Where a POW is seriously wounded or seriously sick, she or he must be directly repatriated (in the case, for example, of a wounded POW who is unlikely to recover, according to medical opinion, within a year) or accommodated in a neutral country (for example, in the case of a POW whose health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat).<sup>48</sup> That said, a prisoner of war may not be repatriated during hostilities if this is against her or his will.<sup>49</sup>

*POWs convicted of an indictable offence or against whom criminal proceedings for an indictable offence are pending*

It must also be noted that combatants, namely members of the armed forces of a party to an IAC who have the right to participate in hostilities,<sup>50</sup> may be prosecuted for violations of IHL, in particular war crimes, or other crimes under international law such as genocide or crimes against humanity.

With regard to such persons, Article 119(5) of Geneva Convention III acts as an exception to the obligation under Article 118 to release or repatriate POWs without delay after the cessation of active hostilities.<sup>51</sup> With respect to POWs convicted of an indictable offence or against whom criminal proceedings for an indictable offence are pending, Article 119(5) allows, but does not oblige, a Detaining Power to detain such persons until the end of the criminal proceedings or the completion of the sentence imposed following conviction.<sup>52</sup> Article 75(3) of Protocol I reflects this position. As mentioned, Article 75(3) reiterates the obligation to release, but it also

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<sup>46</sup> ICRC, *Customary IHL*, 'Rule 128. Release and Return of Persons Deprived of Their Liberty', URL <[https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule128](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule128)>.

<sup>47</sup> Additional Protocol I, Article 85(4)(b).

<sup>48</sup> Third Geneva Convention, Articles 109 and 110.

<sup>49</sup> Third Geneva Convention, Article 109.

<sup>50</sup> This excludes members of the armed forces who are medical and religious personnel: see Article 43(2) of Additional Protocol I.

<sup>51</sup> Article 119(5) of Geneva Convention II provides that: "Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence."

<sup>52</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, above, p. 557.

qualifies this obligation by providing that it applies “[e]xcept in cases of arrest or detention for penal offences”.

That said, Article 115 of Geneva Convention III reflects the ability of the Detaining Power to consent to the repatriation or accommodation in a neutral country of POWs detained in connection with a judicial prosecution or conviction. The ICRC Commentary on Article 115 suggests that: “In accordance with the spirit of the Convention, the Detaining Power should withhold consent only if it has good grounds for doing so and if its refusal would not seriously impair the state of health of the prisoners concerned”.<sup>53</sup>

## Review of detention of POWs

The question as to whether POWs have a right to *habeas corpus* or other judicial review, and the scope of any such review, is complex. It might be argued that because POWs may be held captive until the cessation of active hostilities, international law should not be considered to provide for any entitlement of detained combatants to be informed of the reasons for their detention, challenge the legality of their detention, or, in the absence of disciplinary or criminal proceedings, to be provided with access to legal counsel”.<sup>54</sup>

However, according to the Principles and Guidelines, the right to *habeas corpus* can and should be applied in a manner that is complementary to the provisions of Geneva Convention III. Without undermining the authority to hold a POW captive until the cessation of active hostilities, application of the right to *habeas corpus* is a mechanism through which compliance with Article 75(3) of Protocol I can be ensured, namely the right of all persons detained in an IAC to be released as soon as the circumstances justifying detention or internment have ceased to exist.

This can also act as a complementary mechanism to ensure: that no grave breach of Protocol I occurs through an unjustified delay in the repatriation of POWs following the cessation of active hostilities; and that States comply with Articles 109 and 110 of Geneva Convention III concerning seriously sick or wounded POWs. This also serves to ensure that judicial guarantees are available to protect non-derogable rights (such as freedom from torture and cruel, inhuman or degrading treatment), which must be protected at all times.<sup>55</sup>

There is good reason to extend *habeas corpus* to POWs. As explained by Professor Doswald-Beck, a former Head of the ICRC Legal Division, the right of

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<sup>53</sup> *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, above, p. 536.

<sup>54</sup> See, for example, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, 22 October 2002, para 142.

<sup>55</sup> See, for example: Human Rights Committee General Comment No 29, ‘States of Emergency (Article 4)’, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 16; General Comment No 35, above, para 67; American Convention on Human Rights, Article 27(2); Inter-American Court Advisory Opinion OC-8/87 (1987), para 42; Inter-American Court Advisory Opinion OC-9-87 (1987), para 41(1); Inter-American Convention on Forced Disappearance, Article X; Arab Charter on Human Rights, Article 4(2); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section M(5)(e); Commission on Human Rights resolution 1992/35, para 2; Joint Study on global practices in relation to secret detention in the context of countering terrorism, UN Doc A/HRC/13/42 (2010), paras 46-47; Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/7/4 (2008), paras 67 and 82(a); and Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, UN Doc CAT/OP/HND/1 (2010), para 282(a)-(b).



