Detention in Non-International Armed Conflicts

Knut Dörmann*

Introduction

The question of detention in non-international armed conflicts (NIACs) has made it to the forefront of the international legal and operational debate. This is particularly due to the fact that most of current armed conflicts are of a non-international character and that they lead to important numbers of persons being deprived of their liberty. When assessing the legal and operational challenges posed in such situations, it is important to bear in mind that NIACs may take different forms, ranging from classical civil war situations with armed violence essentially occurring within the confines of one single territory between government armed forces and dissident armed forces or other organized armed opposition groups, to NIACs spilling over to neighboring countries, and to armed conflict situations in which multinational forces intervene on the side of a host government against organized armed opposition groups. The debate, therefore, needs to focus on common features to all types of NIACs, as well as on where distinctions need possibly to be made. For example, with regard to a NIAC, when multinational forces intervene on the side of a host government, questions arise as to how to deal

* Head, Legal Division, International Committee of the Red Cross (ICRC). Special thanks are due to Jelena Pejic, Legal Advisor, Legal Division, ICRC, for her substantive contribution to this article. Thanks are also due to Helena Sunnegardh, Legal Attaché, Legal Division, ICRC, for her assistance.
Detention in Non-International Armed Conflicts

with the relationship between the third States and the host government, bearing in mind that they may be subject to different domestic and international legal obligations.

This contribution cannot attempt to look at all the challenges that arise; it can only give a snapshot of them. As will be shown, a more in-depth discussion is required in the years to come. The article will focus on two main issues. It will first address the applicable legal framework to detention in NIAC and, in particular, the interplay between international humanitarian law (IHL) and international human rights law; and second, present the International Committee of the Red Cross’s (ICRC’s) analysis of the need to strengthen the law in light of humanitarian problems observed in its field operations and the related normative weaknesses. The concluding remarks will then summarize how the international community has responded to the ICRC’s analysis.

Before addressing these two issues, some observations on the sources of law applicable in NIAC should be made to set the frame.

The main sources of treaty IHL governing NIAC are Article 3 common to the four Geneva Conventions of 1949¹ (generally considered to reflect customary law²), which specifically refers among others to persons in detention,³ and the 1977 Additional Protocol II to the Geneva Conventions, relating to the protection of victims of non-international armed conflicts,⁴ when applicable—namely, Articles 4–6, which specifically relate to persons deprived of liberty.⁵ The development of customary international law has complemented treaty law.⁶ Due to the paucity of treaty rules, customary IHL plays a more significant role in NIAC than in international armed conflicts (IACs). Still, the question remains whether IHL needs to be further strengthened, taking into account the challenges posed by current forms of NIAC. In particular it needs to be assessed whether existing protections are strong enough in such situations.

IHL is not the only legal framework relevant in NIACs. It is generally accepted, despite the views of a few important dissenters, including the United States,⁷ that human rights law applies alongside IHL in armed conflicts, and that it also applies extraterritorially.⁸ What is not settled is the precise interplay of the two branches of international law in situations of armed conflict and the extent of the extraterritorial application of human rights law.

It is widely accepted that IHL is the lex specialis in IAC (in the field of detention of persons in particular through the detailed regulation on prisoners of war, namely, in the Third Geneva Convention,⁹ and internment of persons protected by the Fourth Geneva Convention¹⁰). However, the interplay is more complex in NIAC for at least two reasons.
First, while it is clear that States’ human rights obligations continue in NIAC, determining the interplay of a State’s IHL and human rights treaty obligations remains a difficult endeavor. One reason is that—contrary to IHL applicable in IACs—IHL in NIACs is more rudimentary, and thus gives less rise to conflicts between norms that would generally be addressed through application of the lex specialis rule. It is also not sufficient to state in general terms that human rights law continues to apply in armed conflict without elaborating on what this means in practice. Situations of armed conflict are different from times of peace. This explains why some IHL and human rights rules differ in content, and thus produce conflicting results when applied to the same situation. The norms of these two bodies of law reflect the different reality for which each body was primarily developed. One example relates to the rules applicable to the use of force: the IHL rules on the conduct of hostilities differ from those that would apply in law enforcement situations. Differences exist as well in the field of detention. The most evident difference between IHL and human rights standards concerns the rules governing procedural safeguards for security detention.

