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Detention in Armed Conflicts

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Actes du Colloque de Bruges

La détention en conflit armé

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CICR

Delegation of the ICRC to the Kingdom of Belgium, the EU and NATO

Délégation du CICR auprès du Royaume de Belgique, de l'UE et de l'OTAN

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DISCOURS DE BIENVENUE

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Monsieur le directeur du service académique et des admissions du Collège de l'Europe, Mesdames et Messieurs, chers invités, chers amis, j'ai l'honneur et le plaisir, au nom du Comité international de la Croix-Rouge (CICR), de vous accueillir pour ce 15ème Colloque de Bruges, qui sera dédié cette année à l'étude de différentes problématiques liées à la détention en temps de conflit armé.

Quinze ans pour le Colloque de Bruges, c'est déjà un petit jubilé ! Quinze ans de rencontres annuelles sur le droit international humanitaire (DIH), à chaque fois dans cette même salle, durant lesquelles de nombreuses discussions stimulantes se sont tenues, et grâce auxquelles des idées ont pu émerger et certaines, même, se concrétiser. Quinze ans qui ont également permis de constituer une collection des actes de ces Colloques de Bruges offrant aux praticiens, aux chercheurs ou aux étudiants de solides références en DIH sur des sujets d'importance.

Je saisis cette opportunité pour saluer la présence parmi nous de Monsieur Thierry Germond, qui, alors Chef de délégation du CICR auprès de l'Union européenne, proposa en l'an 2000 un partenariat avec le Collège d'Europe par le biais de la tenue de colloques de DIH. Je salue également la présence de Monsieur Stéphane Kolanowksi, Conseiller juridique principal de la Délégation du CICR à Bruxelles, pour avoir assuré depuis la pérennité de ce colloque juridique ; enfin, celle du professeur Yves Sandoz, membre du Comité – qui va prononcer dans quelques minutes l'allocution inaugurale de ce colloque – qui fut paneliste lors du premier colloque et qui depuis a été un fidèle participant à ce rendez-vous automnal de DIH.

Mesdames et messieurs, l'année 2014 est marquée par les commémorations du centième anniversaire du début de cette tragédie pour l'humanité que fut la première guerre mondiale. Cette guerre représente à l'évidence un bouleversement sans précédent par son extension géographique, par le nombre de militaires lancés dans la lutte, ou encore par l'ingéniosité meurtrière déployée sur les champs de bataille. La Flandre, cette région qui nous accueille aujourd'hui, porte toujours les stigmates bien visibles de cette folie humaine.

Un certain nombre d'entre nous avons passé la première partie de la semaine à Ypres, à quelques kilomètres d'ici, où la Société internationale de droit militaire et de droit de la guerre a tenu sa conférence annuelle. En marge de cette très intéressante conférence, nous avons pu nous rendre sur un certain nombre de lieux emblématiques de la Grande guerre. Ces visites ne peuvent que nous bouleverser par les témoignages directs et indirects des innombrables souffrances engendrées par ce conflit. Les morts, les blessés, les gazés, les disparus, les détenus se comptent par dizaines, voire centaines de milliers sur quelques kilomètres carrés. Ce sont des chiffres auxquels, heureusement, nous ne sommes plus habitués aujourd'hui, même si les conflits actuels engendrent également leur lot de souffrance.

Si la Première Guerre mondiale a marqué un tournant dans l'histoire des conflits armés, elle a également fondamentalement transformé les notions de protection et de secours, ou d'assistance, en temps de conflits. Cette transformation est due, dans une très large mesure, à l'attitude du Comité internationale de la Croix-Rouge sur le terrain, ainsi qu'au soutien apporté par un certain nombre de sociétés nationales, dont, en particulier, la Croix-Rouge de Belgique.

Alors que le CICR est né en 1863, il n'est devenu vraiment opérationnel que lors de la Première Guerre mondiale. C'est à grande échelle que le CICR s'est alors lancé dans des opérations de secours, avec le soutien des sociétés nationales de Croix-Rouge concernées, ainsi que dans des activités de protection. Il a de ce fait posé les bases du dispositif opérationnel qu'on lui connaît aujourd'hui. Mais cela ne s'est pas fait facilement. En effet, le CICR n'avait en 1914 que peu de pratique opérationnelle, et donc peu d'expérience. Par ailleurs, le CICR ne disposait que d'une base juridique extrêmement ténue pour entreprendre ces démarches. Les conventions en vigueur à l'époque ne contenaient en effet aucune disposition attribuant un rôle spécifique au CICR. Seule une résolution de la neuvième Conférence internationale de la Croix-Rouge, qui s'était tenue à Washington en 1912, permettait au CICR d'offrir ses services. La Résolution VI de cette Conférence internationale appelait les Sociétés nationales à créer une commission spéciale chargée de réunir et de transmettre au CICR les secours destinés aux prisonniers de guerre. De son côté, le CICR devait en assurer la distribution à ces prisonniers par l'intermédiaire de ses délégués. C'était tout. Mais cela nous a permis de faire beaucoup.

Le 27 août 1914, le CICR créa l'Agence internationale des prisonniers de guerre. Au terme d'une négociation menée respectivement avec les autorités françaises et allemandes durant l'automne 1914, le CICR envoya dès le 3 janvier 1915 deux délégués, l'un pour la France, l'autre pour l'Allemagne avec pour mission de visiter les camps de détention. Au terme de la Grande guerre, le CICR aura effectué 524 visites officielles de camps. Les opérations de visites aux détenus, si spécifiques au CICR aujourd'hui, étaient alors lancées. Depuis lors, chaque jour, de nombreux délégués du CICR négocient l'accès aux lieux de détention et visitent annuellement plus de 700.000 personnes privées de liberté dans plus de 70 pays.

En parallèle à la mise en place et au développement du travail de l'Agence et des visites aux prisonniers de guerre, le CICR se lança dans des opérations de secours de grande envergure, y compris des activités d'assistance médicale. Pour ce travail, le CICR put compter sur des Croix-Rouge nationales aussi dévouées qu'efficaces. Le travail remarquable de la Croix-Rouge de Belgique en matière d'assistance en est un parfait exemple. La Croix-Rouge de Belgique, qui pouvait compter parmi ses collaborateurs actifs près des lignes de front la Reine Elisabeth, a multiplié les postes de santé un peu partout dans le pays, y compris au plus près des combats. Elle a même transformé un hôtel de la côte belge en hôpital, le célèbre hôpital « L'Océan » et en a assuré la gestion durant le conflit. Cet hôpital était extrêmement important tant pour sa capacité en lits que pour sa localisation à quelques encablures des combats les plus violents.

Enfin, toujours dans l'optique de répondre le mieux possible aux problématiques diverses et variées engendrées par le premier conflit mondial, le CICR s'est engagé dans la question des rapatriements des prisonniers de guerre. Ce n'était pas chose facile en raison du manque de pratique établie, du nombre considérable de personnes concernées et d'Etats impliqués.

Vous l'aurez compris, le choix du thème du 15ème Colloque de Bruges s'imposait, même s'il ne s'agit pas ici de faire une étude des expériences vécues il y a un siècle. Au contraire, en restant fidèle à l'esprit de ce colloque, nous souhaitons plutôt explorer de possibles solutions aux problèmes d'aujourd'hui. C'est ainsi que, dans le cadre ce colloque sur des problématiques liées à la détention en conflit armé, nous vous proposons cinq thématiques particulières, présentant toutes des défis juridiques et opérationnels.

S'il est généralement admis que le droit des conflits armés internationaux est plus étoffé et protecteur que celui des conflits armés non internationaux, un certain nombre de défis se posent tout de même. Nous les aborderons dans la première session qui est consacrée aux différentes formes de privation de liberté en situation de conflits armés internationaux, en s'attachant aux différents régimes de privation de liberté et aux réalités qui les sous-tendent. Nous verrons que, même dans ces situations de conflits armés internationaux, le droit laisse quelques fois place à des interrogations.

Nous examinerons ensuite des questions liées à des situations, bien plus nombreuses et juridiquement souvent délicates, de conflits armés non internationaux. En plus de certaines incertitudes juridiques, se posent des questions d'ordre pratique relatives à la détention par des groupes armés non étatiques. Or, ne pas chercher à leur laisser la possibilité de détenir en situation de conflit armé n'est pas une option. L'alternative – à savoir de ne pas « faire de prisonniers » – n'étant certainement pas ce que nous souhaitons voir sur le terrain. De même, si le CICR n'est pas en mesure de visiter d'éventuelles personnes détenues par des groupes non étatiques, c'est tout le système de protection de ces personnes qui est mis à mal. Cela s'observe malheureusement beaucoup trop souvent. Nous espérons pouvoir discuter ouvertement et de manière créative de solutions possibles à ces nombreuses problématiques.

Le troisième sujet retenu, la détention à l'étranger, est une pratique aujourd'hui fréquente. Pour autant, elle suscite nombre de controverses que nous examinerons en passant de la pratique d'une organisation aujourd'hui expérimentée en la matière, à savoir l'Organisation du traité de l'Atlantique nord (OTAN), à celle d'un Etat, impliqué lui aussi dans cette organisation mais également dans d'autres, que ce soit les Nations unies ou l'Union européenne. Par ailleurs, la jurisprudence toute récente nous offre également matière à débattre dans le cadre de ce colloque. Je n'ai nul doute que cette troisième session sera, elle aussi, très intéressante.

Je vous recommande d'être présents demain matin également. Le programme nous amènera en effet à travers deux sujets d'actualité, à savoir le transfert des personnes détenues d'une part, et l'articulation entre le droit international humanitaire et les droits de l'homme en matière de détention en conflit armé d'autre part. Pour ces deux thèmes, nous voyons s'affronter des pratiques et des opinions différentes. Cela ne serait pas en soi tellement problématique si les conséquences, tant en matière humanitaire que de responsabilité juridique, n'étaient aussi importantes. La pratique et les décisions de justice commençant à s'étoffer, je m'attends à des discussions animées demain matin !

Comme vous pouvez le constater, nous avons un programme aussi chargé qu'intéressant qui nous permettra de traiter de diverses questions liées à la détention en situation de conflit armé. Pour aborder ces questions délicates, nous avons avec nous des orateurs du monde académique, d'organisations humanitaires, des diplomates ou encore des militaires, ayant une grande expérience et expertise dans les problématiques et domaines que nous vous proposons d'aborder tout au long de cette journée et demie de discussion et de réflexion. Je suis très heureux de pouvoir accueillir nos orateurs, dont certains sont déjà des habitués de nos rendez-vous de Bruges, et d'autres, je l'espère, qui le deviendront également.

Le CICR a ses idées, ses opinions, ses convictions basées sur 100 ans de pratique en matière de détention et sur l'expertise qu'il a pu développer depuis la première guerre mondiale. Mais il nous importe de les confronter à d'autres afin de pouvoir préciser ou clarifier ce qui mérite de l'être et ainsi faire avancer le droit et l'action humanitaires au bénéfice des personnes privées de liberté.

Je ne saurais terminer sans remercier le Collège d'Europe pour la confiance renouvelée chaque année dans l'organisation des désormais traditionnels Colloques de Bruges, et sans vous remercier, vous les participants, d'avoir été si nombreux à répondre favorablement à notre invitation à participer à ce 15ème Colloque de Bruges.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons avoir pendant ces deux jours et je vous remercie de votre attention. Et, sans transition, je souhaite inviter le professeur Yves Sandoz à prononcer l'allocution inaugurale.

KEYNOTE ADDRESS

Mr. Yves Sandoz
Member of the International Committee of the Red Cross

Mesdames et messieurs,

Je ne vais pas répéter ce que vient de dire François Bellon et tout le bien que je pense du Colloque de Bruges et de la fructueuse collaboration qui s'est instituée à travers lui entre le Collège d'Europe et le Comité international de la Croix-Rouge (CICR). J'aimerais toutefois souligner encore à quel point ce Colloque, qui avait initialement plutôt une vocation didactique afin de permettre aux diplomates en poste à Bruxelles qui le souhaitaient de se familiariser avec les fondements du droit international humanitaire, a progressivement joué le rôle qui est le sien aujourd'hui, soit celui d'une chambre d'échos et de dialogue pour des problèmes actuels du droit international humanitaire, à l'instar, dans un autre cadre, de la table ronde de l'Institut international de droit humanitaire de San Remo.

Ce Colloque joue tout particulièrement bien ce rôle cette année avec le choix très judicieux de la détention dans les conflits armés, thème à la fois central sur le plan humanitaire – on a parfois utilisé, et non sans raison, l'expression d' **«** enfer carcéral » – et d'actualité puisque le CICR a pris une initiative en vue de la clarification et du renforcement de la protection juridique des personnes privées de liberté dans les conflits armés non internationaux, sur la base d'un mandat qui lui a été donné par la Résolution 1 adoptée en 2011 par la xxxii^{ème} Conférence internationale de la Croix-Rouge et du Croissant-Rouge. Beaucoup de participants à ce colloque se sont penchés sur ce dossier mais je vais néanmoins rappeler ses grandes lignes à ceux qui ne le connaissent pas.

Cette initiative est justifiée par une importante disparité qui existe entre les dispositions détaillées applicables lors des conflits armés internationaux et les règles sommaires qui ont été codifiées pour les conflits armés non internationaux. Il en résulte une certaine incertitude quant aux sources et au contenu des règles qui concernent la détention dans ceux-ci, et des débats sont encore ouverts en ce qui concerne l'applicabilité et la pertinence du droit international des droits de l'homme, ainsi que des limites précises du droit international humanitaire coutumier.

Le CICR a identifié quatre domaines clé où les règles du droit international humanitaire concernant la détention en temps de conflit armé non international sont déficientes, ou en tout cas insuffisamment précises : les conditions de détention ; la protection des groupes particuliè-

rement vulnérables de détenus, comme les femmes, les enfants et les personnes âgées ; les motifs procéduraux d'internement ; et, enfin, le transfert des détenus d'une autorité à une autre. le CICR est actuellement engagé dans un processus de recherche et de consultation concernant ces sujets avec les Etats et autres acteurs pertinents, dans l'objectif de soumettre un rapport avec différentes options. Une nouvelle séance de consultation aura d'ailleurs lieu dès lundi prochain.

Plusieurs défis particuliers se posent par ailleurs quant à la détention par des groupes armés non étatiques parties à un conflit armé non international. Le débat est ouvert sur des questions telles que la manière de prendre en considération les capacités relatives de ces groupes, qui ne sont pas toujours en mesure d'assurer des conditions de détention décentes, et sur les craintes exprimées par les gouvernements que la réglementation de la détention par des groupes armés dans le domaine de la détention ne paraisse légitimer une activité qu'ils continuent de considérer illégale du point de vue de leur législation nationale.

Cela dit, il faut aussi rappeler que le CICR n'est pas le seul sur la scène internationale à s'être penché sur le domaine de la détention et je rappellerai, mais sans les commenter faute de temps, quatre autres initiatives en cours qui trouveront certainement, elles aussi, un écho lors de notre colloque. Il s'agit tout d'abord du processus de Copenhague sur la détention dans les opérations multinationales, qui a débuté en 2007 et a abouti en 2012 à l'adoption de principes et directives. Il faut ensuite relever que certains domaines de l'ensemble des règles minimales pour le traitement des détenus de 1955 sont actuellement revus par une groupe de travail intergouvernemental mis sur pied par la Commission des nations unies sur la prévention du crime et sur la justice criminelle : des questions comme le respect de l'éthique médicale dans les lieux de détention ou la détention en isolement font notamment l'objet d'un nouvel examen. On mentionnera en troisième lieu le travail de rédaction d'un nouveau commentaire de l'article 9 (droit à la liberté et à la sécurité de sa personne) du Pacte international relatif aux droits civils et politiques de 1966, entrepris par le Comité des droits de l'homme des Nations unies. Le groupe de travail des Nations unies sur la détention arbitraire, enfin, prépare un projet de principes de base et de lignes directrices concernant les voies de recours et procédures liées au droit de toute personne privée de liberté de contester la légalité de sa détention devant un tribunal. Ce projet devrait être soumis au Conseil des droits de l'homme en septembre 2015.

Le CICR a suivi de près tous ces projets avec le souci constant d'une bonne coordination et d'une bonne complémentarité. Certains des participants à ce colloque ont également participé à l'un ou l'autre de ceux-ci et pourront, s'ils le jugent utile, nous apporter des précisions à propos de l'un ou l'autre des thèmes du colloque.

Je n'aimerais par ailleurs pas terminer ce bref rappel sans mentionner un autre projet, de longue haleine, également entrepris par le CICR, celui d'une mise à jour, bien nécessaire, des commentaires des Conventions de Genève et de leurs protocoles additionnels. Ces nouveaux commentaires vont bien sûr toucher aussi les nombreux articles concernant la détention dans ces conventions et, particulièrement à travers le commentaire de l'article 3 commun des Conventions de Genève, puis celui de l'article 5 du Protocole additionnel 2, la question de la détention dans les conflits armés non internationaux.

Ce rappel étant fait, j'aimerais maintenant user de la liberté académique qui prévaut dans un tel colloque pour vous faire partager, à titre personnel, quelques réflexions plus générales que m'a inspirées son thème.

La première concerne la raison d'être de la détention, ses objectifs. J'en distinguerai six. Il y a bien sûr en premier lieu l'idée de punir ceux qui ne respectent pas les normes que s'est fixées la société dans laquelle ils vivent. La sanction est le corolaire nécessaire de toute règle. Le philosophe Michel Foucault dans son ouvrage « Surveiller et punir, naissance de la prison », nous relate un supplice d'écartèlement infligé en public au 18ème siècle pour nous rappeler que la peine de prison a alors constitué un grand progrès, avec le souci à l'époque que la prison ne soit surtout pas trop confortable pour que la punition reste dissuasive : le lien entre punition et dissuasion était donc déjà établi. Ce premier aspect – punir et dissuader – prend évidemment une importance croissante en droit international humanitaire avec le développement de son aspect pénal.

Le deuxième objectif possible de la détention est de neutraliser une personne. En temps de paix il s'agit de neutraliser une personne pour protéger la société, en imposant un internement administratif, au-delà de la durée de la peine qui leur a été infligée, à des psychopathes dangereux, comme des délinquants sexuels ou des incendiaires jugés inguérissables. Dans un conflit armé international, le prisonnier de guerre, pour autant qu'il n'ait pas violé le droit international humanitaire, n'est pas puni par sa détention, mais empêché de reprendre le combat. La détention administrative n'est pas non plus exclue lors de conflits armés à l'égard de civils jugés dangereux, que ce soit sur son propre territoire ou dans des territoires occupés.

Le troisième objectif est d'obtenir des informations de celui que l'on détient. Le quatrième objectif est de disposer d'une monnaie d'échange, qu'elle soit financière ou autre (échange de prisonniers, pression sur la famille, etc.). Il s'agit, en d'autres termes, de prise d'otages. Le cinquième objectif est d'abuser de la personne que l'on détient, soi-même ou en l'utilisant comme « marchandise » (esclavage, abus sexuels, réseaux de prostitution, etc.). Le sixième objectif est de détenir pour terroriser ses ennemis ou pour les narguer.

Se posent dans tous les cas les questions du droit de détenir, de la responsabilité de celui qui détient, des droits des détenus, et des droits de leur famille (et des proches). Par rapport aux objectifs de la détention et aux questions ci-dessus mentionnées il me paraît important de clarifier où se situent les zones rouges de ce qui est clairement en violation du droit, et où se situent les zones grises où le droit n'est pas parfaitement clair et mériterait soit d'être clarifié, soit peut-être même d'être développé. Mais ce faisant, il s'agira de distinguer les normes qui doivent être précises et universelles de celles qui doivent garder une certaine souplesse, un certain degré d'adaptabilité au contexte et aux circonstances. Permettez-moi de brièvement illustrer mon propos.

A l'égard des deux premiers objectifs précités – soit punir et neutraliser – il est clair qu'il existe un droit de détenir lors des conflits armés. La question de savoir exactement qui a le droit de détenir reste toutefois ouverte, notamment dans les conflits armés non internationaux. Avec le troisième objectif, on entre encore davantage dans une zone grise. Même si elle n'est pas forcément en violation du droit, une détention avec le seul objectif d'obtenir des informations peut facilement le devenir. Les trois autres objectifs se situent en revanche tous clairement dans la zone rouge : il ne fait pas de doute que la prise d'otages est un crime, et même un crime de guerre si elle est liée à un conflit armé ; point n'est besoin d'épiloguer sur les abus sexuels, la prostitution forcée ou la mise en esclavage, qui peuvent également entrer dans la catégorie des crimes de guerre s'ils sont commis lors de conflits armés ; enfin il n'est pas nécessaire non plus de s'étendre sur la violation grave des normes internationales que représente l'odieuse pratique, récemment mise en œuvre, d'exécutions sommaires par décapitation, transmises par internet pour narguer et terroriser.

Restent donc trois motifs de détention qui ne sont pas *a priori* totalement interdits. Il s'agit alors, dans les trois cas, de clarifier et préciser, voire de développer, les normes applicables, soit d'une part celles concernant la légitimité de la détention, d'autre part les garanties judiciaires et de traitement dont doit bénéficier la personne légitimement détenue et, pour certaines de ces garanties, sa famille (ou ses proches). Je ne vais pas essayer d'entrer dans cette brève présentation sur toutes les nombreuses questions méritant clarification et je me contenterai de rappeler certaines d'entre elles.

En ce qui concerne les prisonniers de guerre, on est apparemment en terrain solide grâce à la 3ème Convention de Genève, même s'il reste de nombreux points qui doivent être clarifiés dans les cas d'espèce, notamment la gravité d'une atteinte à la santé qui justifie le rapatriement ou la conséquence du refus d'un prisonnier de guerre d'être rapatrié à la fin des hostilités. On pourrait toutefois se poser la question, dans certains cas, de la légitimité de soustraire le prisonnier de guerre à certaines des garanties liées à la détention administrative. Nous en reparlerons ci-dessous.

Avec l'internement pour des raisons de sécurité, on entre dans un domaine où il est particulièrement important de mettre les points sur les i car grands sont les risques d'abus. Il convient notamment de rappeler que l'internement administratif doit rester une mesure exceptionnelle ; ne peut pas être une mesure collective ; doit cesser si les raisons de l'internement n'existent plus ; doit respecter le principe de la légalité, notamment en respectant les garanties procédurales (droit du détenu d'être informé de la raison de sa détention, de disposer d'une assistance judiciaire, d'être présent ou représenté lors des délibérations sur son cas, d'avoir des contacts avec sa famille ; révision régulière de la justification de la détention par un organe indépendant).

Ces règles générales sont valables dans les conflits armés internationaux pour les civils détenus pour des raisons de sécurité sur le territoire d'une partie en conflit ou en territoires occupés. En ce sens, le statut de prisonnier de guerre est une grosse exception puisqu'il s'agit d'un internement collectif, sans revue régulière (sauf en cas de problèmes graves de santé) et d'une durée indéterminée puisqu'elle dépend de la longueur du conflit. Une question qui mériterait d'être posée à cet égard est précisément celle de la durée. Aucune limite n'est fixée par le droit humanitaire alors que la détention de prisonniers de guerre dans des conflits armés qui s'éternisent devient particulièrement cruelle et ne peut faire, pour l'heure, que l'objet d'accords *ad hoc* négociés pour des raisons humanitaires.

La situation est beaucoup moins claire dans les conflits armés non internationaux et l'on entre là dans une zone grise, car on se situe entre une détention liée à une condamnation pénale et une détention administrative et, si l'on se situe plutôt du côté de la détention administrative, entre les règles spécifiques des conflits armés et les règles générales et strictes de l'internement administratif, avec la prise en compte des droits de l'homme et une nécessaire clarification de sa relation avec le droit international humanitaire dans ces situations. Contrairement au prisonnier de guerre, le membre d'un groupe armé qui participe directement aux hostilités peut, dans un conflit armé non international, être puni par le droit interne du seul fait de sa participation à ce conflit, le droit international humanitaire n'excluant pas une telle condamnation. Se pose alors une question d'application qui peut avoir de grandes incidences. La peine de mort n'est pas interdite dans de nombreux Etats et pas non plus par le droit international humanitaire, qui ne fait que lui fixer certaines restrictions. Son application lors d'un conflit armé non international ne pourrait toutefois que raviver les haines et inciter les groupes rebelles à eux aussi tuer des personnes qu'elles détiennent, entraînant ainsi un cercle vicieux de haine et de violence. Sinon l'abolition de la peine de mort, il est de ce fait important lors d'un conflit armé d'obtenir au moins le gel des exécutions.

Une autre question délicate est celle de la durée, que nous venons d'évoquer pour les conflits armés internationaux. Si l'on s'inspire du droit international humanitaire applicable lors de

tels conflits, l'on aurait tendance à fixer la même limite, soit celle de la durée du conflit. Indépendamment de sa condamnation pénale, donc même au-delà de celle-ci, une personne ayant participé de manière régulière aux hostilités avec la partie dissidente qui serait capturée par les forces gouvernementales pourrait alors être détenue jusqu'à la fin des hostilités armées sans qu'il ne soit nécessaire de justifier cette détention par le passage régulier devant une autorité indépendante. Une telle solution aurait l'avantage de mettre sur un même pied la partie gouvernementale et la partie dissidente. Elle n'est toutefois pas expressément prévue pour les conflits armés non internationaux et l'argument de la « *lex specialis* » pour défendre cette solution est de ce fait contesté. Les tenants des droits de l'homme insistent dès lors sur le fait que toute détention dont la durée dépasserait celle d'une condamnation pénale prononcée en due forme soit soumise aux règles strictes de la détention administrative imposées par les droits de l'homme. Qu'est-ce que cela signifie dans la pratique et quelle conséquence en tirer pour la détention par les groupes armés ? C'est une question particulièrement délicate, qui fait précisément l'objet des discussions en cours avec les gouvernements et qui sera abordée lors du présent colloque.

La question des droits et obligations en matière de détention des groupes armés qui sont parties à un conflit armé non international est d'autant plus délicate que les Etats reportent là aussi leur double standard. Ils ont accepté l'idée de règles pour la détention applicables lors des conflits armés non internationaux, consacrant même un article spécifique à ce sujet dans le Protocole additionnel 2 de 1977 (l'article 5), mais ne s'interdisent pas pour autant de considérer punissables dans leur législation interne tous les actes des rebelles liés au conflit armé, soit aussi, comme l'utilisation de la force armée, le fait de détenir des personnes. Le dialogue avec les gouvernements visant à préciser le contenu des règles du droit international humanitaire sur la détention applicables par les groupes armés de la partie dissidente est de ce fait compliqué, les gouvernements ayant une certaine réticence à préciser le contenu de règles internationales visant des comportements condamnés par leur législation nationale.

Ces précisions sont néanmoins importantes et vont dans la ligne des règles contenues à l'article 5 du Protocole additionnel 2, que les Etats ont élaboré et, pour la plupart d'entre eux, adopté. Il s'agit donc d'entrer en matière. Si l'on accepte de le faire, on réalise toutefois la complexité de fixer des règles claires du fait de la diversité des conflits armés non internationaux. Dans certains conflits, même si ce sont la minorité, des groupes armés contrôlent une portion non négligeable du territoire pendant une certaine durée. Ces groupes se trouvent alors *de facto* dans la situation d'un Etat qui occupe une partie du territoire de l'Etat ennemi lors d'un conflit armé international. Pour de nombreuses raisons sur lesquelles nous n'allons pas entrer ici, les Etats ne veulent pas faire ce parallèle et s'inspirer des règles de l'occupation. Il n'en reste pas moins que dans certains cas la partie dissidente, qui peut gérer des hôpitaux et des écoles,

peut aussi administrer des prisons, et la question des conditions de détention se pose dès lors de la même manière que pour la partie gouvernementale. Il n'y a alors en principe pas de difficulté à admettre que les exigences que le droit international humanitaire pose à la partie gouvernementale et à la partie dissidente sont semblables.

Cette égalité est toutefois remise en cause si l'on admet que, dans ces cas, les droits de l'homme n'éclairent pas seulement des normes du droit international humanitaire moins précises, mais ajoutent certaines exigences supplémentaires. Comme les Etats dans leur grande majorité ne reconnaissent pas l'applicabilité des droits de l'homme à la partie dissidente, ces exigences supplémentaires ne s'adressent qu'à la partie gouvernementale et remettent ainsi en question le principe de l'égalité des droits et devoirs des belligérants dans les conflits armés non internationaux. Faut-il le reconnaître et y a-t-il de bonnes raisons de l'admettre ? C'est aussi une question qui sera abordée dans notre colloque.

Dans la majorité des cas, par ailleurs, la partie dissidente d'un conflit armé non international ne dispose pas d'infrastructures comparables à celles d'un Etat. Se pose alors la question des conditions minimales qui sont acceptables pour détenir des personnes. Si la formulation utilisée à l'article premier du Protocole additionnel 2 implique, pour que l'on puisse parler de conflit armé non international, un contrôle du territoire et « la capacité d'appliquer le protocole », et donc celle de détenir des personnes selon les critères développés à l'article 5 de ce protocole, ce n'est pas le cas de l'article 3 des Conventions de Genève pour des conflits armés non internationaux qui ne répondraient pas aux critères du Protocole 2. On ne peut donc pas éluder la question. La possibilité de nourrir les détenus, de les loger de manière sûre et décente, dans le respect de critères d'hygiène, de même que celle de leur fournir des soins médicaux en cas de nécessité, paraissent en tout cas indispensables. Est-ce pour autant suffisant ? Certes, si l'on n'est pas en mesure de garder le combattant ennemi tombé en son pouvoir, l'on n'a en principe pas d'autre choix que de le libérer, une exécution sommaire dans un tel cas étant clairement exclue par le droit international : l'article 41 du Protocole additionnel 1 a tranché la question pour les conflits armés internationaux et il est incontestable que ce principe s'impose aussi lors des conflits armés non internationaux.

A vouloir fixer la barre trop haut en ce qui concerne les conditions minimales acceptables pour la détention, on prendrait néanmoins, à l'évidence, le risque de voir se multiplier les situations où la consigne de ne pas faire de prisonniers serait donnée, empêchant par là toute possibilité d'accepter des redditions ou de recueillir des blessés adverses, avec le risque évident d'exécutions sommaires. Fixer la barre à une hauteur « raisonnable » est d'autant plus justifié que l'on constate bien souvent que les parties gouvernementales elles-mêmes sont très loin d'être irréprochables à cet égard. Mais où se situe la zone rouge, où entre-t-on dans une zone grise, quel

degré de flexibilité faut-il accepter en fonction des conditions générales du contexte ? Tout cela ouvre un vaste champ à la discussion, pour le présent colloque et au-delà, cela non seulement avec les gouvernements mais aussi avec les parties dissidentes des conflits en cours, qui doivent être associées à une telle réflexion pour qu'elles acceptent les conclusions qui en seront tirées et que celles-ci entraînent une amélioration concrète des pratiques actuelles.

Reste aussi ouverte la question des garanties judiciaires. Si l'on s'aligne sur les conflits armés internationaux, l'on pourrait admettre qu'elle ne se pose pas pour les soldats gouvernementaux capturés par les forces armées de la partie dissidente, qui pourraient « légitimement » (selon les critères du droit international humanitaire) détenir ces soldats jusqu'à la fin du conflit. Cette hypothèse serait en tout cas confortée si les parties en conflit répondaient à l'injonction qui leur est faite dans l'article 3 des Conventions de Genève de « mettre en vigueur par voie d'accords spéciaux tout ou partie des autres dispositions » de ces conventions. Toutefois, une telle injonction n'est pratiquement plus jamais suivie aujourd'hui et il est difficile d'avoir une attitude claire des gouvernements sur la légitimité et, le cas échéant, la durée d'une telle détention, ceci toujours pour la raison du double standard que j'ai évoquée, et ce d'autant plus qu'une forte tendance voudrait en outre qu'eux-mêmes soient tenus par les droits de l'homme de respecter, en cas de capture de membres des groupes armés, les strictes règles de la détention administrative, comme on vient de le voir. Que ce soit donc pour fixer le statut (en cas de doute) et la durée de la détention des combattants capturés des forces armées, mais aussi pour les condamnations pour violation du droit international humanitaire ; pour d'éventuelles détentions administratives de non combattants ; et pour des condamnations pénales prononcées pour des crimes de droit commun, se pose la question des tribunaux de la partie dissidente et des garanties d'indépendance et de compétence minimales requises.

Bien souvent toutefois, la partie dissidente n'est pas suffisamment structurée et organisée pour établir des tribunaux indépendants dignes de ce nom. Faut-il alors renoncer dans ces cas à envisager toute détention, et même celle de combattants des forces gouvernementales ? Le risque serait alors grand, nous l'avons déjà relevé, que la partie dissidente procède à des exécutions sommaires. Or une partie dissidente peut avoir la capacité de détenir un détenu sans forcément avoir celle de le juger selon des critères acceptables. Il serait donc bien préférable d'admettre la possibilité pour les parties dissidentes de détenir des combattants ennemis même s'ils n'ont pas la capacité de les passer en jugement. Le Protocole 2 lui-même paraît d'ailleurs implicitement l'envisager. En effet, son article 5, qui se penche sur les mesures que les parties doivent observer à l'égard de toute personne privée de liberté pour des motifs en relation avec le conflit armé, ne mentionne que des garanties de traitement et c'est seulement l'article 6, qui traite des poursuites pénales pour des infractions en relation avec le conflit armé, qui mentionne les garanties judiciaires. Cette question mérite donc, elle aussi, d'alimenter notre débat.

Je n'aborderai pas ici la question des règles ou mesures particulières qu'il faudrait prévoir pour la protection des personnes particulièrement vulnérables, sur laquelle le CICR souhaite également ouvrir le dialogue. On ne saurait nier l'importance de celui-ci eu égard, par exemple, aux femmes victimes d'abus sexuels. Ce faisant, on ne doit toutefois pas négliger la crainte émise par certains qu'en se focalisant par trop sur certaines catégories, on laisse de côté d'autres personnes protégées qui sont aussi soumises à des risques importants, tels les jeunes hommes en prison, souvent victimes eux aussi de violence ou de viols.

La question de la responsabilité du détenteur sera également abordée dans le présent colloque, notamment en cas de détention à l'étranger et de transfert à l'étranger. Des clarifications juridiques sont nécessaires mais je me contente ici de mentionner le problème sans entrer en matière. Plus généralement, l'on ne doit pas oublier non plus la responsabilité générale du détenteur par rapport à tout ce qui se passe dans la prison, et pas seulement à l'égard de l'attitude du personnel de la prison. Les autorités pénitentiaires restent trop souvent aveugles sur tous les abus commis par des détenus sur d'autres détenus. C'est d'ailleurs un problème général qui dépasse le seul cadre des conflits armés.

Il faut aussi être conscient que le dialogue humanitaire sur la détention peut s'étendre au-delà du cadre juridique. On peut par exemple chercher à obtenir d'un preneur d'otages, ou des « barons » de la drogue qui contrôlent des lieux de détention, qu'ils acceptent de l'aide ou une action humanitaire visant à améliorer les conditions de détention de personnes qu'ils détiennent. Cela n'ôte rien au caractère criminel de telles détentions : il est exclu d'entrer en matière sur des normes régissant la détention d'otages ! Mais contrairement à la norme, le dialogue et l'action humanitaires doivent s'adapter à tout pour tenter d'améliorer la situation des victimes, y compris quand leur détention elle-même constitue indéniablement un crime international. Ce dialogue peut et doit coexister avec la lutte contre la grande criminalité, qui doit elle aussi se renforcer, à travers la coopération internationale.

Cela dit, je rappellerai pour conclure que notre colloque va se concentrer sur un aspect particulier du problème, même s'il est très important, celui de la détention dans les conflits armés non internationaux. Je tenais toutefois à souligner qu'il s'inscrit en bonne place dans le cadre plus large des efforts indispensables qui doivent être entrepris pour améliorer ce qui est encore trop souvent « l'enfer carcéral ».

Session 1
Deprivation of Liberty in International Armed Conflict

Chairperson: **Elzbieta Mikos-Skuza**,
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PANORAMA DES RÉGIMES D'INTERNEMENT ET D'EMPRISONNEMENT DANS LES CONFLITS ARMÉS INTERNATIONAUX

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Summary

Regarding the issue of internment and criminal detention in international armed conflict (IAC), the status of those who are detained, as well as the conditions and treatment of detention remain crucial. It is significant to keep in mind that situations of IAC also encompass "internationalised" or "transnational" armed conflicts, in which certain types of armed groups are engaged. International law governs those situations, as the State has no legal right to intern or detain foreigners on a foreign territory. Furthermore, even this is subject to some debate. International Humanitarian Law (IHL) governing IAC is a much more detailed corpus than the legal framework applicable to non-international armed conflict (NIAC).

Combatants and certain categories of civilians accompanying armed forces benefit from prisoner of war (POW) status when they have fallen into the hands of the enemy. Article 4 of the third Geneva Convention (GC III) sets out a range of conditions under which members of other militias and members of other volunteer corps belonging to a party to the conflict may benefit from prisoner of war status. Whether those conditions are fully applicable to the members of the armed forces of a party to the conflict is still being debated under IHL. What leaves no room for doubt is that, following Articles 46 and 47 of the first Additional Protocol to the GC (AP I), neither spies nor mercenaries will have the right to the status of prisoner of war. The status of certain categories of persons, such as embedded journalists or members of private military companies, is more controversial.

1 Les opinions exprimées dans cette intervention sont celles de l'auteur et n'engagent nullement le Tribunal Spécial pour le Liban ou l'Organisation des Nations Unies.

Internment of POWs is justified by reasons of military necessity and does not constitute a sanction but only aims at precluding them from engaging in hostilities until the end of the hostilities. If there is a doubt regarding their status, they have to be treated as civilians when they have not committed any act of belligerency or have to be treated as prisoners until a competent tribunal has clarified their status (Article 5(2) GC III). GC III governs the treatment of POWs detained under the authority of the detaining power, which is responsible for their humane treatment. GC III contains a wide range of provisions referring to the POWs' humane treatment, in terms of food, clothing, hygiene, medical attention, etc.

As regards internment of civilians, despite the wording of GC IV, the International Criminal Tribunal for Former Yugoslavia (ICTY) held that the criterion of "allegiance" should be used instead of that of nationality. Every person who does not benefit from the protection granted by GC I, II or III must benefit from the protection enshrined in GC IV. Civilians cannot be attacked nor detained but only interned 'if the security of the Detaining Power makes it absolutely necessary' (Article. 42 GC IV) or 'for imperative reasons of security' in situations of occupation (Article 78 GC IV). Relevant international case law sheds light on these notions, setting out objective criteria in order to establish whether their behaviour is likely to cause damage to the security of the State. To be lawful, internment of civilians is limited to certain procedural safeguards and must be decided on the basis of an examination of the personal situation of the person concerned. Unlike POWs who will not be released before the end of the hostilities, civilians must be freed as soon as the reason justifying their internment has disappeared.

Finally, criminal detention in times of war relates to both suspect or accused and condemned persons. In a situation of armed conflict as well, preventive detention is justified by reasons of public security and, here again, constitutes a non-punitive measure, which will be lifted as soon as the reason justifying it has ceased to exist. As for condemned persons, they should serve their sentence, which may be imprisonment, in a situation of armed conflict. GCs and AP I regulate this kind of deprivation of liberty by reaffirming and reinforcing certain safeguards applicable in peacetime.

Observations introductives

Permettez-moi tout d'abord de vous remercier de m'avoir aimablement invité à participer à ce séminaire. C'est d'ailleurs avec grand intérêt que je lis régulièrement vos comptes rendus qui mettent parfaitement en exergue les enjeux posés par des sujets controversés de droit humanitaire et dessinent des pistes de réflexion intéressantes pour les surmonter. C'est dans cet esprit que je présenterai le sujet que vous m'avez confié, à savoir dresser un panorama général des régimes d'internement et d'emprisonnement dans le cadre de conflits armés internationaux. Je

le ferai au travers de trois questions qui me paraissent être centrales : le statut de personnes détenues, les conditions de détention et le traitement en détention.