POWs to challenge the lawfulness of detention, through *habeas corpus*, should be respected for three practical reasons:<sup>56</sup>

1. To determine whether a person does indeed fall within the category of a POW within the meaning of Article 4 Geneva Convention III, noting that this categorisation means that the person can be detained until the cessation of active hostilities;
2. To act as a check to ensure that a seriously injured or seriously sick POW is repatriated or transferred to a neutral State; and/or
3. To act as a check to ensure that POWs are released and repatriated without delay after cessation of active hostilities.

***This approach, which reflects the fundamental guarantee in Article 75(3) of Protocol I and acts to complement other applicable requirements of IHL in a manner consistent with the prohibition against arbitrary detention under international human rights law, is taken up within Principle 16, para 30, and Guideline 17, para 95, of the Basic Principles and Guidelines.***

## DETENTION IN NON-INTERNATIONAL ARMED CONFLICTS

Principle 16, para 31, and Guideline 17, para 96, concern themselves with the issue of administrative detention or internment in a non-international armed conflict (NIAC). Principle 4 is also of relevance (to detention in IACs and NIACs), since it addresses the question of derogation from *habeas corpus*.

### **Principle 4:**

4. "The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is not derogable under international law.
5. "The right is not to be suspended, rendered impracticable, restricted or abolished under any circumstances, even in times of war, armed conflict or public emergency that threatens the life of the nation and the existence of which is officially proclaimed.
6. "The international law review of measures to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings will depend upon the character, intensity, pervasiveness and particular context of the emergency and upon the corresponding proportionality and reasonableness of the derogation. Such measures must not, in their adoption, represent any abuse of power nor have the effect of negating the existence of the right to bring such proceedings before a court.
7. "Any such practical measures in the application of the right to bring proceedings before a court to challenge the detention are permitted only to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are consistent with the State's other obligations under international law, including provisions of international humanitarian law relating to the deprivation of liberty, and are non-discriminatory."

<sup>56</sup> Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford: Oxford University Press, 2011), p. 279.

**Principle 16, para 31:**

"Administrative detention or internment in the context of a non-international armed conflict may only be permitted in times of public emergency threatening the life of the nation and the existence of which is officially proclaimed. Any consequent deviation from procedural elements of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies must be in conformity with the present Basic Principles and Guidelines, including on the principles of non-derogability, the right to be informed and the court as reviewing body, and the guidelines on equality of arms and burden of proof."

**Guideline 17, para 96:**

"With regard to detention in relation to a non-international armed conflict:

- (a) "Administrative detention or internment may only be permitted in the exceptional circumstance where a public emergency is invoked to justify such detention. In such a case, the detaining State must show that:
  - i) "The emergency has risen to a level justifying derogation;
  - ii) "Administrative detention is required on the basis of the grounds and procedures prescribed by law of the State in which the detention occurs and is consistent with international law;
  - iii) "The administrative detention of the person is necessary, proportionate and non-discriminatory, and the threat posed by that individual cannot be addressed by alternative measures short of administrative detention;
- (b) "A person subject to administrative detention has the right to bring proceedings before a court that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards, including disclosure of the reasons for the detention and the right to defend oneself, including by means of legal counsel;
- (c) "Where a decision to detain a person subject to administrative detention is maintained, the necessity of the detention must be periodically reviewed by a court or administrative board that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards;
- (d) "Where an internment regime is established, it shall be consistent with international human rights law and international humanitarian law applicable to non-international armed conflict to allow full compliance with the right to bring proceedings before a court."

### Authority to detain in NIACs

Principle 16, para 31 (first sentence), and Guideline 17, para 96(a), declare that internment of persons in the context of a NIAC may only be permitted in the exceptional circumstances of an officially proclaimed public emergency which threatens the life of the nation. This position assumes that a derogation from the right to liberty is required because there is no express or implied authority under applicable rules of IHL authorizing the detention of persons in the context of a NIAC. It is a position with which this Commentary aligns itself.

### Assertions of an implied authority to intern in NIACs

While Geneva Conventions III and IV set out detailed provisions concerning the grounds and procedures for detention in an IAC, the Geneva Conventions and their Additional Protocols are silent concerning grounds or procedures for internment in the context of a NIAC. In other words, there is no express authority to detain persons in the context of a NIAC.