Second, the obligations of the State party under human rights law treaties are not legally shared by the non-State party to an armed conflict. In addition, in many cases these obligations could not be practically carried out by the non-State party because it cannot perform government-like functions on which the implementation of human rights norms is based. IHL is the only branch of international law aimed at the protection of persons that clearly binds both State and non-State parties in armed conflict. Common Article 3 of the four Geneva Conventions, for example, is very clear on that, as it refers to “each Party to the conflict.” Based on that, IHL is also the only legal regime binding non-State organized armed groups fighting against each other. It thus remains an indispensable legal framework for these situations.

Bearing in mind these factors, the relationship between IHL and human rights norms in a NIAC, and the respective legal obligations for parties to a NIAC must be determined on a case-by-case basis.

**IHL Rules Applicable to Detention in NIAC**

Deprivation of liberty is an inevitable and lawful occurrence in armed conflict, including in NIAC. The fundamental obligation underpinning any form of detention in armed conflict is to treat persons deprived of liberty humanely. Other, more specific IHL rules give effect to this obligation and complement it. The different rules on detention (most of which overlap with human rights law) may be broadly divided into four groups: rules on the treatment of detainees in the narrow...
Detention in Non-International Armed Conflicts

sense, rules on material conditions of detention, fair trial rights and procedural safeguards in internment.

In the following discussion these rules will be briefly presented and compared to similar or equivalent human rights norms, and the question of whether they remain appropriate and sufficient in contemporary armed conflicts will be addressed.

Rules on the Treatment of Detainees in the Narrow Sense

Rules on the treatment of detainees in the narrow sense aim to protect the physical and mental integrity and well-being of persons deprived of liberty for whatever reason. They comprise, most importantly, the prohibition of murder, torture and other forms of cruel, inhuman or degrading treatment, mutilation, and medical or scientific experiments, as well as other forms of violence to life and health, which includes prohibitions of sexual violence and rape. All of the acts mentioned are prohibited under both IHL and human rights law.

It may be concluded that in this area the normative framework posed by IHL is strong enough. When humanitarian problems arise in contemporary armed conflicts it is due not to lack of norms, but to lack of compliance with and enforcement of these rules.

To the extent that the transfer of detainees may lead to violations of the right to life or of the prohibition of torture and other forms of ill-treatment, this aspect may also be categorized as belonging to the treatment of detainees in the narrow sense.

The transfer of detainees raises significant legal and practical problems in current armed conflicts. The transfer of persons between States has been one of the recurring practices in armed conflicts over the past several years, particularly in situations where multinational forces transfer persons to a “host” State, to their country of origin or to a third State. Generally, there is cause for concern from a humanitarian standpoint whenever there is a risk that a transferred person may be subject to serious violations of IHL upon transfer to the receiving State. The ICRC’s view is that the principle of non-refoulement must be observed whenever a person might be transferred from one authority to another and when there is a risk that a transferred detainee might be subject to torture and other forms of ill-treatment, arbitrary deprivation of life (which includes the imposition of the death penalty after an unfair trial), enforced disappearance, and persecution.

The ICRC works constantly with detaining authorities in various operational contexts to ensure that the principle is adhered to in practice.

There are no explicit IHL rules in treaty law applicable to NIAC dealing with transfers of detainees. However, it may be argued that it would contravene the explicit prohibitions of Common Article 3 to the four Geneva Conventions if a party to a NIAC transferred an individual under its control or authority to another party
while there are substantial grounds to believe that the person would be tortured or otherwise ill-treated or arbitrarily deprived of life. Such a rule exists more explicitly in IHL applicable in IAC. The rules relating to the transfer responsibilities of a detaining authority in an IAC go even further for specific categories of persons. They establish specific post-transfer responsibilities for the transferring State in case the receiving State does not comply with the provisions of the Third Geneva Convention or the Fourth Geneva Convention.