Avant d'aborder ces sujets, autorisez-moi à faire trois courtes digressions. Je rappellerai, tout d'abord, que la notion de conflit armé international n'englobe pas seulement les hostilités opposant les forces de deux Etats entre elles, mais également des situations impliquant des groupes armés à divers titres dans le cadre de conflits armés dits « non internationaux internationalisés » et, selon une doctrine sujette à débat, de conflits armés dits « transnationaux ». Je soulignerai également que, dans ces hypothèses, la détention doit être régie par le droit international car, sans lui, un Etat n'aurait aucun titre légal à interner ou emprisonner des étrangers capturés sur un territoire qui n'est pas le sien. Je conclurai ces remarques en faisant observer que les règles de détention dans le cadre des conflits armés internationaux sont, à première vue, moins problématiques que celles, lacunaires, gouvernant les conflits armés non internationaux. Nous verrons toutefois qu'elles ne sont pas exemptes de controverses.

1. L'internement des prisonniers de guerre

Examinons successivement le statut, les conditions de détention et le traitement en détention des prisonniers de guerre.

Commençons donc par évoquer quelques aspects contestés du *statut de prisonniers de guerre*. Nous savons que certaines catégories d'individus peuvent bénéficier de ce statut lorsqu'ils tombent au pouvoir de l'ennemi. Il s'agit essentiellement des combattants, mais pas seulement, puisque, par exemple, des civils qui suivent les forces armées peuvent en jouir également. Nous savons aussi que, parmi les combattants, l'article 4 de la 3ème Convention de Genève distingue les forces armées régulières de celles irrégulières. Outre être rattachées à une partie au conflit, ces dernières doivent respecter certaines conditions d'organisation, de distinction et de respect du droit humanitaire pour obtenir le statut de prisonnier de guerre. Mais qu'en est-il des forces armées régulières ? Sont-elles aussi tenues par de telles exigences ? La question mériterait d'être clarifiée. Il est traditionnellement enseigné que l'existence de ces conditions va de soi pour de telles forces et est donc présumée à leur égard. Autrement dit, lorsqu'ils appartiennent à des forces régulières, les combattants capturés par l'ennemi bénéficient automatiquement du statut de prisonniers de guerre. Mais perdent-ils ce statut lorsqu'ils ont violé ces conditions ? La lecture du texte de l'article 4, paragraphe A), alinéas 1) et 3) de la 3ème Convention de Genève nous incite à répondre à cette question par la négative[2]. Cette interprétation ne semble cependant pas faire l'unanimité. Notons à ce propos que la condition de respect du droit humanitaire est souvent interprétée avec souplesse s'agissant des forces

2 Marco Sassòli, « Combattants et combattants illégaux », in: Vincent Chétail, *Permanence et Mutation du Droit des Conflits Armés*, Bruxelles, Bruylant, 2013, pp. 156-158.

armées irrégulières : pour obtenir le statut de prisonnier de guerre, il suffit qu'elles aient pour directive de respecter ce droit et que la plupart de leurs membres s'abstiennent effectivement de le violer. Quant à la condition de distinction, elle doit être, en principe, respectée individuellement par les membres des forces armées régulières comme irrégulières. Ils seront sinon déchus du statut de prisonnier de guerre et, le cas échéant, poursuivis pour sabotage ou espionnage. La portée de cette obligation de distinction demeure également sujette à de vifs débats depuis l'adoption controversée de l'article 44, paragraphe 3) du 1er Protocole additionnel. En effet, comme vous le savez, ce texte autorise, dans des situations exceptionnelles, les combattants à ne pas se distinguer de l'adversaire en permanence, pour autant qu'ils le fassent pendant chaque engagement militaire ou pendant le temps où ils sont exposés à la vue de l'adversaire alors qu'ils prennent part à un déploiement militaire qui précède le lancement d'une attaque. Mais quelles sont ces situations exceptionnelles ? L'occupation ? Les guerres de libération nationale ? D'autres situations ? Que signifient précisément les notions d'« engagement militaire » ou de « déploiement militaire » ? Rien n'est moins certain. Certes, les Etats semblent peu enclins à atténuer l'obligation de distinction. En effet, pareille atténuation comporterait des risques aussi bien pour les populations civiles que pour les Etats eux-mêmes. Ceux-ci auraient alors fort à faire pour combattre des mouvements d'opposition d'autant plus puissants qu'ils pourraient opérer dans une plus grande clandestinité. Est-ce cependant réaliste, d'un point de vue militaire, et justifié, d'un point de vue juridique, d'imposer une obligation absolue de distinction à des mouvements de résistance, surtout lorsque ceux-ci se battent pour des causes légitimes et respectent le droit humanitaire ? Mouvements qui n'auront souvent d'autres choix que d'agir dans l'ombre contre des forces étatiques aux moyens bien plus sophistiqués.

Par ailleurs, nous n'ignorons pas que, selon les articles 46 et 47 du 1er Protocole additionnel, ni les espions – lorsqu'ils sont pris sur le fait – ni les mercenaires – lorsqu'ils répondent aux conditions prescrites – n'ont droit au statut de prisonnier de guerre. Les membres des sociétés privées en sont, eux aussi, écartés, à moins qu'ils soient intégrés dans les forces armées de l'un des belligérants et donc assujettis à une chaîne de commandement garante d'une discipline interne – ce qui sera rarement le cas dans la pratique –, ou qu'ils soient considérés comme des « personnes qui suivent les forces armées sans en faire directement partie » au sens de l'article 4, paragraphe A), alinéa 4) de la 3ème Convention de Genève[3]. Encore faut-il pour cela admettre que de telles personnes puissent être définies comme incluant les membres des sociétés privées. Une interprétation littérale de ce texte laisse sous-entendre que les accompagnateurs des forces armées doivent exercer des activités de support sans lien direct avec des opérations

3 Cf. à ce sujet : Louise Doswald-Beck, « Military Companies under International Humanitarian Law », in: Simon Chesterman et Chia Lehnardt (dir.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford, OUP, 2007, p. 118.

militaires (à l'exception notable des membres civils d'équipages d'avions militaires). Si nous nous en tenons à cette acception, les membres des sociétés privées ne pourront pas relever de cette catégorie et seront ainsi privés du statut de prisonnier de guerre, à tout le moins lorsqu'ils sont engagés dans des combats.

Observons au passage que, parmi le personnel accompagnant les forces armées, sont visés les correspondants de guerre. Une fois accrédités auprès d'un belligérant, ils ont droit au statut de prisonnier de guerre. Le sort à réserver aux journalistes dits « *embedded* » dans les forces armées – c'est-à-dire qui se déplacent avec elles sans être formellement accrédités auprès d'elles – reste néanmoins ouvert[4]. Lorsqu'ils tombent aux mains de l'ennemi, certains les assimilent à des prisonniers de guerre, d'autres à des journalistes privés au statut de civil.

Disons maintenant quelques mots à propos des *conditions d'internement* des prisonniers de guerre. Leur privation de liberté se justifie par des nécessités militaires. Elle ne constitue ni une sanction ni une vengeance. Il s'agit simplement de les empêcher de combattre à nouveau. En conséquence, ils peuvent être internés jusqu'à la fin des hostilités sans aucun motif individuel ni procédure particulière. Par ailleurs, si un doute subsiste quant à leur statut alors qu'ils n'ont commis aucun acte de belligérance, ils doivent être traités comme des civils. En revanche, selon l'article 5, alinéa 2) de la 3ème Convention de Genève, s'ils ont perpétré des actes de guerre, ils doivent être assimilés à des prisonniers de guerre jusqu'à ce qu'un tribunal compétent ait clarifié leur sort.

Formulons deux questions à ce propos. En dépit des termes clairs utilisés par l'article 5 précité, le fonctionnement d'un tel tribunal peut-il s'affranchir des exigences procédurales requises en matière judiciaire ? En principe, les nécessités militaires devraient dicter que, dans des conditions tumultueuses de guerre, pour se prononcer promptement sur le sort des personnes détenues, l'institution de commissions d'officiers suffise, à condition toutefois qu'elles offrent un minimum d'indépendance et d'impartialité[5]. Deuxièmement, nous n'ignorons pas que certaines puissances détentrices ont exploité les failles de l'article 5, alinéa 2) susvisé en s'arrogeant le droit de décider souverainement si tel ou tel cas était bien douteux au sens de cette disposition sans jamais en référer à un tribunal compétent. L'article 45, paragraphe 1) du 1er Protocole additionnel a toutefois tempéré ce monopole de qualification réservé à la puis-

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4 Cf. à ce sujet : Robin Geiss, « How does international humanitarian law protect journalists in armed conflict situations? », *Interview – CICR*, 27 juillet 2010 ; Knut Dörmann, « International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts », CICR – 2007, disponible à l'adresse suivante : <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/media-protection-article-?opendocument>

5 Cf. à ce sujet : Yasmin. Naqvi, « Doubtful prisoner-of-war status », *Revue internationale de la Croix-Rouge*, 2002, pp. 578-584.

sance détentrice en énonçant trois présomptions en faveur de la personne détenue. Elle est, selon ce texte, présumée bénéficier du statut de prisonnier de guerre lorsqu'elle le revendique, lorsque la partie dont elle dépend le fait en son nom ou lorsqu'elle y a droit en apparence. Et si un doute persiste, cette personne continuera à être protégée par le statut de prisonnier de guerre jusqu'à ce qu'un tribunal tranche la question. Pouvons-nous toutefois considérer que cette disposition du 1er Protocole additionnel reflète bel et bien le droit international coutumier et qu'elle puisse alors être invoquée à l'encontre de tout Etat, y compris de ceux qui n'ont pas ratifié ce Protocole ?

Terminons ce rapide tour d'horizon du régime de détention des prisonniers de guerre par une observation au sujet du *traitement* qui leur est réservé *en détention*. Partant du principe que les prisonniers de guerre ne sont privés de liberté que pour les empêcher de participer aux hostilités, la 3ème Convention de Genève organise un régime d'internement visant à réaliser un équilibre délicat entre deux paramètres : d'une part, le traitement humain de personnes placées en situation vulnérable du fait notamment qu'elles ne sont pas sous le bouclier de la puissance dont elles relèvent ; d'autre part, la sécurité de la puissance détentrice par la neutralisation de ces individus qui la menacent. Dans cette perspective, ceux-ci sont placés dans des camps, sous l'autorité, les lois et les règlements de la puissance détentrice, tout en étant protégés par une centaine de dispositions détaillées régissant, entre autres, le lieu de détention, le logement, l'alimentation, l'habillement, l'hygiène, l'exercice de la religion, les activités intellectuelles, éducatives et récréatives, les ressources pécuniaires et les relations avec l'extérieur. Il convient toutefois de se demander si ce régime progressiste et protecteur – conçu en 1949 pour éviter la reproduction du traitement effroyable subis par les prisonniers de guerre durant la seconde guerre mondiale – est réellement adapté à la réalité des conflits armés internationaux contemporains et, en particulier, des conflits non internationaux internationalisés ou transnationaux auxquels participent des groupes armés[6]. En effet, confrontés à des hostilités de plus en plus violentes, complexes et difficiles à gérer, les forces armées étatiques, et *a fortiori* les groupes armés, sont souvent incapables d'établir des camps de détention qui répondent à toutes les exigences consacrées par la 3ème Convention de Genève. Que l'on songe, par exemple, aux difficultés logistiques liées à la mise en place de camps d'internement dans des zones désertiques ou urbaines comme ce fut le cas en Irak, en Libye ou au Mali. Certes, de nombreuses dispositions figurant dans la 3ème Convention, d'une haute technicité, n'ont sans doute pas acquis un caractère coutumier. Certes, envisager l'adoption d'amendements à cette Convention pour l'adapter à pareille nouvelle donne risque de remettre en question des équilibres fragiles et des progrès fondamentaux. Cela étant, les violations

6 Cf. à ce sujet : Luisa Vierucci, « Is the Geneva Convention on Prisoners of War Obsolete? The Views of the Counsel to the US President on the Application of International Law to the Afghan Conflict », in: *Journal of International Criminal Justice*, vol. 2, 2004, pp. 869-870.

dont la 3ème Convention fait sans cesse l'objet pourraient, à terme, décrédibiliser la protection accordée aux prisonniers de guerre devenue, à certains égards, obsolète.

2. L'internement des civils

J'en viens maintenant à ma deuxième catégorie d'individus : les civils. Fidèle à l'approche retenue précédemment, je formulerai quelques remarques sur, tour à tour, le statut, les conditions de détention et le traitement en détention des civils.

A propos du *statut de civil*, rappelons que l'article 4 de la 4ème Convention exclut de son champ d'application les ressortissants de l'Etat capteur. Toutefois, la chambre d'appel du Tribunal international pour l'ex-Yougoslavie a considéré que ce critère de nationalité était dépassé par la nature des hostilités dites « inter-ethniques » modernes et devait être remplacé par un critère d'allégeance. A l'évidence, la condition de nationalité correspond à une conception « souverainiste » du droit humanitaire qui prévalait en 1949 et qui visait à empêcher que ce droit s'immisce dans les rapports entre un Etat et ses ressortissants. De plus, la conception défendue par le Tribunal pour l'ex-Yougoslavie vise à donner une protection étendue à des individus qui auraient normalement dû échapper à celle offerte par la 3ème Convention de Genève. Le critère d'allégeance n'en demeure pas moins difficile à manier, en théorie comme en pratique. Dans certains cas, il sera relayé par l'appartenance ethnique, dans d'autres, pas. Et cette appartenance est, elle-même, sujette à caution. Il est inutile de rappeler combien il est hasardeux de parler d'ethnicité pour tenter d'isoler des groupes humains, quelles qu'en soient les raisons.

Par ailleurs, insistons sur le fait que toute personne qui ne relève pas des personnes protégées par les autres Conventions de Genève et, en particulier, par celle relative aux prisonniers de guerre doit, en principe, bénéficier de la protection offerte par la 4ème Convention et, en cas de capture, par les dispositions concernant les internés civils. Cette conclusion n'est malheureusement pas partagée par l'ensemble de la doctrine, ni par tous les Etats. En effet, d'aucuns considèrent que des individus qui ont participé aux hostilités ou qui ont contribué à l'effort de guerre (par exemple, en travaillant dans des usines d'armement ou en s'offrant comme bouclier humain) ne peuvent, par définition, être assimilés à des civils au sens strict du terme. Ils sont, selon eux, des « quasi-combattants », des « hors-la-loi », voire même des « terroristes », passant entre « les mailles du filet » tissé par le droit humanitaire. D'autres invoquent, en revanche, une lecture textuelle, historique et téléologique de l'article 4 susvisé pour inclure, parmi les personnes protégées, toutes celles qui ne le sont guère par les autres Conventions, en ce compris les soldats dits « illégaux », c'est-à-dire ceux qui n'appartiennent pas aux forces armées régulières ni à celles irrégulières parce qu'ils n'en remplissent pas les conditions. Nous ne rappellerons pas ici les arguments militant en faveur ou en défaveur de ces conceptions. Ils

ont déjà fait couler beaucoup d'encre. Contentons-nous de formuler un bref commentaire. Il pourrait sembler injuste que des combattants « légaux » puissent être internés sans procédure particulière dès lors qu'ils sont prisonniers de guerre, alors que ceux « illégaux » – comme nous le verrons – ne peuvent l'être qu'à la suite d'une décision administrative ou judiciaire. Toutefois, si les premiers devraient pouvoir être aisément identifiés sur base de critères objectifs, les seconds ne pourront l'être qu'à l'issue d'un examen concret de leurs activités passées, en tenant compte de la menace qu'ils représentent pour l'avenir[7].

Sur un autre plan, retenons que cette controverse sur le statut des personnes protégées que nous venons d'évoquer repose souvent sur des malentendus relatifs à la qualification juridique à donner à telle ou telle situation de guerre. Des malentendus entretenus d'abord sur la nature des conflits armés non internationaux internationalisés. En principe, la question du statut des individus détenus – prisonniers de guerre ou internés civils – ne devrait guère se poser vis-à-vis de certains groupes organisés qui, comme en Afghanistan ou en Iraq, combattent contre des forces armées étatiques et ce, en parallèle à un conflit armé international classique. En effet, ces combats s'inscrivent dans le cadre d'hostilités non internationales. Des malentendus entretenus ensuite sur la nature juridique des conflits armés transnationaux. S'ils sont qualifiés de non internationaux, nous retombons dans l'hypothèse précédente. L'affaire est, en revanche, plus complexe s'ils sont estampillés « internationaux ». Mais je ne m'attarde pas sur ce problème controversé de qualification des hostilités qui dépasse le cadre de mon exposé et qui a été examiné lors d'un précédent Colloque de Bruges.

Venons-en aux *conditions de détention* des civils. *A priori*, et contrairement aux combattants, les civils ne peuvent être détenus, pas plus qu'ils ne peuvent d'ailleurs être attaqués. La 4ème Convention de Genève prévoit néanmoins des exceptions à ce principe essentiel. Ils peuvent être privés de liberté « si la sécurité de la Puissance au pouvoir de laquelle ces personnes se trouvent le rend absolument nécessaire » ou, en territoire occupé pour « d'impérieuses raisons de sécurité ». Qu'entendons-nous par ces notions ? La jurisprudence internationale est instructive à cet égard. Tout en considérant que des mesures d'internement de civils doivent demeurer exceptionnelles et en laissant aux Etats un large pouvoir d'appréciation pour décider si elles sont justifiées, les juridictions pénales internationales s'appuient sur des critères concrets liés aux activités, aux connaissances et aux qualifications des personnes concernées pour déterminer si leur comportement est susceptible de causer un préjudice à la sécurité de l'Etat. Elles procèdent au cas par cas sans fixer aucun critère général ni abstrait. Sur cette base, ces tribunaux considèrent, par exemple, que tout civil participant – ou ayant participé – aux hostilités peut être interné. A l'inverse, cette mesure ne se justifie guère pour obtenir des renseignements de la part d'un civil relatifs aux activités militaires conduites par les

7 Marco Sassòli, *op.cit.*, p. 173.

forces dont il relève, ce qui – soit dit en passant – sera bien souvent le cas dans la pratique. A l'évidence, l'internement, simple mesure administrative, d'un individu soupçonné d'avoir commis une infraction pénale ne peut se substituer à des poursuites judiciaires qui sont, comme nous le verrons, soumises à des garanties spécifiques. Nous reprocherons à la jurisprudence internationale d'être essentiellement casuistique et, en conséquence, de ne pas proposer de définition générale du concept de comportement attentatoire à la sécurité d'un Etat. Pareille approche offrirait, sans doute, plus de lisibilité aux organes politiques, militaires et judiciaires tenus d'appliquer cette notion. Cette conception repose – je le concède – sur un tropisme « continental » de quelqu'un qui est parfois réfractaire à trop de pragmatisme. Je n'ignore cependant pas que celui-ci a ses vertus, dont la principale est de ne pas figer des concepts appelés à évoluer.

Pour être légale, la mise en détention d'un civil doit également obéir à certaines conditions d'ordre procédural. Contrairement à celle d'un prisonnier de guerre, elle ne peut être décidée qu'à la suite de l'examen approfondi de la situation personnelle de la personne capturée. De plus, cette dernière dispose du droit d'obtenir qu'un tribunal ou un collège administratif reconsidère, dans les plus brefs délais, cette décision d'internement et, au cas où elle serait maintenue, qu'un appel puisse être interjeté à son encontre. Elle peut également solliciter le réexamen de son sort périodiquement, au moins deux fois l'an. Les observations que nous avons formulées à propos de la souplesse devant présider au fonctionnement de l'organe susceptible de se prononcer sur le statut des prisonniers de guerre devraient également s'appliquer au tribunal ou collège administratif statuant sur la situation des internés civils.

A l'instar de la 3ème Convention de Genève, la 4ème Convention tente d'établir un équilibre délicat dans le *traitement en détention* des internés civils entre, d'une part, l'obligation de les considérer aussi humainement que possible et, d'autre part, la nécessité de les empêcher de nuire à l'ennemi dans la mesure où, comme nous l'avons dit, ils représentent une menace pour sa sécurité. Ce faisant, ceux-ci bénéficient de certaines garanties similaires à celles octroyées aux prisonniers de guerre en matière, par exemple, de logement, d'alimentation, d'habillement, d'hygiène, de soins médicaux, d'activités intellectuelles, récréatives et sportives et de relations avec l'extérieur. Il existe néanmoins plusieurs distinctions notables entre les traitements réservés à ces deux catégories de détenus qui résultent de leur différence de statut. Nous n'avons pas le temps de nous étendre sur cette question. Nous observerons seulement que, alors que les prisonniers de guerre ne seront, en principe, libérés qu'à la fin des hostilités, les internés civils devront l'être dès que la raison qui a justifié leur mise en détention a disparu et, au plus tard, à la cessation des combats.

Clôturons cette présentation du régime des internés civils comme nous l'avons fait à propos des prisonniers de guerre en soulignant que ce régime très détaillé et protecteur s'avèrera souvent difficile à mettre en œuvre dans les conflits internationaux contemporains, surtout lorsqu'ils impliquent des groupes armés ne disposant ni d'une autorité ni d'une infrastructure développée.

3. L'emprisonnement pour raisons pénales

Il nous reste maintenant à dire quelques mots sur la détention d'individus, en temps de guerre, pour des raisons pénales. Des principes essentiels ont été édictés dans ce domaine par les Conventions de Genève et le 1er Protocole additionnel et développées dans la jurisprudence, notamment des cours et tribunaux internationaux. Pour rappel, des individus peuvent être incarcérés pour des raisons criminelles selon deux *statuts* : celui de suspect ou d'accusé d'une part, ou celui de condamné d'autre part. A chacun de ces statuts correspondent, en principe, des *conditions de détention* spécifiques, strictement encadrées. De façon générale, nous retiendrons que la justification habituellement invoquée pour la détention avant jugement – dite « provisoire » ou « préventive » – est tirée d'impératifs de sécurité publique, comme le risque que l'inculpé commette de nouvelles infractions, prenne la fuite ou altère des preuves. A l'instar de l'internement des prisonniers de guerre ou des civils, cette mesure ne constitue donc pas, à proprement parler, une peine, mais une mesure de sûreté ou de prévention. Exceptionnelle, elle doit être levée dès que la raison qui la justifie n'existe plus, comme s'agissant – rappelons-le – des mesures d'internement infligées aux civils.

Le condamné sera, en revanche, contraint de purger une peine, parfois d'emprisonnement, au terme d'un procès équitable tenu conformément à toutes les garanties essentielles de justice. En tant que sanction pénale, l'emprisonnement poursuit d'abord un objectif « rétributif ». Il possède aussi une dimension réparatrice et socio-pédagogique. Et comme l'internement, il est, enfin, préventif. Le *traitement en détention* réservé au condamné devrait ainsi être le reflet de tous ces objectifs, même si, en temps de guerre, le faire payer pour les crimes commis et, surtout, le placer hors d'état de nuire constitueront souvent une priorité. Mettons l'accent sur le fait que, même s'il est plus restrictif que l'internement, l'emprisonnement pour des raisons pénales doit obéir à certaines conditions – désormais reconnues sur le plan international – en matière de locaux de détention, d'hygiène, de vêtements, d'alimentation, de soins médicaux, de notification en cas de décès, etc.

A ce titre, nous retiendrons que les Conventions de Genève et le 1er Protocole additionnel articulent la répression pénale autour de deux paramètres : d'une part, encadrer les *conditions de détention* et le *traitement en détention* d'individus accusés ou reconnus coupables de crimes par des garanties fondamentales similaires à celles préconisées en temps de paix (en

matière, par exemple, d'indépendance, d'impartialité, de présomption d'innocence, de droits de la défense, de légalité pénale) et, d'autre part, tenir compte de la particulière vulnérabilité de ces personnes en temps de guerre par le renforcement de certains principes ou l'affirmation de normes spécifiques comme celles d'assimilation et d'indulgence. Par exemple, la 3ème Convention de Genève prévoit que les prisonniers de guerre peuvent continuer à bénéficier de toutes les garanties offertes par cette Convention (en matière, par exemple, de notification à la puissance détentrice et de contrôle de celle-ci, d'expédition de correspondances ou de visite des représentants de la Croix-Rouge) lorsqu'ils sont poursuivis et même condamnés pour des actes criminels accomplis avant leur capture (crimes de guerre, crimes contre l'humanité, actes de génocide ou infractions de droit commun, à condition toutefois que ces dernières soient incriminées dans le droit de la puissance détentrice comme dans celui de la puissance d'origine). Dans cette même lignée protectrice, la 3ème Convention invite la puissance détentrice à traiter les prisonniers de guerre avec une indulgence particulière en optant pour des sanctions disciplinaires plutôt que pénales ou, lors de la fixation d'une peine, en n'ignorant pas l'absence de devoir de fidélité vis-à-vis d'elle. Assimilés aux membres des forces armées de la puissance détentrice, les prisonniers de guerre doivent, par ailleurs, être jugés par les mêmes tribunaux selon la même procédure que ceux-ci et purger leur peine au sein de mêmes établissements pénitenciers dans les mêmes conditions qu'eux, le tout dans le respect des principes fondamentaux rappelés ci-dessus. Enfin, de nombreuses dispositions de la 4ème Convention de Genève protègent, elle aussi, de façon renforcée les civils jugés et emprisonnés par une puissance occupante. Nous n'avons malheureusement pas le temps de les examiner.

Observations conclusives

En guise de conclusion, je dirai que la détention, qu'elle soit administrative ou pénale, est réglementée par des normes extrêmement détaillées de droit humanitaire dans les conflits armés internationaux. Au lendemain de la seconde guerre mondiale, les rédacteurs de ces conventions étaient inspirés par la nécessité de protéger au mieux des individus particulièrement vulnérables parce qu'ils sont entre les mains de la puissance adverse. Certes, comme je l'ai souligné, certaines de ces normes apparaîtront aujourd'hui désuètes par rapport à la réalité des conflits armés contemporains, notamment internationalisés ou transnationaux. Elles sont, par ailleurs, difficiles à mettre en œuvre, surtout par des acteurs non étatiques, même lorsqu'ils sont contrôlés par des Etats. Cela étant, une refonte totale des Conventions de Genève et Protocoles additionnels n'est, sans doute, ni nécessaire ni souhaitable. En effet, les grands principes régissant la détention figurant dans ces conventions demeurent d'actualité. Ancrés dans la mémoire et les traditions de nombreuses armées du monde et dans la jurisprudence de leurs tribunaux, ils constituent des points de repère indispensables pour les acteurs politiques, militaires et judiciaires. N'oublions pas non plus que ces principes ont été acquis au prix de complexes et tumultueuses négociations. Or, dans le contexte actuel, les Etats cherchent, plus

que jamais, à combattre librement les menaces – notamment terroristes – auxquelles ils sont confrontés. Rien ne nous garantit donc que de nouvelles tractations aboutiraient à relever ces défis, tout en renforçant la protection des personnes détenues.

Je vous remercie pour votre attention.

PROTECTIONS FOR PERSONS DEPRIVED OF THEIR LIBERTY IN INTERNATIONAL ARMED CONFLICT

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Résumé

Cette contribution se concentre sur l'analyse de la relation entre le droit international humanitaire (DIH) et le droit international des droits de l'homme (DIDH) sous le prisme des règles inhérentes à la protection des détenus dans les conflits armés internationaux (CAI).

Règles de droit matériel

Traditionnellement, la libération conditionnelle et l'échange constituaient la règle en matière de protection des détenus en CAI. Toutefois, au cours du 19ème siècle, le paradigme changea et l'internement de longue durée devint la norme, générant ainsi le besoin d'un cadre juridique plus détaillé afin de réglementer la détention dans ces situations. Dans la foulée d'autres réglementations, la 3ème Convention de Genève de 1949 (CG III) fut adoptée afin de renforcer la protection des prisonniers de guerre (PG). La CG IV fut quant à elle adoptée afin de régir la condition des personnes civiles privées de liberté. Tandis que les instruments précités protègent les individus privés de liberté en vertu d'obligations issues d'une relation interétatique, les protections offertes par le DIDH se développèrent autour de la relation Etat-individu. Comme la Cour internationale de justice (CIJ) l'a rappelé en 2004 dans son Avis consultatif sur le mur, certaines de ces règles protectrices relèvent exclusivement de l'un ou l'autre régime. Ce n'est que lorsque certains droits relèvent à la fois du DIH et du DIDH que la question de la relation entre les deux corps de règles fait naitre des controverses. Néanmoins, en ce qui concerne les règles substantielles relatives au traitement des détenus, il apparait que ces deux corps juridiques se sont en réalité mutuellement renforcés.

Règles procédurales

La situation est toute autre concernant la relation qu'entretiennent DIH et DIDH au sujet des règles procédurales applicables à la détention. Les controverses pourraient être liées au fait que – contrairement au droit matériel, de caractère davantage prohibitif – les règles de procédure sont de nature plus permissive, offrant ainsi aux Etats plus de latitude dans leur pouvoir de détenir en temps de guerre qu'en temps de paix. S'agissant de la privation arbitraire de liberté, l'exemple de l'article 9(1) du Pacte international relatif aux droits civils et politiques (PIDCP) est parlant. Certains écueils, tels que la base légale exigée par le prescrit de l'article 9(1), peuvent aisément être contournés en se fondant sur le DIH ; mentionnons dans ce cas l'autorisation

spécifique contenue dans les CG III et IV d'interner les PG et les civils qui présentent une menace sécuritaire. Mais une difficulté survient lorsque l'on tente de concilier l'exigence – trouvée en DIDH – d'un réexamen de la détention par un organe judiciaire avec la possibilité, contenue en DIH, de recourir à un organe administratif pour ce faire. Un problème similaire apparaît lorsqu'on analyse la liste exhaustive des motifs de détention de l'article 5 de la Convention européenne des droits de l'homme (CEDH) qui ne contient guère la possibilité d'interner, pourtant autorisée en DIH. Certains soutiennent qu'il faudrait « choisir » le droit qu'il convient d'appliquer dans une situation donnée, voire encore que la norme la plus permissive en fonction des circonstances trouverait à s'appliquer. D'autres attendent des Etats qu'ils adhèrent aux deux familles d'obligations et qu'ils respectent par conséquent la norme la plus exigeante, ou qu'ils s'exposent à une violation de leurs autres obligations internationales dans l'hypothèse où ils suivraient l'obligation la moins sévère.

D'autres solutions – telles que le fait de miser sur le caractère coutumier d'un grand nombre de règles de DIH ou d'attendre des Etats qu'ils dérogent à leurs obligations de DIDH – peuvent encore être choisies afin de concilier les deux législations. L'affaire Hassan c. Royaume-Uni *de la Cour européenne des droits de l'homme mérite en ce sens d'être mentionnée. Dans cette affaire, la Cour rejeta l'argument britannique principal fondé sur l'idée que l'application du DIH excluait la compétence découlant de l'article 1 CEDH. Ce faisant, la Cour a renforcé sa fonction de contrôle et peut désormais combler une lacune en matière d'application du DIH puisqu'elle est dorénavant habilitée à appliquer le droit des conflits armés par l'entremise des droits consacrés dans la CEDH. Toutefois, eu égard à l'importance accordée par la Cour aux garanties procédurales applicables aux personnes internées, il n'est pas certain qu'elle opte pour une approche similaire en ce qui concerne l'internement des PG, soit à l'égard d'une modalité de privation de liberté pour laquelle aucun mécanisme de réexamen n'est prévu par la CG III. Tous les doutes caractérisant cette relation complexe sont donc loin d'être levés.*

I. Introduction

This contribution is about the protection of detained persons in international armed conflict. In particular, it compares how the relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) is understood depending on whether one is speaking of the substantive or the procedural rules of protection for detainees. It will be suggested that, whereas the relationship between IHL and IHRL raises fewer problems when speaking of substantive rules of protection for detainees, the situation is very different when speaking of procedural rules.

II. Substantive Rules of Protection

Until relatively recently, the elaboration of detailed rules on the protection of detainees in armed conflict was not strictly necessary, as long-term internment of persons in such situations was not the defaul rule traditionally; instead, parole and exchange, *inter alia*, at least in more modern times, were more common ways of dealing with captured enemy combatants.[1] Indeed, this is a point that is often forgotten in contemporary arguments that view detention as a 'natural consequence' of war.

This changed in the nineteenth century, with long-term internment becoming increasingly commonplace in armed conflict.[2] The result was the need for a regime to regulate detention and protect persons detained in such situations. Early examples of protective rules for prisoners in armed conflict included relevant provisions in the Lieber Code and the Brussels Declaration.[3] The decades that followed saw significant advances in codifying rules in this area, with key multilateral treaties negotiated in The Hague and Geneva.

With the negotiation of the third and fourth Geneva Conventions of 1949, elaborate regimes for the protection of prisoners of war (POWs) and civilian internees, respectively, were adopted, building on those previous codifications. Thus, the third Geneva Convention contains rules from basic requirements such as that of humane treatment,[4] to far more specific and detailed rules, such as those limiting what information may be required from POWs,[5] rules regulating (but not prohibiting) the use of POW labour,[6] rules on the law binding POWs,[7] and the right of POWs to sufficient water and soap for cleaning their laundry.[8] The fourth Geneva Convention contains a similarly broad array of substantive rules for civilians deprived of their liberty.[9]

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Stephen Neff, "Prisoners of War in International Law: the Nineteenth Century" in: Sibylle Scheipers (ed.), *Prisoners in War* (Oxford, OUP, 2010).

2 *Ibid.*

3 Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (Lieber Code); Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874.

4 Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (hereinafter 'GC III'), Article 13.

5 Article 17 GC III.

6 Articles 49–57 GC III.

7 Article 82 GC III.

8 Article 29 GC III.

9 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *op.cit.*,75 UNTS 287 (hereinafter 'GC IV'), Part III, Section IV.

Whilst the third and fourth Geneva Conventions clearly offer important protections to persons deprived of their liberty in international armed conflict, these treaties were, at least at the time of their adoption (and, to some extent, still today), concerned with the obligations of States in the context of inter-State relations, as opposed to being directly concerned with the rights of individuals. However, at the same time as the 1949 Geneva Conventions were being negotiated, international law was broadening its subject matter to include more generally the relationship between individuals and States exercising authority over them, without any necessary inter-State implications. This, of course, was most prominent in the post-Second World War era with International Human Rights Law (IHRL).[10]

Notwithstanding many differences between IHL and IHRL, including that noted above, both have important consequences for the protection of individuals, and this is especially evident with respect to detained persons. This leads on to the question of the relationship between the two bodies of law, an issue that has been the subject of considerable academic debate. The International Court of Justice (ICJ) in its *Israeli Wall* advisory opinion summarised the spectrum of possibilities in the following manner: 'there are … 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'.[11] It is, of course, with regard to this third situation, where a matter is regulated by both IHL and IHRL, that the most controversy has arisen, where competing arguments of *lex specialis*, displacement, harmonisation, and parallel application have been advanced.

Interestingly however, regarding substantive rules of protection for detainees, few controversies seem to arise for the relationship between IHL and IHRL. First, it is with regard to substantive treatment that a number of specific rules are prescribed under IHL that do not have equivalents under IHRL, such as those referred to above for POWs. These would fall within the first category noted by the ICJ in the *Israeli Wall* opinion, i.e. rights protected by IHL alone, and no question of their relationship to IHRL need therefore arise. In addition, where both bodies of law have something to say on substantive treatment of detainees, they seem largely in accordance with one another and have evolved in a mutually reinforcing way. This can be illustrated with a number of examples. Thus, the fundamental principle of humane

10 This relationship is built upon in other literature by the present author: Lawrence Hill-Cawthorne, *Humanitarian Law, Human Rights Law and Bifurcation of Armed Conflict* (2015, forthcoming) ICLQ; Lawrence Hill-Cawthorne, "Just Another Case of Treaty Interpretation? Reconciling Humanitarian and Human Rights Law in the ICJ" in: Mads. Andenas and Eirik Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge, CUP, 2015).

11 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paragraph 106.

treatment of detainees is common to both IHL and IHRL, and in many ways it operates as the basis for the more detailed rules on treatment in each of those bodies of law.[12] Moreover, the more specific prohibitions that are rooted in the humane treatment requirement often also find expression in both IHL and IHRL, such as the prohibitions of torture and murder, as well as the requirements relating to conditions of detention.[13] In these examples, the relevant rules under IHL and IHRL, even if not identical, point in the same direction and each has therefore been able to influence the other over time.[14] We need not ask whether one overrides the other for both can be applied in parallel, without any kind of a 'choice' having to be made between the two.

III. Procedural Rules for Detainees

The situation is very different for the procedural rules applicable to detention under IHL and IHRL, that is, those rules that regulate who may be detained and when, the procedural mechanisms for reviewing the legality of detention and the point at which detainees must be released. In this area, there is a greater divergence in the rules under IHL and IHRL, and there has been a far greater reluctance in bringing these rules closer together than there has been with regard to the substantive rules of protection. This is perhaps a result of the different nature of substantive and procedural rules on detention. Substantive rules of protection under IHL are clearly humanitarian and prohibitive in nature; as such, they are more susceptible to reconciliation and mutual evolution with IHRL, itself a principally humanitarian and prohibitive body of law. Procedural rules on detention, on the other hand, are in a sense permissive, granting powers to States which, under a peacetime regime governed entirely by domestic law and IHRL, they would not possess, such as the right to detain POWs indefinitely without judi-

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12 See, e.g., Article 27(1) GC IV; Common Article 3 GC IV, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 10.

13 Prohibiting torture, see Article 7 ICCPR and Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, opened for signature 12 December 1977, entered into force 7 December 1978) 1125 UNTS 3 (hereinafter 'AP I'), Article 75(2)(a)(ii). Prohibiting murder, see Article 6 ICCPR (prohibiting arbitrary deprivation of life); Article 75(2)(a)(i) AP I. (It should, however, be noted that the definition of torture under IHL and IHRL is not identical, notably differing with respect to the status of those capable of committing the offence). On conditions of detention, see, e.g., Part III, Section IV, GC IV; Human Rights Committee, Communication No 1972/2010, 19 November 2014, paragraph 9.2 (demonstrating that poor conditions of detention can lead to a violation of Article 10 ICCPR).

14 See, e.g., Yves Sandoz, Christophe Swinarski and Beuno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva 1987) 892 (on Article 76(2) AP I, concerning the protection of pregnant women and mothers with dependent infants from the death penalty, which was based on the ICCPR); Theodor Meron, "The Humanization of Humanitarian Law" (2000) 94, in: AJIL 239, 245.

cial oversight,[15] or the right to intern civilians where necessary for reasons of security, subject to initial and periodic (administrative or judicial) review.[16] That is not to say, of course, that the procedural safeguards, such as those in GC IV on initial and periodic review of civilian internment, are not humanitarian in nature, but rather that they are more clearly based also on considerations of military necessity. In the Israeli Supreme Court's words, the procedural rules define the 'zone of reasonableness' within which a belligerent State can act.[17]

It is conceded that the preceding distinction drawn between substantive and procedural rules applicable to detainees is a somewhat crude categorisation and necessarily one to which there are exceptions (such as fair trial guarantees, which have evolved in IHL by analogy to their more developed counterparts in human rights treaties). However, it does go some way in explaining the stark difference in the way the relationship between IHL and IHRL is treated depending on the types of rules with which one is concerned.