Relying on Common Article 3 to the Geneva Conventions and Articles 5 and 6 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), it is argued by some that international humanitarian law implies a power to intern persons in a NIAC. Gill and Fleck, for example, express the following view:<sup>57</sup>

“The law of non-international armed conflict is less explicit in stipulating the legal basis for operational detention than the law of international armed conflicts. However, a generic power to that effect is implicit in Common Article 3, in as much as it identifies as one category of persons taking no active part in hostilities ‘those placed hors de combat by... detention’. Articles 5 and 6 of (Protocol II) also refer to ‘persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained’, which makes it clear that the deprivation of physical liberty of a person in contemplated in the law applicable to non-international armed conflicts.”

This approach forms the basis of the ICRC’s assertion, in its Opinion Paper on internment in armed conflict, that Common Article 3 and Protocol II govern deprivation of liberty in NIAC.<sup>58</sup> Because Protocol II – which relates exclusively to NIACs – explicitly mentions internment, the ICRC expresses the view that this confirms that internment “is a form of deprivation of liberty inherent to NIAC”, although it at the same time acknowledges that Protocol II does not refer to the grounds for internment or applicable procedural rights.<sup>59</sup>

The Opinion Paper distinguishes between a ‘traditional’ NIAC, occurring in the territory of a State between government armed forces and one or more non-state armed groups, and ‘NIACs with an extraterritorial element’, in which “the armed forces of one or more State, 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”.<sup>60</sup> In the situation of a ‘traditional’ NIAC, the ICRC acknowledges that domestic law constitutes the legal framework for possible internment whereas, in the situation of a NIAC with an extraterritorial element, such as in Afghanistan for example, the ICRC contends that both customary and treaty IHL contain an inherent legal basis to intern.<sup>61</sup>

#### No implied authority to intern in NIACs

Consistent with the view of many experts,<sup>62</sup> this Commentary disagrees with the assertions set out above. In short, it takes the view that Common Article 3 and Protocol II do not provide a legal authority to deprive a person of liberty in NIAC. The ICJ considers that these provisions simply guarantee a minimum level of humanitarian treatment for people who are in fact detained during a NIAC.

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<sup>57</sup> Terry Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2010), p. 471. See also Jelena Pejic, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’ (2005) 87(858) *International Review of the Red Cross* 375, p. 377.

<sup>58</sup> ICRC Opinion Paper, above, p. 6.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 7.

<sup>61</sup> *Ibid.*, pp. 7-8.

<sup>62</sup> See, for example, Gabor Rona, ‘Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?’ (2015) 91 *International Law Studies* 32-59.

This Commentary points to the following reasons to reject assertions of an implied authority to intern in NIACs:

1. *If the Geneva Conventions and their Additional Protocols had intended to provide a power to detain in a NIAC, such authority would have been expressly provided*

Normal principles of interpretation require that, where certain matters have been explicitly set out in a legal instrument, the lack of similar explicit reference elsewhere in the legal instrument calls for interpretation that such matters are excluded.<sup>63</sup>

As discussed in the preceding sections of this Commentary, the authority to detain in an IAC is set out in great detail, with specific authorization and substantive grounds specified in Article 21 of Geneva Convention III (concerning prisoners of war) and Articles 42 and 78 of Geneva Convention IV (concerning civilians posing a serious threat to security). In contrast, the Geneva Conventions and their Additional Protocols are silent concerning grounds or procedures for internment in the context of a NIAC.

The Geneva Conventions and their Additional Protocols should therefore be interpreted to mean that, had a power to detain in a NIAC been intended, this would have been expressly provided for. This was the approach taken in the 2014 decision of the UK High Court in *Mohammed v. Ministry of Defence*, where Mr Justice Leggatt stated:<sup>64</sup>

“I think it reasonable to assume that if CA3 and/or AP2 had been intended to provide a power to detain they would have done so expressly – in the same way as, for example, Article 21 of the Third Geneva Convention provides a power to intern prisoners of war. It is not readily to be supposed that the parties to an international convention have agreed to establish a power to deprive people of their liberty indirectly by implication and without saying so in terms”.

This conclusion is intimately linked to the question of *why* IHL treaty law omitted explicit authority to detain in NIACs, considered next.

2. *It is highly likely that the negotiating States to the Geneva Convention did not want to authorize grounds for detention in NIACs*

It is not likely that the parties negotiating the Geneva Conventions should have been so specific in the drafting of Geneva Conventions III and IV concerning the authority to detain and applicable procedures in the context of IACs while leaving an only vaguely implied authorization in the context of NIACs.

Indeed, there are cogent reasons why States negotiating the Geneva Conventions and their Additional Protocols would not have wanted to establish a legal authority to detain persons in non-international armed conflicts. Given that Common Article 3 applies to “each Party to the conflict”, and that Protocol II applies to non-state armed groups that are able to implement Protocol II, Justice Leggatt, in the High Court in the United Kingdom, focussed on one of the cornerstones of IHL, that of

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<sup>63</sup> Known in Latin as *expressio unius*.