It is the ICRC’s view that in light of the lack of specificity in NIAC treaty law and the problems observed in a variety of conflict situations throughout the world, it should be considered whether the existing legal framework could be strengthened by identifying specific rules dealing with responsibilities in cases of transfer in NIACs. It would be crucial to provide more legal guidance to detaining authorities. The lack of legal provisions in IHL governing NIACs suggests that it would be highly advisable to provide a set of workable substantive and procedural rules that would both guide the actions of States and non-State organized armed groups and protect the rights of affected persons. Current practice, in which more and more NIACs involve coalitions of States fighting one or more non-State organized armed groups in a “host” country, indicates that uncertainty about how to organize a lawful transfer regime, including with regard to post-transfer responsibilities, is likely to increase, rather than decrease; thus a need to further reflect on the possibility of strengthening the legal framework. The underlying principles of IHL rules applicable in IAC should serve as a starting point.

Rules on Material Conditions of Detention
The purpose of the rules on material conditions of detention is to ensure that detaining authorities adequately provide for detainees’ physical and psychological needs, which include food, accommodation, health, hygiene, contacts with the outside world, religious observance and others. Treaty and customary IHL provide a substantial catalogue of standards that pertain first and foremost to conditions of detention in IAC. They also provide less detailed standards that apply in NIAC, as do “soft law” human rights instruments. A common catalogue of norms could be derived from both bodies of law.

In the absence of specific treaty law for NIAC other than what is contained in Additional Protocol II to the Geneva Conventions, this common catalogue can provide important guidance. A normative strengthening in the ICRC’s view is nevertheless desirable to better address the humanitarian problems observed by ICRC delegates in places of detention worldwide. They relate particularly to lack of adequate food, water, accommodation and access to medical care; no contact with families and the outside world; failure to separate appropriately (adults from
Detention in Non-International Armed Conflicts

children, those charged with criminal offenses from security detainees, etc.); failure to register detainees; and overcrowding.

When looking at the rules on material conditions of detention it seems important to also analyze the needs of particularly vulnerable groups (namely, women, children, the disabled and the elderly). The situation of women, for instance, requires special attention. When women are detained in the same prison as men, their access to fresh air may be compromised if the courtyard is communal, since mixing with men would put them at risk of abuse and may not be permitted for cultural reasons. Likewise, women often remain locked in their cells if prison corridors are open to both sexes. Female detainees have specific health and hygiene needs. Pregnant women and nursing mothers require dietary supplements and appropriate pre- and postnatal care so that they and their babies remain in good health.211

Children in detention also require specific protection and care. Prison conditions and facilities are not always adapted to their needs and vulnerabilities, especially in terms of protection against inhumane or degrading disciplinary measures. In addition, in numerous situations, these children are deprived of access to appropriate schooling or vocational training. They may also suffer from a lack of sufficient recreational and physical activity. They rarely enjoy adequate communication with the outside world, including with their parents, which may seriously affect their emotional development.30

Most of these concerns, which include the needs of other categories of persons, such as the elderly and the disabled, are not sufficiently addressed under current IHL governing NIAC. Common Article 3 to the Geneva Conventions does not provide special protection to particularly vulnerable persons in detention, and Additional Protocol II to the Geneva Conventions only obliges the parties to NIACs to separate detained women and men “within the limits of their capabilities.”31 Similarly, under customary law, detained children must be held in quarters separate from those of adults, except when they are accommodated with their family.32 Besides these rules, the law applicable to NIACs does not provide further specific protection and thus, it is submitted, requires supplementing.

Fair Trial Rights

Persons detained on suspicion of having committed a criminal offense are entitled to a number of fair trial rights. The list of fair trial rights is almost identical under IHL and human rights law. While Common Article 3 to the Geneva Conventions does not provide a list of judicial guarantees, it is now generally accepted that Article 75(4) of Additional Protocol I to the Geneva Conventions— which was drafted based on the corresponding provisions of the International Covenant on Civil and Political Rights (ICCPR)— reflects customary law applicable in all types of armed
conflict. Article 75(4), in fact, encapsulates all of Article 6(5) of Additional Protocol II, which supplements Common Article 3 in NIAC. IHL reinforces human rights law in that it allows no derogation from fair trial rights in situations of armed conflict.