To illustrate the tension between IHL and IHRL that arises in the context of *procedural* safeguards for detainees, let us take the arbitrary deprivation of liberty prohibition in IHRL as a starting point. As it appears in Article 9(1) of? the International Covenant on Civil and Political Rights (ICCPR), for example, reconciling this with the relevant procedural rules for internees in IHL is not problematic, for the 'arbitrariness' standard is sufficiently open to allow for the grounds for internment provided for in the third Geneva Convention for POWs and the fourth Geneva Convention for civilians. This is simply an application to the area of detention of the ICJ's approach in the *Nuclear Weapons* advisory opinion, such that what constitutes arbitrary deprivation of life in armed conflict under IHRL requires a *renvoi* to the IHL rules on the conduct of hostilities.[18] Moreover, the requirement of a legal basis for compliance with Article 9(1) ICCPR can be met by relying on the specific authorisation to intern POWs and civilians that pose a security threat in GC III and GC IV respectively.

However, problems arise where consistent or contextual interpretation of the relevant procedural rule under Human Rights Law does not appear possible. Thus, on the text alone, one cannot reconcile IHRL's requirement of *court* review of detention with IHL's acceptance of *administrative* review, nor can one reconcile Article 5 ECHR's closed list of grounds for permissible

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15 Articles 21 and 118 GC III. No mechanism for reviewing internment is provided for in GC III, given the assumption that it is necessary for the duration of hostilities in order to prevent the enemy combatant from returning to the hostilities.

16 Articles 41-3 and 78 GC IV.

17 HCJ 7015/02 and 7019/02, *Ajuri and others v. IDF Commander in the West Bank, IDF Commander in the Gaza Strip and others* [2002] 125 ILR 537, paragraph 29.

18 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paragraph 25.

detention,[19] which does not include internment, with IHL's specific authorisation of internment. It is in these circumstances that it is often suggested that we must 'choose' between these two sets of obligations, or that the more permissive rules of IHL modify IHRL such that the IHL standards become determinative of lawfulness. Yet in any other area of international law, one would not *necessarily* attempt to reconcile different sets of obligations that offer differing degrees of discretion to the State. Rather, one might expect that the State would either adhere to both sets of obligations, by honouring the more demanding standard, or they could follow the less demanding standard and then face the consequences of breaching their other international obligations.

It is true that IHL and IHRL pose particular difficulties, in that a workable set of rules is essential in this area. In addition, the customary nature of the majority of rules of IHL leaves greater possibility for reconciliation with IHRL. However, reconciliation could equally be achieved by States derogating from their human rights obligations,[20] enabling them to revert to the more permissive detention regimes provided for in IHL. This appeared to be the road down which the European Court of Human Rights was going with its previous case law.[21] Yet in *Hassan v. UK*, the Court took a different approach, reading into Article 5 ECHR the bases for detention provided for in GC IV by relying on subsequent practice of the States (notably the absence of any derogations in order to exploit the more permissive IHL rules) and the rule in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which a treaty can be interpreted with reference to other relevant rules of international law binding on the parties.[22] That said, the Court did not entirely defer to IHL, for it relied on the continued operation of Article 5 ECHR in the background to argue that the internment review body under Articles 43 and 78 GC IV 'should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness'.[23]

The present contribution will not dwell on the details or merits of the *Hassan* judgment. However, one significant aspect of the judgment should be mentioned that demonstrates the continued relevance of the ECHR to detention in international armed conflict more generally, both for procedural and substantive safeguards. Thus, the Court, whilst upholding the UK's claim that Article 5 ECHR should be read so as to accommodate the detention regimes in IHL,

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19 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

20 See, e.g., Article 15 ECHR; Article 4 ICCPR.

21 ECtHR, *Al-Jedda v. United Kingdom*, App No 27021/08, Judgment (Grand Chamber), 7 July 2011; *Al-Skeini v. United Kingdom*, App No 55721/07, Judgment (Grand Chamber), 7 July 2011.

22 *Ibid.*, App No 29750/09, Judgment (Grand Chamber), 16 September 2014.

23 *Ibid.*, paragraph 106.

rejected the government's principal argument that the application of IHL excluded jurisdiction arising under Article 1 ECHR.[24] In consequence, the Court retains its oversight function and can fill an important enforcement gap in IHL by applying IHL norms through the prism of the Convention rights. Indeed, this was one of the most important consequences of the ICJ's approach to the relationship between IHL and IHRL, enabling human rights treaty bodies to enforce IHL through their treaty rules.

A final point left unanswered by the Court is whether it would take the same deferential approach to IHL in the case of internment as a POW under GC III, for under GC III, unlike GC IV, internment for the duration of hostilities is the default position, with no mechanism for reviewing internment. The Court placed emphasis on the importance of procedural safeguards for internees,[25] and it is possible, therefore, that the complete absence of such safeguards from the GC III internment regime will mean that the Court is far less willing to read Article 5 ECHR in a manner that is quite as accommodating of GC III as it did with regard to GC IV.

IV. Concluding Remarks

The relationship between IHL and IHRL has formed the subject matter of an enormous volume of academic commentary and jurisprudence. Yet this relationship seems far less controversial in the area of detention when speaking of substantive as opposed to procedural standards of protection. The former are humanitarian and prohibitive in nature in both bodies of law. The latter, however, appear in IHL as far more permissive in nature, defining the parameters of an act that has come to be seen as an inherent part of armed conflict. In consequence, States have been far less willing to bring these IHL rules closer to their more protective equivalents in IHRL.[26] It remains to be seen whether this relationship will be treated as a binary - either/or - 'choice' between legal regimes or whether a more symbiotic approach will be adopted that allows the rules under IHL and IHRL to evolve and influence one another.

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24 *Ibid.*, paragraph 77.

25 *Ibid*., paragraph 106.

26 See, e.g., the UK Ministry of Defence's position in *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB).

INTERNMENT OF CIVILIANS IN ARMED CONFLICT

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Résumé

Cette contribution analyse la question de l'internement des civils en droit international humanitaire (DIH) (A), *ainsi que celle de l'internement en droit international des droits de l'homme (DIDH) et particulièrement les retombées en DIH de l'affaire* Hassan c. Royaume-Uni *devant la Cour européenne des droits de l'homme* (B).

(A) *L'internement des civils en situation de conflit armé international (CAI) est permise dans trois cas : (i) si une telle mesure est nécessaire pour d'impérieuses raisons de sécurité (articles 42 et 78 CG IV), (ii) en tant que mesure pénale suite à une infraction commise par une personne civile en situation d'occupation (article 68 CG IV), ou (iii) dans l'intérêt de la personne internée lorsque la personne civile le requiert elle-même (article 42, pagraphe 2 CG IV). Cette contribution n'examinera que la première hypothèse. Concernant la question de savoir de qui la sécurité est protégée par l'internement en situation de CAI, deux situations doivent être distinguées : L'occupation et le CAI autre que l'occupation. Il est aujourd'hui admis que l'article 42 couvre à la fois les forces armées et la population civile de l'Etat concerné. Quant à l'article 78, la question se pose de savoir s'il concerne à la fois les habitants du territoire occupé et ceux de la puissance occupante, ou seulement ces derniers. Par ailleurs, s'agissant de l'application des règles de DIH aux situations d'occupation, ajoutons que l'article 3(b) du premier Protocole additionnel (PA I) a ici supplanté l'article 6, paragraphe 3 de la CG IV. Par conséquent, contrairement à ce que prescrit l'article 6, paragraphe 3 de la GC IV, le DIH s'appliquera entièrement jusqu'à la fin de l'occupation. Cela signifie donc que la puissance occupante aura le droit d'interner des civils, y compris après la période d'un an qui suit la fin générale des opérations militaires.*

(B) *Dans l'affaire* Hassan c. Royaume-Uni*, l'Etat en question invoqua le DIH (CG III ou IV selon le statut de Tarek Hassan) comme base pour la détention. Bien que l'application du DIH comme base légale d'un internement d'une période de 10 jours maximum ne pose guère de problème, l'article 5 de la Convention européenne des droits de l'homme (CEDH) n'en stipule pas moins que nul ne peut être privé de sa liberté, sauf dans certains cas spécifiques listés restrictivement par le texte. Or, aucun cas prévus par l'article 5 n'est applicable au prisonnier de guerre ou à l'interné civil dans le cadre d'un CAI. Tout Etat partie à la CEDH peut cependant contourner les limites qui lui sont*

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imposées par l'article 5 en invoquant l'article 15, permettant des dérogations à certaines dispositions de la Convention. Le Royaume-Uni n'ayant cependant formulé aucune dérogation de ce type concernant ses opérations en Irak, le requérant soutint que sa détention constitue par conséquent une violation de l'article 5 de la CEDH. Le Royaume-Uni s'est défendu en invoquant l'argument selon lequel l'article 5 de la CEDH peut être « accommodé » au DIH en situation de CAI et que l'application du DIH en tant que lex specialis *en pareille situation permet donc d'éviter à l'Etat de devoir déroger à l'article 5. La Cour acceptera finalement l'argument du Gouvernement britannique selon lequel l'absence d'une dérogation expresse aux termes de l'article 15 n'empêche pas un Etat d'invoquer le DIH aux fins de détention, aboutissant à la conclusion que toute privation de liberté fondée sur le DIH ne constitue pas une violation de l'article 5 de la CEDH en situation de CAI.*

L'affaire Hassan *soulève d'intéressantes questions à plusieurs égards. Premièrement, la Cour accepte que l'examen périodique par une autorité compétente des conditions d'internement, prévu en DIH (articles 43 et 78 CG IV), est conforme à l'article 5 de la CEDH pour autant qu'il soit fait dans le respect d'un certain nombre de garanties procédurales. Ajoutant entre autres des exigences d'impartialité, cette décision renforce les garanties applicables à l'internement des civils en CAI. Deuxièmement, la Cour de Strasbourg fonde l'accommodement de la CEDH au DIH sur l'article 31, paragraphe 3 (b) et (c) de la Convention de Vienne de 1969 sur le droit des traités (CVDT) selon lequel les traités doivent être également interprétés à la lumière de « toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité » (article 31, paragraphe 3 (b) ainsi que de « toute règle pertinente de droit international applicable dans les relations entre les parties » (article 31, paragraphe 3 (b). Enfin, le fait pour l'Etat de pouvoir « accommoder », soit de justifier la détention dans le cadre de l'article 5 CEDH en se fondant sur le DIH, est conditionné par le fait d'invoquer expressément le DIH. L'affaire* Hassan c. Royaume-Uni *n'entérine par conséquent pas la lecture selon laquelle le DIH constitue systématiquement une base légale pour la détention en cas de CAI, puisque le droit des conflits armés devant être expressément invoqué, il ne constituerait pas la base légale de la détention dans le cas contraire.*

Before addressing the substantive issues raised by the internment of civilians in international armed conflicts, it is useful to clarify the meaning of the terms "internment" and "civilians". The term "civilian" was defined in the previous contributions and I subscribe to the definition proposed there. As for the term "internment", in line with the commentaries to the 1949 fourth Geneva Convention relative to the protection of civilian persons in time of war (GC IV)[2] and the 1977 first Additional Protocol relating to the protection of victims of interna-

2 *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, adopted at Geneva, 12 August 1949, 75 UNTS 287.

tional armed conflicts (AP I),[3] I understand internment as the 'deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned':[4] In other words as a preventive administrative measure, not a penal sanction.[5]

The general framework of internment of civilians having already been described by the previous speakers, this contribution will focus on some specific questions raised in the context of international armed conflicts. I will first deal with specific issues raised by internment of civilians under International Humanitarian Law (IHL) (A), before turning to Human Rights Law and some remarks on the recent *Hassan v. UK* judgment of the European Court of Human Rights (ECtHR)[6] (B).

A. Internment of Civilians under International Humanitarian Law

In summary, internment of civilians in international armed conflicts is allowed in three cases: *firstly*, if such a measure is necessary for imperative reasons of security either of the State in whose territory the alien civilians are captured (Article 42 GC IV) or of the occupying power (Article 78 GC IV); *secondly*, as a penalty to be imposed on civilians in occupied territories (Article 68 GC IV); and *thirdly*, in the interest of the interned person, following a voluntary request by the civilian himself or herself (Article 42 paragraph 2).

In accordance with the definition of internment as exposed above, I will focus only on the first case. With respect to aliens in enemy territory, Article 42 GC IV allows for internment 'only if the security of the Detaining Power makes it absolutely necessary'. As for civilians in occupied territory, Article 78 authorises interment '[i]f the Occupying Power considers it necessary, for imperative reasons of security (…)'. Jerome de Hemptinne has referred earlier to these terms. I will complement what he said – to which I fully subscribe - by focusing on the following issues: firstly, both articles talk about security: whose security is it? (1); secondly, does Article 78 GC IV apply beyond the temporal limit set out in Article 6, paragragh 3 GC IV (2)?

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3 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts (Protocol I)*, adopted at Geneva, 8 June 1977, 1125 UNTS 4.

4 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC/Martinus Nijhoff Publishers, 1987 (AP Commentary), p. 875, paragraph 3063.

5 Jean S. Pictet, *Commentary – IV Geneva Convention relative to Protection of Civilian Persons in Time of War*, Geneva, ICRC, 1958, p. 343.

6 ECtHR, *Hassan v. the United Kingdom*, judgment, Grand Chamber, 16 September 2014, appl. no. 29750, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501#{"itemid":["001-146501"]}>.

1. Whose security is protected by internment in an international armed conflict?

In order to identify whose security is protected by internment in an international armed conflict, it is important to distinguish between internment of aliens in enemy territory (Article 42) and internment in occupied territory (Article 78). Article 42 specifically speaks of the security of the detaining power. This has been interpreted to cover both the armed forces and the civilian population of the State concerned.[7] On the contrary, Article 78 contains a general reference to security without further clarification. Does this refer only to the security of the occupying power, or does it also extend to the security of the inhabitants of the occupied territory? The underlying question relates to acts which do not present a link to the armed conflict. If Article 78 is interpreted as referring to security in general, then internment as an administrative measure will be allowed even for persons whose actions may have no nexus whatsoever with the conflict. The obligation of the occupying power to maintain order in the occupied territory has been invoked as an argument in favour of this broad reading of Article 78.[8] On the other hand, if security is interpreted as requiring some kind of link to the conflict, then Article 78 cannot be applied to such cases.[9] A contextual interpretation of the Article, in light of Article 6, paragraph 3, points to the fact that security should be linked to the hostilities and that a nexus with the armed conflict is necessary in order for a State to be able to invoke Article 78.

2. Does Article 78 GC IV apply beyond the temporal limit set out in Article 6 paragraph 3 GC IV?

GC IV provides that 'interned persons shall be released (…) as soon as the reasons for internment no longer exist' (Article 132, paragraph 1), and, in any case, 'as soon as possible after the close of hostilities' (Article 133). In case these obligations are not respected, the Convention continues to apply even beyond the end of the armed conflict, for as long as the internment continues (Article 6, paragraph 4).

Aside from these general provisions, I would like to make one final remark on the temporal scope of application of Article 78. Article 6, paragraph 3 GC IV provides that '[i]n the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations'. The article explicitly allows some provisions of the Convention to apply beyond this one-year limit, but Article 78 is not among these provisions. Does this mean that the occupying power has no right to intern civilians 'one year after the general close of military operations'?

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7 Els Debuf, *Captured in War: Lawful Internment in Armed Conflict*, Paris – Oxford, Pedone Editions – Hart Publishing, 2013, p. 341.

8 Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", in: *EJIL*, vol. 16, 2005, pp. 664-665; see also Debuf, op. cit., p. 413.

9 Debuf, *op. cit.*, pp. 413-414.

In my view, this question should be answered negatively. As I have extensively argued elsewhere, Article 6, paragraph 3 GC IV has been replaced by Article 3(b) AP I, which abolishes the 'one year' time limit and calls for the application of all IHL rules until the end of occupation.[10] Indeed, there is sufficient evidence showing that the rule set down in Article 3(b) AP I has been accepted even by States which are not parties to the Protocol.[11] Therefore, my conclusion is that Article 3(b) is the only relevant provision for the end of application of IHL rules on belligerent occupation.

B. Internment of Civilians under Human Rights: the *Hassan v. UK* Judgment of the European Court of Human Rights

Turning to human rights related issues raised by internment in international armed conflicts, I will focus on the *Hassan v. UK* judgment handed down by the European Court of Human Rights (ECtHR) on 16 September 2014. The case concerns the detention of an Iraqi citizen, Tarek Hassan, by UK forces in Iraq between the 23rd of April and the 2nd of May 2003. The UK invoked IHL as a basis for the detention, namely the third and fourth Geneva Conventions: Hassan was suspected of being either a combatant, and thus subject to detention as a prisoner of war under GC III, or a civilian posing a security threat, and thus subject to internment under GC IV (paragraph 88). While IHL can undoubtedly be invoked as the legal basis of a ten day internment, things are more complicated when it comes to the application of the European Convention on Human Rights (ECHR). Indeed, Article 5 dealing with deprivation of liberty is framed in a restrictive way. This provision holds that '[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'.[12] There follows a list of six cases justifying deprivation of liberty, none of which can be applied to detention of prisoners of war and civilians in an international armed conflict. Of course, a State party to the ECHR wishing to circumvent the restrictive language of this provision may use the derogation procedure set out in Article 15, since Article 5 is not included among the articles which cannot be subject to derogation.[13]

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10 AP I, *op. cit.*, Article 3(b), p. 8: 'The application of the Conventions and of this Protocol shall cease (…) in case of occupied territories, on the termination of occupation, except (…) for those persons whose final release, repatriation or re-establishment takes place thereafter'.

11 For further analysis and relevant positions adopted by States, see Vaios Koutroulis, "The application of international humanitarian law and international human rights law in situation of prolonged occupation: only a matter of time?", in: IRRC, vol. 94, 2012, pp. 172-176; Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Paris, Pedone, 2010, pp. 170-179.

12 European Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, 213 UNTS 222 (ECHR)

13 *Ibid.*, article 15, paragraphs 1 and 2:
'1. In time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.'

However, the UK had not made any derogation under Article 15 with respect to its operations in Iraq (paragraph 98). According to the applicant, lacking a formal derogation, Article 5 continues to apply without any modifications and, since detention of enemy combatants or dangerous civilians comes under none of the six cases mentioned in Article 5, such detention constitutes a violation of the ECHR (paragraphs 81-83). The UK government argued that IHL applied as *lex specialis*, displacing or modifying Article 5. In view of the *lex specialis* rule, the ECHR can accommodate detention in international armed conflicts, and thus no specific derogation has to be made (paragraphs 86-90).

Rejecting the applicant's argument and not endorsing the Government's position that IHL, as *lex specialis*, displaced Article 5, the ECtHR held that 'the lack of formal derogation under Article 15 does not prevent the Court from taking account of the context and provisions of International Humanitarian Law when interpreting and applying Article 5 (paragraph 103)'. Indeed, the Court stated that 'the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the third and fourth Geneva Conventions' (paragraph 104). In other words, the Court accepted the government's argument that the lack of a derogation under Article 15 does not prevent a State from invoking IHL in relation to detention, the result being that a deprivation of liberty grounded on IHL does not constitute a violation of Article 5.[14] This result is achieved through the "accommodation" of Article 5 to IHL prescriptions.

This judgment will be discussed in more detail later in the conference. At this point, I will limit myself to some remarks on three specific points of the judgment, namely, the added value of the *Hassan* judgment with respect to the procedural aspects of internment (1), the legal basis of the concept of "accommodation" (2), and the need for a State to specifically invoke IHL in order to be able to rely on this accommodation (3).

1. The added value of the *Hassan v. UK* judgment with respect to the procedural safeguards of internment under IHL

Article 5, paragraph 4 ECHR stipulates that the lawfulness of the detention needs to be decided by a court. Under IHL, the internment of aliens in enemy territory is decided by the detaining power, can be appealed 'as soon as possible by an appropriate court or administrative body', and should be reviewed by this body 'at least twice yearly' (Article 43 GC IV). In situations of occupation, the internment of protected persons should be decided 'according

14 According to paragraph 105 of the *Hassan* judgment, *op. cit.*: 'deprivation of liberty pursuant to powers under international humanitarian law [i.e. the third and fourth Geneva Conventions] must be "lawful" to preclude a violation of Article 5 paragraph 1 [of the ECHR].'

to a regular procedure to be described by the Occupying Power', can be appealed 'with the least possible delay', and is 'subject to periodical review, if possible every six months, by a competent body' (Article 78 GC IV). In *Hassan*, the Court accepts that reviews by such a 'competent body' are not contrary to Article 5, provided that a number of procedural requirements are fulfilled, namely:

- that such body 'should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness';
- that 'the first review should take place shortly after' the beginning of internment;
- that subsequent reviews should take place at frequent intervals, in order to re-examine the interned person's situation and ensure release 'without undue delay' in case the reasons of internment have ceased to exist (paragraph 106).

Hassan's calls for a first review 'shortly after' the beginning of internment and for subsequent reviews 'at frequent intervals' remain rather vague and do not add much to what is already prescribed by IHL rules.[15] On the other hand, requiring the competent body to 'provide sufficient guarantees of impartiality and fair procedure' is a useful precision given that, textually speaking, such conditions are not explicitly set out in the relevant IHL articles.[16] This ruling may prove a vehicle for expanding procedural safeguards applicable to the internment of civilians in international armed conflicts.

2. The legal basis of the "accommodation"

The critical part of the *Hassan* judgment relates to ECtHR's admission that lack of formal derogation under Article 15 does not prevent taking into account IHL in interpreting and applying Article 5 of the Convention. Without endorsing the *lex specialis* argument advanced by the UK, the Court appears to ground this "accommodation" of the Convention to IHL on the 1969 Vienna Convention on the Law of Treaties, and more specifically on letters (b) and (c) of Article 31 paragraph 3, that is the subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31, paragraph 3(b)), and any relevant rules of international law applicable in the relations between the parties (article 31 paragraph 3(c)).[17]

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15 Cf. Jean d'Aspremont – Jérôme de Hemptinne, *Droit international humanitaire*, Paris, Pedone, 2012, pp. 340-341; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge, CUP, 2009, pp. 172-176.

16 In this respect, the judgment confirms the relevant interpretations put forth by the commentary to the GC IV and legal scholarship; see Pictet, *op. cit.*, p. 260; Jelena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence" in: IRRC, vol. 87, 2005, pp. 386-388.

17 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 332, p. 340.

I must admit that I tend to concur with the criticism voiced in the partly dissenting opinion expressed by four of the Court's judges on the legal basis for this "accommodation". Indeed,the judges convincingly make the following points.

- The absence of derogation in State practice does not necessarily denote their conviction that article 5 can be accommodated to fit IHL and is thus not violated. It may simply denote the States' belief that either article 5 or IHL are not applicable to the situation at all.18
- The practice invoked is not common to all States, nor is it sufficiently concordant and consistent.
- The practice relating to the 1966 International Covenant of Civil and Political Rights is not relevant since the Covenant's provision on detention (Article 9) is formulated in much more flexible terms than Article 5.19

As to consistent interpretation of the Convention with other relevant rules of international law, again the dissenting judges' reasoning seems more convincing than the judgment itself. According to the judges:

> 'consistent interpretation of the Convention with other norms of international law has its limits (…) There is simply no available scope to "accommodate" (…) the powers of internment under international humanitarian law *within*, *inherently* or *alongside* Article 5, paragraph 1.

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18 Indeed, State practice in this respect seems to have been accumulated without careful consideration or analysis of the reasons underlying the absence of derogation by States. For example, the United States' well-known position was that Human Rights Law does not apply at all in situations of armed conflict outside US territory. Following this view, the US should not be expected to formally derogate from a set of rules which it does not consider applicable in the first place. Along the same lines, to take another example mentioned in paragraph 42 of the judgment as relevant State practice, the Soviet Union did not recognise the existence of an international armed conflict with Afghanistan from 1979 to 1989. Indeed, the USSR's position was that its forces were invited into Afghanistan by the Afghan authorities. Consistent with this interpretation, it rejected the ICRC's attempts to discuss problems in the application of IHL raised by the presence of its forces in Afghanistan, stating that these problems should be discussed with the Afghan authorities and did not concern the Soviet Union (« ces problèmes devraient être discutés avec les autorités afghanes, [et] ne concernaient pas l'URSS, car les forces soviétiques n'auraient participé à aucun combat »; CICR., *Rapport d'activités* 1980, CICR., Genève, 1981, p. 49; see also, Koutroulis, *Le début et la fin de l'application du droit de l'occupation, op. cit.*, pp. 211-212). In view of this position, the fact that the USSR did not derogate from the International Covenant of Civil and Political Rights during 1979-1989 with respect to the armed conflict and occupation in Afghanistan cannot be considered as evidence of the Union's conviction that IHL can be invoked to displace human rights in situations of armed conflict without any formal derogation. In this case, the absence of derogation is explained by the fact that the State involved did not recognise the existence of an armed conflict in the first place.

19 International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 172, p. 175, article 9, paragraph 1: '(…) No one shall be subjected to arbitrary arrest or detention.'

> [Accommodation] effectively disapplies or displaces the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision. Whatever *accommodation* means, it cannot mean this!'[20]

3. The need for the State to specifically invoke IHL in order to be able to rely on it

According to paragraph 107 of the *Hassan* judgment, 'the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State.' In other words, the "accommodation" – justification of detention under article 5 through IHL – will take place only if the State specifically requests it.

This to me is one of the most intriguing parts of the judgment. The first question raised by this finding is a temporal one: when is the State supposed to 'specifically plead' IHL as grounds for detention? The second problem is that the aforementioned finding leads to the peculiar conclusion that, in international armed conflicts, detention of protected persons, while being lawful under IHL, will normally violate Article 5 of the ECHR, unless the State specifically decides to invoke IHL, in which case, Article 5 will not be violated.

If this reading is correct, what the *Hassan* judgment tells us about the relation between IHL and Human Rights Law is that human rights continue to apply unchanged in situations of detention under IHL, the two branches being completely independent one from the other, and not interacting, unless the State wants them to do so, in which case human rights are adjusted to IHL. This reasoning seems problematic in that it leaves the relations between IHL and human rights essentially unregulated. However, either IHL constitutes a legal ground for detention under Article 5, or it does not. It seems peculiar, to say the least, to hold that internment of civilians in an international armed conflict will violate Article 5 of the ECHR, unless the State specifically invokes IHL.

In conclusion, in the *Hassan* judgment, the ECtHR rejects the argument that a formal derogation is necessary in order to invoke IHL as a legal basis for detention. The logical next step would be to hold that IHL constitutes such a legal basis at all times, as the logical consequence of the relations between these two sets of rules of international law. The Court however refuses to take that step. It invents an informal derogation procedure and then tries to pin it down using some kind of formality, i.e. the condition to specifically plead the argument. This seems like an artificial construction, which may prove highly problematic in practice.

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20 ECtHR, *Hassan v. UK, op. cit.*, Partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, paragraphs 16, 18 (italics in the original).

SESSION ONE DEBATE – DEPRIVATION OF LIBERTY IN INTERNATIONAL ARMED CONFLICT

During the debate following the presentations of the first session, the audience raised four main issues.

1. Internment of Enemy Aliens in the State's Own Territory

A participant raised a question concerning the internment of enemy aliens in the State's own territory. The question concerned civilians, but not in occupied territory. Would the way in which the relationship between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) be different in the case of enemy civilians in a State territory, precisely because they are in the State's own territory? Is this situation likely to generate a reluctance to allow the State to invoke IHL at all, or a willingness to allow the State to intern civilians but with a greater reliance on IHRL? The question is particularly acute regarding the issue of review mechanisms.

A panellist replied that the conditions of internment of protected persons in the State's own territory depends on whether these persons are prisoners of war (POW) or civilians. The panellist explained that the State is allowed to detain POWs everywhere (including in its own territory). However, the State would not have to detain civilians if it is an occupying power. Contrariwise, if the State is not an occupying power, there is no limitation as to the geographical scope of application of Article 42 of the fourth Geneva Convention (GC IV). The speaker finally suggested that the title of the general section containing that provision – i.e. 'Aliens in the territory of a party to the conflict' – means that detention has to take place in the territory of a party to the conflict. Therefore, the detention of civilians in the State's own territory does not amount to a violation of IHL.

Another panellist added an argument based on the reasoning of the European Court of Human Rights (ECtHR). According to this reasoning, if we accept the extraterritoriality argument, it should not make a difference in terms of human rights whether civilians are detained in enemy or in occupied territory. A good example is the *Rahmatullah* **case**, where it is basically said that as long as a person is in the power of the United Kingdom (UK) government – whether this person is abroad or at home – he or she has, as a right, access to *habeas corpus*.

2. Temporal Scope of Application of Article 78 GC IV

A participant raised doubts as to whether Article 3, b) of the first Additional Protocol (AP I) implies that Article 78 GC IV continues to apply after the end of hostilities. Highlighting the

wording of Article 3, b) in the first Additional Protocol (AP I) – 'These persons shall continue to benefit from the relevant provisions of the Conventions and of [AP I] until their final release (…)' – the participant emphasised that it is not to the detainees' benefit to be detained *ad infinitum*. According to him, the wording of the provision means that the State had lost the right to detain and that the concerned persons must be released or detained under another regime – e.g. human rights.

One of the panellists observed that in the *travaux préparatoires* of Article 3, b), the debate around maintaining application of the provisions until the end of application of IHL rules originally only referred to AP I. It was the States themselves that proposed an amendment and changed the text in order to include the Geneva Conventions. This was simply because the exception found in Article 6, paragraph 3, which was a specific rule based on the naïve idea – forged through the German and the Japanese occupation – that once the hostilities are over the occupying power does not really want to remain an occupying power and will consequently start giving back governmental functions to local authorities. Since it gives back governmental functions to local authorities, factually speaking, the question that was supposed to be dealt with by the Geneva Conventions would not continue to be relevant. Unfortunately, this did not actually happen in practice. States sought to prolong the application of the whole Geneva Convention. In this context, there was not any specific mention of Article 78. That is the counterpart of prolonging the whole IHL in order to apply until the end of occupation.

3. Scope of Application of the POW Status

A participant spoke about the remaining uncertainties around the POW status with regard to the scope of application. He asked whether a person not in uniform held by the enemy can challenge their POW status where the circumstances are grey. Is such a person able to challenge this status when he or she was not engaged in a belligerent act? The participant explained that sometimes, to challenge their POW status might be interesting since the State has to justify why it is holding a person who is not held as a POW but as a civilian. The latter will in this case be able to go to human rights courts.

One of the panellists explained that when there are doubts regarding the status of a person who had not been engaged in a belligerent act, this person must *a priori* be considered as a civilian. With respect to the question as to whether it is more interesting to be considered as a civilian or a POW, the panellist argued that even though the status of civilian appears to be more protective, the choice of status will ultimately depend on the circumstances.

Another panellist added that, with respect to the scope of application of the POW status, the International Criminal Tribunal for the former Yugoslavia (ICTY) said that once the hostilities

end, the prohibitive, the protective rules will continue to apply if people, are detained. But that does not mean that any of the permissive rules necessarily continue to apply beyond that point.

4. 'Authorisation Theory' within the IHL-IHRL Relationship

One of the participants called into question the actual "authorisation theory" surrounding IHL, according to which the law of armed conflict actually gives an authorisation to take action. He explained that before the birth of Human Rights Law – which always requires a legal basis – nobody needed an authorisation. He reminded the audience that Henri Dunant's idea was simply grounded on a twofold approach encompassing prohibitions and prescriptions. Since international law limits a State's powers, States get an "authorisation" by the simple fact that they have the power. As a concrete example, there is no State in the world that has domestic legislation authorising the detention of POWs. However, IHL applies in this case, regardless of the fact that no such legislation exists.

Two of the panellists also disagreed with this theory and suggested that States have construed Articles 42, 43 and 78 GC IV as giving them a right to detain as well as viewing them as setting limits. The recent State practice would certainly reinforce this approach, one of the panellists argued. According to another panellist, these provisions are based on the basic reservation in Article 27, paragraph 4 GC IV which says that States may introduce security measures when necessary as a result of the war. Taking out the ICTY approach, the panellist added that the reason States needed that particular reservation was explained by the fact that the previous three paragraphs in Article 27 GC IV lay out certain blanket prohibitions – i.e. humane treatment, protection of women and non-discrimination – all of these running the risk of being violated when interning enemy aliens.

A panellist further completed this approach, stating that in 1949, there were background rules that applied, particularly on IACs because we had rules on the minimum standard of treatment of aliens and the State could simply detain enemy aliens on its territory if it wanted. He argued that the background rules now are certainly those of Human Rights Law, involving the following question: 'is there a legal basis to detain? '

Session 2
Deprivation of Liberty in Non-International Armed Conflict

Chairperson: **Knut Dörmann**,
ICRC Legal Division

LEGAL FRAMEWORK FOR DETENTION BY STATES IN NON-INTERNATIONAL ARMED CONFLICT

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Résumé

Cette contribution étudie dans quelle mesure les Etats peuvent et doivent respecter le droit international humanitaire (DIH) et le droit international des droits de l'homme (DIDH) lorsqu'ils détiennent des membres d'acteurs non étatiques dans le cadre d'un conflit armé non international (CANI).

Toute personne détenue tombe par définition dans la catégorie des personnes qui ne participent pas directement aux hostilités et qui, selon l'article 3 commun aux Conventions de Genève de 1949 (CG), doivent être traitées avec humanité et ne pourront faire l'objet, entre autres, de torture, de traitements inhumains ou dégradants, de mutilations, ni être pris en otages. La même disposition prévoit un droit pour ces personnes d'être recueillies et soignées, ainsi que de recevoir les visites du CICR. L'article 4 du Protocole additionnel II (PA II) aux CGs, qui s'applique à un nombre plus limité de CANIs, ajoute aux actes prohibés par l'article 3 commun les punitions collectives et le pillage (des effets personnels des détenus). Plus détaillé encore, l'article 5 du PA II contient des garanties liées, entre autres, à la nourriture, à l'eau potable, à l'hygiène, aux secours individuels et collectifs, devant être reconnues à toute personne privée de liberté pour des motifs en relation avec le conflit armé, qu'elle soit internée ou détenue. Dans le cadre du projet sur le renforcement de la protection juridique des détenus en CANI, le CICR a ouvert un débat avec les Etats afin de compléter la notion de traitement humain, incluant notamment des garanties issues du DIDH. L'article 3 commun contient par ailleurs des garanties procédurales concernant, entre autres, la composition de l'organe qui jugerait les personnes détenues. Sur ce point, l'article 6 du PA II est plus détaillé, stipulant par exemple que toute condamnation

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ne pourra être prononcée qu'après qu'un « tribunal offrant des garanties essentielles d'indépendance et d'impartialité » ait statué.

Le DIH conventionnel ne règle toutefois pas la question des raisons, des motifs et de la procédure selon lesquels des personnes peuvent être détenues en l'absence de poursuites judiciaires dans le cadre d'un CANI. Le CICR soutient que les standards minimums de DIH pourraient être complétés grâce à divers instruments ou décisions issus du DIDH. Ainsi, la détention devrait par conséquent constituer une mesure exceptionnelle, ne jamais servir d'alternative à des poursuites judiciaires, être ordonnée sur base individuelle, cesser aussitôt que les raisons de sécurité ne le justifient plus, et être conforme au principe de légalité.

*L'absence, dans le DIH des CANIs, de raisons admissibles pour la détention ainsi que de l'exigence que ces raisons soient prévues en droit interne n'autorise néanmoins pas, selon l'étude du CICR sur le DIH coutumier, les privations arbitraires de liberté. Seul l'article 5 de la Convention européenne des droits de l'homme (CEDH) énumère de manière exhaustive les cas dans lesquels une personne peut être privée de liberté. Mais la Cour européenne des droits de l'homme a récemment jugé qu'en CAI, la CEDH pouvait être interprétée en ce sens qu'elle permet à un Etat d'interner des prisonniers de guerre ou des civils sur base de l'article 5, pour autant que cet Etat invoque expressément le DIH comme base de cette détention (*Hassan c. Royaume-Uni, *paragraphes 101-103). Plusieurs juridictions ont répondu de manière contradictoire à la question de savoir si le DIH des CANIs pouvait, en pareille situation, servir de base à la détention de membres d'un groupe armé. Selon moi, la base légale permettant à un Etat de détenir des membres d'un groupe armé non étatique fait défaut en DIH conventionnel et coutumier.*

*S'agissant des garanties procédurales applicables aux personnes détenues sans procès préalable, d'aucuns procèdent par analogie avec le DIH applicable aux situations de CAI afin de combler les carences inhérentes aux CANIs et au régime juridique qui leur est applicable. Si cette théorie présente certains avantages, elle soulève également son lot de problèmes d'ordre pratique et procédural. Et le DIDH contient quant à lui de nombreuses garanties procédurales en cas d'internement (information quant aux raisons de l'internement, accès à un organe judiciaire, droit à l'assistance juridique, etc). En outre, le droit à la liberté individuelle est, en tant que tel, dérogeable en cas de situation menaçant la vie de la nation. Toutefois, plusieurs organes de droits de l'homme ont pris des décisions renforçant le caractère indérogeable du droit au recours judiciaire en cas de privation de liberté. En DIDH coutumier, il est clair que le droit d'accès à la procédure d'*habeas corpus *est indérogeable. En situation de CAI, la Cour de Strasbourg a, dans l'Affaire* Hassan, *jugé que l'examen des conditions de la détention par un organisme compétent suffit à rencontrer les exigences de l'article 5 de la CEDH, si cet examen ne peut être réalisé par un tribunal indépendant. Le CICR a pour sa part également énoncé une série de garanties procédurales*

qui doivent être respectées afin de sauvegarder les droits des personnes détenues administrativement. Ces garanties sont très similaires à celles prévues par la CG IV et applicables en cas d'internement des civils pour raisons de sécurité. Ici encore, il est cependant difficile d'appliquer par analogie aux membres de groupes armés détenus en situation de CANI, le régime juridique applicable aux civils internés. Pour faire l'objet d'une « accommodation » en temps de guerre, les instruments de DIDH devront cependant se fonder sur un régime procédural de DIH contraignant.

*Enfin, l'application du DIDH en tant que lex specialis peut être problématique à plusieurs égards dans le cadre d'un CANI. Il n'est d'abord pas certain que les Etats, en internant des milliers de personnes, pourront respecter les garanties procédurales imposées par le DIDH (notamment celles d'amener les personnes qui le réclament devant une juridiction dans un délai raisonnable). Face à un tel dilemme, une issue à envisager serait de revoir à la baisse les exigences posées par la procédure d'*habeas corpus *concernant les personnes arrêtées au cours des hostilités.*

I. Introduction

While I most often focus on the perspective of armed groups and the difficulties they have in adhering International Humanitarian Law (IHL) in non-international armed conflicts (NIACs), this contribution discusses how States can and must comply with IHL and International Human Rights Law (IHRL) when detaining persons, in particular rebel fighters, in a NIAC. I will shortly deal with what is clearly regulated by IHL treaties (and which is probably most important from a humanitarian point of view), i.e. their (humane) treatment and judicial guarantees, and then focus in more detail on what is not regulated in IHL treaties (nor in my view in customary law), i.e. on what basis, for what reasons and following what procedure such persons may be detained. In doing both, the increasing relevance of IHRL will be highlighted.

II. Treaty Law on Treatment of Persons

Common Article 3 to the four Geneva Conventions prescribes that those who do not or no longer directly participate in hostilities, 'including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction'. All persons detained (in relation with the conflict) by definition fall under this category. The article then adds some details by prohibiting summary executions, torture, cruel treatment, outrages upon personal dignity, in particular humiliating and degrading treatment, and the taking of hostages. It furthermore prescribes that the wounded and sick must be cared for and provides for a right of the International Committee of the Red Cross (ICRC) and other impartial humanitarian bodies to offer their services, *inter alia* to visit such detainees.