<sup>64</sup> *Mohammed v. Ministry of Defence* above, para 242.

reciprocity. He observed:<sup>65</sup>

“...providing a power to detain would have meant authorising detention by dissident and rebel armed groups. That would be anathema to most states which face a non-international armed conflict on their territory and do not wish to confer any legitimacy on rebels and insurgents or accept that such groups have any right to exercise a function which is a core aspect of state sovereignty.”

On appeal from the High Court in the same case, the Court of Appeal thus gave weight to the fact that “the original ICRC draft of the Geneva Conventions which provided for the application of the Conventions in their entirety to non-international armed conflicts was rejected” by the negotiating States.<sup>66</sup>

3. *If Common Article 3 and Articles 5 and 6 of Protocol II were to be interpreted as implying an authority to detain in NIACs, it would be necessary (but it is not possible) to identify the scope of such an implied power*

International humanitarian law prohibits arbitrary detention, Rule 99 of the ICRC’s catalogue of rules of customary IHL stating that: “Arbitrary deprivation of liberty is prohibited”.<sup>67</sup> It is explained that State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts, noting also that the arbitrary deprivation of liberty is incompatible with the requirement that detainees be treated humanely, reflected in Common Article 3 as well as Additional Protocols I and II.<sup>68</sup>

Common Article 3 and Rule 99 in this respect reinforce the general prohibition against arbitrary detention. This prohibition is reflected in Article 9(1) of the ICCPR, which provides that “no one shall be subjected to arbitrary arrest or detention” and requires that any deprivation of liberty be “on such grounds and in accordance with such procedure as are established by law”.<sup>69</sup> These phrases echo the prohibitions against arbitrary deprivation of liberty on the one hand and unlawful deprivation of liberty on the other. Concerning the prohibition against unlawful deprivation of liberty, Article 9(1) requires that the substantive grounds for detention must be prescribed by law. Two requirements arise from this:

- a) The first is that any detention that lacks a legal basis is both unlawful and arbitrary, and thus in violation of both aspects of the prohibition under Article 9(1) of the ICCPR.<sup>70</sup>

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<sup>65</sup> Ibid, para 245.

<sup>66</sup> *Mohammed and others v. Secretary of State, Rahmatullah v. Ministry of Defence* [2015] EWCA Civ 843, para 178.

<sup>67</sup> Rule 99, above.

<sup>68</sup> Ibid. See also Rule 87 of the ICRC’s catalogue of rules of customary international humanitarian law: ICRC, *Customary IHL*, ‘Rule 87. Humane Treatment’, URL <[https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule87](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule87)>.

<sup>69</sup> Similar provisions are established in regional human rights treaties. See: Article 6 of the African Charter on Human and Peoples’ Rights; Article 7 of the American Convention on Human Rights; Article 14 of the Arab Charter on Human Rights; and Article 5 of the European Convention on Human Rights.

<sup>70</sup> General Comment 35, above, para 11; Human Rights Committee, *Mika Mika v. Equatorial Guinea*, Communication 414/1990, UN Doc CCPR/C/51/414/1990 (1994), para 6.5.

- b) The second is that the law must be defined “with sufficient precision to avoid overly broad or arbitrary interpretation or application”.<sup>71</sup> If a person is detained without such legal authorization, the deprivation of liberty is unlawful and thereby in violation of Article 9(1).<sup>72</sup>

From this second requirement, it follows that the law must identify the scope of any express or implied authority to detain. The Geneva Conventions and their Additional Protocols do not point to the scope of any power to intern in NIACs. Indeed, in discussing Rule 99 in the context of the grounds for detention in NIACs, the ICRC’s catalogue of rules of customary IHL points to no express or implied authority to detain. It instead recognizes that:<sup>73</sup>

“The prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law”.

The ICRC’s catalogue of rules of customary IHL does not assert, nor even hint at the possibility, that Common Article 3 and Articles 5 and 6 of Protocol II imply a legal authority to detain.

In the recent UK litigation already cited, Justice Leggatt was therefore well justified to take the view that it is not possible to deduce the scope of any implied power from the Conventions or their Protocols,<sup>74</sup> with the Court of Appeal concluding that this fact could not be overcome.<sup>75</sup>

4. Because the scope of any implied power to intern in NIACs is not discernible, such internment would be arbitrary

Recent General Comment No 35 of the Human Rights Committee states that: “Security detention *authorized and regulated by and complying with* international humanitarian law in principle is not arbitrary” (emphasis added).<sup>76</sup> The General Comment thereby predicates the non-arbitrary nature of detention in armed conflict as detention that satisfies the following three elements:

- i) It is authorized by IHL;
- ii) It is regulated by IHL; and
- iii) It is thereby capable of being evaluated as to its compliance with IHL.