In light of the preceding, it would appear that the existing legal framework is robust enough to address the protection needs of persons suspected of having committed a criminal offense. If humanitarian problems arise nevertheless, it is generally due not to a lack of rules, but rather to a lack of implementation or lack of respect for existing rules.

**Procedural Safeguards in Internment**

The question of procedural safeguards in internment is probably the key issue in terms of legal and practical challenges with regard to detention in NIAC, in particular in “multinational” NIACs.

Internment may be defined as the non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in an armed conflict. The area of procedural safeguards in internment is probably the principal area in which differences emerge in IHL applicable to international and non-international armed conflicts, as well as between IHL and human rights law, and where gaps in IHL governing NIAC may be observed.

Outside armed conflict, non-criminal (i.e., administrative) detention should be very exceptional. In the vast majority of cases, deprivation of liberty happens when a person is suspected of having committed a criminal offense. The rationale under human rights law is the assumption that the courts of a State are functioning, that its judicial system is capable of absorbing whatever number of persons may be arrested at any given time, that legal counsel is available, that law enforcement officials have the capacity to perform their tasks, etc. The reality in situations of armed conflict is, however, different. As a consequence, IHL provides for different rules. While these latter rules are quite detailed in addressing internment in IAC, IHL treaties do not contain rules on procedural safeguards for persons interned in NIAC. They imply, however, that persons would be interned in NIACs. Additional Protocol II explicitly mentions internment in Articles 5 and 6(5). It thus confirms that it is a form of deprivation of liberty inherent to NIAC. At the same time, the Protocol does not list internment grounds or process rights.

In a traditional NIAC occurring in the territory of a single State between government armed forces and one or more non-State organized armed groups, domestic law, informed by the State’s human rights obligations and IHL, constitutes the legal framework regulating the deprivation of liberty of members of such non-State
Detention in Non-International Armed Conflicts

armed groups by the State. What does this mean in terms of State obligations? That question is subject to diverging opinions.

According to some views domestic law does not permit non-criminal detention in armed conflict without derogation from obligations under applicable human rights law treaties. Under the ICCPR this would apply even if the State provided judicial review as required under Article 9(4).

Others suggest that derogation would be necessary if the State suspended the right to habeas corpus and provided only administrative review of internment in a NIAC (as would be sufficient in IAC).

According to still other views, the right to habeas corpus is not subject to derogation. Such an approach, which is perfectly valid and necessary in peacetime, seems difficult to reconcile, it is submitted, with the law or the reality of armed conflict, in particular in situations in which a NIAC involves multinational forces fighting abroad alongside a host government and these forces undertake internment.

In NIACs involving States fighting outside their own territories alongside of the host State's armed forces in the latter's territory, identification of the legal framework governing internment is even more complex than in those instances where the NIAC involves only government forces engaging organized armed groups in its territory. There are two examples of such NIACs. The first example is a "multinational NIAC," in which multinational armed forces are fighting alongside the armed forces of a "host" State in its territory against one or more organized armed groups (for example, the situation as it prevailed in Afghanistan after the confirmation of the Karzai government by the Loya Jirga in 2002, which turned the initial IAC into a NIAC). The second is a NIAC in which United Nations forces or forces acting under the aegis of a regional organization are sent to help stabilize a "host" government involved in hostilities against one or more organized armed groups in its territory. The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo and the African Union Mission in Somalia are examples.

Uncertainty surrounding States' human rights obligations in these two NIAC scenarios arise. These exist for internment in general, but are also particularly acute in the field of procedural safeguards. Five such general issues of uncertainty have been identified by Jelena Pejic; these illustrate the complexity:

First, as has been pointed out, a few States still reject the notion of application of human rights law in armed conflict as such.