Additional Protocol II (AP II) expands upon common Article 3. It should first be noted that AP II applies to a much narrower set of NIACs than common Article 3.[2] The first provision of direct relevance for treatment of detainees in AP II is Article 4, which bears the title 'Fundamental Guarantees', showing the influence of IHRL and the interplay between the two regimes. It contains in paragraph 2 a non-exhaustive list of prohibited acts, which adds to those already outlawed in common Article 3: collective punishment and pillage (of personal belongings of detainees). Paragraph 3 contains provisions specific to treatment of children, including any that have been detained, requiring that such children receive an education, and requiring reunification with family members. The most detailed and only specific provision on the treatment of detainees in AP II is its Article 5. It applies to persons whose liberty has been restricted for reasons related to the armed conflict, and outlines certain aspects of treatment that such persons are to be accorded, in addition to those already stipulated in Article 4 and common Article 3. These include provision of food and drinking water, safeguards as regards health and hygiene, a right of detainees to receive collective and individual relief, to practice their religion, and a right to appropriate working conditions. The second paragraph of Article 5 requires detaining authorities, but only 'within the limits of their capabilities', to separately detain men and women, except where members of the same family are accommodated together, to allow detainees to correspond with their families, and to locate detention facilities such that detainees are not exposed to the dangers arising out of the armed conflict. The detaining authorities must equally allow detainees the benefit of medical examinations. In the current initiative of the ICRC on strengthening legal protection of detainees in non-international armed conflicts,[3] under a mandate received from the International Conference of the Red Cross and the Red Crescent, the ICRC discusses with States the possibility to add further details on what humane treatment implies and to set out rules specific to some vulnerable groups. ICRC lawyers also consider that additional guarantees for persons detained in NIACs may already now be drawn from IHRL and by analogy from the Geneva Conventions (GC) (presumably from the very detailed rules of GC IV on the treatment of civil internees in Articles 79-135 of that Convention).[4]

III. Judicial Guarantees

Common Article 3 does not protect persons falling within its ambit from prosecution, nor does it prescribe that only persons waiting for trial or sentenced may be detained. Sub-paragraph (d) simply prohibits executions without previous trial and prescribes that if a person is tried,

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2 See Article 1(1), Additional Protocol II.

3 See International Committee of the Red Cross (ICRC), D*etention in non-international armed conflict: The ICRC's work on strengthening legal protection*, available at: :<https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>

4 Jelena Pejic, "The protective scope of Common Article 3: more than meets the eye", 93 in: *International Review of the Red Cross* 189 (2011), pp. 215-219.

this must happen before a regularly constituted court and that the trial must adhere to all the judicial guarantees which are recognised as indispensable by civilised peoples. In my view, this must today be understood as a reference to IHRL, in which those guarantees are detailed and which constitutes the *lex specialis* in this respect (contrary to what is the case under IHRL, under common Article 3, those guarantees may obviously not be derogated from in a NIAC, as the provision has been made for precisely such a situation). Others rather point to alleged separate customary IHL judicial guarantees. Both approaches lead to the same results. As for the substantive law that is applicable, it is domestic criminal law.

In this respect too, Additional Protocol II explicitly adds much more detail in its Article 6. The trial must be conducted before a 'court offering the essential guarantees of independence and impartiality' (which is easier for armed groups to comply with than the requirement of Article 3 common that the court must be 'regularly constituted', which implies that it must be established by law, which armed groups have practical and conceptual difficulties in adopting). Specific guarantees mentioned in Article 6 are the presumption of innocence, the right to be informed on the nature and cause of the charge, the necessity to provide means of defence, individual criminal responsibility, the right to be present at the trial, the prohibition of the requirement to testify against oneself, the right to be advised on the possibility of an appeal, and limits to the death penalty. The principle of legality (*nullum crimen sine lege*) is equally mentioned (and it refers again to domestic criminal law).

Finally, the only, very limited, surrogate to any kind of combatant immunity, laid down in IHL of IACs, for those who have participated in hostilities in a NIAC (without violating IHL), is an encouragement of amnesty at the end of the conflict.[5] Although an amnesty conceptually presupposes a crime, a charge or a sentence, this and only this aspect of Article 6 equally covers administrative detainees, as internment is specifically mentioned in the provision. In the case of internees without trial, the encouragement of amnesty simply means a recommendation of immediate release.

IV. Admissibility of Detention of Fighters without Trial and Applicable Supervisory Procedures

What is not regulated in existing IHL treaty law is the reasons, the basis and the procedure according to which persons may be detained without trial in a NIAC. Those interrelated questions are obviously particularly relevant for fighters, i.e. members of an armed group. By analogy to what the ICRC suggests in relation to the distinct question of when a person may be targeted

5 Article 6(5), Additional Protocol II.

in a NIAC,[6] one could limit this concept of fighters to persons having a continuous fighting function in an armed group. It is in particular with regard to fighters that some States and authors want to apply by analogy the regime applicable to prisoners of war (POWs) provided for in GC III (without giving them the corresponding rights, as they are in NIACs by definition 'unprivileged'). Others suggest applying by analogy the regime laid down in GC IV for civil internees, while still others want to apply, in the absence of IHL rules, IHRL, either as *lex generalis*, or, as I would suggest, as *lex specialis* on the issues discussed in this section. The ICRC has adopted an institutional position, of which it does not claim that it corresponds to existing legal obligations, but refers to it as a legal and policy framework, without clarifying what is law and what is policy.[7] Simultaneously, the ICRC discusses those questions with States in its above-mentioned initiative on strengthening the legal protection of detainees in NIACs.

1. Treaty and customary IHL of NIACs does not provide a clear answer

The IHL of NIACs simply makes reference to the seeming inevitability of internment and detention by all sides participating in the conflict,[8] but I do not think that this can be seen as a legal basis (and even less as an indication of the admissible reasons and procedure required) for internment. Customary law is not very helpful in finding an answer. The ICRC Customary Law Study simply considers (mainly based upon the practice of human rights bodies) that there is (both in IACs and NIACs) a customary IHL prohibition of arbitrary detention. In interpreting this prohibition, the Study states that the basis for internment must be previously established by law and restates an 'obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention'.[9]

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6 Nils Melzer, *Interpretive Guidance on the notion of direct participation in hostilities under International Humanitarian Law*, Geneva, ICRC, 2009, pp. 32-36, available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

7 Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", 87 in: *International Review of the Red Cross* 375 (2005), at 377-391. The journal article makes a disclaimer in footnote that '[t]he views expressed in this article reflect the author's opinions and not necessarily those of the ICRC', which is misleading, given that in 2005 the ICRC adopted an institutional position entitled "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence". This document (…) was annexed to the ICRC's report on IHL and the Challenges of Contemporary Armed Conflicts presented to the 2007 International Conference. (ICRC Conference Document 31IC/11/5.1.2, p. 18 available at: <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>).

8 Articles 5 and 6, Additional Protocol II.

9 Jean-Marie Henckearts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Cambridge: Cambridge University Press (2005), pp. 348-351.

2. The ICRC institutional position

For the ICRC, depriving persons of their liberty for security reasons (distinguished from detention with a view to prosecution/trial, and the separate regime of internment of prisoners of war in IACs) during the course of an armed conflict is an exceptional measure of control. that is taken in both IACs and NIACs, at the initiation of the executive, rather than a judicial, branch of government.[10] However, the ICRC holds that 'although this type of deprivation of liberty is often practised in both international and non-international armed conflicts and other situations of violence, the protection of the rights of the persons affected by it is insufficiently elaborated.'[11] Given that, in situations of armed conflict, IHL and IHRL operate concurrently, the ICRC considers that it is possible to envisage filling some of those procedural gaps in IHL by reference to IHRL treaties, instruments of soft law and jurisprudence, which may supplement the minimum standards found in IHL.[12] The following general principles are then applicable to internment/administrative detention: a) it must be considered an exceptional measure, b) it may never serve as an alternative to criminal proceedings, c) it can only be ordered on an individual, case-by-case basis, and must not be taken on a discriminatory basis (mass internment would amount to collective punishment), d) administrative detention must cease as soon as the security reasons leading to the detention cease to exist and finally, e) administrative detention must conform to the principle of legality.

We can only hope that the ICRC succeeds in having this framework accepted by States in the current process, mentioned above and aimed at strengthening IHL on detention in NIACs. Current reports indicate however that States will not accept it as binding IHL.[13] If it remains a 'policy framework' suggested by the ICRC, or becomes part of 'guidelines' reflecting discussion with States, one cannot imagine that human rights supervisory bodies will, as the European Court of Human Rights (ECtHR) has recently done in respect of the treaty rules of IHL of IACs,[14] "accommodate" their interpretation of human rights requirements to such very "soft" IHL, or even recognise that such rules constitute, as I would suggest, a *lex specialis*.

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10 Pejic, "Procedural principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *op. cit.* p. 375.

11 *Ibid*., p. 376

12 *Ibid*., p. 379

13 See ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty, Synthesis Report from Regional Consultations of Government Experts*, Geneva, ICRC, 2013, pp. 30-31, available at: <https://www.icrc.org/eng/assets/files/2013/strengthening-protection-detention-consultations-synthesis-2013-icrc.pdf>.

14 European Court of Human Rights (ECtHR), *Hassan v. the United Kingdom*, [2014] ECHR 29750/09, in particular paragraphs 104-106.

3. Admissible reasons for detention

IHL was traditionally seen as a branch prohibiting and prescribing certain conduct for the benefit of persons affected by armed conflicts. If IHL of NIACs did not list admissible reasons for detention, nor a requirement that domestic law envisages such reasons, this could be seen as implying, from a purely IHL point of view, that States were free on those matters. Admittedly, according to the ICRC Study, customary IHL prohibits the arbitrary deprivation of liberty in both international and non-international armed conflicts.[15] This rule is however interpreted through significant reference to IHRL (practice) and it is only on that basis that the Study states that the basis for internment must be previously established by law.[16] Therefore, it is only because of IHRL that a discussion about admissible reasons of detention in NIACs has arisen. Indeed, under IHRL, any detention requires the existence of a legal basis established in domestic law. A person may only be deprived of liberty 'on such grounds and in accordance with such procedure as are established by law'.[17] On the distinct question of the reasons for which domestic law may authorise detention, most universal and regional general IHRL treaties prohibit arbitrary arrest or detention.[18] Only Article 5 of the ECHR specifically and exhaustively enumerates the admissible reasons for depriving a person of his/her liberty. Administrative detention is not listed among those reasons and is inadmissible under that provision of the ECHR,[19] except if instituted to prevent an individual from committing a concrete and specific offence.[20] The European Court of Human Rights has however recently found that State practice, in conformity with which the ECHR has to be interpreted, shows that in cases of international armed conflict, a State need not even to proceed to a derogation (under Article 15 of the ECHR) to allow the Court to "accommodate" the exhaustive list of admissible reasons of detention contained in Article 5 of the ECHR with IHL of international armed conflicts allowing the internment of POWs and, for imperative security reasons and subject to procedural guarantees prescribed in GC IV, civil internees.[21] As for the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee underlines that '[t]he drafting history (…) confirms that "arbitrariness", is not [simply] to be equated with 'against the law', but

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15 Henckaerts and Doswald-Beck, *op. cit.*, pp. 344-352.

16 *Ibid.*, pp. 348-351.

17 Article 9, paragraph 1, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). *See also* Article 5(1) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 7, American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR), and Article 6, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR).

18 Article 9, paragraph 1 ICCPR, Article 7, paragraph 3 ACHR, and Article 6 ACHPR.

19 *Hassan v. UK, op. cit.*, paragraph 97.

20 See ECtHR, *Guzzardi v. Italy*, (1981) 3 EHRR 333, paragraph 102.

21 *Hassan v. UK, op. cit.* paragraphs 101-103.

must be interpreted more broadly to include inappropriateness, injustice, lack of predictability and due process of law'.[22] The arrest and detention must be reasonable and necessary.[23]

At least under IHRL, the question arises as to whether IHL of NIACs provides for such a legal basis for detaining insurgents. A lower court in the United Kingdom (UK) has forcefully and with detailed arguments denied that IHL of NIACs provides a legal basis for detaining enemy fighters.[24] Many, including the United States (US), however answer affirmatively. This position is bolstered by the implicit or explicit reliance on the part of the US (and many others) on the application by analogy of IHL of IACs to NIACs. Even in the ICRC's view, 'both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC.' However, the ICRC adds, 'a valid domestic and/or international legal source (depending on the type of NIAC involved), setting out the grounds and process for internment, must exist or be adopted in order to satisfy the principle of legality.'[25]

In favour of the position that IHL provides a legal basis for detaining fighters, one may mention that GC III (particularly its Article 21) is generally considered as containing a sufficient legal basis for interning POWs. No State provides, in its domestic legislation, a separate legal basis for the internment of POWs. The (then) European Commission on Human Rights did not deem it necessary to assess whether the detention of Cypriot POWs by Turkey was a violation of Article 5 of the ECHR,[26] even though detention of POWs does not appear in the exhaustive list of admissible reasons for detention laid down in that provision. Many argue that GC IV provides a sufficient legal basis for interning protected civilians for imperative security reasons.[27] However, as its Article 78 requires that '[d]ecisions regarding such (…) internment shall be made according to a regular procedure to be prescribed by the Occupying Power', this can also be read to imply that the occupying power must legislate, and thereby establish in its domestic law a clear legal basis for the operation of Article 78, and associated rules.

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22 UN Human Rights Committee, *Mukong v. Cameroon* (Comm. no. No. 458/1991) (1994), 5 Selected Decisions of the Human Rights Committee 86.

23 UN Human Rights Committee, *H van Alphen .v the Netherlands* (Comm. no. 305/1988) (1990) UN Doc. A/45/40 (vol II), 108, at 115, paragraph 5.8 and UN Human Rights Committee, *Spakmo v. Norway* (Comm. no. 631/1995) (1999) UN Doc. A/55/40 (vol II), 22, at 26, paragraph 6.3. See also UN Human Rights Committee, General Comment No. 8: Article 9 (Right to liberty and security of persons) (1982) in: *'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies'* (2004) UN Doc. HRI/GEN/1/Rev.7, p. 130, paragraphs 1 and 4.

24 See High Court of Justice Queen's Bench Division, *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB).

25 Pejic, "The protective scope of Common Article 3: more than meets the eye", *op. cit*. p. 207.

26 The European Commission of Human Rights, *Cyprus v. Turkey*, (1976) 4, at 532-533, paragraph 313.

27 *Hassan v. UK, op. cit*., paragraphs 104 and 105.

As for the US, the Obama administration considers that in the armed conflict against Al-Qaeda, the Taliban and 'associated forces', those who provide substantial support to the enemy may be detained like prisoners of war in an international armed conflict, for the entire duration of the conflict,[28] and it is only for policy reasons that the US chooses to hold them no longer than necessary and has instituted a periodic review of the necessity to continue their internment.[29] It adds that under the logic of IHL those who may be targeted (and at the least members of an armed group with a continuous fighting function may be targeted at any time) may also, as a lesser evil, be targeted and detained. In my view, this is correct, but it does not exclude the fact that grounds, and a procedure justifying such detention must nevertheless be prescribed. It is interesting to note, that during the regional consultations held by the ICRC within the framework of its initiative to strengthen the legal protection of detainees in NIACs, it was only in the European consultation (which also included governmental experts from the US, Israel and Canada) that several States insisted on a status-based approach to the admissibility of internment in NIACs, which would make members of an armed group detainable without any further reason.[30] In my view, an alleged legal basis sufficient to allow a State to detain enemy fighters without any need of further legislation cannot be found in IHL treaty law. As for the allegation that it is provided by customary law, the number of States confronted by NIACs that have adopted specific legislation authorising detention of fighters shows that no general practice and *opinio juris* exists according to which IHL alone would provide a sufficient legal basis.

4. Procedural guarantees for those detained without trial

As for the procedural guarantees from which those to be interned must benefit, some argue that in law there are none, by analogy to the lack of procedural guarantees for POWs that a detaining power wants to intern. Others draw an analogy with the guarantees contained in GC IV in the case of administrative detention of civil internees, while still others require compliance with human rights guarantees, which include a right to initiate *habeas corpus* proceedings. Those who want to proceed by analogy have difficulties in explaining how such guarantees constructed - and sometimes enriched - by analogy can prevail over the black letter guarantees prescribed in IHRL.

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28 See US District Court for the District of Columbia, in: Re: *Guantánamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Authority Relative to Detainees Held at Guantánamo Bay*, Misc. No. 08-442 TFH (2009), available at: <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

29 UN Human Rights Committee, *Replies of the United States of America to the list of issues* (13 September 2013), UN Doc. CCPR/C/USA/Q/4/Add.1, paragraph 89.

30 ICRC, *Regional Consultation of Government Experts, Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty, Montreux, Switzerland, 10-11 December 2012*, Geneva, ICRC, pp. 16-19, available at: <https://www.icrc.org/eng/assets/files/2013/strengthening-protection-detention-consultations-montreux-2012-icrc.pdf>.

Arguments in favour and against an application of IHL of international armed conflicts by analogy

The approach of referring – in NIACs – to rules of IAC reflects the general tendency to bring the law of non-international armed conflicts closer to that of international armed conflicts. This has both positive and challenging aspects. On the one hand, we have the positive side effect of rendering moot controversies on whether a given conflict is international or non-international and which law to apply in conflicts of a mixed nature. There is, in addition, no real difference between a non-international armed conflict such as that between Sri Lankan government forces and the Liberation Tigers of Tamil Eelam (LTTE) in northern Sri Lanka in 2008 and the international armed conflict between Eritrea and Ethiopia in 1999. In favour of application of the rules on POWs by analogy, it must be mentioned that Article 3 of GC III encourages parties to NIACs 'to bring into force by special agreements, all or part of the other provisions of the present Convention.' If the parties so agree, they could therefore apply the rules of GC III to fighters, which do not require any individual procedure to decide upon the internment. At least in 1949, when this provision was adopted, States apparently considered that the application of POW status was not detrimental to fighters since special agreements to the detriment of war victims would be void under IHL.[31] Even without an agreement, a government could obtain the same result, i.e. POW status of fighters, by resuscitating the concept of recognition of the belligerency of an armed group which has fallen into disuse.[32]

On the other hand, strong arguments call into question the appropriateness of applying in NIACs the same rules as in IACs. There are fundamental differences between both types of conflicts that may prevent the application of rules by analogy from producing a useful result. Many non-international armed conflicts are fought against or between groups that are not well-structured. It is much more difficult to determine, for the purposes of interning fighters, which persons belong/do not belong to an armed group than it is to determine who belongs to governmental armed forces. Positive IHL of NIACs does not even prescribe explicitly, as the law of IACs does, that fighters must distinguish themselves from the civilian population. Joining and leaving an armed group is a comparatively informal undertaking, while members of governmental armed forces are incorporated and formally dismissed. As armed groups are inevitably illegal, members do their best not to be identified as such. Upon arrest it is more difficult to identify rebel fighters than it is to identify soldiers of the armed forces of another State. The correct classification can be made by a tribunal. However, a tribunal will only have its say if the arrested person is not classified by analogy as a POW, because POWs do not have to be classified as such by a tribunal if the detaining power is ready to treat them as

31 Article 6, Geneva Convention III.

32 Henckaerts and Doswald-Beck, *op. cit.*, p. 352.

POWs.[33] Second, while in international armed conflicts, POWs must be released and repatriated at the end of active hostilities,[34] that moment in time is more difficult to determine in a non-international armed conflict, and repatriation is logically impossible in the classic non-international armed conflicts limited to the territory of one State. Even when the end of active hostilities is determined, no obligation for a government to release rebels at that moment exists in IHL.[35]

The regulation by IHRL

Anyone interned must be informed, at the time of arrest[36] or promptly thereafter[37], of the reasons for his or her internment. In addition, an arrested person has a right to start proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention (and order release if the detention is not lawful).[38] The court does not necessarily have to be a fully independent and impartial tribunal capable of trying a person, but it must have a judicial character and it may only make decisions after judicial, adversarial proceedings that provide the individual guarantees appropriate to the reasons of the internment in question. Such guarantees include a right to legal assistance if the remedy cannot be exercised effectively otherwise. The court must come to a decision within a period that is not specified in the practice of treaty bodies and which depends on the circumstances of each case. However, the procedure must begin within a few days after the request for review is made.

As such, the right to personal freedom is subject to possible derogations in the case of a situation threatening the life of the nation. Under the American Convention on Human Rights (ACHR) however, judicial guarantees essential for the protection of non-derogable rights may not be subject to derogations. The Inter-American Court of Human Rights has therefore found that the access to *habeas corpus* and *amparo* proceedings are non-derogable rights.[39] Similarly, the Human Rights Committee considers that the right to have any arrest controlled by a judicial body may never be derogated from because it constitutes a necessary mechanism of enforcement for non-derogable rights such as the prohibition of inhumane and degrading

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33 Article 5 of Geneva Convention III prescribes status determination tribunals only for persons a detaining power wants to deny POW status.

34 Article 118, Geneva Convention III.

35 Article 6(5) Additional Protocol II simply *encourages* the widest possible amnesty.

36 Article 9(2) ICCPR.

37 Article 5(2) ECHR and Article 7(4) ACHR.

38 Article 9(4) ICCPR, Article 5(4) ECHR, Article 7(6) ACHR and, arguably, Article 7(1)(a) ACHPR.

39 Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights*, Advisory Opinion OC-8/87 of January 30, 1987. Series A, No. 8.

treatment and the right to life.[40] The ECtHR accepted in the past that certain violations of the right to a judicial remedy provided for in Article 5(4) ECHR were covered by the right to derogation under Article 15 ECHR.[41] The Court would however not necessarily decide so today, as international practice has in the meantime developed towards recognising the non-derogable nature of *habeas corpus*. As a possible first step in this direction, the Court held that a period of fourteen days before being brought before a judicial authority, together with lack of access to a lawyer and of possibility to communicate with family and friends, was contrary to the Convention despite a derogation by the State concerned.[42] As for customary IHRL, it is widely claimed that the right to *habeas corpus* is non-derogable.[43] Although not based upon IHRL, for the detainees held by the US in the 'war on terror' in Guantánamo, access to *habeas corpus* proceedings was granted by the US Supreme Court in 2004,[44] was eliminated again by Congress in 2006 and then imposed again by the US Supreme Court on constitutional grounds in 2008.[45]

The ECtHR has accepted that it might not be practicable in an IAC for the legality of detention to be determined by a 'court'; a 'competent body' as required by Convention IV may be sufficient under the ECHR, 'if it provides sufficient guarantees of impartiality and fair procedure to protect against arbitrariness'.[46] The Inter-American Commission on Human Rights also came to the conclusion, in the case of an IAC, that a 'quasi-judicial body' is sufficient.[47] Until now, no such position has been adopted by human rights bodies concerning NIACs, and in my view it is unlikely that they will do so, as no hard law provision in this respect exists in IHL.

The institutional position of the ICRC

In its institutional position, the ICRC also requires that certain procedural safeguards be in place for administrative detention so as to not violate the rights of persons detained. Detainees must

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40 See UN Human Rights Committee, General Comment 29: Article 4: Derogations during a state of emergency (2001) in: "Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies", *op. cit.*, p. 184, paragraph 16.

41 ECtHR, *Ireland v. United Kingdom*, [1978] ECHR 1, paragraphs 202-224.

42 ECtHR, *Aksoy v. Turkey*, [1996] ECHR 68, paragraphs 78, 83 and 84.

43 For a list of practice pointing to the non-derogability of habeas corpus, see Henckaerts and Doswald-Beck, *op. cit.*, pp. 350-351 and accompanying footnotes; Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *op. cit.*, p. 387.

44 *Hamdan v. Rumsfeld*, 548 US 557, 126 S. Ct. 2749 (2006).

45 See *Boumediene et al. v. Bush et al.* 553 US 723, 128 S. Ct. 2229 (2008), which could be evidence that States consider *habeas corpus* to cover even persons they see as enemy fighters in what they take to be an armed conflict.

46 *Hassan v. UK*, *op. cit.*, paragraph 106.

47 *Coard et al v. United States*, Case 10.951, Report n° 109/99, Inter-American Commission on Human Rights., 29 September 1999, paragraph 58.

a) have prompt access to information about the reasons for their detention, in a manner which allows the person to take steps to challenge/request a decision on the lawfulness of the detention;
b) be registered and held in a recognised place of internment/detention, with the detainee's family being notified unless contrary to his/her wishes;
c) have contact with their consular representations, if foreign nationals;
d) have the lawfulness of their internment/detention reviewed by an independent and impartial body;
e) have the right to legal assistance;
f) have the right to periodic review of the lawfulness of continued detention, in order to ascertain whether the security reasons for which they are being held continue to prevail;
g) be able to, together with their legal representative, attend in person proceedings listed in (d) and (f) above;
h) be allowed to have contact – including correspondence and visits – with family members
i) have access to medical care and attention should their condition require it.

Those safeguards very much resemble the regime laid down by GC IV for the procedure to intern civilians for imperative security reasons, enriched by some IHRL guarantees. They lead to a reasonable and realistic regime, but it is difficult to claim that they correspond, in particular for fighters, to the existing law. While it has been shown above that an analogy with the procedures concerning POWs is inappropriate for members of armed groups in a NIAC, there is no reason (other than the desired result) why, under existing law, there should be an analogy between fighters and civilians. It is however only if this is binding law that such a regime could in my view be considered as a *lex specialis*, with which the more far-reaching guarantees offered by IHRL treaties must be "accommodated". Unless States accept new binding IHL procedural guarantees following the current ICRC initiative to strengthen the IHL of NIACs concerning detention, a human rights body will be likely to make the IHRL provisions prevail.

An attempt to apply the lex specialis principle

When comparing the rules of IHL of non-international armed conflicts on procedural guarantees for persons arrested with those of IHRL, the former do not (yet) exist while, except for the admissible extent of derogations, the latter are clear and well developed by jurisprudence. As far as persons detained by a State are concerned, the extraterritorial application of IHRL to those persons is also less controversial than for other issues. A detainee is moreover clearly under the control of those who detain him or her. The IHRL rules must therefore prevail. They are more precise and more restrictive. The ICRC Customary Law Study appears to adopt this approach when it interprets the alleged IHL rule prohibiting the arbitrary deprivation of liberty through the lens of IHRL.[48] It

48 See Henckaerts and Doswald-Beck, op. cit., pp. 344-352.

may be added that the result is not so different from that of an application by analogy of the guarantees set out in Convention IV for civilians in international armed conflicts, the only difference being that under IHRL a court must decide, while under IHL an administrative body is sufficient.[49]

The only exception where IHL must prevail, as it was specifically made for armed conflicts and provides a rule, exists when either an agreement between the parties or a unilateral recognition of belligerency makes the full regime of POWs applicable. In that case detained fighters have the disadvantage of a lack of access to *habeas corpus* (although there must inevitably exist a procedure to determine whether an arrested person is or is not an enemy fighter benefiting from POW status), but they have the advantages of a detailed regime governing their detention, of immunity against prosecution and of a right to be released at the end of active hostilities.

A first objection to such an application of IHRL as *lex specialis* is that it inevitably leads either to unrealistic requirements for armed groups or, if it only applies to the governmental side, to an unequal treatment between the parties of a NIAC. However, this problem will be discussed in another contribution to this collegium.

The main difficulty with this approach is whether it is realistic to expect States, interning possibly thousands, to bring all internees, at least when they so ask, before a court without delay during a NIAC. The difficulty is not only to bring them before a court, but also to offer the court sufficient files and evidence to obtain confirmation of the admissibility of detaining enemy fighters. At least for captures made during active hostilities, it is unrealistic to expect soldiers who must accept the surrender of enemies, to constitute a file which can be used in court, to leave the battlefield to testify in court and to collect other evidence necessary for the State to oppose the argument of the detainee that he or she did not directly participate in hostilities and was not a member of an armed group, all while the fighting goes on. The crux of the matter is that if a successful *habeas corpus* procedure for the State is not realistic, the obligation to conduct it could lead to the result that most fighters arrested by armed forces on the battlefield will be released by an independent and impartial court, which in turn, could lead to less compliance with the rules in the long-term, i.e. summary executions disguised as battlefield killings and secret detention. A way out of this dilemma may be to considerably lower requirements to the *habeas corpus procedure* at least for persons arrested during hostilities. It is not certain that a Human Rights Court would not show such flexibility. The result of such a reduced *habeas* procedure would not be very different from an application, by analogy, of the internment procedure prescribed by GC IV.

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49 Jean Pictet (ed.), *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, ICRC 1958, pp. 260 and 369.

DETENTION BY NON-STATE ARMED GROUPS

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Résumé

Dans le cadre de son initiative sur le renforcement de la protection juridique des personnes privées de liberté en relation avec un conflit armé non international (CANI), le Comité international de la Croix-Rouge (CICR) rappelle que la privation de liberté est une conséquence naturelle et inhérente aux conflits armés. Je reste toutefois perplexe à l'égard de la confusion caractérisant le régime juridique de droit international applicable à ces situations.

La clarté du droit international est essentielle afin que les groupes armés non étatiques (GANE) le respectent d'une part, et respectent et écoutent les personnes œuvrant à améliorer le respect du droit d'autre part. A cette fin, il est essentiel de (i) dire aux GANEs que le droit international leur permet de détenir ou à tout le moins qu'il ne les en empêche pas ; (ii) leur dire sur quelles bases ils peuvent détenir ; (iii) leur dire quelles procédures ils doivent mettre en place afin d'assurer le respect des droits des détenus ; (iv) leur dire sous quelles conditions ils doivent détenir des personnes en prenant en compte leur réalité et ; (v) leur apporter, dans le respect des principes humanitaires, le soutien nécessaire lorsqu'ils le sollicitent. Pour ce faire, l'Appel de Genève a développé un programme de formation au DIH visant à répondre aux écueils et à conférer aux GANEs une vision plus claire du régime de la détention. En outre, l'Appel de Genève a également créé des enregistrements vidéo à des fins de diffusion sur Internet ou via des applications mobiles dans le but de diffuser des messages clairs visant un plus grand respect du droit international humanitaire.

Il existe trois grands défis auxquels sont confrontés les GANEs. Premièrement, dans le cadre des conflits armés, il existe un déséquilibre notoire entre le régime juridique applicable aux Etats et celui applicable à ces groupes; et particulièrement s'agissant des garanties procédurales et de la base légale nécessaire pour détenir. Deuxièmement, le problème du statut des GANEs demeure épineux. Réticents à conférer à ces derniers un statut leur permettant d'acquérir une légitimité, tant juridique que politique, les Etats ont créé des catégories politiques – telles que celle de « terroristes » – leur permettant d'y reléguer les acteurs mettant en danger la souveraineté étatique. Troisièmement, l'asymétrie caractérisant les GANEs les pousse parfois à user de méthodes de guerre interdites (tels que le viol), y compris contre les détenus.

Au cours de ses activités, l'Appel de Genève a pu récolter des témoignages de membres de GANEs concernant divers sujets. Sur les transferts de détenus, les GANEs font état de l'absence récurrente d'intermédiaires, les empêchant de procéder à de tels transferts ; parfois en raison d'une non reconnaissance de la part de l'Etat. Par ailleurs, l'exigence des **«** *lieux de détention reconnus* **»** *est trop stricte pour la plupart des GANEs et pourrait être remplacée par l'exigence d'un enregistrement et de la communication des noms des détenus. En outre, la plupart des membres des GANEs ignorent le fait que le statut de prisonnier de guerre (PG) ne s'applique pas en CANI. Cette réalité est difficilement compréhensible pour les GANEs en l'absence d'alternative viable à l'absence de statut de PG. Enfin, les GANEs participent également au développement du droit international. De nombreux juristes soutiennent d'ailleurs que les GANEs devraient être pris en compte s'agissant du développement du droit international coutumier.*

In its background paper on 'Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-International Armed Conflict', the International Committee of the Red Cross (ICRC) states:

> 'Deprivation of liberty is an ordinary and expected occurrence in situations of armed conflict.
>
> Whether carried out by government authorities or non-state parties to NIACs, seizing and holding one's adversaries continues to be an innate feature of war and conflict.'[1]

I certainly agree with the ICRC's assertion, but I am perplexed that international law is so confused about such an 'ordinary and expected occurrence'.

Indeed, if we want non-State armed groups (NSAGs) to comply with international law, surely we first have to be able to tell them what the law is. When we are not able to make this clear, we run the risk that all our efforts to convince them to respect international law or to give them incentives to do so will fall flat.

In fact it is not just their compliance with international law that is at stake. It is also their respect for persons such as my colleagues at Geneva Call or delegates of the ICRC who are working to improve compliance with the law. If the product - international law - is not relevant for armed groups, they will see such persons as helpless door-to-door salesmen, trying to sell big volumes of hard bound encyclopaedias in a computer age.

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1 Available at: <https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf>, p. 3.

If we want NSAGs to listen to us, we must be credible and in order to be credible, we must be able to give them elements of answers, not just questions.

First, we must be able to tell them that international law allows them to detain, or if that sounds too permissive, at least that international law does not prevent them from doing so.

Second, we must be able to tell them on what grounds they may detain. While there is some consensus emerging that persons may be detained for imperative reasons of security in NIAC, the law itself remains far from clear on this point.[2]

Third, we must be able to clarify which procedures they need to have in place in order to ensure the rights of detainees. Such procedures must not, by their nature, exclude NSAG practice, such as one which would require a legal basis for detention under domestic law.

Fourth, we must be able to tell them how they are expected to treat detainees and under what conditions they may be detained. Let us be realistic and able to take into consideration the reality they face in the field.

Finally, if they ask us for help in building such procedures, we must be able to provide such support - of course within the framework of humanitarian principles.

Geneva Call has taken a pragmatic approach to these issues. The organisation has been able to develop a robust NSAG-IHL training programme that tries to fill in gaps and provides practical answers on detention, even if the legal foundation is uncertain. In addition to direct training of NSAG members, Geneva Call has created wide dissemination messages in audio and video format, easily accessible via the Internet or mobile phones devices. The dissemination of these messages can be particularly important in the Syrian context, for instance, where ill-treatment and summary executions of detainees has been a widespread practice.[3]

There are furthermore three distinct types of challenges that NSAGs face on the issue of detention.

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2 This is particularly true in light of recent case law on the relationship between IHL and IHRL regarding detention; see ECHR, *Hassan v. The United Kingdom*, (application no. 29750/09), Judgment of 16 September 2014 (regarding issues of detention in IAC) and High Court of England and Wales, *Serdar Mohammed v. Ministry* [2014] EWHC 1369 (QB) (regarding detention in NIAC).

3 See the video campaign 'Fighter not Killer', developed by Geneva Call, in particular the one on summary executions, available at: <http://www.genevacall.org/resources/photos-videos/?gcllmp_search=&gcllmp_country=SYR&gcllmp_thematic=&gcllmp_type=video>

The first challenge is the legal disparity between NSAGs and States. While IHL has been successful in minimising the impact of this disparity, the trend in applying Human Rights Law to NSAGs has brought the problem back to the forefront. This is particularly true in terms of the issue of the legal basis and procedural guarantees on detention. Indeed, unlike IHL, Human Rights Law is not rooted in a pragmatic compromise on the reality of armed conflicts and the need to regulate them and does not contemplate players other than States.

If human rights norms, such as the one requiring courts to be 'established by law', are to be applied to NSAGs, they must be flexible enough to overcome this legal disparity. Otherwise, we will move in a direction where States have a legal right to detain by reference to domestic law while NSAGs do not. As you can imagine, this would not be helpful for NSAGs' perception of international law.

The second challenge has to do with the issue of status, be it legal or political. As with exclusive clubs in general, there is a reluctance to let others in – particularly if the 'other' is trying to destroy you. Sometimes States tend to view engagement of NSAGs as conferring legitimacy, and make it difficult for humanitarian or human rights organisations to build NSAG capacity to implement their obligations – for example by creating 'no contact' laws or through prohibitions on the provision of 'material support' to 'terrorists' – terrorists being a term not clearly defined in international law. Issues of legitimacy arise also beyond humanitarian assistance. Thus, while it would not be a problem for a donor State to help a friendly warring State to build a detention facility, a donor State helping an NSAG enemy of that warring State to do so would most certainly be interpreted as an unlawful interference in its domestic affairs.

The third challenge has to do with asymmetry. Unlike the first two challenges, asymmetry is not intrinsic to NSAGs. As is clear in Iraq and Syria today, an NSAG may well be more powerful than a State. It is true, however, that in general NSAGs are on the move and often employ guerrilla tactics. While this should have no bearing on the ability to refrain from committing sexual abuse against detainees, it will certainly make it more difficult to remove detainees from the combat zone when the enemy can conduct aerial attacks at will or detain persons in *recognised places of detention* (if this is in fact an obligation of NSAGs in NIAC).

Through the course of its work, Geneva Call has been able to collect the views of NSAGs regarding detention and the specific challenges they may face. Allow me to share some of these concerns here.

On handover of detainees: NSAGs often say that they want to hand over detainees but that there are no intermediaries to work with. For example, the ICRC may not be able to secure the

agreement of the State concerned, most of the time because this State does not recognise the existence of an armed conflict in its territory - and this is, therefore, not an option. NSAGs do not know how to proceed in such circumstances. They may also express concerns about which treatment detainees might receive if they are repatriated, as they allege that States often assume such detainees have been 'turned' by the NSAG, particularly when they are young detainees.

On recognised places of detention: whether or not this is in fact an obligation in NIAC, it is clearly a "bridge too far" for most NSAGs, and would jeopardise the delicate balance between the principle of humanity and military necessity. We believe that the better approach would be to encourage NSAGs to record who is detained and communicate this to intermediaries, to allow detainee communication with families, using creative means and/or new technologies in order to meet security concerns, and if possible to receive visitors, at least from humanitarian organisations.

On prisoner of war status: most NSAGs, if not all, are not aware that POW status does not exist in NIAC. They often proudly relate how they treat enemy fighter detainees as POWs and criticise the State saying that their enemy 'does not respect the law'.

This is a very sensitive issue and a difficult one to discuss with NSAGs. On the one hand, we do not want NSAGs to believe States are committing an IHL violation by not granting POW status in a NIAC, when it is perfectly legal for them to convict NSAG detainees under domestic law for their mere participation in hostilities. The problem with clarifying this issue with NSAGs is that it may encourage them to reciprocate and regardless of issues of legality, the result would be reduced protection for detainees.

On perceived State hypocrisy: in the vast majority of trainings that Geneva Call has been able to give all over the world, NSAGs comment on the treatment of detainees in Abu Ghraib or Guantànamo. They ask about the lack of State accountability for such serious IHL violations. Although there are many other examples of State violations, for whatever reason, these are the ones they focus on. They perceive them as 'Realpolitik IHL', wherein the powerful are immune even if they commit serious IHL violations. Of course this is not an excuse for NSAGs to violate IHL, but it certainly makes it harder for them to take it seriously.

A final issue I would like to address is *the contribution by NSAGs to progressive development of international law***.** While there does not seem to be agreement on whether NSAGs do contribute to customary international law, many lawyers have stated that NSAGs *should* contribute to it. I cannot change how international law is made, but I can give you some examples of how NSAG

practice on detention can contribute to the consolidation of emerging normative standards. For example, under IHL of NIAC, the Copenhagen Principles and Guidelines on the Handling of Detainees in Multilateral Military Operations[4], welcomed by 18 States, provide that detaining authorities are to allow visits from ICRC or other humanitarian organisations. While this is not an obligation under conventional or customary IHL in situations of NIAC, this practice is supported by some NSAG doctrine; for example the Free Syrian Army made a public commitment to allow for ICRC visits. The more States and NSAGs make reference to such practice, the more it will become a normative expectation.

Conclusion

Around 250 years ago, a compatriot of mine - a lawyer, Emmerich de Vattel - mentioned that 'a cruel tyrant will immediately answer that the laws of war are not made for rebels, who deserve nothing better than death'.

Vattel certainly did not agree with this statement. He understood that borders are irrelevant to human suffering. Yet, around ten years after his death, the first recognition of belligerency bringing into effect the laws of war in a conflict with 'rebels' (the American war of independence) was made.