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<sup>71</sup> General Comment 35, above, para 22. See, for example, cases where the Human Rights Committee has considered grounds for detention to be insufficiently precise: *Concluding Observations: Combined Second and Third Periodic Report of the Philippines* (concerning vagrancy law), UN Doc CCPR/CO/79/PHL (2003), para 14; *Concluding Observations: Fourth Periodic Report of Mauritius* (concerning terrorism law), UN Doc CCPR/CO/83/MUS (2005), para 12; *Concluding Observations: Sixth Periodic Report of the Russian Federation* (concerning extremist activity), UN Doc CCPR/C/RUS/CO/6 (2009), para 24; and *Concluding Observations: Initial Report of Honduras* (concerning unlawful association); UN Doc CCPR/C/HND/CO/1 (2006), para 13.

<sup>72</sup> General Comment 35, above, para 22; and Human Rights Committee, *McLawrence v. Jamaica*, Communication 702/1996, UN Doc CCPR/C/60/D/702/1996 (1997), para 5.5.

<sup>73</sup> Rule 99, above.

<sup>74</sup> *Mohammed v. Ministry of Defence*, above, para 246.

<sup>75</sup> *Mohammed and others v. Secretary of State*, above, paras 217-218.

<sup>76</sup> General Comment 35, above, para 64.

Even if the argument of an implied authority under Common Article 3 and Protocol II were to be accepted (element (i)), this argument fails elements (ii) and (iii) of the Human Rights Committee's test. Geneva Conventions III and IV specify who – in an international armed conflict – may be detained, on what grounds, in accordance with what procedures and for how long. In the context of a NIAC, however, it is not possible to point to any such regulation, thus falling short of element (ii). The lack of such regulation in a NIAC not only fails element (ii), it also means that it is impossible to ascertain whether any detention in a NIAC complies with IHL (element (iii)).

Unless detention in a NIAC is predicated on national or other law that is informed and consistent with international human rights law, it will therefore be arbitrary.

Also notable about General Comment 35 of the Human Rights Committee is the distinction made between international versus non-international armed conflicts as this concerns any derogation from the right to liberty under Article 9. In the context of an IAC, it acknowledges that IHL includes substantive and procedural rules that help to mitigate the risk of arbitrary detention. Outside that context, however, the Committee spoke of the need for derogating measures involving security detention, which must comply with the requirements of strict necessity and proportionality and which must be limited in duration and accompanied by procedures to prevent arbitrary deprivation of liberty.<sup>77</sup>

It is implicit in this reasoning that the Committee did not consider IHL rules pertaining to detention in a NIAC as themselves providing sufficient procedural guarantees mitigating the risk of arbitrary detention, such that any detention in a NIAC will require derogation from Article 9 of the ICCPR if it otherwise fails to comply with the normal parameters of the guarantees under Article 9.

5. *IHL contemplates internment as a form of deprivation of liberty in NIACs, but only as a matter of fact, not as a matter of law*

While Common Article 3 and Articles 5 and 6 of Protocol II may contemplate that the detention of persons in a NIAC may take place as a *matter of fact*, it does not follow that these provisions imply a *lawful authority* for detention. Such detention, as explained by Justice Leggatt in the High Court in the United Kingdom, “may be lawful under the law of the state on whose territory the armed conflict is taking place, or under some other applicable law; or it may be entirely unlawful”.<sup>78</sup> The Court of Appeal agreed, stating that:<sup>79</sup>

“International humanitarian law regulates the conduct of both States and insurgents during a non-international armed conflict. Regulation is not the same as authorisation. It does not follow from the fact that detention and internment by insurgents is regulated under international humanitarian law that such behaviour is authorised. Equally, it does not follow from the fact that Common Article 3 and APII regulate detention and internment by government forces, that they authorise such detention and internment.”

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<sup>77</sup> General Comment 35, above, para 66.

<sup>78</sup> *Mohammed v. Ministry of Defence*, above, para 243.

<sup>79</sup> *Mohammed and others v. Secretary of State*, above, para 180.