Second, State members of a multinational force, whether acting under UN auspices or otherwise, may not be bound by the same human rights treaties, including the ICCPR, and may therefore have different legal obligations.
Third, the exact extent of the extraterritorial reach of human rights law remains unclear. The International Court of Justice and the UN Human Rights Committee have opined that States continue to be bound by their human rights obligations when they act abroad. However, their pronouncements, especially those by the International Court of Justice, have not yet settled all the legal, political and practical issues that arise. The concrete implications of the statements must be assessed on a case-by-case basis; this is certainly necessary for internment carried out by multinational forces abroad.

Fourth, and somewhat linked to the preceding points and assuming the applicability of human rights law, a legal issue that has not been addressed by any judicial or other body is whether States must derogate from their human rights obligation to protect personal liberty in order to detain persons abroad without providing habeas corpus review. It seems obvious that if the application of human rights law is to be adapted to battlefield reality—that is, situations in which it may not be feasible to provide judicial review of the lawfulness of internment in thousands or tens of thousands of cases—it would appear that a derogation would be necessary. If this is the case, the next issue that needs to be resolved is which State involved in a NIAC should derogate, the one actually holding the detainees or the host State. In practice, no State of a multinational force has ever made a derogation.

Fifth, what is the legal effect of a bilateral treaty adopted between a detaining State and a host State, or of a Chapter VII UN Security Council resolution authorizing internment by a multinational force, in particular when it comes to determining the extent of procedural safeguards to be granted? For example, can a bilateral treaty override the respective States' human rights obligations and provide a legal basis for internment without judicial review, particularly when there has been no derogation from their human rights obligations? It would seem that such a treaty cannot set aside otherwise applicable human rights obligations.

As regards Security Council authority, the issue arose in the international debate as to whether a Chapter VII resolution authorizing a multinational force to "use all necessary means" to fulfill its mandate may be read as permitting internment. Views remain divided. On the one hand, there is good reason to believe that it may (if the mission can use force against persons—the traditional understanding of the formulation “use all necessary means”—then it must logically be allowed to also intern persons). On the other hand, there are also compelling arguments against such a position (the clause is not specific enough to comply with the principle of legality). In any case, such a general clause referring only to “all necessary means” does not help in determining the applicable procedural safeguards in the absence of further details in the resolution.
Detention in Non-International Armed Conflicts

In light of this reality, the ICRC has been particularly active in its legal/policy thinking and, based on that, in its operational dialogue with States.

In light of the lack of IHL treaty rules on procedural safeguards in NIAC (and, to a certain extent, the still rudimentary nature of the process due to civilians interned in IAC), the ICRC developed institutional guidelines in 2005 entitled "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence." The rules derive from an IHL framework, bearing in mind relevant human rights law, and are complemented by policy considerations. They are meant to be implemented in a manner that takes into account the specific situation at hand. The ICRC relies on these guidelines in its operational dialogue with States, multinational forces and other actors.

Two aspects addressed in the institutional guidelines deserve to be specifically mentioned since they are at the heart of any internment system and are the issues most extensively debated internationally and domestically: the grounds justifying internment and the internment review process. Both are related to the principle of legality that must be respected when a State resorts to internment.

Grounds for Internment
International humanitarian law applicable in NIAC does not specify grounds for internment. In its institutional guidelines and operational dialogue, the ICRC relied on "imperative reasons of security" as the minimum legal standard that should inform internment decisions in all situations of violence, including NIAC. This standard is derived from what is accepted in IAC and is deemed appropriate in NIAC. This policy choice takes into account and highlights the exceptional nature of internment. In addition, the standard is already in wide use. The ICRC believes that this standard is also well adapted to the situation of multinational NIAC, in which foreign forces are detaining non-nationals in the territory of a host State. Due to the similarities with internment in occupation situations, in that both occur abroad, the wording chosen is based on the internment standard applicable in occupied territories under the Fourth Geneva Convention. The ICRC believes that the proposed standard strikes a workable balance between the need to protect personal liberty and the detaining authority’s need to protect against activity that is seriously prejudicial to its security.