It took almost another 200 years before common Article 3 to the 1949 Geneva Conventions created a set of treaty-based minimum obligations binding on all non-State parties to a conflict and then another 40 years for customary international law to step in and eliminate most of the differences between the law of international and non-international armed conflict. I say '*most of the differences*', since the biggest remaining gap is precisely on the issue of detention that is being discussed during this colloquium.

As I am an ex-politician used to living and dying on four year election cycles, please forgive me if I seem impatient. I see the *strengthening the law* process as an opportunity not just to fill in legal gaps, but also to take the next logical step of consulting all stakeholders - including NSAGs - to ensure that the law remains relevant and takes into account the specificity of their field conditions.

For humanitarian people, law is not a law for States; it is a law for humanity.

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4 Available at: <http://um.dk/en/foreign-policy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>

THE CHALLENGES IN STRENGHENING PROTECTION FOR PERSONS DEPRIVED OF THEIR LIBERTY IN NON-INTERNATIONAL ARMED CONFLICT

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Résumé

Suite à la Résolution 1 de la 31ème Conférence internationale de la Croix-Rouge et du Croissant-Rouge[1] relative au renforcement de la protection juridique des victimes des conflits armés, le Comité international de la Croix-Rouge (CICR) a été chargé de consulter les acteurs étatiques et non-étatiques compétents sur la question de savoir si le droit international humanitaire (DIH) demeurait pertinent en matière de détention. En raison notamment du maigre régime juridique en matière de détention dans les situations de conflits armés non internationaux (CANIs), le processus s'est logiquement focalisé sur ces dernières.

Le travail du CICR en la matière s'est construit autour de quatre séries de consultations régionales avec les Etats dont l'objectif est le partage de leur différentes expériences. Durant les consultations, quatre domaines sont étudiés : (i) les conditions de détention, (ii) les groupes particulièrement vulnérables, (iii) les motifs et procédures d'internement et (iv) le transfert de détenus. Et, tout en manifestant leur préférence pour un instrument non contraignant, les Etats ont émis la volonté de continuer le processus. Parallèlement aux consultations avec les Etats ayant débuté en janvier 2014, le CICR a également consulté les organisations non gouvernementales (ONGs), la société civile, des organisations internationales et différents groupes armés non étatiques. Durant ces consultations, l'approche principale fut de déterminer quelles pourraient être les possibilités concrètes de mise en œuvre des règles existantes. Les résultats de ces consultations devraient être présentés à la prochaine conférence internationale fin 2015.

(i) Concernant les conditions de détention, une série de conséquences « naturelles » de la privation de liberté furent soulignées : malnutrition, maladie, séparation de familles, disparitions, exposition au danger des hostilités, etc. En droit international, ces effets néfastes de la privation de liberté sont régis par un nombre de règles minimales afférentes à l'alimentation, l'hygiène, les soins médicaux, les contacts avec la famille, etc. Il est apparu que la pierre d'achoppement pourrait, sur ce point, se situer au moment de la capture, lorsque les détenus

1 Cfr CICR, Fédération internationale de la Croix-Rouge et du Croissant-Rouge, Rapport de la 31ème *Conférence internationale de la Croix-Rouge et du Croissant-Rouge*, Genève, 2011, disponible sur https://www.icrc.org/fre/resources/documents/publication/p1129.htm.

sont placés loin des lieux de détention, en des lieux voisins du théâtre d'opérations par exemple. Le débat que nous avons eu a toutefois mené à la conclusion qu'en pareilles circonstances, les détenus recevraient un traitement similaire à celui reçu par les membres des forces armées chargées de la détention.

(ii) En ce qui concerne les groupes vulnérables, un problème particulièrement aigu demeure, celui de la détention par les groupes armés. Du fait de leur immense diversité, certains de ces groupes ont du mal à respecter les standards appropriés à la détention des femmes, des enfants et des personnes âgées, principalement en raison d'un manque de moyens matériels. Dès lors, le défi est de conceptualiser des standards de protections qui soient fonction de l'organisation et des capacités du groupe armé non à gérer les détentions.

(iii) S'agissant du débat sur les motifs et procédures d'internement, celui-ci n'a pas encore eu lieu. Toutefois, les discussions porteront sur les écueils et les types de protections existants. Concernant la privation arbitraire de liberté par exemple, une des solutions permettant d'éviter une telle situation réside dans un véritable réexamen indépendant et impartial de la décision d'interner ou de détenir. Le but des consultations serait ici de déterminer quelles sont les synergies entre les différents droits applicables en CANI et d'évaluer dans quelle mesure ils sont efficaces dans cette situation. Pourquoi recourir à l'internement et non à la détention judiciaire, ou vice-versa ? Quels liens procéduraux peuvent être établis entre les procédures judiciaires et administratives aux fins de contrôle de la privation de liberté ? Quelle serait la nature d'un tel organe de contrôle non judiciaire ?

(iv) Dans le domaine du transfert des détenus, les débats tournent majoritairement autour du principe de non-refoulement qui existe tant en DIH qu'en droit international des droits de l'homme et qui implique que le détenu ne puisse être transféré à un autre Etat s'il existe des risques que cette personne soit torturée ou subisse des traitements inhumains ou dégradants après le transfert.

I will give you an update on where we stand from a procedural point of view, what we are trying to achieve at this stage in the context of the 'detention track' of the Resolution 1 consultation process of the International Committee of the Red Cross (ICRC) strengthening the International Humanitarian Law (IHL) initiative. I will try to keep the procedural part short and then turn to the substantive areas that we have identified to be in need of strengthening following our discussions with States and other players on how best to address these gaps and provide a sense of where the opportunities and challenges lie.

In terms of where we are in the process, our work is based on Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent[2], which essentially invited the ICRC to consult with States and other relevant players, on how to ensure that IHL remains relevant in protecting detainees. There, we focus, for obvious reasons considering the discussion we have had, on the context of non-international armed conflicts (NIACs). As Marco Sassòli said, it is a situation in which analogy to the Geneva Conventions (GCs) is attractive but imperfect, and a fall-back reliance on International Human Rights Law (IHRL) raises questions. How have we tried to resolve this dilemma? One thing I think we can agree on is that there is an absence of clear effective common rules on how to handle detention in NIAC, be it a purely internal or extraterritorial detention. So, our work is based on the need to address that problem.

The core of our work so far has been a series of consultations with government experts, (experts only in the context of these particular consultations). The overriding objective has been to evaluate the opinions of the States, and then to *first* hear whether they agree with this assessment (where gaps lie and the areas we need to strengthen) and *second*, to get a sense of how far they are willing to go and what we can actually achieve in this process. Initially the best way to do this was to give States a separate safe space where they could speak candidly and share their concerns, their experiences and their practices.

We have conducted a first round of four regional consultations with States that was essentially designed to draw out experiences of different States with different perspectives and avoid some of the dominating conflicts of the day from colouring the entirety of the consultation process. Essentially what we did was identify four areas: 1) conditions of detention, 2) particularly vulnerable groups, 3) grounds and procedures for internment, and 4) detainee transfers. We told the States that these are the areas that the ICRC considers in need of strengthening and asked them: do you agree and do you want to continue to work on this? The answer, for the first round of consultations was very much *yes*. It seemed that the States wanted to continue those discussions. In addition, not only was there an overall interest but also an interest in a concrete outcome to the process. However, they wanted a process of a non-binding nature. What type of non-binding instrument? It is far too early to tell but that is the general procedural backdrop.

We then decided to continue these procedural consultations but to move away from the regional approach, and we focussed the discussions with the smaller groups to try to dig deeper on specific substantive issues. In January of this year we held a first thematic consultation on conditions of detention and vulnerable groups, and on Monday we will be holding a second thematic consultation on grounds and procedures for internment and detainee transfers.

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2 Report available at: <https://www.icrc.org/eng/resources/documents/publication/p1129.htm>.

Parallel to this, we have been consulting with non-governmental organisations (NGOs), civil society, and international organisations. Of course, our ongoing engagement with operational dialogue with various non-State armed groups also helps inform our thinking on the process and on what issues might arise on the non-State side when it comes to strengthening IHL. All of this will be followed in April by a meeting of all States. We will then move towards the 2015 International Conference at which we will present our report with our options and recommendations as requested by the International Conference in 2011.

The predominant message to keep in mind is that we are not in a process of negotiations or standard setting at this stage. We are very much in a process of assessing what is feasible, both in terms of an outcome to the process, and in terms of what is possible on the ground in situations of armed conflict. The approach that we have chosen is to take a step back and set aside all of the interplay issues and the difficult reconciliation of various bodies of law. As this outcome boils down to a series of vulnerabilities, we have identified those vulnerabilities faced by detainees and in the world of international law. Whether it is IHRL, the GCs, soft or hard law, there exists an abundance of attempts to address these vulnerabilities. So let us ask the question for each of these four areas: if you were to implement all of these different rules that exist in other areas of law (just disregard the source for now), if you would try to implement them in a NIAC, what would happen? Inevitably the answer has been: some would be very easy to implement, some would be complicated and some would be impossible. We will go into the details, but this is the predominant type of response in these systematic consultations.

Conditions of detention, based on a discussion we have just had, is the easy issue because this is where there is the greatest convergence from different bodies of law, as they all seek to do the same thing and have reinforced each other over the years. What are the vulnerabilities involved? They are rather obvious: malnutrition, family separation, sickness, disappearance, exposure to the danger of hostilities, confinement, isolation,... These are all things that any detainee in the hands of a detaining authority is vulnerable to. The way existing protections in international law address these vulnerabilities is through a set of minimum standards on food, malnutrition, medical care, family contact. For disappearances, there are ICRC rules on registration and notification of families and lawyers.. Depending on the source of law, the actual recipient of the notification might vary slightly but ultimately the approach to address these issues is very similar across these different bodies of law. We put this list of possible protections in front of the experts and said: tell us the nuances and dynamics involved in a NIAC that would affect your ability to provide these protections? Some interesting points arose. One was that in fact, when you look at places for long-term detention in a NIAC (in places of internment or even prisons where persons convicted for conflict-related crimes are

being held), there are not an enormous number of NIAC-related issues that come to mind. In fact, especially to the extent that that particular area might remain unaffected by hostilities, most of the protections that we went through seem to be attainable most of the time. Where things became a bit more complicated was detention conditions at the point of capture when detainees, for example, spend several days a week in an area that is far from any designated place of detention. In those circumstances the reaction from the experts was: obviously we are not going to organise a visit by a spiritual representative at the far operating base, that would have to wait, but basic fundamental needs (food, water, hygiene, medical care) would be provided. Interestingly, when we then tried to ask: if you cannot provide these protections that are found in the standard minimum rules, what would you do instead? The answer was very much: we would give the same degree of care as the detaining forces themselves have. So, when it comes to food, if the detaining unit is eating military rations, then the detainees would eat military rations. If, the sick or wounded members of that unit were treated by the available medic and if their situation was grave, and they were transferred to a more specialised facility away from the battlefield, the same would be done for the detainees.

The challenge is to assess how to account for these nuances in this potential outcome document, what type of approach will be used, what kind of approach for different detention environments? Does one take an approach similar to the second Additional Protocol (AP II) and calibrate it according to capabilities and according to what might be available to the local population or to the troops? There are a number of ways it can be dealt with, but essentially that is the fundamental issue.

Similarly, the same issue arose when it came to vulnerable groups. The vulnerabilities of children, women, the elderly, tend to have to do with their physical security, their specific medical or educational needs, and the ability to separate them from the rest of the detainee population. To all of this, again, very different answers arose when it came to long-term places of detention in stable areas versus in a far operating base: certain protections would be more feasible in the former.

On the issue of armed groups, in terms of conditions of detention and vulnerable groups, a large number of the protections States provide come from human rights, soft law standards which are designed generally by and for States using prisons. What would happen if in fact you expected armed groups to provide the same protections? You can guess the obvious answer.. The result was mainly a debate on how to calibrate the standards according to armed group capabilities. How to calibrate the protection standards in a way that the better and more organised the armed group, the more it will be expected to provide in terms of protection. This is going to be an on-going theme during the process. In short, what was clear was that there

is a predictable difference in the capabilities and expectations of States on the one hand, and armed groups on the other. Which raises the question of the principle of equality of obligations of belligerents: how is this to be dealt with?

As to grounds and procedures for internment, we have not discussed this yet. We will have a three-day meeting on Monday on this topic. What we can discuss now is whether the vulnerabilities and the types of protections are in existence.. In terms of vulnerability in short term arbitrary deprivation of liberty, it is the tendency of parties to armed conflicts to take on the role of a detention authority with the possibility of detaining purely on the base of political beliefs, ethnicity, etc. Whatever the source, the protections designed to address that vulnerability necessitates the existence of an independent and impartial check at the discretion of the detaining authority. Whether it is Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) and the *habeas*, or the mechanisms under GC IV for initial and periodical review, in the end the question we are trying to answer is: which of these very similar various articulations of protection, in terms of an independent and impartial review, would have an effect in armed conflict and why or why not, in a NIAC? The questions then become: why is it that certain States rely entirely on the judiciary for the duration of the NIAC and do not ever resort to internment? What is it that would make them resort to internment in the first place and not go with the criminal justice system? If they do resort to internment, what is it that would require them not to rely on their judiciary to oversee that internment and turn to an administrative board or other independent and impartial authority? If you are to establish an independent and impartial authority that is not a court, what is its nature, what is its composition, what is its hierarchical position relative to the detaining authority? What degree of authority does it have to impose an order or decision to release? I will not go further because we are going to have this discussion on Monday and all this information will be posted on our website if you are interested on hearing what States have to say.

On the issue of transfers, the vulnerabilities that we are trying to address are very simply the possibility of handing over prisoners to another authority that will ill-treat, or torture them, or worse. The traditional mechanism in international law to prevent this is collectively referred to as the principle of *non-refoulement*. The idea being that if there is a certain degree of risk that a particular detainee will be subjected to ill-treatment upon transfer to another authority, that transfer cannot go ahead. It imposes an obligation on the transferring authority to assess the future treatment of the detainee who is in their power. Both IHL and IHRL contain *non-refoulement* or *non-refoulement*-like provisions. IHL focuses more on a broad *non-refoulement* principle than the one found in the Convention on refugees, it has a broader principle on transfers: you can only transfer to another State which is also party to the relevant GC. Only after you have satisfied yourself of their willingness and ability to fulfil their obligations under

that Convention, may you transfer. If after transfer, it comes to light that they are not complying with their obligations under that Convention, then you are actually required to remedy that situation or ask for that detainee to be returned. The receiving State is then required to return the detainee. So we are going to take, again, all of these rules, all of these protections, put them in front of the experts and ask how they would play out if they were applied in NIAC.

So, that is a general overview of how we are approaching things, the main substantive issues that we have ahead of us. I will conclude by reiterating that we have seen how complicated the interplay issue is. We have seen how there are strong arguments on all sides, in every issue and it is sometimes helpful to take a step back and look at the basic humanitarian issues at play, the substantive vulnerabilities and the types of protections that will effectively address those vulnerabilities. That is a place where I think common ground can be found so that we can move forward.

SESSION TWO DEBATE – DEPRIVATION OF LIBERTY IN NON-INTERNATIONAL ARMED CONFLICT

During the debate following the presentations of the second session, the audience raised three main issues.

1. Status of Non-State Armed Groups

A participant highlighted the persistent rebels' desire to be considered as equals to States from a legal perspective. He mentioned Emmerich de Vattel who spoke about the idea of a civil war model during which a belligerent controlling a territory had to be construed as a State, or at least as an entity holding the same level of rights. This outdated theory was afterwards called 'recognition of belligerency' entailing the application of the major part of IHL to situations of non-international armed conflicts (NIACs). This recognition of belligerency could be achieved through applying Article 3 common to the four Geneva Conventions (GCs) which allows States to apply international law in its entirety. However, this is not the direction taken by the States. As a consequence, non-State armed groups (NSAGs) are forced to observe International Humanitarian Law (IHL) in order to obtain a certain legitimacy in international law. The participant also argued that freezing condemnations to the death penalty during armed conflicts might be an interesting step forward. He finally said that there were misunderstandings at what governments actually want with respect to the treatment of enemy fighters.

Another participant underscored the fact that members of NSAGs are first and foremost concerned with total liability, not only with liability under international law. She added that if we want an initiative coming from governments, we have to tackle the question of domestic law. The government should for example commit, at the onset of the conflict, not to prosecute members of NSAGs, on the condition that they commit themselves to treat detained members of armed forces properly, without giving them a right to detain.

A panellist raised doubts as to whether NSAGs really fear imprisonment since their members know they will be jailed anyway. She explained that NSAGs show a keen interest in the 'reciprocity' between them and the State during peace talks. 'Reciprocity' here means equal condemnations for violations of IHL, the panellist added. If members from both sides are equally condemned, she explained, the members of NSAGs stand ready to face their condemnation. Another panellist wondered whether the equality of belligerence might be enshrined in a soft law instrument. He questioned whether it is something that really matters for "hard IHL" which might encompass grave breaches like universal jurisdiction regime. A panellist explained that, in his view, Additional Protocol II (AP II) contains the maximum number of rules States

can reasonably expect from a group controlling a territory, recalling that such a group has to control a territory for AP II to apply. The panellist then insisted on the importance of the psychological dimension of the reciprocity since armed groups dislike the "discrimination issue".

2. Condition of Persons Detained by Non-State Armed Groups

A participant asked a question about the fate of civilians detained by NSAGs. The fact that these persons benefit from lesser guarantee than if they were detained by the government raises an issue.

A panellist warned that all armed groups should not be thrown into the same pot. Certain non-State players control huge territories whilst others - being tremendously mobile - maintain an influence on targeted areas without controlling a territory. This entails highly different capacities and shapes. Players such as the Polissario Front whose political branch is a member of the African Union cannot be compared with groups like the Islamic State in Irak and Syria (ISIS). The great disparity of players led to the existence of a wide array of aims, tactics and codes of conduct. It is therefore a big challenge to assess the group's capacities to reach a given objective. In order to avoid a *calibrage à la carte*, it is a priority to get back to the conception of clear guidelines for NSAGs, she argued, adding that in the meantime we can encourage them to go beyond these catalogues of basic rules.

Commenting on a video displayed by a panellist showing members of a NSAG prosecuting a detainee in a small court, a participant questioned the procedure that has to be observed by armed groups when 'sentencing' their detainees. The participant voiced some doubts regarding the type of procedure, reminding the audience that a NSAG cannot prosecute members of the State armed forces because you cannot prosecute the government for having taken up arms against you. He wondered whether this practice could constitute a sort of *habeas* procedure during which the NSAG may question its entitlement to hold such a person. Is this person entitled to be detained by the NSAG in order to neutralise the enemy forces? The participant said that we have to make a leap and accept that an NSAG has its own procedure. Because as long as we accept that non-State groups have a human rights obligation, a sort of symmetry appears. Such a procedure will determine whether the non-State belligerent has, at least under its own rules, the 'right' to detain that person. This is not grounded on IHL or national law, but elsewhere, the participant insisted.

Explaining that these videos are not made for lawyers, the panellist said that the primary video message was to prevent summary executions occurring. The second message would be that the person appearing on the video could be a civilian helping the enemy and that he is also entitled to be heard. The third idea contained in the video is that the person can be a member

of the NSAG and must also be treated humanely. The Deed of Commitment is a soft law instrument promoted by Geneva Call to enhance the respect of humanitarian rules by NSAGs. In case of non-compliance, the Deed of Commitment provides that the superiors will take sanctions in accordance with international standards. These sanctions are to be implemented by the non-State player itself while adhering humanitarian principles.

3. The *habeas corpus* Proceedings in Non-International Armed Conflicts

A participant insisted on the fact that, when deprived of his/her liberty, a captured rebel will benefit from the right to challenge the lawfulness of his or her detention (*habeas corpus*). Reiterating that the member of a NSAG is a common law detainee, the participant stated that this fact does not constitute a problem in that respect.

Highlighting the importance of determining whether a basis for holding exists or not, another participant added that the judge does not need a long dossier in order to determine whether a person should be prosecuted or not. Consequently, a simplified procedure could work. Another participant agreed on this point but insisted on the fact that an incomplete dossier can lead to practical shortcomings. When having incomplete information on a file, independent judges frequently end up releasing the person. As a result, this person will end up being executed or detained secretly. In addition, the participant underscored the need to have a good balance between realism and efficiency. He added that the procedure leading to a deprivation of liberty depends on the circumstances. Such procedure should not be an across-the-board process and would for example be different whether someone was arrested at home or on the battlefield.

A panellist further replied that the term *habeas corpus* is quite often used without really knowing what it is referring to. He said that the notion is often conflated with the idea of solely judicial supervision of the entirety of the detention. The panellist reminded the audience that the right to *habeas corpus* – the right of a person deprived of liberty to challenge the lawfulness of his or her detention – was one of the core element of the right to liberty of persons contained in the International Covenant on Civil and Political Rights, Article 9 (4).

Session 3
Detention Operations Abroad

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NATO OPERATIONAL PERSPECTIVE

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Résumé

Les opérations de détention se déroulent fréquemment dans le cadre d'environnements complexes offrant peu de temps pour la prise de décision. Or, l'Organisation du Traité de l'Atlantique Nord (OTAN) intervient souvent dans de tels contextes, ce qui rend l'intervention de l'Organisation plus ardue encore. De plus, le rôle sui generis *de l'OTAN dans le cadre de ce type d'opérations ne peut être compris qu'à l'égard de l'approche intergouvernementaliste ayant contribué au concept traditionnel de l'organisation internationale. Selon moi, ces particularités otaniennes ne sont pas un obstacle à l'application du droit international positif et coutumier, en ce compris le droit international humanitaire (DIH), aux deux types de conflit armé. En matière de détention, la position de l'OTAN est d'ailleurs de traiter les personnes capturées en accord avec les Convention de Genève et leurs Protocoles additionnels.*

Dans le cadre des commentaires du **«** *Projet d'articles sur la responsabilité des organisations internationales* **»**, *adopté par la Commission du droit international en 2011, l'OTAN souleva que le Projet d'articles omettait de prendre en compte certaines spécificités propres à l'OTAN. Par exemple, la prééminence de la souveraineté étatique au sein de l'Organisation implique que les décisions de l'Organisation sont prises collectivement par ses Etats membres. Ceci implique également que les décisions prises par tout Etat membre de l'OTAN engagent la pleine responsabilité dudit Etat ; ce qui suppose que ce dernier puisse, sur le plan interne, mettre juridiquement en*

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The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of NATO. They should not be utilised in real-world analytic products as they are based only on very limited and dated open source information. Any assumption made within the text is not reflective of the position of NATO.

œuvre les décisions du Conseil. Cela explique notamment que l'OTAN n'est pas une puissance détentrice, et que seuls peuvent l'être les Etats.

Ce sont les commandants militaires, et non pas l'organisation dont ils font partie, que le droit international positif – particulièrement les articles 86 et 87 du premier Protocole additionnel (PA I) –, le droit international coutumier et la jurisprudence des juridictions internationales tiennent pour responsables en cas de manquement aux instruments internationaux applicables en temps de guerre. S'inscrivant dans la droite ligne des acquis de la pratique internationale en la matière, l'OTAN met pleinement en œuvre les principes établis par le droit international lorsque de tels problèmes de responsabilité surgissent. Les Standard Operating Procedures (SOP) *pour la détention du personnel non-ISAF (International Security Assistance Force) prévoient par exemple que toutes les opérations de détention menées par l'OTAN en Afghanistan seront soumises à un examen interne et externe. Dans ses opérations, l'OTAN veille de ce fait à ce que les détenus soient traités humainement, ne soient pas détenus pour une période trop longue et soient dûment informés quant à leur conditions de détention et de libération. L'Organisation est également attentive au fondement juridique de ses opérations.*

En Afghanistan, l'ISAF est tenue par les SOP qui contraignent les responsables militaires à s'assurer que les opérations de détention soient conduites dans le parfait respect du droit international humanitaire (DIH) et du droit international des droits de l'homme (DIDH). Toute opération de détention de l'OTAN est basée sur des règles d'engagement strictes et ne peut être décidée que si la protection de la force ou le succès de la mission en dépendent, ainsi qu'en cas de légitime défense. Le temps de la détention dans le cadre de l'ISAF est de 96 heures. Par l'intermédiaire d'initiatives diverses (telles que l'actuel travail sur le Manuel relatif au traitement des personnes capturées), l'OTAN s'inscrit dans un processus continu de renforcement des standards applicables à ses Etats membres dans les opérations de détention, Etats qui sont, rappelons-le, les seuls à pouvoir être considérés comme puissances détentrices.

En raison de sa nature d'organisation internationale, l'OTAN ne peut donc agir comme puissance détentrice. La responsabilité des personnes capturées, et les obligations juridiques qui en découlent, n'incombent donc qu'aux seuls Etats. Toutefois, l'OTAN a pu encourager et installer un cadre propice au développement de règles strictes applicables aux opérations de détention conduites sous l'égide des Etats membres. Ces standards proviennent notamment de résolutions du Conseil de sécurité des Nations unies et sont compatibles avec le DIDH.

A. Introduction

The fact that armed forces engage in capturing persons in the vast array of types of conflict is a reality that exposes States to thorough political, media and legal scrutiny. Exercising physical power and control over a person[2] during armed conflicts is the subject of a continuous debate as to the level of applicability of International Humanitarian Law. The difficulty rests on a stubborn and repetitive factor in armed conflicts: detention operations occur in very complex environments and with short-lead decision-making time. The North Atlantic Treaty Organization (NATO) often operates within these operational environments, which adds a new layer of difficulty due to the nature of the Organization. Be that as it may, NATO offers its members, and those participating in operations led by it, a high standard framework for detention operations, one that has been recognised by national courts[3]. However, the *sui generis* role of NATO in detention operations can only be understood in the light of the classic concept of international organisations formed under the intergovernmentalist approach.

In any case, NATO's particularities do not impede the application, fully or partially, of the body of customary and positive international law (Geneva Conventions and their Protocols) to both types of conflicts, international and non-international. The distinction between these classifications of conflicts also poses legal risks to NATO members and its partners, since the nature of current armed conflicts is in many cases uncertain. Notwithstanding this, NATO's default position will always be to treat captured persons in accordance with the Geneva Conventions and their Protocols, more specifically Geneva Convention III (Prisoners of War), Geneva Convention IV (Internment of Civilians), and Additional Protocols I and II.

This paper intends to be a very brief commentary on how NATO has approached the unavoidable detention issue. It seeks to explain what the responsibilities of NATO in operations are with respect to its members and the non-NATO troop contributing nations, which in turn requires analysing the nature of NATO. It is also necessary to identify briefly NATO's current approach after the Afghan experience.

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2 *Serdar v. United Kingdom Ministry of Defence*, 2 May 2014, High Court of Justice Queen's Bench Division, Case No. HQ12X03367, paragraph 147, available at: <www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf>, 29 September 2014.

3 *Ibid*.

B. The Nature of the North Atlantic Treaty Organization

1. NATO members' omnipresent sovereignty4

The International Law Commission asked for comments and observations from international organisations on the Draft of Articles on Responsibility of International Organizations (DARIO)[5]. NATO in its comments raised a general concern. This concern was related to the fact that DARIO did not always cover properly the specificities of the different international organisations, i.e., the 'principle of speciality'.[6]

The DARIO text disregarded both the fact of the type of activities the North Atlantic Treaty member States are engaged in within the NATO framework, and that the decision-making process in NATO permits nations to 'participate on a daily basis in the governance and functioning of the organization'[7], i.e., that nations actually exercise their sovereignty in a quotidian manner.

2. NATO's decision-making procedures

NATO's decision-making process shows the classic intergovernmental nature of the Organization, where sovereignty is omnipresent. Decisions are taken at NATO, after discussion and consultation among the nations' representatives, which reach consensus; this implies that each NATO member has accepted them. This practice expresses the '(…) collective will of all the sovereign states that are members of the Alliance. This principle is applied at every committee level, and demonstrates clearly that NATO decisions are collective decisions made by its member countries.'[8]

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4 'Sovereignty presupposes that there are no limits on the authorized exercise of state power at any point with a sovereign's jurisdiction. If there were limits the source of those limits would be the sovereign. This abstract concept is powered by the different actions of governments and their administrations and manifested in all the activities of their societies, with the intention to reaffirm the independence of the sovereign state with respect to other subjects of international law.' Andres B. Munoz Mosquera, "Host Nation Support Arrangements: the NAC-approved Military-to-Military Legal Tools", in: (2011) *NATO Legal Gazette* 24, at 2-3.

5 Draft Articles of Responsibility of International Organizations, available at:, <www://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf>, 7 September 2014.

6 The ICJ has '(…) pointed out that international organizations do not, unlike States, possess a general competence, but are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.' *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Nuclear Weapons Case)*, Advisory Opinion of 8 July 1996, [1996] ICJ 78, available at: <www.un.org/law/icjsum/9622.htm>

7 UN Doc. (2011) A/CN.4/637, at 11.

8 NATO webpage, <www.nato.int/cps/ar/natolive/topics_49178.htm>, 3 September 2014.

When making decisions in NATO there is no voting or majority decision as it respects the sovereignty of its members, i.e., that all members hold the right to express their opinion on all matters discussed at the North Atlantic Council, as consultations take place under Article 4 or 9 of the North Atlantic Treaty.

NATO's website reflects the position that each NATO nation 'retains full responsibility for its decisions, and is expected to take those measures necessary to ensure that it has the domestic legal and other authority required to implement the decisions which the Council, with its participation and support, has adopted.' This statement leaves no doubt of the fact that consensus creates an effect where nations in all phases of the decision-making process retain the responsibility for all NATO activities. This helps to explain an essential point of NATO detention operations, i.e., the legal consequences of them always rests on the detaining power, and NATO is not a detaining power.

The commentaries[9] also delve into the decision-making process of NATO and NATO-led operations and reinforce the fact that the North Atlantic Council is always the actual authority and its decisions are normally based on relevant United Nations Security Council resolutions.[10] Approval from the Council for NATO and NATO-led operations start with the Initiating Directive that triggers the Alliance's military mechanism, beginning the planning cycle which ultimately results in the production of the operational plan together with the correspondent rules of engagement, all of which will have to be approved in the Council. In this process, NATO's structures and procedures apply international public law, paying special attention to International Humanitarian Law and the principles of International Human Rights Law. Equally, the North Atlantic Council also develops a legal framework for operations, either before or during them, which includes not only provisions related to the status of the forces, but also standard operating procedures on detention.[11]

C. NATO's Approaches

1. Command responsibility

International law, in particular International Humanitarian Law (see Additional Protocol I, Articles 86 and 87), and customary law looks to hold commanders responsible, not the organisation they emanate from. Since the Second World War (*Yamashita*) case-law on 'Commander

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9 UN Doc. (2011) A/CN.4/637, at 12.

10 See *Behrami v. France*, 2 May 2007, European Court of Human Rights, Grand Chamber, available at: <www//hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830#{"itemid":["001-80830"]}>, 4 October 2014.

11 See ISAF Standard Operating Procedures for Detention of Non-ISAF Personnel, at: <www//info.publicintelligence.net/ISAF-DetaineeSOP.pdf>, 7 October 2014.

(or Superior) Responsibility' (see International Criminal Tribunal for the former Yugoslavia's, *Celebici* and *Blaskic* cases, as well as the International Criminal Tribunal for Rwanda's *Akayesu*, which inspired International Criminal Court Article 28)[12] has developed to establish standards as those of *mens rea*, superior-subordinate relationship and failure to prevent or punish (duty to prevent and duty to punish); these standards make commanders accountable for leading their forces, as well as civil officials (or paramilitary leaders). It is a NATO practice that when such issues arise they will be subject to investigation under the standards established by International Humanitarian Law, i.e., Articles 86 and 87 of Additional Protocol I, customary law and international tribunals jurisprudence, i.e., under the criteria of *mens rea*, superior-subordinate relationship, and duty to prevent and duty to punish. Commanders are reminded, for instance, in the Standard Operating Procedures (SOP) for Detention of non-ISAF personnel: 'All ISAF Detention operations will be subject to internal and external scrutiny'.

During NATO's operational planning, and most particularly during the conduction of military action, it is necessary to identify beforehand the legal risks associated with detention operations. These are normally related to the time of detention, the questioning and the information of move and release to the International Committee of the Red Cross (ICRC). NATO commanders are expected to ensure that those detained are, amongst other things, treated humanely and that there is a separation of the detention and questioning functions. In this regard, the ISAF Standard Operating Procedures for Detention of Non-ISAF Personnel is a hallmark for NATO's institutionalisation by developing higher standards for detention among its member States.

NATO procedures require meticulous planning in all aspects of a given operation. A detention run under NATO operational plans is required to be operationally and legally sound, but also realistic and adaptable to circumstances surrounding the detention (operational environment). This always requires that a detention (including the handover) is fully documented, and informed to the highest operational headquarters in theatre and the ICRC.

2. Building up on International Security Assistance Force (ISAF) experiences

NATO's contribution towards improving detention operations comes in the form of Standard Operating Procedures for Detention of Non-ISAF Personnel[13]. The SOP provides ISAF commanders with the necessary direction and guidance for detention operations in Afghan territory. The SOP is extremely inclusive although it excludes 'prisoners of war or to persons indicted for war crimes (PIFWC) pursuant to the lawful exercise of authority by the International Criminal Court or other lawfully constituted tribunals':

12 at: <www.icty.org/sid/8021>, <www.icty.org/case/blaskic/48>, and <www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>, 1 October 2014.

13 ISAF Standard Operating Procedures for Detention of Non-ISAF Personnel, op. cit.

'[c]ommanders at all levels are to ensure that detention operations are conducted in accordance with applicable international law and human rights standards and that all detainees are treated with respect and dignity at all times. The strategic benefits of conducting detention operations in a humanitarian manner are significant. Detention operations that fail to meet the high standards mandated herein will inevitably have a detrimental impact on the ISAF Mission.'

D. Legal remarks

During the conduct of NATO-led operations it is reasonable that, depending on the operational environment, detentions may occur. However, while captured persons may be an intelligence asset, they also represent a potential strategic risk to the prestige and reputation of those involved in detention operations. Nevertheless, NATO's operational authorities run detention operations based on the specific operation's Rules of Engagement (ROE) and take into account that any detention must be made only if necessary for force protection, self-defence, and the accomplishment of NATO's mission.

The time of detention established in ISAF has not been challenged by national or international courts and actually may be considered a generally accepted standard. Along these lines Justice Leggatt states that:

'I consider that detention in accordance with ISAF policy for up to 96 hours (or, exceptionally, a very short further period in order to effect release or transfer in safe circumstances) where considered necessary to assist the Afghan authorities to maintain security was within the mandate conferred by the relevant UNSCRs provided that it did not violate international human rights law. I conclude in part X that such detention was compatible with Article 5 of the Convention; and there is no suggestion that it violated any other relevant international norm. It follows that such detention was authorised by the relevant UNSCRs.' [14]

Equally, ISAF SOP's have established standards on what will be the moment in which a person is considered an ISAF detainee, which only occurs when 'ISAF assumes control and places that individual into detention'. This, then, has prompted NATO to focus mainly on the second part of detention operations, i.e., the condition of an individual's detention and their well-being. With this in mind, NATO is currently working on a Handbook on Treatment and Handling of Captured Persons[15], which builds on the SOP and the Copenhagen Process on the Handling of

14 *Serdar v. United Kingdom Ministry of Defence, op.cit.*

15 In development.

Detainees in International Military Operations (Copenhagen Process) of 19 October 2012.[16] This demonstrates that NATO is continuously looking for opportunities that enhance collective standards among members, standards that have an "opt-in" nature because only States are to be considered 'detaining powers" and 'transferring powers'.[17]

E. A Brief Conclusion

Expectations of NATO to behave as a 'detaining power' are mistaken and based on a lack of awareness of the organisation's nature. Detention operations occurring in operational environments led by NATO follow the essential legal principle that the responsibility for any captured person and all legal obligations arising from detention rest only with the 'detaining power'.

Notwithstanding the above, NATO has proven a valid operating framework for detention operations under which recognised high standards can be developed and expected. These standards may take the form of operation-specific standard operating procedures or handbooks that are drafted within the legal realm of resolutions passed by the Security Council and compatible with International Human Rights Law.

16 Copenhagen Process on the Handling of Detainees in International Military Operations, at: <www//um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf >, 2 October 2014.

17 Note that 'Detention Authority' as defined in the ISAF SOP is not equivalent to a "detaining power'.

THE LEGAL BASIS FOR DETENTION IN EXTRATERRITORIAL NIACS – THE *MOHAMMED SERDAR* CASE

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Résumé

Le principal problème juridique dans l'affaire Mohammed Serdar *(High Court of Justice Queen's Bench Division) est celui de la détention en conflit armé non international (CANI). Mohammed Serdar est détenu du 7 avril au 25 juillet 2010 à Helmand en Afghanistan. Sa détention initiale fut basée sur les* Standard Operating Procedures (SOP) for Detention of Non-ISAF Personnel for 96 hours *de l'*International Stabilization Force in Afghanistan (ISAF). *La raison de sa détention tenait toutefois dans le fait que Mohammed Serdar possédait, selon les autorités britanniques, des informations stratégiques capitales. En 2009, pour des raisons opérationnelles évidentes, le Royaume-Uni (RU) décide qu'il pourrait autoriser une détention allant au-delà de 96 heures afin d'interroger le détenu sur d'éventuelles informations stratégiques qu'il détiendrait. Or, c'était une* décision *de politique opérationnelle, pas juridique, ce qui a donc conduit à s'interroger sur son fondement juridique. Suite à l'interrogatoire de Mohammed Serdar, le RU décida alors de transférer ce dernier aux autorités afghanes, qui refusèrent le transfert en raison du manque d'espace dans les prisons afghanes. Durant toute sa détention sous l'autorité du RU, Mohammed Serdar ne put manifestement pas obtenir de réexamen de sa détention ni émettre des observations sur sa condition. Les autorités britanniques étaient habilitées à détenir pendant 72 heures des nationaux afghans sur base du droit afghan, à condition que les détenus soient transférés vers les autorités nationales en vues de poursuites pénales. Cette autorisation de détenir constituait donc une base initiale pour une détention pénale.*

La principale question juridique est celle de savoir si la détention de Mohammed Serdar peut être justifiée sur base de l'article 5 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH). Pour y répondre, il faut garder à l'esprit que le RU n'a pas dérogé à la CEDH en Afghanistan. Dès lors, plusieurs questions périphériques furent soulevées. Tout d'abord, le gouvernement britannique soutint que l'autorisation de détenir découlait, sur le plan juridique, d'une résolution du Conseil de sécurité des Nations unies (CSNU). Le fait est qu'aucune résolution du CSNU ne se réfère à telle autorisation de détenir pour raisons de sécurité – soit d'interner – dans le cadre des opérations en Afghanistan. Ensuite fut soulevé l'argument selon lequel le droit international humanitaire (DIH) pourrait à son tour constituer une base pour la

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

détention ou l'internement (voir infra*). Furent également abordées d'autres questions telles que le lien entre la détention pénale et l'exigence posée par l'article 5(3) de la CEDH.*

Mais le nœud du problème dans l'affaire Serdar Mohammed *demeure la question de savoir s'il est possible de détenir une personne sans déroger à la CEDH. La Cour européenne des droits de l'homme tiendra-t-elle donc compte d'une telle autorisation fondée sur le DIH ? De surcroît, dans l'hypothèse où Strasbourg tiendrait compte de pareille autorisation, en existe-t-il une dans le cadre d'un CANI extraterritorial ? Le premier problème étant de déterminer si le DIH conventionnel applicable aux CANIs – soit l'article 3 commun et le deuxième Protocole additionnel (PA II) aux Conventions de Genève de 1949 (CG) – contient, implicitement, une autorisation d'interner ou de détenir. Pour diverses raisons, le juge considéra que ce n'est pas le cas. Au regard du texte des CG III et IV – contenant une autorisation expresse de détenir – le juge considéra que si les auteurs de l'article 3 commun et du PA II avaient voulu inclure une autorisation de détenir, ils l'auraient fait de manière explicite. Le juge soutint ensuite que l'impératif humanitaire des textes précités milite en défaveur d'une telle autorisation. Il semble cependant que l'argument exactement contraire, de dire qu'il vaut mieux accepter une autorisation implicite de détenir, plutôt que de concevoir la détention par l'Etat en l'absence de tout cadre juridique,,rencontre bien davantage l'impératif humanitaire de ces dispositions. Par ailleurs, le juge développa l'argument selon lequel le fait de reconnaitre une autorisation implicite de détenir sur base de ces textes équivaudrait à reconnaitre aux groupes armés non étatiques l'autorisation de détenir. Or, les Etats ne sont certainement pas prêts à reconnaitre une telle prérogative à ces groupes. Le juge souleva alors un argument intéressant en posant la question de savoir quelle était la portée de cette autorisation. En effet, accepter de manière implicite pareille autorisation conduit également à la nécessité de déterminer, implicitement, qui on peut détenir, sur quelles bases et dans le respect de quelles procédures. Or, il serait extrêmement difficile de lire cela, même de manière implicite, dans le droit conventionnel.*

Le juge britannique examina ensuite la question de l'existence d'une autorisation de détenir ou d'interner en DIH coutumier. Privilégiant étrangement une approche de droit civil, il vérifia si le droit coutumier autorisait la détention, et pas s'il l'interdisait. En cherchant une autorisation, le juge a ainsi utilisé une approche basée sur les droits de l'homme et s'est donc posé la mauvaise question, le conduisant à une réponse erronée. À cet égard surgit à nouveau *la question de la portée de cette autorisation basée sur le droit coutumier, plus aisée à résoudre que dans le contexte du DIH conventionnel. Il n'est pas impossible que le droit coutumier aborde ces questions de sujets, de procédures et de motifs de détention mais l'affaire* Serdar *ne les aborde pas. Un autre argument fut soulevé : comment est-il possible d'avoir l'autorisation de tuer des personnes qu'on ne peut en réalité détenir ? En réponse à cela, le juge souligna qu'il était possible d'*arrêter *ces personnes, sans toutefois pouvoir les* maintenir *en détention.*

Summary of the Facts

The European Court of Human Rights (ECtHR) did not need to deliver the *Hassan* judgement in order to know how they were going to deal with the potential relevance of IHL. The *Hassan* case was important but nonetheless an easy case for Strasbourg. This case was easy because it was a matter of dealing with specific treaty provisions that have been ratified by 192 States (possibly even 193) and were clearly very well established as a matter of law.