6. The purpose of Common Article 3 and Articles 5 and 6 of Protocol II is simply to guarantee a minimum level of humanitarian treatment

Common Article 3 and Articles 5 and 6 of Protocol II require that any detained persons be treated humanely (Common Article 3), that they enjoy certain generally-applicable rights and safeguards (such as the benefit of medical examinations under Article 5(2)(d) of Protocol II) and that they enjoy certain procedural safeguards pertaining to the prosecution and punishment of criminal offences (Article 6 of Protocol II). As noted in the ICRC Commentary:<sup>80</sup>

“Like common Article 3, Protocol II has a *purely humanitarian purpose* and is aimed at securing fundamental guarantees for individuals in all circumstances”. (emphasis added)

Justice Leggatt, in the High Court in the United Kingdom, thus remarked: “The need to observe such minimum standards is equally relevant to all people who are in fact detained, and does not depend on whether or not their detention is legally justified”.<sup>81</sup> The Court of Appeal agreed.<sup>82</sup>

7. Customary international humanitarian law does not, as an alternative, authorize detention in NIACs

In *Mohammed and others v. Secretary of State, Rahmatullah v. Ministry of Defence*, it was argued by the Secretary of State that, should an authority to detain in NIACs not be capable of being derived from IHL treaty law, customary international law could alternatively be relied upon. On this point, he argued that States involved in internationalized NIACs do detain persons, and have done so for many years on the understanding that they may do so as of right.<sup>83</sup> In other words, a customary norm of IHL has developed in the context of this third category of conflict. The Justices of the Court of Appeal disagreed, concluding that: “...we do not consider that in the present state of the development of international humanitarian law it is possible to base authority to detain in a non-international armed conflict on customary international law”.<sup>84</sup>

It should be noted that the ICRC’s major international study into State practice in international humanitarian law,<sup>85</sup> undertaken to identify customary international humanitarian law, does not assert the existence of customary IHL as the basis for authority to detain in NIACs.

For these reasons, it is concluded that international humanitarian law does not imply any authority to detain persons in a non-international armed conflict.

### **In what situations is the deprivation of liberty in a NIAC permissible?**

Because IHL does not imply any authority to detain persons in a NIAC, the practical consequences of this are that any detention or internment in a NIAC

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<sup>80</sup> International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. (Geneva: International Committee of the Red Cross, 1987), p. 1344.

<sup>81</sup> *Mohammed v. Ministry of Defence*, above, para 244.

<sup>82</sup> *Mohammed and others v. Secretary of State*, above, para 218.

<sup>83</sup> *Ibid*, para 222.

<sup>84</sup> *Ibid*, para 242.

<sup>85</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (ICRC and Cambridge University Press, 2005).



must either: be fully compliant with the prohibition against arbitrary and unlawful detention under Article 9(1) of the ICCPR, without an accompanying derogation from the right to liberty; or be subject to a lawful derogation under Article 4 of the ICCPR.

#### Detention in a NIAC without an accompanying derogation

Article 9(1) of the ICCPR guarantees the right to liberty and security of the person. It provides that “no one shall be subjected to arbitrary arrest or detention” and requires that any deprivation of liberty be “on such grounds and in accordance with such procedure as are established by law”. These two phrases reflect the prohibitions against arbitrary deprivation of liberty on the one hand and unlawful deprivation of liberty on the other, although the concepts of arbitrariness and unlawfulness are interlinked. Thus, as explained by the Human Rights Committee, detention “may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful”.<sup>86</sup>

Concerning the prohibition against unlawful deprivation of liberty, Article 9(1) requires that the substantive grounds for detention must be prescribed by law. Two requirements arise from this. The first is that any detention that lacks a legal basis is both unlawful and arbitrary, and thus in violation of both aspects of the prohibition under Article 9(1) of the ICCPR.<sup>87</sup> The second is that the law must be defined “with sufficient precision to avoid overly broad or arbitrary interpretation or application”.<sup>88</sup> If a person is detained without such legal authorization, the deprivation of liberty is unlawful and thereby in violation of Article 9(1).<sup>89</sup> Unlike Article 5(1) of the ECHR, the ICCPR does not list the permissible reasons for deprivation of liberty, although it expressly recognizes that individuals may be detained on criminal charges (Article 9) and it expressly prohibits imprisonment for failure to fulfill a contractual obligation (Article 11).

Any deprivation of liberty must not only be pursuant to and carried out in compliance with applicable law, the law must itself not be arbitrary, it must comply with international law and it must be implemented in a non-arbitrary manner.<sup>90</sup> Deprivation of liberty will be considered arbitrary if it results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 or 21 of the Universal Declaration of Human Rights,<sup>91</sup> or comes about as a result of the total or partial non-observance of international norms relating to the right to a fair trial of a grave nature.<sup>92</sup> The detention of a person will be arbitrary if it

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<sup>86</sup> General Comment 35, above, para 11.

<sup>87</sup> General Comment 35, above, para 11; Human Rights Committee, *Mika Mika v. Equatorial Guinea*, Communication 414/1990, UN Doc CCPR/C/51/414/1990 (1994), para 6.5.