The "imperative reasons of security standard" is high. It must be carefully evaluated in relation to each person detained as to whether it has been met. It should be uncontroversial that direct participation in hostilities is an activity that would meet the "imperative reasons of security standard." While direct participation in hostilities is a notion that is particularly relevant when it comes to the use of force in armed conflict, as it defines the circumstances under which civilians lose their
Knut Dörmann

protection from direct attacks, it seems obvious that the same persons engaging in such activity may a priori also be subject to internment. This is dependent, of course, on what direct participation in hostilities encompasses in terms of an individual’s conduct. The ICRC has issued its interpretive recommendations on that issue, certain aspects of which are the subject of controversial debate. This article is not the place to elaborate on the substance of the recommendations or the reaction they received. It suffices to say that some of the wide interpretations defended by others would seem quite problematic from a targeting perspective, as would reconciling them with the “imperative reasons of security standard” applicable to internment.

As posted in the ICRC guidelines on procedural principles and safeguards, internment may not be resorted to for the sole purpose of interrogation or intelligence gathering unless the person in question is deemed to represent a serious security threat based on his or her own activity. Similarly, internment may not be used in order to punish a person for past activity.

**Internment Review Process**

In terms of process, the ICRC’s institutional guidelines state, inter alia, that a person must be informed promptly in a language he or she understands of the reasons for internment. This must be done in order to enable the interned to exercise his or her right to challenge the lawfulness of the internment with the least possible delay before an independent and impartial body. The right to be informed is specifically recognized for IAC in Article 75(3) of Additional Protocol I, and while not explicitly provided for in NIAC, it can be seen as an element of the obligation of humane treatment applicable to internment in all situations of armed conflict. An interned has the right to challenge the lawfulness of his or her internment with the least possible delay before an independent and impartial body. In practice, exercising this right in an effective way will require the fulfillment of several procedural and practical steps, including providing interned with sufficient evidence supporting the allegations against them, ensuring that procedures are in place to enable interned to seek and obtain additional evidence and making sure that interned understand the various stages of the internment review process and the process as a whole. In the case that the internment review is administrative in nature and not judicial, it is essential to ensure the independence and impartiality of the review body.

The ICRC’s institutional guidelines provide that an interned has the right to automatic, periodic review of the lawfulness of continued internment. Such review requires the detaining authority to ascertain whether the “imperative reasons of security standard” continues to be met, and to order release of the interned if that is
not the case. The safeguards that apply to initial review are also to be applied to each periodic review. 62

The fact that the ICRC felt obligated to produce guidelines based on law and policy indicates the need for a discussion of whether IHL applicable in NIAC also must be strengthened. IHL treaty law simply does not spell out procedural safeguards for persons interned in a NIAC.

**Conclusion**

As has been detailed, there is an important body of law governing detention in NIAC. This body of law is sometimes based on a complex interplay between IHL and human rights law. Still, it is submitted, there are a number of normative gaps or areas in which IHL needs to be further strengthened in order to respond to humanitarian problems posed by detention in NIAC. This is one of the conclusions of a two-year internal study conducted by the ICRC on the need to strengthen the legal protection for victims of armed conflicts. 63 Strengthening the law may mean reaffirmation of existing law in situations where it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict.

The objectives of the ICRC study were to better identify and understand the humanitarian problems arising out of current armed conflicts, and to analyze existing treaty and customary rules of IHL with a view to determining whether this legal framework offers adequate answers to these humanitarian problems or if further development of the law may be needed. With respect to most of the questions examined, the ICRC study showed that IHL, in its current state, provides a suitable legal framework for regulating the conduct of parties to armed conflicts. In almost all cases what is required to improve the victims’ situation is stricter compliance with that framework, rather than adoption of new rules. If all parties concerned fully respected IHL, most current humanitarian issues would not exist. If attempts were undertaken to strengthen IHL, these should, therefore, build on the existing legal framework. However, the ICRC study also showed that IHL, in its current state, was not adequate in every respect and should be further developed in some areas. In addition to the issue of persons deprived of their liberty in NIAC, the ICRC identified three other areas where the law should be strengthened: international mechanisms for monitoring compliance with IHL and reparation for victims of violations, the protection of the natural environment in armed conflict and the protection of internally displaced persons in armed conflict. After finalization of the internal study the ICRC consulted States with a view to discovering to what
extent the study’s conclusions were broadly shared and to assess the possibility of strengthening legal protection for victims of armed conflicts in these areas.\textsuperscript{64}