The main issue in the case of *Serdar Mohammed v. Ministry of Defence* (High Court of Justice Queen's Bench Division) was detention in a non-international armed conflict. The facts can be summarised as follows: Serdar Mohammed was detained from the 7th of April to the 25th of July 2010 in Helmand, Afghanistan. His initial detention was based on the International Stabilization Force in Afghanistan (ISAF) Standard Operating Procedures (SOP) for Detention of Non-ISAF Personnel for 96 hours. However, the *reason* that Serdar Mohammed was being detained was that it was thought - because he was a Taliban commander – that he might have significant intelligence. In addition, in 2009, the United Kingdom (UK) had decided, on a policy basis - not law -, that it could authorise detention for longer than 96 hours. That is because, if a State is involved in a high-intensity non-international armed conflict it is evident, from a practical point of view, that you need to be able to detain people for more than 96 hours. Moreover, it is obvious that the State is going to need to do that. However, the question of the legal authority to detain then arises. Instead of a legal authority, we had a *policy authority*. This authorised detention was limited to interrogating the detainee for significant new intelligence. After interrogating Serdar Mohammed for significant new intelligence, the UK then wanted to transfer him to the Afghan authorities. However, the Afghan authorities then said that they did not have the capacity in their prison system to receive Serdar Mohammed. So for a time, the UK was acting … as nursemaid. They were holding him, pending the opportunity to transfer him to the Afghan authorities. In the case of *Mohammed Serdar*, that is called 'logistical detention', which is a novel concept… During all his period of detention in the hands of the UK, he had no access to judicial review of detention and, in fact, no opportunity to make representations.

So, looking at the assorted time limits, there was the possibility that the ISAF forces could detain persons under Afghan law. They could detain them for 72 hours, provided that the basis of that detention was that they were going to be transferred to the Afghan authorities, with a view to prosecution for suspected criminal offences. In other words, there was a criminal basis to the detention. Elsewhere, there were the ISAF SOP under which persons could be detained for 96 hours. After the 96 hours, the assumption is that it is a form of non-reviewable detention. It is not necessarily based on criminal charges. Under the ISAF SOP, after 96 hours detainees must be released or transferred to the Afghan authorities with a view to criminal

proceedings. As there is no provision for internment in Afghan domestic law, then, there is a longer period - which is not defined - when, under UK policy, you can detain someone for a specific purpose. So, there is little doubt that the initial detention, at least up to 96 hours, was justified.

Legal Issues at Stake in the *Serdar Mohammed* Case

There were some preliminary issues raised by the case. Here I am just trying to clear the ground, so we can get at the real issues. One issue raised was that there was an attempt to use the act of State defence or bar to jurisdiction. It would be nice if domestic courts would actually clarify whether it is a defence or bar to jurisdiction. It sounds like the American claim that something is a political question. Leaving aside Human Rights Law, you cannot bring a case before the English courts if (i) you are foreign and (ii) the action occurred outside the realm – the realm being fairly broadly defined. In those circumstances, you cannot bring a civil claim. However, it was found that there was no reliance on that because the case was actually brought on the basis of the Human Rights Act. The judge ruled that the act of State doctrine has relevance in relation to a Human Rights Act claim. He is probably correct. He then had to consider the applicability of the European Convention on Human Rights (ECHR). The first issue he had to consider was whether the applicant was within the jurisdiction. It is worth remembering that the judgment was delivered before the *Hassan* case. The judge in this case was bound by the Supreme Court decision in *Al-Jedda*. He was not bound by the ECtHR decision in *Al-Jedda* - which actually reversed the Supreme Court's - but he could take it into account. It is absolutely clear now that anybody who is detained is regarded by Strasbourg as being within their jurisdiction and there is no particular problem with that. That is not an issue that can be reasonably appealed.

The second question is whether - when exercising the power to detain - the UK armed forces were acting as agents of the United Nations (UN), or whether they were acting as agents of the UK. I am slightly surprised that Court time was wasted with this argument. It is completely obvious that the UK armed forces were acting as agents of the UK. However, these were steps that the judge had to go through.

However, the substance of the case is whether the detention can be justified under Article 5 of the European Convention on Human Rights, bearing in mind that the UK had not derogated from the Convention with regard to the situation in Afghanistan. There were a range of separate issues. The first question concerns legal authority to intern or detain on security grounds. In this area, the government relied on two basic arguments. The first was that the legal authority to intern derived from a Security Council (UNSC) resolution. You might wonder why they used this argument when they did not in *Al-Jedda*. The Court here, emphasising that

it was not bound by the ECtHR's decision in *Al-Jedda*, distinguished the situation in Iraq from that in Afghanistan. At least in the case of Iraq, the UNSC resolution had expressly referred to detention in the accompanying letters that were attached to the resolution. In the case of Afghanistan, there is no reference to any sort of power to detain but only a reference to being able *'to take all necessary measures'*. So, even though the judge recognised he was bound by the Supreme Court in *Al-Jedda*, which decided that the UNSC resolution was the authority to detain, he distinguished the case before him from the domestic case in *Al-Jedda*.

The second ground that was relied on for authority to detain was IHL. It is nice at long last to see the UK relying on IHL as an authority to detain. The Court found that there is neither an implied authority under common Article 3 nor in AP II, nor is there authority under customary law *(*see infra). Then, the British government raised some really bizarre arguments. It started looking at the detail of Article 5 and assumed there was no internment. The applicant challenged that, first of all on the grounds that there was an adequate certainty and the purpose of detention was not covered. The British government argued that they had the authority to detain to enforce existing obligations. The Court responded that it was not what 5(1)(b) is about. And the British government finally said - because they were contemplating transfer to the Afghan authorities - that this constituted detention with a view to extradition or transfer. Again the Court did not accept the argument.

There was also an issue about the link between detention for criminal purposes - because ultimately Serdar Mohammed was to be transferred to the Afghan authorities - and the requirement under Article 5(3) of the ECHR that every arrested person must be brought promptly before a judge. The British government first claimed that the fact that the UK was detaining Serdar Mohammed did not matter. The government then argued that it was actually detaining him for criminal proceedings before the Afghan authorities. According to the UK, it is justified under 5(1)(c) ECHR, even if the Afghan authorities were not going to bring criminal proceedings, let alone promptly. Again, the judge was not persuaded. With regard to Article 5(2), which is about being given information as to why you are being detained, it was found there was no violation. There was however a clear violation of Article 5(4), the *habeas corpus* provision. The issue of transfer at the end was not raised except in the context of justifying detention on the grounds of Article 5(1)(f).

Actually, the real issue in the case of *Serdar Mohammed* is to determine whether it is possible to intern without derogation. The question is: will the ECtHR take account of an authorisation under IHL, which is not an obligation? However, if IHL *does* authorise internment, will the ECtHR take account of it? Also, will Strasbourg potentially take account of it if *in fact*, there is authority to intern in an extraterritorial NIAC? That second question is not a human rights

question, it is an IHL question. When those more familiar with the law of armed conflict than with Human Rights Law denounce intrusions by human rights bodies - saying they do not know what the law is going to be - part of the problem is actually because some issues of IHL are not themselves clear. A specific IHL question that Strasbourg has to grapple with, is whether there is authority to intern in an extraterritorial NIAC. That is what the case is principally about. The issue of grounds of detention under Article 5(1) and 5(3) are irrelevant. The type of review mechanism is likely to depend on the answer to the first question, i.e. whether you can intern in an extraterritorial NIAC.

IHL Issues with Respect to Internment

Two issues were raised with regard to internment. (1) You can intern because it is implied in common Article 3 and AP II (2). The second argument is that you can intern under customary IHL. Why did the judge fail to accept these arguments? This is important because this was a very considered judgment. Mr Justice Leggatt is not an expert in international law and particularly not in either Human Rights Law or IHL. This does not mean he was talking through the back of his hat. Whether he got it right or wrong is a separate question but it was a very considered judgment. This decision was very disconcerting because as an IHL expert, I cannot think that Jelena Pejic and Dieter Fleck are wrong.

Authority to intern under treaty law

The first issue is really precise. It is whether you can identify an authority to intern in the treaty regime – i.e. in common Article 3 and AP II. The first reason Mr Justice Leggatt rejected that argument was that he thought that GC III and GV IV do give express authority to intern. In the case of GC III, he relied on Article 21, and in the case of GC IV, the judge argued that if there had been any intention to give implied authority to intern, they would not have done so by implication, they would have done so expressly. It was not done expressly. He then agreed with the Council that common Article 3 and AP II do have detailed provisions on detention. He did not dispute that those provisions do address the existence of detention but that does not help establish the authority to detain. He then argued that the humanitarian purpose of common Article 3 and AP II argued *against* an authority to intern. It seems to me there is an equally strong humanitarian argument the other way. That is that if you want to have a legal framework around internment, it might be better to regard it as implied - and then establish what it is - rather than suggesting that States are going to intern without a legal framework. Therefore, I am not convinced by the humanitarian argument.

He then said that if you are to say there was implied authority to intern, that would have to apply to the non-State armed groups. States are not going to be willing to give non-State groups the authority to detain. I will come back to that issue in the context of customary law, because

I think it ties in with the fact that in my view, Mr Leggatt Justice was asking himself the wrong question. He then said - and I think this is a good argument and a very troubling one – that if there was to be an authority to intern, he would also then require there to be something on the scope of that authority. Whom can you detain? On what grounds can you detain them? What are the procedures? Hence, simply saying there is an implied authority is not going to answer those other questions. Because you cannot assume that such implied authority also means to intern the *following* people, on the *following* grounds, observing the *following* review procedures. It would be very difficult to read that by implication into treaty provisions. I am not certain how this pitfall could be circumvented. So, for those five reasons, the judge rejected the claim that an authority to intern can be read into or implied in common Article 3 or/and AP II.

Authority to intern under customary IHL

The judge then turned to the claim that there is authority to intern under customary humanitarian law. In my view, he again asked himself the wrong question. Slightly oddly for a common law judge, Mr Justice Leggatt took a very civil law approach. You would have thought that a judge used to common law would be used to the idea that you can do anything unless the law says you cannot. Surely, if the *Lotus* is still good law, he should have been looking for whether customary law prohibits interning, not whether it authorises it. Looking for an authorisation is a very human rights specific approach and not a general international law approach. So I think he was asking himself the wrong question and I think that may have influenced his answer.

There is then the reason whether he was looking for evidence that the UK at least thought it had customary authority to intern in an extraterritorial NIAC. If the government is relying on customary law authority to intern you might have thought that they would have mentioned it somewhere. They did not use it in *Al-Jedda*, they did not use it in *Al-Skeini*, and there is no reference to it in the Joint Doctrine Publication (JDP) 1-10[2] which contains the UK doctrine on detention. It does discuss their possible basis of internment and it does not even raise the possibility of an authority to intern under customary law. It would help if there were some evidence that the UK has somewhere thought it could rely on a customary power to intern. In this context, the judge looked at the customary IHL study and pointed out that there were provisions about detention. It did not say there was any sort of customary authority to detain but assumed that the authority was coming from elsewhere..

Again – and I think the issue I mentioned about the scope of authority is another issue we have to consider in this context - whom can you intern, on what grounds, and with what

2 at: <https://www.gov.uk/government/publications/jdp-1-10-second-edition-captured-persons-cpers>

procedures for review? That would also be a problem under customary law. I do not think it is inconceivable that customary law might address those issues. It think it would be easier to make the argument in a customary law context than in an implied interpretation of a treaty. However, the same issues arise. The judge also emphasised the degree of disagreement there is. He said that some people claim the only authority to intern is Human Rights Law. Others say there is a need for new rules which implies that the existing rules are insufficient. That weakens the government's claim that under customary law there is authority to intern. With regard to the Copenhagen Process principles, the judge said the principles are not legally binding and they provide no authority to intern. The argument made was: how can you possibly have authority to kill people whom you could not actually detain? And he said: no, that is not the rationale at all, that gives you authority to *arrest* them but not to continue the detention.

What will happen next? The decision has been appealed. I think the best argument is likely to be that internment in NIACs is not prohibited - nor is it authorised - in customary IHL and I hope that the British government will use its best arguments and not its worst.

What I think is very unclear is what the ECtHR will do, whether it will allow reliance on IHL in a NIAC without derogation. I think they might allow some reliance on IHL where derogation is allowed. However, it is going to be particularly problematic where you are not relying on a treaty provision but on an alleged custom.

REVIEW OF DETENTION IN EXTRATERRITORIAL OPERATIONS

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Résumé

De nos jours, les opérations militaires sont le plus souvent menées hors du territoire des Etats qui les dirigent et sont fréquemment menées dans l'objectif d'assister un autre Etat à combattre des insurgés sur son territoire. Cette réalité s'applique tout autant aux Etats intervenant seuls qu'aux organisations internationales ou autres coalitions d'Etats. Parmi les nombreuses questions juridiques que ces opérations soulèvent, le thème de la détention en dehors du territoire de l'Etat est récurrent. En raison à la fois de l'importance numérique de ce type de conflit et des carences du régime y afférent, cette contribution se cantonnera à l'analyse de la question sous l'angle des conflits armés non internationaux (CANIs). Elle se concentrera par ailleurs sur l'unique question de la détention pour raisons de sécurité.

Le droit international humanitaire (DIH) conventionnel permet l'internement des prisonniers de guerre (PGs) (3ème Convention de Genève (CG III), article 21). L'internement des civils est également possible à des fins sécuritaires en situation de conflit armé international (CAI) (CG IV, article 42) ou en situation d'occupation (CG IV, article 78). Le DIH applicable aux CANIs ne contient quant à lui pas de base légale pour la détention (hormis certaines dispositions concernant l'examen de la détention). Face à ce constat, il est tentant d'appliquer les standards du droit international des droits de l'homme (DIDH) à pareille situation, dont l'application hors du territoire de l'Etat demeure controversée.

Premièrement, l'application extraterritoriale du DIDH conventionnel ne fait pas consensus. Certains Etats refusent l'application du Pacte international relatif aux droits civils et politiques (PIDCP) hors de leur territoire, là où d'autres l'acceptent. Les organ*isations de droits de l'homme partagent davantage l'avis d'une application extraterritoriale du PIDCP (p. ex. le Comité des droits de l'homme, observation générale n°31, paragraphe 10). La Cour internationale de justice a également accepté une application extraterritoriale limitée du DIDH. La Cour européenne des droits de l'homme, quant à elle, a partiellement approché la question en considérant que le DIDH s'appliquait aux personnes détenues dans les infrastructures d'un Etat partie à la Convention européenne des droits de l'homme (CEDH), y compris hors du territoire de l'Etat concerné (p.ex.*

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Al Skeini et Al. v. UK, Hassan v. UK*)*.

Les articles 4 du PIDCP et 15 de la CEDH permettent, dans certaines circonstances strictement définies (p. ex. danger public exceptionnel menaçant l'existence de la nation), qu'il soit dérogé à certaines dispositions de la Convention. Aucune de ces dispositions ne renvoit expressément à la possibilité de déroger au texte de manière extraterritoriale. Toutefois, si on interprète dans le même sens les dispositions relatives au champ d'application de la Convention et celles permettant d'y déroger, il est possible de tirer la conclusion qu'en l'absence d'une référence expresse à l'application extraterritoriale du texte, rien ne justifie non plus qu'il soit interdit d'y déroger au-delà du territoire de l'Etat. Deuxièmement, l'argument de l'existence d'une guerre ou d'un « autre danger public menaçant la vie de la nation » (CEDH, article 15) ne paraît pas permettre une dérogation *à cet instrument en dehors du territoire de l'Etat. Toutefois, dans l'affaire* Hassan, *le juge George Leggatt évacue cet argument en soulignant que, dans le contexte d'une opération de maintien de la paix, cette guerre ou ce danger public exceptionnel pourrait parfaitement survenir dans l'Etat sur le territoire duquel la détention a lieu. Dans les affaires* Al-Jedda *et* Hassan, *la Cour de Strasbourg parait également envisager cette possibilité de dérogation extraterritoriale.*

Concernant la relation entre le DIH et le DIDH, il est intéressant de noter que dans l'arrêt Hassan, *la Cour a entériné le fait que des agents étatiques détenant une personne à l'étranger constitue une base pour l'application extraterritoriale de la CEDH. Par là même, elle confirma que l'article 5 de la CEDH pouvait être lu comme s'appliquant pleinement à l'internement, ainsi qu'à sa révision, en situation de conflit armé international (CAI). Mais par l'entremise d'une lecture conjointe des deux matières « accommodant » le DIDH au DIH, la Cour a en quelque sorte élevé et renforcé les exigences de révision par rapport à ce qu'exigeait le texte de la CG IV. La Cour limite ce raisonnement aux situations de CAI. Je suggère toutefois qu'il puisse également s'appliquer dans le cadre des CANI, dont l'internement est tout autant une des caractéristiques.*

Détenir des individus dans le cadre d'une opération extraterritoriale entraîne de nombreuses difficultés pratiques pour les Etats. Cela explique que certains Etats soient souvent enclins à transférer les détenus aux autorités nationales. En effet, la puissance détentrice peut palier la limitation des ressources à laquelle elle doit faire face dans ce contexte par l'implication totale ou partielle des autorités nationales au processus de (révision de la) détention. Il ressort par ailleurs des Principes de Copenhague sur les détenus dans les opérations militaires *et de la doctrine internationale que l'application du DIDH aux situations de CANI impliquerait au minimum qu'un organe impartial et indépendant se charge de la procédure de révision de la détention.*

Introduction

Military operations increasingly take place outside the territory of the States carrying out these operations. Nowadays they often involve assisting the government in another State in its fight against insurgents. This is the case irrespective of who leads the operation, be it the United Nations (UN) (e.g. MINUSMA, *Mission multidimentionnelle intégrée des Nations unies pour la stabilisation au Mali* – United Nations Multidimensional Integrated Stabilization Mission in Mali), a single State (e.g. the French operation Serval in Mali), or a coalition of States (e.g. the International Stabilization Force in Afghanistan, ISAF).

Such extraterritorial operations raise difficult legal questions. Many of these questions are about detention, including the issue of review of detention. This is particularly the case for detention during an armed conflict in which States detain persons outside their own territory. In such cases there are different legal regimes at play, namely International Humanitarian Law (IHL) and International Human Rights Law (IHRL). In addition, there is an element of extra-territoriality. How does the fact that an operation takes place in a third country influence the requirement for, and modalities of, such review?

I submit that it does so both legally and practically. In this contribution I will briefly develop these two aspects.

This contribution focuses on detention in situations of non-international armed conflict for two reasons. First, non-international armed conflicts are the prevailing type of conflict at present. Secondly, as will be explained below, the IHL regime applicable to such conflicts contains very little guidance on detention, thus begging the question of what is the applicable law. The discussion is limited to so-called security detention, i.e. detention for reasons related to security.[2] This is to be distinguished from criminal detention, i.e. detention on the basis of suspicion of a criminal offence or after conviction for such an offence.

Legal Aspects

Treaty-based International Humanitarian Law applicable in international armed conflicts contains rules regarding detention in Geneva Conventions III and IV. Geneva Convention III, dealing with prisoners of war, provides in Article 21 that the detaining power may subject prisoners of war to internment.

2 Such detention is often referred to as 'internment'. The terms 'detention' and 'internment' are used interchangeably in this contribution.

Geneva Convention IV is about the protection of civilians. It contains two articles setting out grounds for detention. Article 42 is part of the section in the convention devoted to 'aliens in the territory of a party to the conflict' and provides, in so far as relevant here,: 'the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary'.

Article 78 is found in the section dealing with occupied territory. It reads, in the relevant part: 'If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment'.

Unlike the IHL applicable in international armed conflict, the law applicable to NIAC does not explicitly provide a legal basis for detention, let alone contain provisions regulating review of detention. This raises the question of whether it is appropriate to look to the International Law of Human Rights, which does contain standards for review of detention, in particular in the International Covenant of Civil and Political Rights (ICCPR) and regional human rights conventions such as the European Convention of Human Rights and Fundamental Freedoms (ECHR).[3] The application of human rights standards outside the State's borders during an armed conflict is however controversial for a number of reasons.

Extraterritorial application controversial

First, there are a range of views regarding the extraterritorial application of human rights treaties. Certain States deny that the ICCPR applies extraterritorially, or at least consider that there is such an application only in exceptional circumstances.[4] Other States have taken a broader view of the extraterritorial application of the convention. This view is closer to the views of human rights monitoring bodies, which have taken an increasingly broad view of extraterritorial application. The Human Rights Committee for example, in its General Comment 31, states that:

> '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

3 See e.g. the report of the Expert meeting on the supervision of the lawfulness of detention during armed conflict organised by the University Centre for International Humanitarian Law, Geneva, 24 – 25 July 2004, which states at 41 that 'The experts state that as IHL does not provide procedural guarantees to persons detained during non-international armed conflict, human rights standards must always apply.'

4 See e.g. consideration of the fourth periodic report of the United States by the Human Rights Committee, 14 March 2014,,at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E>; Australian government response to the Human Rights Committee's List of Issues, UN Doc. CCPR/C/AUS/Q/5/Add.1, 21 January 2009, at 4.

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'.

The International Court of Justice has similarly accepted a relatively low standard for extraterritorial application of human rights treaties including the ICCPR.[5]

The European Court of Human Rights (ECtHR) has developed criteria for the extraterritorial application of the ECHR in a piecemeal fashion. Its judgment in the *Al Skeini et al v. UK* case was a very important step in this development.[6] Although it did not answer all the questions regarding extraterritorial application, it made it clear that the ECtHR considers a person in an extraterritorial detention facility of a State protected by ECHR. In *Hassan v. UK*, it held that where soldiers of a State party acting extraterritorially take a person into custody, this person is within the jurisdiction of that State in the sense of Article 1 ECHR and therefore benefits from the protections of the Convention.[7]

Derogation

There are questions surrounding the possibility of derogation from human rights treaties in relation to extraterritorial conduct. Article 4 ICCPR and Article 15 ECHR provide for the possibility of derogation from some but not all provisions of the Conventions. Article 4 (1) ICCPR reads:

> 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant 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 solely on the ground of race, colour, sex, language, religion or social origin.'

At first sight, this paragraph and the corresponding text of Article 15 ECHR suggest that derogation in respect of extraterritorial conduct is impossible, or at least only available in very limited situations. After all, neither explicitly refers to the possibility to derogate in respect of extraterritorial conduct. On the other hand, that is also the case for the articles setting out

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5 See Richard Wilde, "Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties, 12", in: *Chinese Journal of International Law* 639 (2013).

6 ECtHR, Grand Chamber, Al Skeini and others v. UK, Appl. No. 55721/07, 7 July 2011.

7 ECtHR, Grand Chamber, Judgment, Hassan v. UK, Appl. No. 2975/09, 16 September 2014, paragraph 76.

the scope of application of the treaties. If a particular interpretation is given to the scope of application of the substantive provisions of the Convention, it is logical to interpret the scope of application of the provision on derogation identically. As Justice Leggatt held in the UK case of *Serdar Mohammed v. Ministry of Defence*:

> 'Now that the Convention has been interpreted, however, as having such extraterritorial effect, it seems to me that Article 15 must be interpreted in a way which reflects this. It cannot be right to interpret jurisdiction under Article 1 as encompassing the exercise of power and control by a state on the territory of another state, as the European Court did in the Al-Skeini case, unless at the same time Article 15 is interpreted in a way which is consonant with that position and permits derogation to the extent that it is strictly required by the exigencies of the situation.'[8]

Another argument that has been put forward for the case that derogation is not possible for extraterritorial conduct, is that in the case of such conduct there will not be a 'public emergency which threatens the life of the nation' or, as Article 15 ECHR puts it, a 'war or other public emergency threatening the life of the nation.'[9] That this is the case was suggested by Lord Bingham in the *Al Jedda* case before the UK House of Lords.[10] He made two points in this regard. The first was that the life of the State party that wishes to derogate from the human rights treaty simply cannot be threatened by an overseas situation which it entered into voluntarily and from which it could withdraw at any time. His second point was that the absence of any extraterritorial derogations under Article 15 ECHR should be taken into account in interpreting Article 15 and lead to the conclusion that such derogations are impermissible. In the *Serdar Mohammed* case however, Justice Leggatt was not convinced by this argument. He considered that:

> 'Article 15, like other provisions of the Convention, can and it seems to me must be "tailored" to such extraterritorial jurisdiction. This can readily be achieved without any undue violence to the language of Article 15 by interpreting the phrase "war or other public emergency threatening the life of the nation" as including, in the context of an international peacekeeping operation, a war or other emergency threatening the life of the nation on whose territory the relevant acts take place.'

The latter is the better view in my opinion. This appears to also be the point of view of the ECtHR. In its judgments in the *Al Jedda* and *Hassan* cases, it implied that derogations in respect of extraterritorial conduct are possible when it noted the UK's failure to derogate in respect of operations in Iraq.

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8 *Serdar Mohammed v. ministry of Defence*, [2014] WWHC 1369 (QC).

9 Expert meeting, *op.cit.*, at 27.

10 *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58.

If this is the case, such derogations would then have to meet the "regular" requirements for derogations. This includes the requirement that derogation is possible 'only to the extent strictly required by the exigencies of the situation'. This will have to be proven by the State wishing to derogate.[11]

Interrelationship IHL – human rights

The interrelationship between IHL and Human Rights Law is much debated. The limits of this contribution do not allow for an in-depth discussion of this topic. It is pointed out, however, that in the recent ECtHR judgment in *Hassan v. UK,* it is the first time the ECtHR has addressed this topic head-on. In this case, the UK Government, in their observations, acknowledged that where State agents operating extraterritorially take an individual into custody, this is a ground of extraterritorial jurisdiction which has been recognised by the Court. However, they submitted that this basis of jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the contracting State are operating in territory of which they are not the occupying power, and where the conduct of the State will instead be subject to the requirements of International Humanitarian Law. The ECtHR did not agree, but instead held that the ECHR continues to apply under such circumstances, although it must be interpreted against the background of IHL. This method of interpretation resembles the one used by the International Court of Justice in the Nuclear Weapons Advisory Opinion. Using it, the Court concluded that Article 5 ECHR must be read as including internment in international armed conflict as a permissible ground of detention, even though the express wording of that article does not include such a ground.

The Court applied the same reasoning to the issue of review of detention:

> 'As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5, §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5, § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair pro-

11 Expert meeting, *op.cit.*, p. 4. Note also that the Human Rights Committee has suggested that Article 9 cannot be derogated from, even though the text of Article 4 does not state this. Human Rights Committee, General Comment 29 on Article 4, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), paragraph 13 (b).

cedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay.'

In so doing, the Court used a "symbiotic" reading of IHL and the ECHR: it interpreted Article 5 ECHR using IHL, but used the application of the ECHR in the background to impose standards for review of detention beyond what the text of Article 43 Geneva Convention IV requires.

It is important to note that the ECtHR held that such "accommodating" Article 5 to IHL is only possible in international armed conflict, noting that the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of the IHL regime applicable in international armed conflict. This rules out most situations of armed conflict in which States operate extraterritorially, as such conflicts tend to be non-international in nature. I suggest it can be argued that internment for security purposes is also an accepted feature of non-international armed conflicts, although it must be recognised that the question whether IHL is applicable to non-international conflicts provides a legal basis for internment.

In the eyes of the ECtHR however, presumably a State party would have to derogate from Article 5 in order to be able to intern. The question is then how far such a derogation could go or in other words what the court would be willing to consider is 'strictly required by the exigencies of the situation'. Such exigencies are closely bound up to the factual circumstances, and point to the practical aspects of review of extraterritorial detention.

Practical Aspects

The starting point for a discussion of such practical aspects is that in extraterritorial operations States will normally have more limited capabilities than they do "at home". It must also be borne in mind that detention operations, and particularly review of detention, can be very resource-intensive.[12] This may be one reason why in many cases States operating extraterritorially hand over detainees to local authorities as soon as possible. This is for example the standard operating practice for UN peace operations.[13] In such cases there is need for an initial review of the lawfulness of detention, but not for subsequent periodic reviews.

Whether detention is only for a brief period or longer, resource limitations can of course not be

12 Brian Bill, "Detention Operations in Iraq: A View from the Ground", in: Raul Pedrozo (Ed.), 86 *Naval War College International Law Studies* 412 (2010).

13 Jelena Pejic, "Conflict Classification and the Law Applicable to Detention and the Use of Force", in: Elizabeth Wilmshurst (Ed.), *International Law and the Classification of Conflicts* 80 (2012), at 97.

a valid reason not to respect the applicable law unless the law itself provides for derogation. This means that in situations in which the IHL regime applicable to international armed conflicts provides for review of detention, such review must be undertaken in accordance with the requirements in the Geneva Conventions. Resource limitations of the detaining power may be mitigated by involving the authorities of the host State in reviewing detention. One example of this is the review boards used by the United States in Iraq, which were composed of both Iraqi and American officials.[14] The detaining power could also choose to "outsource" the entire review process to the authorities of the host State.

As discussed, the law applicable to detention in non-international armed conflicts, including the law applicable to review of detention, is much less clear than in international armed conflicts. Given the dearth of treaty rules, some also call for applying human rights provisions lock, stock, and barrel in non-international armed conflict. In the case of review of detention this means judicial review in accordance with Article 9 ICCPR,[15] with all the attendant procedural safeguards.[16]

In extraterritorial non-international armed conflicts, however, this does appear to be very realistic. As Pejic and Droege have written, the legal requirement of judicial review in situations of battlefield detention by multinational forces in a "host" State is not established and would in many instances be unworkable for a variety of reasons.[17] They state that a minimum standard is the requirement that internment review be carried out by an independent and impartial body. This view appears to be shared by the States that drafted the Copenhagen Process Prin ciples and Guidelines on the Handling of Detainees in International Military Operations. These

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14 Bill, *op.cit.*, at 427.

15 Article 9 (3 – 4) are relevant in this regard, and read:
'3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

16 Such as the right to a lawyer, the right to receive information and the right to hear of have witnesses heard.

17 Jelena Pejic & Cordula. Droege, "The Legal Regime Governing Treatment and Procedural Guarantees for Person Detained in the Fight against Terrorism", in: Larissa van den Herik & Nico Schrijver (Eds.), *Counter-terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* 527 (2013), at 556. Pejic and Droege do not elaborate on what these reasons could be. One could think inter alia of large numbers of detainees, the large number of judges needed that are not available, lack of interpreters, and problems concerning the treatment of classified information.

guidelines are non-binding but constitute an important indication of what States consider to be the law in force. The Copenhagen Guidelines state that:

> 'A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.'

This is a sensible view, but it does of course raise questions of its own as to when a body can be said to be 'independent and impartial' as well as to the standards that the review procedure must meet. These are questions that are being studied in the context of the process that the International Committee of the Red Cross has launched on strengthening the protection of persons deprived of their liberty in relation to a non-international armed conflict. This is a very valuable process that hopefully will bring more clarity in this area.

Conclusion

Sir Hersch Lauterpacht once wrote that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law'.[18] I would add to this, 'and the law of internment in extraterritorial non-international armed conflicts is at the vanishing point of the law of war.' This is because of the lack of treaty-based IHL provisions dealing with internment in non-international armed conflicts.

This lack, and the many questions surrounding the applicability of Human Rights Law extra-territorially during an armed conflict, make it very difficult to determine the rules applicable to review of extraterritorial detention. For this reason, initiatives to clarify these rules are very welcome. In particular the ICRC-led process on strengthening the protection of persons deprived of their liberty in relation to a non-international armed conflict is potentially very helpful.

Any process of clarifying or developing the law applicable to review of extraterritorial detention will have to take into account the practical aspects of such detention, several of which have been touched on in this contribution. If not, the law risks being seen as unworkable and consequently being ignored.

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18 Hersch Lauterpacht, *The problem of the revision of the law of war*, 29 British Yearbook of International Law 360 (1952), at 382.

During the debate following the presentations of the third session, the audience raised five main issues.

1. The Domestic Law Applicable to Detention Operations Abroad

A participant opened the debate by wondering whose domestic law has to be taken into account when defining the security detention regime applicable by State A intervening to assist State B in dealing with its non-international armed conflict (NIAC). A panellist replied that it is important to start with the reality on the ground. She first recalled that situations of domestic emergencies are likely to generate a need for internment, especially when a State is intervening against the backdrop of an extraterritorial NIAC. Moving aside the issue of whose domestic law has to be applied, the panellist argued that, when a domestic law on internment exists, the intervening State would probably rely on it as defining the scope of its power to intern. A problem actually arises when the territorial State has no proper domestic law on internment. In this case, the intervening State cannot base its authority to detain on the territorial State's domestic law.

Another participant wondered by virtue of which mechanism an intervening State could apply that local law. Since such a law would not apply to the foreign State on its own terms, the situation automatically entails a kind of substitution to the local authority, the participant explained. He thus considered the relevance of some *ad hoc* agreement with the host State or even of a United Nations Security Council (UNSC) resolution which could allow the intervening State to rely on the domestic law in order to intern. He finally wondered whether the foreign State could automatically rely on that domestic law.

A panellist replied that it depends on whether or not the intervention is a consent-based operation. If it is not a consent-based operation, if would be difficult for the intervening State to rely on the domestic law. Contrariwise, if it is a consent-based operation, whether or not there is a UNSC resolution, it would be useful to have some form of agreement between the intervening State and the host State allowing the former to use the latter's domestic legal authority to intern. In the absence of such a mechanism, the panellist raised two arguments that could be used before a court. First and foremost, the foreign State might invoke the fact that it is working alongside the host State to rely on its domestic legal authority. Second, if the Security Council comes up with (i) a specific resolution stating that 'all necessary means including the authority to intern' can be used or with (ii) a resolution setting out the grounds for internment, who can be interned, for how long as well as the review mechanisms. Beside

these two cases - which are not likely to happen in the current international environment – a UNSC resolution would be a waste of time and energy.

2. State Obligations at Stake During Operations Abroad

Giving the example of the United States (US) undertaking detention security operations in Afghanistan, a participant wondered to what extent Afghanistan's human rights and International Humanitarian Law (IHL) obligations are affected by what the US government does on the Afghan territory.

A panellist replied that, at least with respect to consent-based operations, the territorial State has an obligation to ensure that those assisting it do not breach its own international obligations. The problem is that when the territorial State is breaching these obligations, it might be awkward to ask the intervening State to respect the obligations the former does not itself respect. However, a foreign intervening State could not be challenged on the basis of violations committed by the host State. The only way is to challenge the intervening State on its own international obligations insofar as they apply extraterritorially.

The panellist further explained that since the intervening State is going to have to intern, the best way to prevent IHL and human right violations is to make provision for it. Before setting off an operation, the foreign State can, for example, find out whether the territorial State's law allows it to intern, find out what the legal argument for detention is going to be, sort out who will be running the detention facility, etc. She nevertheless argued that the review of internment in a NIAC would not have to be an insuperable problem in such a context. Giving the example of the *Lawless v. Ireland* case, she explained that, if the State derogates to Article 5 (4) European Convention on Human Rights (ECHR), the review mechanism does not have to be a court. The fact that a State cannot usually bring criminal proceedings against the people it is interning – usually because the information it obtained is not information the State can rely on in a court – would consequently not constitute an obstacle to such a review mechanism.

3. Derogations in the Context of Detention Operations Abroad

A participant asked how to justify the criterion of an emergency threatening the life of the nation in the context of extraterritorial operations. Article 15 (1) ECHR (Derogation in time of emergency) indeed allows the High Contracting Parties to derogate to Article 5 (4) of the ECHR (right to liberty and security) in case of an emergency threatening the life of the nation. However, whose nation is to be taken into consideration according to the wording of that provision?

One of the panellists explained that an interesting approach was taken in the *Serdar Mohammed* case where the judge said that article 15 (1) ECHR could be read as referring to the nation

'on whose territory the [extraterritorial operations] take place'[1]. Therefore, there would be a threat to the life of the nation of the host State where an intervening State is operating. This approach was also taken by the European Court of Human Rights (ECtHR) in other cases, including the *Hassan* case. This would mean that article 15 (1) is not as demanding as its wording might suggests.

Another panellist further explained that, with regard to derogation, the position under the ECHR was slightly different from that in other human rights treaties. The Convention says '*war* or other public emergency(…)'. According to the panellist, the inclusion of the word 'war' in Article 15 (1) ECHR - which she assumed applies to non-consent operations - indicates that States can derogate extraterritorially. When State A is assisting State B in its own armed conflict, she agreed that the terms 'other public emergency threatening the life of the nation' can reasonably be interpreted as meaning that State A needs a situation that threatens the life of State B's nation in order to intervene. Regarding consent-based operations, the intervening State could rely on the threat for the territorial State in order to derogate. The panellist however disagreed on the level of requirement requested by Strasbourg when assessing the existence of a domestic emergency. When dealing with a post- General comment 29 world now, Strasbourg is going to be slightly more demanding than it was previously with regard to the existence of a domestic emergency within the own territory of a State, she suspected. Because once the existence of such a situation is established, Strasbourg would allow the State to derogate. Moreover, she added, it would help the ECtHR to allow derogations if the State acknowledges that it is dealing with a common Article 3 NIAC. Indeed, Strasbourg has shown a willingness to allow States to derogate, even when they were not willing to admit that they were dealing with a NIAC.