<sup>88</sup> General Comment 35, above, para 22. See, for example, cases where the Human Rights Committee has considered grounds for detention to be insufficiently precise: *Concluding Observations: Combined Second and Third Periodic Report of the Philippines* (concerning vagrancy law), UN Doc CCPR/CO/79/PHL (2003), para 14; *Concluding Observations: Fourth Periodic Report of Mauritius* (concerning terrorism law), UN Doc CCPR/CO/83/MUS (2003), para 12; *Concluding Observations: Sixth Periodic Report of the Russian Federation* (concerning extremist activity), UN Doc CCPR/C/RUS/CO/6 (2009), para 24; and *Concluding Observations: Initial Report of Honduras* (concerning unlawful association); UN Doc CCPR/C/HND/CO/1 (2006), para 13.

<sup>89</sup> General Comment 35, above, para 22; and Human Rights Committee, *McLawrence v. Jamaica*, Communication 702/1996, UN Doc CCPR/C/60/D/702/1996 (1997), para 5.5.

<sup>90</sup> Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/16/47 (2011), Annex, para 8(a) and (e).

<sup>91</sup> See corresponding articles 12, 18, 18, 21, 22, 25, 26 and 27 of the ICCPR.

<sup>92</sup> Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/16/47 (2011), Annex, para 8(b) and (c).

includes elements of inappropriateness, injustice, lack of predictability, lack of due process of law or discrimination.<sup>93</sup> The concept of arbitrariness is also intended to guarantee that even reasonable conduct that is provided for by law should be undertaken in accordance with the provisions, aims and objectives of the Universal Declaration of Human Rights and the ICCPR, such as the prohibitions against discrimination and torture or ill-treatment.<sup>94</sup>

Applied to the situation of 'security detention' not in contemplation of prosecution on a criminal charge (such as internment in a NIAC), the Human Rights Committee has concluded that that such detention presents severe risks of arbitrary detention such that it should normally be assumed that the detention is arbitrary.<sup>95</sup> The Committee nevertheless acknowledged in its General Comment 35 that security detention may be resorted to in the absence of a derogation from Article 9, but only "under the most exceptional circumstances" – namely where "a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat" – and only if the following conditions are met:<sup>96</sup>

"...the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken."

The Human Rights Committee describes this situation as applicable only under "the most exceptional circumstances". This formulation, while certainly correct, could be misconstrued when taken in isolation, as the Committee fails to be explicit in recalling the requirement that any detention, whether pursuant to or in the absence of a derogation, must always be prescribed by law. This is reflected elsewhere in the General Comment, where the Committee cites its own jurisprudence to support the statement that deprivation of liberty without legal authority (by way of substantive grounds prescribed by law) is unlawful.<sup>97</sup> Furthermore, if a "present, direct and imperative threat" calls for the detention of a person who poses such a threat, and this "cannot be addressed by alternative measures" consistent with Article 9(1) of the ICCPR, the result is that the State should be able to and must derogate from Article 9(1). This alternative is considered next. The passage quoted therefore might be mistakenly taken to

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<sup>93</sup> Report of the Working Group on Arbitrary Detention, *ibid*, para 8(e). See, for example: Human Rights Committee *Mukong v. Cameroon*, Communication 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994), para 9.8; Human Rights Committee, *de Moraes v. Angola*, Communication 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005), para 6.1; and Human Rights Committee, *Gorji-Dinka v. Cameroon*, Communication 1134/2002, UN Doc CCPR/C/83/D/1134/2002 (2005), para 5.1.

<sup>94</sup> Report of the Working Group on Arbitrary Detention, *above*, para 8(b); Human Rights Committee, General Comment No 16, 'The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)', (1988), para 4; Human Rights Committee, *Garcia v. Colombia*, Communication 687/1996, UN Doc CCPR/C/71/D/687/1996 (2001); Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, para 7.

<sup>95</sup> General Comment 35, *above*, para 15.

<sup>96</sup> General Comment 35, *above*, para 15.

<sup>97</sup> General Comment 35, *above*, para 22; and Human Rights Committee, *McLawrence v. Jamaica*, Communication 702/1996, UN Doc CCPR/C/60/D/702/1996 (1997), para 5.5.

suggest think that security detention, including internment in a NIAC, may be permitted in the absence of authorization under the law and without a derogation from Article 9(1) of the ICCPR.

In summary, to be compliant with the prohibition against arbitrary and unlawful detention, any detention in the absence of a derogation from Article 9 must:

1. Be pursuant to domestic law that is defined with sufficient precision and is compliant with international law, including international human rights law.
2. Not involve elements of inappropriateness, injustice, lack of predictability, lack of due process of law or discrimination.
3. Not come about as a result of the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 or 21 of the Universal Declaration of Human Rights, or the total or partial non-observance of international norms relating to the right to a fair trial of a grave nature.