In summary, States who participated in a first round of bilateral consultations confirmed the main conclusion of the ICRC’s study, that IHL remains as relevant today as ever before to ensuring protection to all victims of armed conflict. These States agreed that in most cases greater compliance with the existing legal framework is the best way to address the needs of victims. As a consequence, the adequacy of existing rules of IHL was strongly reaffirmed. The States consulted also broadly agreed on the analysis of the humanitarian concerns set out in the study; their views on how to address these concerns in legal terms varied, however, and therefore the best way to proceed remains open for discussion. States were not necessarily convinced that a treaty-making process was required. All options must be studied, including the preparation of soft-law instruments, the identification of best practices and the facilitation of expert processes aimed at clarifying existing rules. The consultation also showed that States were not entirely convinced that the law needed reinforcement in all the areas identified by the ICRC. They also indicated that it would not be realistic to work simultaneously on all four areas. Most States stressed that future discussions should focus in the near term on two areas: protection for persons deprived of liberty and mechanisms for monitoring compliance with IHL.

The ICRC submitted a report with the substantive findings and the results of the consultation with States to the 31st International Conference of the Red Cross and Red Crescent in November 2011.\textsuperscript{65} It also proposed a draft resolution with a view to obtaining agreement of the members of the Conference (i.e., all States parties to the Geneva Conventions, all national Red Cross and Red Crescent Societies, the International Federation of Red Cross and Red Crescent Societies and the ICRC) for the way forward. The International Conference adopted resolution 166 by consensus, confirming the two priority areas for future work: protection for persons deprived of liberty and mechanisms for monitoring compliance with IHL. The main elements of the resolution relevant for this contribution on detention in NIAC state:

\textit{The 31st International Conference of the Red Cross and Red Crescent, ...}

mindful of the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict,\textsuperscript{67} ...


Detention in Non-International Armed Conflicts

2. *acknowledges* that the report [submitted by the ICRC to the International Conference] identifies serious humanitarian concerns and challenges that need to be addressed, in particular those related to the protection of persons deprived of their liberty in relation to armed conflict . . . and that, on the basis of the consultations, the report calls for concrete and coordinated action to address these concerns;

3. *recognizes* the importance of analyzing the humanitarian concerns and military considerations related to the deprivation of liberty in relation to armed conflict with the aim, *inter alia*, of ensuring humane treatment, adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability, and the requisite procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict;

4. *recognizes* . . . that further research, consultation and discussion are needed to assess the most appropriate way to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict; . . .

6. *invites* the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organisations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict; . . . and *encourages* all members of the International Conference, including National Societies, to participate in this work while recognizing the primary role of States in the development of international humanitarian law; . . .

8. *invites* the ICRC to provide information on the progress of its work at regular intervals to all members of the International Conference and to submit a report on this work, with a range of options, to the 32nd International Conference of the Red Cross and Red Crescent, for its consideration and appropriate action.

Through this resolution the International Conference recognized the need to further assess how best to address the situation of persons deprived of liberty in NIAC. It gave a particular focus to ensuring humane treatment; adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability; and the requisite procedural and legal safeguards for persons detained, interned or transferred during armed conflict. The ICRC will respond to the invitation expressed by the International Conference and continue further research, consultation and discussion in cooperation with States in that particular domain in order to identify and propose a range of options and its recommendations. In light of the many questions addressed in this article, work in this area will be important—but also challenging.
Notes


3. Common Article 3(1), supra note 1, provides “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by .. . detention.”


5. Id., art. 4 (“all persons who do not take a direct part or who have ceased to take part in hostilities”); art. 5 (“persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”); art. 6 (“this Article applies to the prosecution and punishment of criminal offences related to the armed conflict”).