4. The Legal Basis for Detention in NIACs to be Found in the Absence of a Prohibition under Customary IHL

One participant called into question the absence of a prohibition as a legal basis for detention under customary IHL. Taking the example of freedom of the press which obviously needs a legal basis in order to be limited, the participant stated that there is no prohibition to limit the freedom of the press in IHL. Would this situation mean that a State may limit the freedom of the press as soon as an armed conflict exists?

A panellist replied that there would be steps in the reasoning with respect to that question. If the question is 'do State players think there is a customary law prohibition on internment?', we start looking at whether States in practice intern in NIACs. Obviously the overwhelming

1 ECtHR, *Serdar* case, paragraph 156.

weight of practice is going to be in territorial NIACs, in their own territory. However, the first thing would be to gather the evidence that routinely States intern when they are confronted with a domestic emergency, even if it is not technically a NIAC. In such territorial cases, States of course rely on national legislative authority to intern. However, we might be able to say that if we have got all this evidence of States *in fact* interning, the fact that in most cases they pass domestic legislation because they can, is irrelevant when establishing whether or not there is nothing prohibiting internment in a NIAC. Then it could be possible to assert that, as intervening State, we are not relying on domestic legislation authority because we are working outside the country. There is no guarantee it would work before a court, the panellist stressed, but it is a much more principled international way to ask 'does IHL prohibit the situation?' rather than ask 'does IHL authorise it?'

5. Composition of Body Reviewing Detention

A participant observed that a panellist mentioned the fact that the Copenhagen Guidelines state that the body tasked to reconsider periodically the detention has to be impartial and objective as opposed to impartial and independent. The participant wondered which necessary attribute this body needed to qualify in order to take the decision appropriately while avoiding the use of 'objective' or 'independent'. He also wondered which criteria are to be taken into account in order for a court to qualify such a body as independent or objective.

One of the panellists replied that the criteria of independence and impartiality were possibly an analogy with court marshals. The obvious solution is making sure that the members of the administrative board are outside the chain of command of those in charge of the detention. Another panellist agreed on this point, adding that the fact that the body has the final authority to set someone free is the key factor. He further referred to *Jelena Pejic*'s procedural safeguards containing a list of necessary useful criteria to assess which attributes an impartial and independent body would need to have with respect to the review of detention.

Session 4
Transfers from One Authority to Another

Chairperson: **Stéphane Kolanowski**,
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THE PRINCIPLE OF *NON-REFOULEMENT* IN RELATION TO TRANSFERS

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Résumé

Cette contribution a trait aux transferts de détenus ou de personnes non détenues entre plusieurs parties à un conflit. Le principe de non-refoulement interdit le transfert d'une personne d'une autorité à l'autre lorsqu'il existe de sérieuses raisons de croire que cette personne pourrait être sujette, en raison de ce transfert, à des violations de certains droits fondamentaux. Le principe concerne particulièrement la torture ou d'autres formes de mauvais traitements tels que la persécution ou la privation arbitraire de la vie. Il se retrouve sous divers aspects en droit international humanitaire (DIH), en droit international des droits de l'homme (DIDH) ainsi qu'en droit des réfugiés. Le principe de non-refoulement constitue en outre un principe de droit international coutumier.

Quoiqu'il soit le plus souvent associé au droit des réfugiés, ce sont les Conventions de Genève de 1949 (CG) qui renferment la plus ancienne et – en un sens – la plus solide consécration du principe de non-refoulement. Les articles 12 CG III et 45 CG IV disposent que la puissance détentrice ne pourra transférer des prisonniers de guerre (PG) ou des personnes civiles à une autre puissance que lorsqu'elle se sera « assurée que la Puissance en question est désireuse et à même d'appliquer la Convention » (article 12, alinéa 2 CG III). Ces dispositions couvrent entièrement les conventions précitées et ne se limitent pas à la torture ou à la persécution. L'article 118 CG III – qui concerne le rapatriement des PG à la fin des hostilités actives – ne contient quant à lui pas explicitement le principe de non-refoulement. Toutefois, ce principe constitue une exception à l'obligation de rapatrier le PG lorsqu'il existe de sérieuses raisons de croire que ce dernier encoure le risque de voir certains de ses droits fondamentaux bafoués après son transfert.

Le DIH applicable dans les conflits armés non internationaux (CANIs) ne contient pas explicitement le principe de non-refoulement. Néanmoins, du fait des interdictions absolues contenues dans l'article 3 commun aux quatre CG – interdiction des traitements cruels et de la torture, par

exemple – cet article pourrait être interprété comme l'impliquant. Plusieurs arguments, telle qu'une interprétation par analogie avec le DIH des conflits armés internationaux (CAI), militent en faveur de cette thèse. En cas de libération de personnes privées de liberté, le deuxième Protocole additionnel aux CG (PA II) exige par exemple que soient prises « les mesures nécessaires pour assurer la sécurité » de ces personnes « par ceux qui décideront de les libérer » (article 5(4)). Si cela est vrai pour leur libération, ce devrait aussi l'être à l'égard de leur transfert. Un autre argument pourrait être que le fait de ne pas observer le principe de non-refoulement lors du transfert serait susceptible de conduire à une violation de l'obligation de faire respecter le prescrit de l'article 3 commun, exigé en vertu de l'article 1er commun aux quatre CGs.

L'interdiction absolue de la torture et d'autres formes de mauvais traitements contenue dans l'article 3 commun pourrait être lue en parallèle avec les mêmes interdictions issues du DIDH. Si cette législation contient le principe de non-refoulement en vertu de ces interdictions, alors les règles parallèles contenues dans le DIH devraient l'impliquer également. Le principe se retrouve également dans plusieurs instruments internationaux de droit des réfugiés, dont la règle la plus protectrice se retrouve à l'article 1(2) de la Convention de l'Organisation de l'unité africaine (OUA) régissant les aspects propres aux problèmes des réfugiés en Afrique. En DIDH, le principe se retrouve également dans divers instruments prohibant notamment la torture, d'autres formes de mauvais traitements et les privations arbitraires de la vie. Le Conseil des droits de l'homme et la Cour européenne des droits de l'homme disposent en effet que le principe de non-refoulement constitue l'une des caractéristiques essentielles de l'interdiction absolue de la privation arbitraire de la vie, de la torture et d'autres formes de mauvais traitements.

Les Etats, comme les organisations internationales, sont liés par le principe de non-refoulement, qui a déjà été mis en pratique dans le cas, par exemple, des Interim Standard Operating Procedure des Nations unies sur la détention. La question est moins évidente s'agissant des groupes armés non étatiques (GANEs), car ni les règles du DIH ni celles du droit des réfugiés ne leur sont applicables. Toutefois, en vertu du raisonnement mentionné supra, l'article 3 commun s'applique aussi à eux. Il importe également de souligner que le principe s'applique à tout transfert entre Etats ou entre GANEs. Il ne s'applique donc pas aux transferts entre différents lieux gérés par une seule et même entité.

Sur le plan procédural, le principe de non-refoulement implique que l'autorité envisageant de transférer procède à une évaluation personnalisée des risques. Dans ce cadre, le droit de recours issu du DIDH signifie que l'intéressé a l'opportunité de contester la décision de transfert devant un organe indépendant et impartial. Un tel droit s'accompagne d'une batterie de garanties procédurales telles que l'opportunité de l'intéressé d'exprimer ses craintes à l'égard du transfert ou la suspension de la procédure de transfert durant le temps de l'examen du bien-fondé de ses craintes.

Suite à transfert, le DIH applicable en CAI (articles 12 CG III et 45 CG IV) exige que, si la puissance récipiendaire ne se conformait pas à ses obligations en vertu des CG, la puissancce transférante prenne les « mesures efficaces pour remédier à la situation » ou exige le retour des personnes transférées. Malgré l'absence de disposition similaire dans le DIH des CANIs, en DIDH ou en droit des réfugiés, la prégnance de ces dispositions devrait se retrouver dans des accords de transfert dans le cadre de CANIs. Des mécanismes de contrôle post-transfert ont par exemple été institués entre certains Etats et des organisations internationales dans le cadre de récents conflits internes.

The transfer of detainees has been a salient feature of recent armed conflicts. Two trends gave it particular prominence: the number of foreign fighters involved in non-State armed groups, leading the States that capture them to send them back to their country of nationality; and the increased number of non-international armed conflicts in which the territorial State is supported by third States or International Organizations: when these supporting States and International Organisations capture enemy fighters, they aim at transferring them to the territorial State authorities. Especially in the latter situation, some of the capturing authorities have been reluctant to envisage keeping these detainees in their custody, and thus aim at transferring them within short time-frame. This creates specific challenges with regard to the respect for the principle of *non-refoulement*.

This presentation is divided in five parts. It first provides an overview of the norms on transfer and *non-refoulement* in international humanitarian law (IHL), international human rights law (IHRL) and refugee law. It then shortly recalls who is bound by these norms; and to which type of transfer do they apply. Fourth, it addresses the obligations that the principle of *non-refoulement* imposes before the transfer on the authority that wants to transfer a person under its control. The fifth and last part highlights what post-transfer obligations and responsibilities exist and how they have been put into practice in recent conflicts.

For the purpose of this presentation, an authority means a State or another party to an armed conflict, such as an International Organisation or a non-State organised armed group. The presentation focuses on situations where the transferring authority is a party to an armed conflict. Also, for the purpose of this presentation, transfer means the hand-over of a person from the control of one party to the conflict to a State or non-State actor. It does not include the transfer of a detainee from one place of detention to another place of detention under the custody of the same party to the conflict.

Finally, it has to be noted that the principle of *non-refoulement* is not the only rule that could

prevent, or be relevant for, the transfer of a detainee.[1] However, the focus of this presentation will be on the principle of non-refoulement and its impact on transfers.

• The principle of non-refoulement

The principle of *non-refoulement* prohibits the transfer of persons from one authority to another when there are substantial grounds to believe that the person would be in danger of being subjected to violations of certain fundamental rights. This is in particular recognized for torture and other forms of ill-treatment, arbitrary deprivation of life and persecution. The principle of *non-refoulement* is found expressly in IHL, IHRL and refugee law, though with different scope for each of these bodies of law, as discussed below. The gist of the principle of *non-refoulement* has also become customary international law.[2] So let us turn to these three bodies of law.

o Provisions on transfer in international armed conflicts (IACs)

While the term *non-refoulement* is often associated with refugee law, the oldest provisions protecting persons deprived of liberty in case of transfer - and the strongest ones - are to be found in the 1949 Geneva Conventions. According to Article 12 of the 1949 Third Geneva Convention relating to prisoners of war (GC III), prisoners of war can *"only be transferred by the Detaining Power to a Power which is a party to the Convention"*. Thanks to the universal ratification of the 1949 Geneva Conventions, this requirement will always be fulfilled today. Furthermore, and crucially, the transfer can take place only *"after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention"*

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1 *The views expressed in this presentation are those of the author alone and do not necessarily reflect the views of the ICRC.
Notably, the prohibition of mass expulsion, the specific provisions with regard to transfer that exist in IHL such as Art. 49 of the 1949 Fourth Geneva Convention on the protection of Civilians, or the problems that transfer can raise in terms of the protection of family life.

2 UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, Transfer of persons, 12 August 2005, OP 3 (E/CN.4/2006/2, p. 25); United Nations High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 1994; UNHCR, Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007, paras 15 and 21; Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2003, pp. 87ff, at para. 216; Phil C. W. Chan, 'The protection of refugees and internally displaced persons: Non-Refoulement under customary international law?', *The International Journal of Human Rights*, 10:3, pp. 231ff. For a different view and a critical analysis of Lauterpacht and Bethlehem, see James Hathaway, 'Leveraging Asylum', *Texas International Law Journal*, Vol. 45, 2010, pp. 503ff, at pp. 507-527.

(Art. 12(2) GC III). Article 45(3) of the 1949 Fourth Geneva Conventions on the protection of civilians (GC IV) contains an identical provision with regard to persons protected under that Convention. These provisions are very broad. Unlike most of the norms of *non-refoulement,* it is not limited to particular grounds like torture or persecution, but covers the entire protection granted by these two Conventions.

More directly in line with what is usually understood to be *non-refoulement,* Article 45(4) GC IV provides that *"*[i]*n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs"*.

Let us finally mention Article 118 GC III, which governs the repatriation of prisoner of war at the end of active hostilities. This article does not contain a *non-refoulement* provision, and, on the face of it, could have been understood as an absolute obligation to repatriate prisoners of war. However, it has been argued early on that it was nevertheless prohibited to return a prisoner of war if there were risks for his or her fundamental rights upon return,[3] and State practice over the last decades at least has been in conformity with this position.[4] Indeed, when the International Committee of the Red Cross (ICRC) is solicited by parties to IACs for the repatriation of prisoners of war, which has been the rule over the last 25 years, it systematically requests to be able to discuss in private with the prisoners before their repatriation to ensure that they are willing to be repatriated and that they have no concern with regard to the principle of *non-refoulement*.[5] Such consistent State practice must be taken into account when interpreting Art. 118 GC III.[6]

o The principle of *non-refoulement* as an implicit requirement of Common Article 3 in non-international armed conflicts (NIACs)

There is no explicit provision with regard to *non-refoulement* in IHL applicable in NIACs. However, parties to armed conflicts are bound by the Geneva Conventions, and in particular by their Common Article 3, in all circumstances. It would be consistent with the categorical

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3 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. III, Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, pp. 547f.

4 Theodor Meron, 'The Humanization of Humanitarian Law', *The American Journal of International Law*, Vol. 94, 2000, pp. 239-278, at pp. 253-256; Françoise J. Hampson, 'The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict', in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014, pp. 373ff, at pp. 378 and 381.

5 Alain Aechlimann, 'Protection of detainees: ICRC action behind bars', *International Review of the Red Cross*, Volume 87 Number 857 March 2005, pp. 83ff, at pp. 104f.

6 1969 Vienna Convention on the law of treaties, Art. 31(3)(b).

prohibition that are found in Common Article 3 to understand this article as prohibiting the transfers of persons in case where there are risks upon transfer of violence to life and person, such as murder or torture or other forms of ill-treatment.[7] Arguments to support such an interpretation can be found both in IHL and IHRL.

Four arguments can be drawn from IHL.

First, the analogy with the law applicable in IAC. In the same way that the Geneva Conventions in Articles 12 CG III and 45 GC IV prohibit circumventing the protection of the Conventions by transferring the prisoner or other protected person to a non-compliant party, IHL applicable in NIAC should not be circumvented by transferring persons where they would be in danger of being submitted to violations of Common Article 3 upon transfer.[8]

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7 ICRC, *Strengthening International Humanitarian Law protecting persons deprived of their liberty, Synthesis report from regional consultation of government experts*, November 2013, p. 23 (recalling that *"it was noted by some participants that non-refoulement obligation could be implied in common Article 3"*); Michael Byers, 'Legal Opinion on the December 18, 2005 "Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan"', *Liu Institute for Global Issues*, 7 April 2006, p. 3; Hathaway found that *"there is judicial authority for the view that international humanitarian law should be construed to preclude the forcible repatriation of aliens who have fled generalized violence or other threats to their security arising out of internal armed conflict in their state of nationality"* (James C. Hathaway, *The rights of refugees under international law*, Cambridge, Cambridge University Press, 2005, p. 369, with references therein, referring in particular to Common Article 3 as specified in Hathaway, above note 2, p. 504). For another view: see Hampson, above note 4, p. 385 (who considers the arguments based on IHL applicable in NIAC "extremely tenuous").

8 See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case no IT-95-13/1-A, Appel Judgement, 2009, paras 70-71, in which the Appeal Chamber *"considers that Common Article 3 of the Geneva Conventions reflects the same spirit of the duty to protect members of armed forces who have laid down their arms and are detained as the specific protections afforded to prisoners of war in Geneva Convention III as a whole"*. As explained by Sassòli and Tougas, *"[a]lthough it did not clearly state so, the appeals chamber appeared to be willing to apply the principle of article 12, that until final release and repatriation, each agent having custody of prisoners must ensure that their transfer does not diminish the protection to which they are entitled (…) simply based upon common article 3."* Marco Sassòli and Marie-Louise Tougas, 'International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan', McGill Law Journal, Vol. 56, 2011, pp. 959–1010 at p. 981). See also ICRC, *Synthesis report from regional consultations*, above note 7, p. 23 *("Many experts agreed that common Article 3 would at least prohibit a party to a NIAC from circumventing the Article's rules by deliberately transferring a detainee to another party that would violate them")* and Jonathan Horowitz 'Transferring Wartime Detainees and a State's Responsibility to Prevent Torture', *National Security Law Brief* Vol. 2, 2012, pp. 43ff, at p. 52. The 2013 Norwegian Law of War Manual states that the IAC rules with regard to internees apply to the extent appropriate in NIAC, and that such internees may only be transferred to another State after Norway has satisfied itself of the willingness and ability of the receiving authority to apply the same international obligations as Norway is bound by (see paras 6.89 and 6.120 respectively, Manual i krigens folkerett, 2013, available at: http://brage.bibsys.no/xmlui/bitstream/id/201436/manual_krigens_folkerett.pdf, last accessed 29 June 2015).

Second, Article 5(4) of the 1977 Second Additional Protocol (AP II) requires from the authority that decides to release a person deprived of liberty that *"necessary measures to ensure* [his or her] *safety shall be taken by those so deciding"*. If this is required for release, it should arguably also be required for transfer, an operation by which the transferring authority similarly "releases" control over the detainee.[9]

Third, as mentioned already, States have considered that Article 118 GC III is subject to the prohibition to return a prisoner of war in case of danger for his or her fundamental rights despite the fact that it is not expressly mentioned in that article. The same logic should also apply for NIAC.

Last but not least, this would correspond to the obligation to "*ensure respect*" as enshrined in Common Article 1 to the Geneva Conventions.[10] If a party to the conflict transfers a detainee to another authority, under the custody of which the detainee would be in danger of being subjected to torture or other forms of ill-treatment, that party to the conflict would clearly not have done all it could to ensure respect for Common Article 3.

On this basis, it could be argued that all the fundamental guarantees provided for in Common Article 3 should be covered by the principle of *non-refoulement*, including humane treatment, as well as the prohibition of hostage taking and of the passing of sentences not affording all judicial guarantees.[11] However, for the latter, the more restrictive interpretation in human rights jurisprudence, discussed below, might limit the prohibition of *non-refoulement* under Common Article 3 to flagrant denial of justice.

IHRL supports such interpretation of Common Article 3. Indeed, the absolute prohibitions on torture and ill-treatment in Common Article 3 "*should be interpreted in the light of the interpretation given to the parallel provisions in human rights law*".[12] As we will see below, the absolute pro-

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9 For example, the U.K. Joint Doctrine Publication 1-10, *Captured Persons*, (3rd Edition), January 2015, states that transfer cannot take place immediately if it would *"compromise the safety of the detainee"* (para. 1221).

10 ICRC, *Synthesis report from regional consultations*, above note 7, p. 24 (which recalls that some experts regarded transfer obligations *"as part of a State's obligations under common Article 1 to take appropriate measure to ensure that other States respect IHL"*); Horowitz, above note 8, pp. 50f. Reuven (Ruvi) Ziegler develops this arguments for the transfer of detainees by non-belligerent States to States parties to a NIAC: '*Non-Refoulement* between 'Common Article 1' and 'Common Article 3", in Cantor and Durieux (eds), above note 4, p. 386ff. For a more general view of the obligations under Common Article 1, see Knut Dörmann and José Serralvo, 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations', *International Review of the Red Cross* (forthcoming).

11 See *The Copenhagen Process: Principles and Guidelines*, Commentary accompanying Principle 15, para. 15.4.

12 Cordula Droege, 'Transfers of detainees: legal framework, non-refoulement and contemporary chal-

hibition of torture and other forms of ill-treatment in IHRL includes the prohibition to transfer a detainee if there are substantial ground to believe that he or she would be in danger of being submitted to such ill-treatment upon transfer, and it has been found to be the case even when this was not explicitly mentioned in the IHRL treaty in question. There is therefore no reason why the same absolute prohibition in IHL should not have the same legal implication.[13]

o International human rights law and refugee law

So let us now turn to IHRL and refugee law, as both legal frameworks continue to apply during armed conflicts.[14]

Refoulement is prohibited under IHRL on a number of grounds. The strongest protections concern the danger of being subjected to torture, other forms of ill-treatment and arbitrary deprivation of life.[15] The Convention Against Torture expressly prohibits return in case of danger of torture,[16] and regional instruments extends the prohibition to the risk of others forms of ill-treatment.[17] Despite the fact that the principle of *non-refoulement* is not expressly mentioned in the International Covenant on Civil and Political Rights, the Human Rights Council considers that it constitutes a fundamental component of the absolute prohibition of arbitrary deprivation of life and of the prohibition of torture and other forms of ill-treatment.[18] The European Court of Human Rights (ECtHR) found the same with regards to the scope of

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lenges', *International Review of the Red Cross*, Volume 90 Number 871 September 2008, pp. 669ff, at p. 675; see also Emanuela-Chiara Gillard, 'There's no place like home: states' obligations in relation to transfers of persons', International Review of the Red Cross, Volume 90 Number 871 September 2008, pp. 703ff, at p. 711; John Bellinger and Vijay Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for The Geneva Conventions and Other Existing Law', *American Journal of International Law*, Vol. 105, 2011, pp. 201-243 at p. 236; Horowitz, above note 8, p. 57. See also Art. 31(3)(c) of the 1969 Vienna Convention on the law of treaties.

13 Droege, above note 12, p. 675; Mike Sanderson, 'The Syrian Crisis and the Principle of Non-Refoulement', *International Law Studies*, Vol. 89, 2013, pp. 776–801 at pp. 798–799.

14 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 25 ; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, para. 216. See also ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005, pp. 299-305; United Nations Office of the High Commissioner for Human Rights, *International legal protection of human rights in armed conflict*, 2011.

15 See in particular Droege, above note 12, pp. 671 – 673; Gillard, above note 12, pp. 716-722.

16 1984 Convention Against Torture, Art. 3.

17 Inter-American Convention to Prevent and Punish Torture, Art. 13(4); Charter of Fundamental Rights of the European Union, Art. 19(2).

18 Human Rights Council, General Comment 20 on Article 7, 10 March 1992, para. 9 and General Comment 31, 26 May 2004, para. 12.

the rights enshrined in the Convention, again despite the absence of express provision on *non-refoulement* in the Convention.[19] Finally, the UN Sub-Commission on the Promotion and Protection of Human Rights asserted that "*the transfer of a person to a State where that person faces a real risk of being subjected to torture, cruel, inhuman or degrading treatment or extra-judicial killing would be a breach of customary international law*".[20] The risk that the authority to which the detainee is transferred would transfer him further in violation of the principle of *non-refoulement* (also called secondary *refoulement)* is also prohibited.[21]

Furthermore, several universal or regional instruments, regional courts and treaty bodies extend the prohibition to return to other grounds: where there is a danger of enforced disappearance in the Convention of the same name;[22] where there is a danger of being submitted to the death penalty in the European Union Charter of fundamental rights,[23] and the ECtHR[24] as well as the Human Rights Committee[25] have found the same in their case-law with regard to transferring States that had abolished the death penalty; where there is a risk to be tried by a special or *ad hoc* Court in the requesting State in the Inter-American Convention to prevent and punish torture,[26] or where there is a risk of flagrant denial of justice according to the ECtHR case-law.[27] The United Nations Committee on the right of the child also interpreted the prohibition of underage recruitment and participation in hostilities as including the prohibi-

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19 ECtHR, *Soering v. United Kingdom*, Judgment, 7 July 1989, Application No. 14038/88, paras 88–91; *Chahal v. United Kingdom*, Judgment, 15 November 1996, Application No. 22414/93, para. 74, *El Masri v. The Former Yugoslav Republic of Macedonia*, Judgment, 13 December 2012, Application No. 39630/09, para. 212.

20 Resolution 2005/12, *Transfer of persons*, 12 August 2005, OP 3 (E/CN.4/2006/2, p. 25).

21 Droege, above note 12, p. 677 with references therein; ECtHR, Hirsi Jamaa and others v. Italy, Judgment, 23 February 2012, Application no. 27765/09, para. 147; See also *U.K. Ministry of Defense Strategic Detention Policy*, March 2010, which prohibits transfer in case of real risk of *"unlawful rendition"* (para. 3(1)(f)).

22 International Convention for the Protection of All Persons from Enforced Disappearance (2006), Art. 16(1); furthermore, the Human Rights Committee considers enforced disappearance as an act of torture or cruel, inhuman and degrading treatment (see Human Rights Committee, *Grioua v Algeria*, communication 1327/2004, CCPR/C/90/D/1327/2004, 16 August 2007, paras 7.6 and 7.7, and references therein), which would include the risk of enforced disappearance under the prohibition of transfer in case of risk of torture or other forms of ill-treatment.

23 Charter of Fundamental Rights of the European Union, Art. 19(2).

24 ECtHR, *Al-Saadoon v. United Kingdom*, Judgment, 2 March 2010, Application No. 61498/08, para. 137.

25 UN Human Rights Committee, *Kwok Yin Fong v. Australia*, CCPR/C/97/D/1442/2005, 23 November 2009, para. 9.7.

26 Inter-American Convention to Prevent and Punish Torture, Art. 13(4).

27 *Othman (Abu Qatada) v. United Kingdom*, judgement, 17 January 2012, Application no. 8139/09, para. 258 with references therein; See also UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, Transfer of persons, 12 August 2005, OP 8 (E/CN.4/2006/2, p. 26); The Copenhagen Process: Principles and Guidelines, Commentary accompanying Principle 15, para. 15.4.

tion to return a person when he or she would be in danger of being submitted to it.[28] Finally, the ECtHR and the Inter-American Court of Human Rights both held that, in exceptional circumstances at least, it might be prohibited to return a person suffering from a serious mental or physical illness depending on the quality and availability of the health care in the country of return.[29]

Contrary to refugee law,[30] the principle of non-refoulement under IHRL is absolute and allows no exception or derogation.[31]

Turning to refugee law, the 1951 Geneva Convention for the protection of Refugees prohibits the return of refugees and asylum seekers to territories where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.[32] The same provision is found in the American Convention on Human Rights[33] and in the Bangkok principles on the status and treatment of refugees.[34] A stronger rule is found in the 1969 OAU Refugee Convention, that extents the prohibition to return when the risk is linked to external aggression, occupation, foreign domination or events seriously disturbing public order.[35] The latter obviously covers situations of armed conflicts.

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28 United Nations Committee on the Rights of the Child, General Comment no 6 (2005), which provides that in view of the high risk of irreparable harm involving fundamental human rights, including the right to life, States should not return children *"where there is a real risk of under-age recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties*" (para. 28).

29 ECtHR, *N v. United Kingdom*, Judgement, 27 May 2008, Application No 26565/05, para. 42; Inter-American Court of Human Rights, *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14 of 19 August 2014 (Ser A) No 21, para. 229. See also ICRC, *Strengthening International Humanitarian Law protecting persons deprived of their liberty, Thematic consultation of government experts on grounds and procedure for interment and detainee transfers*, April 2015, p. 47 (*'The unavailability of adequate medical care at the receiving place of detention was mentioned as another appropriate ground to consider in delaying, but not precluding, a transfer'*) and *Arrangement for the transfer of detainees between the Canadian Forces and the Ministry of Defense of the Islamic Republic of Afghanistan*, 18 December 2005, para. 6.

30 1951 Convention Relating to the Status of Refugees, Art. 33(2).

31 Droege, above note 12, p. 678; Gillard, above note 12, p. 729.

32 1951 Convention Relating to the Status of Refugees, Art. 33.

33 American Convention on Human Rights, 1969, Art. 22(8).

34 Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles")*, Art. III(1).

35 Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, Art. II(3). The Cartagena Declaration recommended using such an enlarged definition of refugees (*Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, Art. III(3)).

• Which authority is bound?

Of course States are bound by all these provisions – depending on ratifications for the relevant treaties. Transfers carried out in military operations abroad raise however the question of the extraterritorial application of IHRL and refugee law. As is well known, while contested by a small number of States, the extraterritorial application of IHRL has been constantly asserted by international courts and treaty bodies,[36] and this is also the position of the United Nations High Commissioner for Refugees (UNHCR) with regard to *non-refoulement* under refugee law.[37] As far as the Member States of the Council of Europe are concerned, such application has been confirmed by the ECtHR with regard to the applicability of the Convention to extraterritorial detention.[38]

International Organisations are bound by customary IHL when they become be party to a conflict[39] and at all times by customary IHRL and refugee law. This has been put in practice with regard to the principle of *non-refoulement*. In particular, the United Nations *Interim Standard Operating Procedures* foresee that detained persons shall not be transferred "*to any authority in situations where there are substantial grounds for believing that there is a real risk that the detained person will be tortured or ill-treated, persecuted, subjected to the death penalty or arbitrarily deprived of life.*"[40] Beyond customary law applicable to International Organisation

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36 Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10 *("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")*. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 109, with references therein; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, para. 216-217.

37 UNHCR, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations*, above note 2, paras 24 and 43, which concludes that the decisive criterion for the scope of application of the principle of non-refoulement, as with that principle under human rights law, is *"whether they come within the effective control and authority of that State"* (para. 43).

38 ECtHR, *Al-Saadoon v. the U.K.*, above note 24; *Al-Jedda v. the United Kingdom*, 7 July 2011, Application 27021/08, paras 74-86; for the extraterritorial application of the ECHR beyond detention situations, see *Al-Skeini and others v. the United Kingdom*, 7 July 2011, Application no. 55721/07, paras 130-150.

39 Tristan Ferraro, 'The applicability and application of international humanitarian law to multinational forces', *International Review of the Red Cross*, (2013) 95, pp. 561ff, at pp. 573ff.

40 United Nations, Department of Peacekeeping Operations, *Interim Standard Operating Procedures, Detention in United Nations Peace Operations,* 25 January 2010, Ref. 2010.6, para. 80. See also Standard Operating Procedures Detention of non-ISAF Personnel SOP 362, Annex D, as quoted in http://www.beehive.govt.nz/sites/all/files/MAPP_Slevel55L-11102109300.pdf (last accessed on 29 June 2015), (p. 3 para. 9), as well as (outside situations of armed conflicts) the examples mentioned in NATO Legal Deskbook, 2nd ed, 2010, p. 299, first paragraph.

as such, the various national contingents remain bound by the obligations binding upon the concerned troop contributing States as a matter of treaty or customary law[41] - for IHL at least in situations where the troop contributing State is a party to the conflict concurrently with the International Organisation.[42]

With regard to non-State organized armed groups, the protection granted by international law is more reduced because of the prevailing view that IHRL and refugee law do not formally apply to or bind non-State organized armed groups. Therefore, the only available protection is that which is found in IHL applicable in NIACs. As Common Article 3 applies to all parties to the conflict, the interpretation submitted above - namely that *non-refoulement* is a component of the absolute prohibitions that are found in Common Article 3 - implies that non-State organized armed groups parties to armed conflicts are also bound by it. It is submitted, thus, that Common Article 3 prohibits a non-State organized armed group from returning a person to the territory controlled by its enemy if there is a real risk of ill-treatment in that territory; it also prohibits the transfer of detainees between co-belligerents organized armed groups, again if there are dangers for the person under the custody of the group to which he or she is transferred.

• What type of transfer is concerned?

With regard to the type of transfer covered by the prohibition, it is important to underline that the principle of *non-refoulement* applies irrespectively of the crossing of a border. What matters for the principle of *non-refoulement* is the transfer of jurisdiction or control over a person.[43] Let us take a practical example to illustrate it: when the U.S. returned Afghan detainees from Guantanamo Bay to Afghanistan, the principle of *non-refoulement* applied. Obviously, it did not apply with regard to the transfer between Guantanamo Bay and Bagram Airfield, both under U.S. control. It applied when the person was transferred from the U.S. authorities in Bagram to the Afghan authorities in Afghanistan. Otherwise, it would not apply at all. [44] Again, for the Member States of the Council of Europe this has been clarified in the ECtHR *Al-Saadoon* judgment. While this judgment does not use the term *non-refoulement*, it does apply the protection stemming from the European Convention to the transfer to the Iraqi

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41 Human Rights Council, General Comment 31, 26 May 2004, para. 10; UN Secretary-General, *Observance by United Nations forces of international humanitarian law*, ST/SGB/1999/13, 6 August 1999, Section 2

42 Ferraro, above note 39, pp. 588ff, especially at pp. 593-595.

43 UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, *Transfer of persons*, 12 August 2005, OP 1 (E/CN.4/2006/2, p. 25); UNHCR, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations*, above note 2, paras 24 and 43; Droege, above note 12, p. 677; Gillard, above note 12, pp. 712-715.

44 According to Bellinger and Padmanabhan, (above note 12, p. 237), the U.S. and the U.K. have taken the position that *non-refoulement* protection does not apply as a matter of law to in-country transfers.

authorities of an Iraqi national captured by the United Kingdom in Iraq, so a transfer within Iraq without crossing any border.[45]

- **What obligations prior to the transfer does the principle of non-refoulement entails for a party willing to transfer a detainee?**

It follows from the principle of *non-refoulement* that an authority that is planning to return a person must assess on an individual basis, carefully and in good faith, whether that person would be in danger of a violation of the rights protected under the principle of *non-refoulement*. If there are substantial grounds to believe so, the person must not be transferred.

Under IHRL, a person who has grounds to allege a violation of his or her rights has the right to an effective remedy.[46] This is not generally the case in IHL, except for specific instances[47] but, as mentioned above, human rights law continues to apply during armed conflict. In the context of *non-refoulement*, the right to a remedy means the right to challenge the transfer before an independent and impartial body.

The jurisprudence of international human rights bodies, and in particular the ECtHR, have considered that a number of procedural guarantees are essential to conclude that an effective remedy is available.[48] For transfers from the transferring State's territory, the effective remedy is typically before national courts.

Transfers in the context of extraterritorial military operations is a relatively new phenomenon, and State practice in this respect has been conflicting. However, the ECtHR has stated in *Al-Saadoon* that the Convention rights (including the right to an effective remedy with regard to transfers that might violate Articles 2 and 3 of the Convention) apply also to persons under the control of the United Kingdom abroad.[49]

It should be borne in mind that review of transfer need not be exclusively judicial in nature. The key issue is whether the remedy is effective, i.e. whether the concerned person has a meaningful chance to obtain an independent and impartial decision that he or she would

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45 ECtHR, *Al-Saadoon v. the U.K.*, above note 24, para. 143.

46 See in particular Art. 2(3) ICCPR, Art. 13 ECHR and Art. 25 of the American Convention on Human Rights.

47 Such as Arts 35, 43 and 78 of the Fourth Geneva Convention.

48 See, e.g. ECtHR, *Chahal v. the United Kingdom*, above note 19, paras 152-154; *Al-Saadoon v. the U.K.*, above note 24, paras 160-166; *De Souza Ribeiro v. France*, Judgment, 13 December 2012, Application no. 22689/07, para. 82. See also Droege, above note 12 p. 679-680 and Gillard, above note 12, p. 731-738.

49 ECtHR, *Al-Saadoon v. the U.K.*, above note 24, para. 166.

not be transferred in a situation that would violate the principle of *non-refoulement*.[50] The modalities of its implementation depend on the concrete circumstances of the case and on the capacities of the authorities, so long as it is effective. In the context of transfers between States occurring outside of the transferring State's territory, practical solutions need to be found that take into account both the constraints created by extraterritorial military operations and the need to provide real protection against the violation of the fundamental rights protected by the principle of *non-refoulement*.[51] In that regard, experience has shown that for an assessment under the principle of *non-refoulement* to be effective, it is essential to i) inform the concerned person in a timely manner of the intended transfer; ii) grant the person concerned the opportunity to express to an independent and impartial body any fears he or she may have about the transfer and explain why he or she would be at risk; iii) suspend the transfer during the assessment of whether there are substantial ground to believe the person would be in danger upon transfer, because of the irreversible harm that would be caused if the person was indeed found to be in danger.[52] The assessment of the policies and practices of the receiving authority, and of the personal circumstances of the detainee to be transferred – including the well-foundedness of the concerned person's fears – are deemed of importance.[53]

To mitigate the risks for persons to be transferred, transferring States sometimes resort to bilateral agreements. While it is of course important to take such agreement – or lack thereof – into consideration when assessing the potential risks faced by the person to be transferred, the existence of a bilateral agreement does not necessarily remove such risk.[54] The crux of

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50 See e.g. Committee against Torture, *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005), para. 13.8.

51 See Horowitz, above note 8, p. 64.

52 See notably ICRC, *Thematic consultation report*, above note 29, p. 49; U.K. JDP 1-10, *Captured Persons*, above note 9, paras 1212, 1214 and 1221 *(in fine); Agreement between the European Union and the Central African Republic concerning detailed arrangements for the transfer to the Central African Republic of persons detained by the European Union military operation (EUFOR RCA) in the course of carrying out its mandate, and concerning the guarantees applicable to such persons*, 18 July 2014, Art. 3(3). While the European Union (E.U.) was not a party to that conflict, the agreement seems to have been negotiated and signed keeping in mind the possibility that the E.U. might at some point become a party to the conflict and that the agreement would remain in force in such situation, as shown by preambular paragraph 7 (that refers to the possibility that EUFOR RCA would intern persons under the law of armed conflicts).

53 ICRC, *Thematic consultation report*, above note 29, p. 49.

54 Droege, above note 12, pp. 692–700; Gillard, above note 12, pp 742-750; Lena Skoglund, 'Diplomatic Assurances Against Torture – An Effective Strategy?: A Review of Jurisprudence and Examination of the Arguments', Nordic Journal of International Law, Vol. 77, 2008, pp. 319–364. Sassòli and Tougas, above note 8, pp. 996–999; see also ECtHR, Saadi v. Italy, Judgment, 28 February 2008, Application no. 37201/06, paras 147–148; *Othman (Abu Qatada) v. United Kingdom*, above note 27, paras 187ff; for refugee law, see UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, 2006.

the matter is whether it could be expected that the assurances, in their practical application and in view of the particular circumstances of each situation, will provide an effective and sufficient guarantee to ensure that the transferred detainee will be protected against unlawful treatment. This is particularly unlikely where there is a systematic practice of torture or ill-treatment.[55] One must also look at whether the assurance is general or linked to one specific individual; arguably the latter is stronger. The exact nature and scope of the agreement's provisions and their binding nature are obviously essential. It is indeed unlikely that diplomatic assurance only, without an independent and effective post-transfer monitoring mechanism, would be sufficient to remove risks that would exist in the absence of bilateral agreement.[56]

Many transfer agreements also forbids the imposition and execution of the death penalty, an issue on which the effectiveness of such bilateral agreements does not create the same concerns.

• Post-transfer obligations and responsibilities

Once the transfer has taken place, the responsibility for the transferred person rests with the receiving authority. But the transferring authority may have a number of post-transfer obligations or responsibilities.

Under IHL applicable in IAC, clear obligations are defined in Articles 12 GC III and 45 GC IV. If the Power to which the detainee have been transferred "*fails to carry out the provisions of the Convention in any important respect*", the transferring Power must "*take corrective measures to correct the situation or request the return of the prisoners of war*" (for GC III), respectively "*the return of the protected person*" (for GC IV).

There is no equivalent provision with regard to post-transfer responsibilities in IHRL, refugee law, or IHL applicable in NIACs. But as a matter of policy, the considerations underpinning Articles 12 GC III and 45 GC IV should be taken into account in order to protect detainees from violation of IHL in NIACs also.[57] In the absence of provisions in these bodies of international

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55 *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/54/324, para. 37; UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, *Transfer of persons*, 12 August 2005, OP 4, E/CN.4/2006/2, p. 25.