#### Detention in a NIAC pursuant to an accompanying derogation

Short of the existence in national law of grounds to detain a person consistent with the provisions of Article 9 of the ICCPR, administrative detention or internment in a NIAC may therefore only be permitted in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. ***This position is reflected in Principle 16, para 31 (first sentence), and Guideline 17, para 96(a), of the Basic Principles and Guidelines.***

Article 4(1) of the ICCPR allows a State party to derogate from certain rights in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" and "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination".

Article 4(2) sets out a list of rights from which no derogation may be made, even in states of emergency. The right to liberty under Article 9 is not included in that list, which means that it is in principle capable of being restricted in its scope of application, provided that all of the procedural and substantive requirements of Article 4 are complied with, namely that such derogation: (1) is notified to the Secretary General of the United Nations; (2) takes place only in a time of public emergency threatening the life of the nation; (3) involves measures that do not exceed those strictly required by the exigencies of the situation; (4) is consistent with the state's other obligations under international law; and (5) is non-discriminatory.<sup>98</sup> As with all forms of limitations on the exercise of rights and freedoms, derogating measures must also be temporary and proportionate.<sup>99</sup> It is important to underscore that this proportionality requirement means that derogation can never mean obliteration of the right. As the Committee emphasizes:<sup>100</sup>

"...the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will

<sup>98</sup> See: General Comment 35, above, para 65; and General Comment No 29, above, especially paras 4-5, 8-9 and 13.

<sup>99</sup> General Comment 29, above, para 4.

<sup>100</sup> Ibid.

ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. "

Outside the context of an IAC, the Human Rights Committee has reaffirmed that "the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application".<sup>101</sup>

It has also reiterated that, although the existence of a state of emergency may be relevant to determining whether or not a particular arrest or detention is 'arbitrary': "The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances".<sup>102</sup> This is consistent with Rule 99 of the ICRC's catalogue of rules of customary IHL, applicable to both international and non-international armed conflicts, and which states that: "Arbitrary deprivation of liberty is prohibited". The duty on derogating States to ensure that any security detention remains necessary and proportionate is further accentuated by Rule 128(C) of the ICRC's catalogue of rules of customary IHL, which provides that: "Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist".

***These features are reflected in Guideline 17, para 96(a), of the Basic Principles and Guidelines.***

**Derogating measures allowing for administrative detention or internment in a NIAC must not undermine the exercise of the right to *habeas corpus***

In the case of a derogation, such derogation must comply with the procedural and substantive requirements noted above and must, notwithstanding the derogation, remain consistent with the fundamental guarantee against arbitrary detention.<sup>103</sup> The Human Rights Committee has in this regard taken the view that certain elements of Article 9 of the ICCPR cannot be made subject to lawful derogation under Article 4. It said, in its General Comment 35:<sup>104</sup>

"The procedural guarantees protecting liberty of a person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. In order to protect non-derogable rights, including those under 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."

Rather than speaking of an obligation not to diminish the right to *habeas corpus* in any derogating measure, Principle 4 of the Working Group's Basic Principles and Guidelines is more direct by stating that the right to *habeas corpus* "must not be suspended, rendered impracticable, restricted, or abolished under any circumstances, even in times of war, armed conflict, or public emergency which threatens the life of the nation and the existence of which is officially proclaimed".<sup>105</sup> ***This is elaborated within Guideline 17, para 96, of the Basic Principles and Guidelines.***

<sup>101</sup> General Comment 35, above, para 66.

<sup>102</sup> General Comment 35, above, para 66. See also General Comment 29, above, paras 4 and 11.

<sup>103</sup> General Comment 35, above, para 66. See also General Comment 29, above, para 16.

<sup>104</sup> General Comment 35, above, para 67.

<sup>105</sup> Basic Principles and Guidelines, above, Principle 4 at para 5. See also the 2012 and 2014 reports of the Working Group on Arbitrary Detention: UN Doc A/HRC/22/44 (2012), para 47; and UN Doc A/HRC/27/47 (2014), para 22.

## CONCLUSION

Principles 4 and 16, and Guideline 17, of the Working Group's Basic Principles and Guidelines on *habeas corpus* address important issues pertaining to detention in armed conflict. These provisions accurately reflect the jurisprudence and views of international and regional bodies, including the International Court of Justice, the UN Human Rights Committee, the UN Committee against Torture, the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. They are also consistent with various features of the Geneva Conventions and their Additional Protocols and the ICRC Commentary on rules of customary international humanitarian law. In light of some recent State practices, they hold especially important value, including for the combating of incommunicado and secret detention and torture and other forms of ill-treatment.



**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00  
**f** +41 22 979 38 01  
[www.icj.org](http://www.icj.org)