9. GC III, supra note 1.

10. GC IV, supra note 1.

11. The International Court of Justice (ICJ) in the Legal Consequences of the Construction of a Wall judgment, supra note 8, in paragraph 106, stated:

361
Detention in Non-International Armed Conflicts

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: 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.

The Court, however, was not called upon to elaborate further in terms of detention.

In the Armed Activities on the Territory of the Congo decision, supra note 8, paragraph 216, the ICJ recalled its advisory opinion in Wall, stating,

"[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: 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." It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," particularly in occupied territories (citations omitted).


16. See, e.g., Common Article 3, supra note 1 ("Persons taking no active part in hostilities, including... those placed hors de combat by... detention... shall in all circumstances be treated humanely."); IHL AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, supra note 12, at 15.


362


20. Id. at 675.

21. GC III, supra note 1, art. 12(2) (“Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.”).

22. GC IV, supra note 1, art. 45(3) (“Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.”).


25. See, e.g., GC III, supra note 1, arts. 21–38; GC IV, supra note 1, arts. 83–95; CUSTOMARY LAW STUDY, supra note 2, Rules 118–28.

26. See Additional Protocol II, supra note 4, art. 5; CUSTOMARY LAW STUDY, supra note 2, Rules 118–28.


29. STRENGTHENING LEGAL PROTECTION FOR VICTIMS OF ARMED CONFLICTS, supra note 23, at 10.

30. Id.
Detention in Non-International Armed Conflicts

31. Additional Protocol I, supra note 18, art. 5(2)(a).
32. CUSTOMARY LAW STUDY, supra note 2, Rule 120.
34. See, e.g., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3092 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) (“[m]ost of the guarantees listed in sub-paragraphs (a)–(j) [of Article 75(4)] are contained in the ... Covenant on Human Rights”); MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 463 ¶ 2.17 (1982).
35. CUSTOMARY LAW STUDY, supra note 2, Rule 100.
38. Id.
41. Id. at 17.
42. Id.; Expert Meeting on Procedural Safeguards, supra note 39, at 866–68.
46. Pejic, supra note 15.
47. See General Comment 31, ¶ 10, supra note 8 ("States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. . . . 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 of a State Party assigned to an international peace-keeping or peace-enforcement operation."). See also Cordula Droegel, Elective Affinities? Human Rights and Humanitarian Law, 90 INTERNATIONAL REVIEW OF THE RED CROSS 501, 510–13 (2008).

48. It should be noted, however, that the European Court of Human Rights has taken positions in the field of detention abroad, although it has been criticized for some of its findings.

49. U.N. Charter, ch. VII.


51. Droegel, supra note 19, at 690–91.

52. The institutional guidelines were published as Annex 1 to an ICRC report, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, presented at the 30th International Conference of the Red Cross and Red Crescent, held in Geneva in 2007. The guidelines were also published in Jelena Pejic, Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence, 87 INTERNATIONAL REVIEW OF THE RED CROSS 375 (2005), available at http://www.icrc.org/eng/assets/files/other/icrc_858_pejic.pdf [hereinafter Procedural Principles and Safeguards for Internment/Administrative Detention].

53. Id. at 383.


Detention in Non-International Armed Conflicts

57. See supra note 52.
58. Procedural Principles and Safeguards for Internment/Administrative Detention, supra note 52, at 380.
59. Id. at 382.
60. Pejic, supra note 15.
61. Procedural Principles and Safeguards for Internment/Administrative Detention, supra note 52, at 387.
62. Id. at 388.
63. For a discussion of the study process, see STRENGTHENING LEGAL PROTECTION FOR VICTIMS OF ARMED CONFLICTS, supra note 23, at 4–9. See id. at 4–5 and 8–24 for a discussion of the normative gaps.
64. See id. at 4, 24–29.
65. Id.
67. This paragraph indicated in general terms the possible ways of acting without expressing a preference with regard to the priority. The priority areas were identified later in the resolution.