56 Droege, above note 12, p. 695. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 42.

57 See *The Copenhagen Process: Principles and Guidelines*, Principle 15 and accompanying commentary, especially para. 15.5. See also ICRC, *Synthesis report from regional consultations*, above note 7, p. 26 (which recalled the general agreement among experts that post-transfer monitoring of the receiving detention facility and the treatment of transferred detainees is useful as a means of lowering the risk of ill-treatment, and that some experts considered post-transfer monitoring a legal obligation, while others considered it solely as a good practice).

law, the necessary stipulation should be agreed upon in bilateral transfer agreement.[58] It is submitted that this would also correspond to the States obligations to ensure respect for IHL as provided for in Common Article 1 to the Geneva Conventions.[59]

In recent NIACs, States and International Organisations have agreed upon and put in place various forms of capacity building program for the detention authorities of the receiving State,[60] as well as post-transfer monitoring mechanisms.

Recent agreements on transfer typically foresee a right of access to the detainee by the transferring State after the transfer. This is the case notably for the Memorandum of Understanding signed between Afghanistan and several troop contributing nations, such as Canada,[61] Demark,[62] Norway,[63] the U.K.[64] and the U.S.[65] with regard to transfer to Afghan authorities, or among troop contributing nations themselves,[66] as well as the agreements concluded between

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58 See e.g. U.K. JDP 1-10, *Captured Persons*, above note 9, para. 1227 and the references in foot-notes 61 to 69 below.

59 For a general view of the obligations under Common Article 1, see Dörmann and Serralvo, above note 10.

60 See e.g. *Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States f America On Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan*, 9 March 2012, paras 6(e) and 10.

61 *rrangement for the transfer of detainees between the Canadian Forces and the Ministry of Defense of the Islamic Republic of Afghanistan*, 3 May 2007, para. 2.

62 *Memorandum of the Understanding between the Ministry of Defense of the Islamic Republic of Afghanistan and the Ministry of Defense of the Kingdom of Denmark concerning the transfer of persons between the Danish Contingent of the International Security Assistance Force and Afghan Authorities*, 08 June 2006, Art. 4.

63 *Memorandum of Understanding between the Ministry of Defence of the Islamic Republic of Afghanistan and the Ministry of Defence of the Kingdom of Norway concerning the transfer of persons between the Norwegian contingent of the International Security Assistance Force to Afghan authorities*, 12 October 2006, Section 4.

64 *Memorandum Of Understanding between The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan concerning the transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan*, 30 September 2006, para. 4.

65 *MoU between Afghanistan and the U.S.*, above note 60, para 7.

66 *Arrangement between the Government of Canada and the Government of the United States of America concerning the transfer of person between the Canadian Forces and the U.S. Forces in Afghanistan*, 18 November 2011, para. 6(2); *Arrangement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning U.S. support for the transfer of UK-held detainees from UK detention to the Afghan authorities at Parwan*, 2 May 2013, para. 12.

the United Nations[67] and France[68] and some States where their forces operate. Some of them specifies that the access is granted notably for the purpose of monitoring the well-fare and conditions of detention of the detainees.[69] Such monitoring also helps informing future transfer decisions, and in practice it did sometimes led to transfers being suspended.[70]

Agreements usually do not set a specific limit to the duration of the monitoring. The monitoring is generally meant to continue until there is no longer a risk of ill-treatment,[71] which would be coherent with its object and purpose. This is often considered to be at least until release or criminal conviction.[72]

Some agreements contain more detailed stipulations. For example, several agreements include specific provisions in case of allegations of mistreatment, including to inform the authorities which had transferred the detainees of the steps and corrective actions taken and to investigate and, where appropriate, prosecute.[73] Some of them include also the obligation to return

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67 *Supplemental Arrangement to the Status of Forces Agreement between the United Nations and the Government of the Republic of Mali concerning the treatment of individuals detained and handed over to the Government of Mali by the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), Bamako, 1 July 2013, para. 5; Supplemental Arrangement to the Status of Forces Agreement between the United Nations and the Government of the Central African Republic relating to the status of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), relating to the treatment of individuals detained and handed over to the Government of the Central African Republic by MINUSCA*, Bangui, 2 September 2014, para. 11.

68 *Accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval »*, signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013, Art. 10; *Accord entre le Gouvernement de la République française et le gouvernement de la République centrafricaine concernant le statut du détachement français déployé en République centrafricaine dans le cadre de la mise en œuvre des résolutions du Conseil de sécurité des Nations unies et du rétablissement de la sécurité en République centrafricaine*, signé à Bangui le 18 décembre 2013, Art. 12(6).

69 *Arrangement between Canada and the U.S., above note 66, para. 6(2); MoU between Afghanistan and the U.S*. above note 60, para. 10.

70 Horowitz, above note 8, pp. 57 and 61-64; 'U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada' Human Rights Institute, Columbia Law School, December 2010; England and Wales High Court, *Evans, R. (on the application of Maya Evans) v. Secretary of State for Defence*, [2010] EWHC 1445 (admin), paras. 287–327; ICRC, *Thematic consultation report*, above note 29, p. 50 (mentioning that practice shared by the experts included halting transfer).

71 ICRC, *Thematic consultation report*, above note 29, p. 53; U.K. JDP 1-10, *Captured Persons*, above note 9, para. 1232.

72 *The Copenhagen Process: Principles and Guidelines*, Principle 15, and accompanying commentary, para. 15.5; U.K. JDP 1-10, *Captured Persons*, above note 9, para. 1232; *Supplemental Arrangement between the UN and the C.A.R.*, above note 67, para. 24.

73 *Arrangement between Canada and the U.S. above note 66, para. 7(2); Arrangement between the U.K. and the U.S.*, above note 66, para. 19; *Arrangement between the E.U. and the C.A.R.*, above note 52, Art. 5(2); *Supplemental Arrangement between the UN and Mali*, above note 67, para. 10; *Supplemental Arrangement between the UN and the C.A.R.*, above note 67, paras 17-18.

the detainee upon request of the transferring State.[74] Such kind of efforts are also reflected in national policy or orders such as for the United Kingdom, the *Joint Doctrine Publications 1-10* on captured persons,[75] which should be discussed in the next presentation.

The risk of secondary *refoulement* has also been addressed, notably through stipulating that the receiving State cannot transfer the detainee further without the written approval of the initial transferring authority; [76] or that the State planning to carry out a secondary transfer obtains assurances from that third State in terms of treatment and ability to monitor.[77]

These various agreements, capacity building measure and strong post-transfer monitoring mechanisms demonstrate that States found practical solutions that aim at ensuring the human treatment of detainees transferred during extraterritorial military operations, with a view to effect such transfer in respect of the principle of *non-refoulement*. To positively influence the treatment of transferred detainees, the manner in which the measures agreed upon are implemented in practice is key.[78] Efforts to that effect must therefore be encouraged, and commended.

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74 *Arrangement between Canada and the U.S*. above note 66, para. 4(4); *Arrangement between the U.K. and the U.S*., above note 66, para. 9; *Supplemental Arrangement between the UN and the C.A.R.*, above note 67, para. 18. See also ICRC, *Synthesis report from regional consultations*, above note 7, pp. 23 and 26; ICRC, *Thematic consultations report*, above note 29, p. 53f (which recalls that experts gave examples of States requesting the return of transferred detainees, but doubted the existence of a legal basis to demand the return of persons transferred to their own governments).

75 U.K. JDP 1-10, *Captured Persons*, above note 9, paras 1226-1234.

76 *Amendment to the MoU between Afghanistan and Denmark*, above note 62, section 6(2); *Arrangement between Canada and the U.S*. above note 66, para. 9(4); *Supplemental Arrangement between the UN and the C.A.R.*, above note 67, para. 16. *Echange de lettres entre la France et le Mali*, above note 68, Art. 10(4).

77 See e.g. *Arrangement between the U.K. and the U.S.*, above note 66, paras 7 and 17; *Supplemental Arrangement between the UN and Mali*, above note 67, para.11.

78 For an analysis of the practical implementation of a monitoring system, see England and Wales High Court, *Evans, R. (on the application of Maya Evans) v. Secretary of State for Defence*, [2010] EWHC 1445 (admin), paras. 287–327. For a critical review of what it calls *"ineffective monitoring in practice"* see 'U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada' Human Rights Institute, Columbia Law School, December 2010, pp. 13-12.

TRANSFER AGREEMENTS: THE EU EXPERIENCE

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Summary

Steered by the High Representative for Foreign Affairs and Security Policy, the Common Foreign and Security Policy (CFSP) encompasses the Common Security and Defence Policy (CSDP) of the European Union (EU). The CSDP provides the EU 'with an operational capacity drawing on civilian and military assets' (Treaty on European Union, Article 42.1), allowing it to deploy a wide range of civilian or military missions with mandates as diverse as peace-keeping, conflict prevention or strengthening international security. Amongst the twenty or so missions the EU has deployed since 2001, both operations Atalanta and European Union Force Central African Republic (EUFOR RCA) have offered a framework for the conclusion and application of transfer agreements. This contribution explores the reasons, the legal tools and the content of these agreements.

Against the backdrop of the mandate given by the Council to several missions, some of them are allowed to detain persons under certain conditions. However, the legal basis for the detention operations differs from one mission to another (e.g. Article 105 of the United Nations (UN) Convention on the Law of the Sea (UNCLOS) for operation Atalanta and United Nations Security Council (UNSC) Resolution 2134 (2014) for operation EUFOR RCA). In Atalanta, the EU member States have transferred to the EU the power - recognised by the UNCLOS - to seize pirate ships or aircrafts. They did so by the means of a Council Joint Action 2008/851/CFSP on 10 November 2008. It is interesting to note that the European Court of Human Rights (ECtHR) case law considers that a detention period without judicial review may be extended outside the usual limits imposed by Article 5 European Convention on Human Rights when maritime environment or constraints justify such an extension (e.g. distance to cover). Moreover, it is important to note that the above-mentioned Joint Action emphasises that the seizure and detention of persons can only be ordered in light of their 'prosecutions (…) *by the relevant State'. Unlike operation Atalanta, the legal basis for operation EUFOR RCA does not mention the possibility to seize and detain persons. Only operational planning documents (e.g. rules of engagement) provide for such a possibility. Transfer agreements are generally crucial as the EU is not competent to sue and judge the persons it detains. In the framework of operation Atalanta, persons captured and suspected of piracy would be transferred to the EU member States or to third States involved in their capture. In the context of EUFOR RCA, only the Central African Republic (CAR) is competent*

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with regard to people having committed criminal offences under national criminal law.

During operation Atalanta activities, before transferring, the EU must agree with the transferee State - by means of an international instrument or a unilateral declaration from the former - on which legal standards will have to be observed during transfer. If persons are captured within the territorial or internal waters of a State, the coastal State must agree to the transfer to another State. On account of UNSC resolution 1816 (2008), Somalia benefits from a special status entailing a lighter procedure facilitating such transfers to third States. Under EUFOR RCA, the aim of the detention is to protect threatened civilians. As agreed between the EU and CAR in an initial agreement given the situation, the latter is the only transferee regarding the situation(except where the International Criminal Court is competent). Article 218 of the Treaty on the functioning of the EU contains the procedure for the conclusion of transfer agreements.

Both examined agreements contain a provision regarding humane treatment of the persons deprived of their liberty, who have to be treated in accordance with Human Rights Law standards. They also cover obligations of the transferee State (provisional detention, criminal proceedings and judgment) as well as EU control procedures over these obligations. The prohibition of the death penalty is systematically part of the agreements that are legally binding upon the parties. There are however substantial differences between Atalanta and EUFOR RCA agreements. First, the Atalanta agreement is much more detailed on procedural aspects the transferee State has to observe. Nevertheless, EUFOR RCA gives more possibilities to the EU regarding the control of the conditions of detention. Second, the Atalanta agreement does not force any State to accept the transfer, while the EUFOR RCA agreement obliges CAR (except in certain cases) to accept the transfer of persons who are likely to commit offences to CAR criminal law. Finally, EUFOR RCA operation was given a mandate to detain certain persons if CAR authorities authorised this prolonged detention. This possibility is not covered by the Atalanta agreement.

Les accords de transfert de personnes détenues dans le cadre des opérations de gestion de crise de l'Union européenne

Introduction

1. Dans le cadre de son action extérieure, dont les dispositions générales sont régies par le titre V du Traité sur l'union européenne (TUE), l'Union européenne (UE) mène une politique de sécurité et de défense commune (PSDC), partie intégrante de sa politique étrangère et de sécurité commune (PESC). En application de l'article 18.3. TUE, la PESC est conduite par le Haut représentant de l'Union pour les affaires étrangères et la politique de sécurité (HR), assisté dans cette tâche par le Service européen pour l'action extérieure, institué par le Traité de

Lisbonne[2]. La PESC, conformément à l'article 24 TUE, « est soumise à des règles et procédures spécifiques. Elle est définie et mise en œuvre par le Conseil européen et le Conseil qui statuent à l'unanimité (…) Cette politique est exécutée par le [HR] et par les Etats membres (…) »

2. La PSDC « assure à l'Union une capacité opérationnelle s'appuyant sur des moyens civils et militaires »[3] auxquels l'Union peut avoir recours en vue de la mise en œuvre d'opérations de gestion de crise en dehors de l'Union européenne, soit sur le territoire d'Etat tiers, soit dans des zones qui ne sont pas soumises à la juridiction des Etats, comme la haute mer. Les différentes missions susceptibles d'être entreprises par l'UE couvrent un champ d'action très large, comme le montre la diversité des actions décrites à l'article 43 TUE, dont la liste fournie au paragraphe 1 n'est de surcroit pas limitative.

3. Dans ce cadre, l'UE a mené depuis les débuts de la PSDC en 2001[4] plus d'une vingtaine d'opérations de gestion de crise, de caractère civil ou militaire. Deux opérations ont servi de cadre à la conclusion et à l'application des accords de transfert de personnes:

- l'opération Atalanta, décidée par le Conseil en novembre 2008[5], pour laquelle l'UE a conclu quatre accords de transfert avec le Kenya[6], les Seychelles[7], l'Ile Maurice[8] et la Tanzanie[9];
- l'opération EUFOR RCA, décidée par le Conseil en février 2014[10], pour laquelle l'UE a conclu un accord de transfert avec la République centrafricaine[11].

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2 Article 27.3. TUE

3 Article 42.1. TUE

4 La PSDC a remplacé en 2009, avec la mise en vigueur du traité de Lisbonne, l'ancienne politique européenne de sécurité et de défense commune.

5 Action commune du Conseil 2008/851/PESC du 10 novembre 2008 concernant l'opération militaire de l'Union européenne en vue d'une contribution à la dissuasion, à la prévention et à la répression des actes de piraterie et de vols à main armée au large des côtes de la Somalie (JOUE L 301, 12.11.2008, p.33), dernièrement modifiée par la décision du Conseil 2014/872/PESC du 21 novembre 2014 (JOUE L 335, 22.11.2014, p. 19);

6 Accord sous la forme d'un échange de lettres entre l'UE et le Gouvernement du Kenya du 6 mars 2009 (JOUE L79, 25.3.2009, p.49), dénoncé par le Kenya en mars 2010.

7 Accord sous la forme d'un échange de lettres entre l'UE et la République des Seychelles du 29 septembre 2009 (JOUE L 315, 2.12.2009, p. 37).

8 Accord entre l'UE et la République de Maurice du 14 juillet 2011 (JOUE L 254, 30.9.2011, p. 3).

9 Accord entre l'UE et la République Unie de Tanzanie du 1er avril 2014 (JOUE L 108, 11.4.2014, p. 1).

10 Décision du Conseil 2014/73/PESC du 10 février 2014 relative à une opération militaire de l'Union européenne en République centrafricaine-EUFOR RCA (JOUE L 40, 11.12.2014, p. 59) modifiée par la décision du Conseil 2014/775/PESC (JOUE L 325, 8.11.2014, p.17).

11 Accord entre l'UE et la République centrafricaine du 18 juillet 2014 (JOUE L 251, 23.8.2014, p. 1).

4. On analysera successivement:

- les raisons de la conclusion de ces accords,
- les instruments juridiques utilisés pour conclure ces accords,
- le contenu de ces accords.

Les raisons de la conclusion des accords de transfert

5. En vue de l'exécution du mandat qui lui est confié par le Conseil, chacune des opérations de gestion de crise, Atalanta ou EUFOR RCA, peut être amenée à retenir à bord de bâtiments de guerre ou dans ses locaux, des personnes suspectes. La base juridique autorisant cette rétention diffère cependant selon chaque opération.

(a) Atalanta:

- L'article 105 de la Convention des Nations unies sur le droit de la mer (CNUDM) autorise les Etats « *en haute mer* (souligné par nous) ou en tout autre lieu ne relevant de la juridiction d'aucun Etat [à] appréhender les personnes et saisir les biens se trouvant à bord ». L'action commune du 10 novembre 2008 autorise expressément dans son article 2 (c) l'opération Atalanta à « appréhender (…) les personnes suspectées d'avoir l'intention (…) de commettre, commettant ou ayant commis des actes de piraterie (…) ». L'UE est partie à la Convention des Nations unies sur les droits de la mer (CNDUM), mais n'a pas mentionné dans la déclaration de compétences qu'elle a faite au moment du dépôt de son instrument de ratification, la lutte contre les actes de piraterie. On peut donc en déduire que, par le biais de l'action commune du 10 novembre 2008, les Etats membres ont en quelque sorte délégué à l'opération de l'UE ce pouvoir d'appréhension reconnu par la CNUDM. La situation est différente dans les eaux territoriales de la Somalie puisque cette appréhension est faite sur la base d'une résolution [12] du Conseil de sécurité adoptée en application du chapitre VII de la Charte des Nations unies autorisant la rentrée dans les eaux territoriales de Somalie des Etats mais aussi des organisations internationales telles que l'UE, « conformément au droit international applicable », ces derniers mots permettant aux Etats ou aux organisations internationale d'agir dans les eaux territoriales de Somalie conformément à la CNUDM et par conséquent d'appréhender les voleurs à main armée[13] ou les pirates refugiés dans ces eaux.
- Dès lors que le transfert des personnes en vue de leur prise en charge par des autorités judiciaires ne peut être immédiat, il est nécessaire de retenir à bord des bâtiments de guerre les suspects pendant une période dont la durée peut être fixée dans les plans

12 Résolution 1816(2008) et suivantes du Conseil de Sécurité des Nations Unies.

13 On entend par voleurs à main armée les personnes ayant commis des actes de violence similaires à ceux des pirates dans les eaux territoriales.

d'opération ou les règles d'engagement agréés par le Conseil de l'UE. On rappellera que la Convention européenne des droits de l›homme impose dans son article 5.3 que toute personne arrêtée ou détenue soit « aussitôt traduite devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires ». La jurisprudence de la Cour européenne des droits de l'homme considère que les contraintes liées à la localisation en mer des bâtiments peuvent justifier un allongement significatif des délais de comparution devant les autorités judiciaires[14].

- Quelle que soit la zone géographique d'appréhension des personnes, l'article 2 de l'action commune précitée du 10 novembre 2008 n'autorise l'appréhension et la détention des personnes qu' « en vue de l'exercice de poursuites judiciaires par les Etats compétents ».

(b) La situation est différente dans le cadre de l'opération EUFOR RCA.

- La résolution du Conseil de Sécurité des Nations Unies (CSNU) 2134 (2014) du 28 janvier 2014 autorise l'UE à prendre « toutes les mesures nécessaires » (paragraphe 44 de cette résolution) en vue de l'accomplissement de son mandat. Il s'agit là de la formule habituelle utilisée par le Conseil de sécurité pour autoriser les Etats ou les organisations internationales à utiliser la force sur le théâtre où ils sont déployés. Dans ces conditions, l›UE considère que cette autorisation lui fournit une base juridique lui permettant de retenir des personnes pendant une courte durée pour des raisons tenant à la sécurité de la force ou des personnes concernées, mais aussi pour permettre leur remise aux autorités de RCA lorsque ces personnes sont suspectées d'avoir commis des crimes ou des délits graves au regard de la législation pénale de la RCA.
- A la différence de l'opération Atalanta, la possibilité d'appréhender puis de retenir des personnes n'est pas expressément mentionnée dans l'acte juridique établissant l'opération, mais seulement dans les documents de planification opérationnelle et dans les règles d'engagement.

6. Dès lors que l'UE n'est pas compétente, par définition, pour poursuivre et éventuellement juger les personnes suspectées d'avoir commis des actes de piraterie ou des crimes et délits au regard de la législation pénale de la RCA, il convient de transférer les personnes concernées vers les Etats compétents.

(a) Dans le cadre d'Atalanta, en application de l'article 12.1. de l'action commune ci-dessus mentionnée, les personnes suspectées d'avoir commis des actes de piraterie ou des vols à main armée, et arrêtées et détenues en haute mer ou dans les eaux sous souveraineté de la Somalie,

14 Par exemple, *Medvedyev et autres* (jugement de la Cour européenne des droits de l'homme du 29 mars 2010)

sont transférés par l'opération Atalanta en priorité aux Etats membres ou aux Etats tiers dont le navire ayant capturé les personnes concernées bat le pavillon. Si ces derniers Etats ne peuvent ou ne souhaitent pas exercer leur juridiction, les suspects sont dans ce cas transférés à un autre Etat membre ou à un autre Etat tiers souhaitant exercer sa juridiction. Par ailleurs, en application de l'article 12.2 de cette même action commune, les personnes suspectées d'avoir commis des actes similaires, mais cette fois-ci dans les eaux souveraines d'autres Etats tiers, peuvent être transférées soit aux autorités de l'Etat côtier en question soit, avec le consentement de ce dernier, à un autre Etat.

(b) Pour ce qui concerne maintenant la RCA, seul ce pays est compétent pour poursuivre les crimes et délits commis sur son territoire, sauf exception liée à la compétence de la Cour pénale internationale (CPI).

Les conditions juridiques à remplir avant un transfert et les modalités procédurales de mise en œuvre de ces conditions

7. Quelles sont d'abord les conditions juridiques à satisfaire avant un transfert?

(a) Dans le cadre d'Atalanta, l'article 12.3 de l'action commune l'établissant dispose clairement qu' « Aucune des personnes mentionnées aux paragraphes 1 et 2 ne peut être transférée à un Etat tiers si les conditions de ce transfert n'ont pas été arrêtées avec cet Etat tiers d'une manière conforme au droit international applicable, notamment le droit international des droits de l'homme, pour garantir en particulier que nul ne soit soumis à la peine de mort, à la torture ou à tout autre traitement cruel, inhumain ou dégradant. ». Par conséquent, l'UE considère qu'il est nécessaire d'arrêter avec cet Etat[15] les conditions dans lesquelles le transfert peut être effectué. Le verbe « arrêter » est en fait suffisamment large pour couvrir les deux cas de figure suivants:

- le premier et de loin le plus fréquent consiste à conclure un accord international avec le pays tiers concerné par lequel ce dernier s'engage à respecter, pendant les phases de poursuite, de jugement et de détention, un certain nombre de conditions conformes au droit international des droits de l'homme ;
- il est aussi possible de demander au pays tiers d'émettre une déclaration unilatérale, par la voie d'une déclaration considérée par l'UE comme engageant juridiquement le pays en question, de respect des conditions énoncées ci-dessus. Cette technique a été utilisée à une reprise à l'occasion de la mise en œuvre d'un accord-cadre de participation de la Norvège aux opérations de gestion de crise de l'UE dans le cadre d'Atalanta.

15 Le transfert vers un Etat membre ne nécessitera pas la conclusion d'un arrangement avec l'UE, cette dernière considérant à priori que ses Etats membres accorderont à l''occasion du transfert un traitement conforme aux droits de l'homme aux personnes suspectes.

Lorsque la capture des personnes suspectées a lieu en haute mer, c'est-à-dire au-delà des eaux territoriales des Etats côtiers, il n'est pas nécessaire que l'accord de transfert ou la déclaration relative au transfert soit précédé de l'acceptation souveraine d'un autre Etat, dès lors que l'on se trouve dans une zone qui n'est pas soumise à la juridiction d'un Etat côtier.

En revanche, si les personnes concernées sont capturées par une force navale dans les eaux souveraines (eaux territoriales ou eaux internes) d'un Etats tiers riverain de la zone d'opération d'Atalanta, quelle que soit l'infraction dont cette personne est soupçonnée (pirate refugié dans ces eaux ou voleur à main armée), le transfert vers un autre pays tiers ne pourrait se faire que sur la base de l'acceptation de l'Etat tiers côtier. A l'exception de la Somalie, aucun Etat n'a accepté, dans le cadre de l'opération Atalanta, que des personnes capturées sur son territoire souverain à l'occasion de patrouilles ou d'une entrée dans les eaux territoriales, soient transférées vers un autre Etat. Pour ce qui concerne la Somalie, l'accès à ses eaux souveraines est autorisé par une résolution du CSNU[16] dont les dispositions autorisent implicitement le transfert vers un autre Etat tiers mais dont la mise en œuvre est conditionnée à la notification au Secrétaire général des Nations unies (SGNU) par le gouvernement de Somalie de l'offre de coopération faite par l'organisation internationale ou l'Etat autorisé à pénétrer dans les eaux souveraines de la Somalie. L'offre de coopération faite par l'UE à la Somalie dans le cadre d'Atalanta décrit les objectifs et les modalités des actions anti-piraterie entreprises dans les eaux de la Somalie, notamment par le biais du traitement juridictionnel des pirates et voleurs par des Etats tiers autres que la Somalie. Dès lors que cette notification au SGNU par la Somalie n'est pas obligatoire, l'accomplissement de cette formalité peut être vu comme une sorte d'acceptation par la Somalie que des personnes capturées sur son territoire soient transférées vers un autre Etat.

Il convient enfin de remarquer que dans le cas où la force Atalanta appréhenderait des suspects dans les eaux souveraines des Etats côtiers de la région autres que la Somalie, ces derniers n'accepteraient probablement pas que le transfert des suspects soit soumis à des conditions agréées avec l'UE, dès lors que la capture a été réalisée sur leur territoire souverain. Cette exigence pourrait se heurter à celle figurant à l'article 12 de l'action commune qui dispose que tout transfert vers un pays tiers, quel que soit le lieu de capture, ne peut avoir lieu que si les conditions de ce transfert ont été arrêtées préalablement avec cet Etat.

(b) Dans le cadre d'EUFOR RCA, la question se pose dans des termes sensiblement différents. L'objectif principal de l'opération n'est pas en effet de transférer des personnes suspectes vers les autorités de RCA mais de protéger des civils menacés. Si la nécessité d'un accord de trans-

16 Résolution 1816(2008)

fert figure dans les documents de planification, le choix du pays d'accueil est par définition contraint, à la différence des choix offerts dans le cadre d'Atalanta, puisque les personnes suspectées d'avoir commis des crimes et délits ne peuvent être remises qu'à la RCA, sauf compétence de la CPI.

8. Pour ce qui concerne maintenant la procédure applicable aux accords de transfert conclus entre l'UE et un pays tiers, il convient d'abord de rappeler que la base juridique de ces accords est fournie par l'article 37 TUE selon lequel « L'Union peut conclure des accords avec un ou plusieurs Etats ou organisations internationales dans les domaines relevant de la [PESC] »[17]. La procédure de conclusion des accords de l'UE est détaillée dans l'article 218 du Traité sur le fonctionnement de l'UE qui prévoit, pour ce qui concerne les accords conclus dans le domaine de la PESC:

- une décision d'ouverture des négociations prise par le Conseil des Ministres de l'UE sur recommandation du HR,
- une négociation par le HR assisté par le service européen pour l'action extérieure,
- une décision de conclusion de l'accord.

Le contenu des accords de transfert

9. Il convient d'abord de remarquer qu'il existe un certain nombre de points communs entre les accords de transfert conclus dans le cadre de l'opération Atalanta («Accords Atalanta») et celui conclu dans le cadre de l'opération EUFOR RCA («accord EUFOR RCA»).

a. En premier lieu, tous les accords contiennent une disposition générale située au début de l'accord selon laquelle les personnes transférées seront traitées avec humanité, en conformité avec le droit international des droits de l'homme. Les accords Atalanta se réfèrent en outre expressément à l'interdiction de la torture ou de tout autre traitement ou peine cruel, inhumain ou dégradant.

b. L'ensemble des accords contiennent des dispositions couvrant à la fois les obligations du pays où le transfert a lieu en termes de détention provisoire, de poursuite et de jugement et les procédures permettant le contrôle par l'UE du respect de ces obligations. En revanche, le traitement à réserver aux personnes emprisonnées après un jugement n'est pas explicitement couvert par l'accord et doit être compris comme couvert par la clause générale mentionnée au paragraphe ci-dessus.

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17 La Cour de justice de l'Union européenne a jugé dans l'affaire C- 658/11 que cette base juridique était justifiée en vue de la conclusion des accords de transfert qui ne sauraient être considérés comme rentrant dans le cadre de l'espace de sécurité, de liberté et de justice.

c. A l'exception de l'accord avec les Seychelles, où la peine de mort n'existe pas, l'ensemble des accords contient une disposition selon laquelle cette peine ne sera ni requise, ni prononcée, ni exécutée par le pays où les suspects sont transférés.

d. Tous les accords contiennent une disposition selon laquelle l'UE doit, soit marquer son accord au transfert d'une personne détenue du pays de transfert initial vers une tierce partie, soit se voir notifier préalablement ce re-transfert.

e. Enfin, les accords conclus sont des accords juridiquement contraignants, créateurs de droits et d'obligations sur le chef des parties, quelle que soit la forme sous laquelle ils ont été conclus (échange de lettres ou accord conclu sous une forme traditionnelle). A cet égard, l'UE a considéré que l'importance des garanties recherchées au profit des personnes transférées au regard des droits de l'homme nécessitait la conclusion d'un accord international juridiquement contraignant et ne pouvait se satisfaire de la conclusion d'un simple arrangement administratif entre les autorités compétentes de l'UE et du pays tiers concerné.

10. Les principales différences qu'il convient de souligner entre les accords Atalanta et l'accord RCA sont les suivantes :

a. Les accords Atalanta décrivent de façon détaillée les obligations du pays de transfert pour ce qui concerne les garanties à apporter aux suspects en matière de poursuites judiciaires et de jugement. L'accord RCA se réfère simplement aux conventions internationales sur les droits de l'homme traitant de ces questions judiciaires que l'Etat de transfert s'engage à appliquer au profit des personnes concernées. Il contient en revanche des dispositions plus longues et détaillées sur les possibilités données à l'UE de contrôler sur pièce ou sur place les conditions de détention des personnes transférées, ainsi qu'une disposition expresse sur la possibilité donnée au Comité international de la Croix-Rouge (CICR) d'accéder aux personnes transférées.

b. Les accords Atalanta ont pour objectif de prévoir les conditions du transfert vers le pays avec lequel l'UE a conclu un accord, des personnes suspectées d'avoir commis des actes de piraterie sans cependant que le droit international en vigueur n'oblige ces Etats à accepter de poursuivre et de juger ces pirates. L'accord de transfert prévoit ainsi la possibilité pour un Etat d'exercer sa juridiction mais ne le force pas à accepter toute demande de transfert, dès lors que des considérations juridiques ou politiques pourraient le conduire à refuser une demande de transfert faite par l'UE. C'est la raison pour laquelle les accords de transfert Atalanta précisent que le pays de transfert peut autoriser ou accepter le transfert, signifiant ainsi qu'aucune obli-

gation ne pèse sur le pays d'accepter de donner une suite favorable à la demande de l'UE[18]. Les choses se présentent différemment dans le cadre de l'accord RCA. Comme l'explique clairement son préambule, la rétention de personnes pour une courte durée peut s'avérer nécessaire pour l'accomplissement du mandat de l'EUFOR RCA, en particulier pour remettre ces personnes aux autorités de la RCA lorsque ces personnes sont susceptibles d'avoir commis des crimes et des délits au regard de la législation pénale de la RCA. Dans ce cas, sauf si EUFOR estime que les garanties offertes par l'accord pourraient ne pas être respectées, les personnes seront transférées à la RCA qui n'a pas d'autre choix[19] que de l'accepter, s'agissant d'actes commis par ses ressortissants et/ou sur son territoire.

c. L'accord RCA dispose expressément dans son article 3 que « Si une personne retenue par l'EUFOR RCA n'est pas transférée à la RCA dans les meilleurs délais, elle peut être détenue par l'EUFOR RCA, à condition que les autorités judiciaires centrafricaines l'y aient autorisée ». EUFOR RCA ne dispose en effet d'aucun mandat pour détenir des personnes au-delà d'une période nécessairement courte mais indispensable à l'accomplissement de son mandat ou à la protection des personnes concernées, sans l'autorisation d'une autorité judiciaire[20]. Cette possibilité n'est pas prévue dans le cadre d'Atalanta, dès lors que tant pour des raisons pratiques que procédurales, les autorités judicaires d'un Etat tiers ne sauront autoriser des autorités militaires étrangères à détenir au nom de cet Etat tiers des personnes suspectes à bord d'un bâtiment étranger naviguant dans une zone située hors de leur juridiction. Par conséquent, la rétention à bord des navires jusqu'au moment du transfert se fait sous la seule responsabilité d'Atalanta et du pays dont le navire retient la personne, étant entendu qu'en l'absence d'un pays où transférer les suspects, ces derniers devront être relâchés.

Conclusion

11. L'article 21 du TUE dispose que « L'action de l'Union sur la scène internationale repose sur les principes qui ont présidé à sa création, à son développement et à son élargissement et qu'elle vise à promouvoir dans le reste du monde », en particulier « l'Etat de droit, l'universalité et l'indivisibilité des droits de l'homme et des libertés fondamentales, le respect de la dignité humaine ». La fixation par la voie d'un accord international des conditions de transfert de personnels retenus par une force de l'Union européenne sur un théâtre d'opérations extérieures participe de la mise en œuvre de ces dispositions du TUE.

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18 Le mot « accepte » dans l'accord conclu avec le Kenya doit être entendu comme laissant une possibilité au Kenya de refuser le transfert.

19 Sauf compétence de la Cour pénale internationale (CPI).

20 Article 5(3) de la Convention européenne des droits de l'homme et jurisprudence de la Cour européenne des droits de l'homme.

12. Les accords de transfert doivent être appréhendés dans le contexte global de l'action extérieure de l'UE. A cet égard, l'UE dispose d'instruments lui permettant, dans le cadre de sa politique de coopération et de développement, d'aider financièrement les Etats en voie de développement à améliorer le fonctionnement de leurs services d'Etat, en particulier les services judiciaires. Dans ce cadre, les pays tiers avec qui l'UE a conclu des accords de transfert ont pu bénéficier de mesures de coopération en vue d'améliorer le fonctionnement de leur appareil judiciaire dans la lutte contre la piraterie maritime[21].

13. Les opérations liées à la capture, à la rétention et au transfert des personnes suspectées d'acte de piraterie ont fait l'objet de contentieux variés, aussi bien devant des cours nationales que devant des juridictions internationales, mettant en cause les Etats agissant individuellement ou dans le cadre d'organisations internationales comme l'UE ou l'OTAN, ou dans celui d'une coalition, mais pas l'UE elle-même. Les opérations dans le cadre desquelles ces accords de transfert sont conclus, bien que menées avec les moyens navals des Etats membres sont néanmoins des opérations décidées et mises en œuvre par l'UE. Les accords de transfert sont quant à eux conclus par l'UE qui dispose de la personnalité juridique. Il n'est pas impossible, par conséquent, que dans l'avenir, la responsabilité civile de l'UE puisse être mise en cause par des requérants, posant ainsi des questions intéressantes en terme de recevabilité des recours et de détermination des cours compétentes.

21 Programmes CRIMLEA (Critical Maritime Routes Law Enforcement Agency) et MASE (Maritime Security Programm).

POST-TRANSFER MONITORING MECHANISMS

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Résumé

Cette contribution porte sur les mécanismes de contrôle des lieux de détention afghans mis en œuvre par le Royaume-Uni (RU) suite aux transferts de détenus. Elle portera également sur le cas spécifique de la décision des autorités britanniques de transférer des personnes capturées aux autorités afghanes en 2013 et du réexamen continu de ces transferts.

En matière de détention, le RU ne procède pas au transfert de personnes privées de liberté sous son autorité s'il y a, au moment du transfert, de sérieuses raisons de croire que ces personnes risquent d'être sujettes à des actes de torture ou de mauvais traitements. Dans l'affaire Maya Evans *(2010), une* Divisional Court *britannique considéra en l'espèce que le risque de torture ou de mauvais traitements se posait à l'égard de toute personne transférée par le RU aux autorités afghanes, les méthodes d'interrogation et de détention utilisées par ces dernières (ici, l'*Afghan National Directorate of Security*) étant de nature à conduire à des tels manquements. Par conséquent, ne se posant plus à l'égard d'un seul individu, la question était alors celle de savoir s'il existait de potentielles violations systématiques et généralisées des droits de l'homme à l'égard de toutes les personnes détenues.*

Suite à un Memorandum of Understanding *(MoU) conclu en avril 2006 entre le RU et les autorités afghanes ainsi qu'un échange de correspondances entre plusieurs Etats et l'Afghanistan, les représentants étatiques et ceux de la Commission indépendante afghane des droits de l'homme, du Comité international de la Croix-Rouge (CICR) et de certaines agences onusiennes furent autorisés à visiter et à s'entretenir avec les détenus. En 2010, une* Detention Oversight Team *(DOT) britannique est déployée afin de contrôler les conditions de détention dans les lieux de détention afghans. La DOT informe aussi les autorités compétentes de l'interruption du transfert lorsqu'une personne précédemment détenue par le RU est susceptible de subir des actes de torture ou des mauvais traitements. Cette fonction a également des vertus préventives. Dans l'affaire* Maya Evans, *la Cour considéra que le système de surveillance du Royaume-Uni était, sous certaines conditions, suffisant pour prévenir la multiplication d'actes de torture et de mauvais traitements sur les personnes détenues à Lashkar Gah et Kandahar. Les transferts furent cependant acceptés*

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à la condition que des visites régulières et privées soient organisées auprès des détenus, et que le RU procède à la suspension immédiate des transferts ultérieurs si l'accès aux détenus est refusé sans raison valable ou si un détenu s'est valablement plaint de torture ou de mauvais traitement à son égard. D'autres instruments sont également disponibles dans l'arsenal du Secrétaire d'État britannique, dont certaines garanties liées au traitement des détenus font partie.

*Entre avril 2012 et l'été 2013, la suspension par le RU des transferts de détenus vers les autorités afghanes généra une série de problèmes opérationnels et diplomatiques. En 2013, plusieurs difficultés se posèrent quant à la situation des personnes détenues en vue d'être transférées mais qui ne le furent finalement pas. A défaut de pouvoir détenir ces personnes ou de les transférer, le RU se retrouva confronté à l'éventualité de libérer ces dernières, qui seraient dès lors enclines à poser des problèmes de sécurité au RU, à l'*International Security Assistance Force *(ISAF) et aux forces afghanes de sécurité, ainsi qu'à la population. La question s'est alors posée de savoir s'il y avait, en transférant ces personnes, des risques sérieux de penser que des mauvais traitements ou des actes de torture pouvaient être perpétrés à l'égard des personnes détenues si celles-ci étaient transférées aux autorités afghanes.*

*En juin 2013, le Ministère a évalué le risque que de tels actes surviennent dans plusieurs lieux de détention du pays. Le Ministère a aussi évalué la potentialité que les transferts soient réalisés en violation du droit à un procès équitable (article 6 Convention européenne des droits de l'homme – CEDH). L'évaluation du risque que des tels manquements puissent être commis à l'*Afghan National Defence Facility *(ANDF) ou dans d'autres lieux de détention n'a pas conduit à des résultats probants. Le Ministère a donc permis que les transferts vers l'ANDF reprennent sous réserve que la DOT procède à des inspections régulières des lieux de détention.*

In this presentation I will talk about post-transfer monitoring mechanisms from a UK perspective. I will attempt to put those mechanisms in context – where they fit and what function they perform. I will then also talk about post-transfer monitoring in the very specific context of the part it played in the decision to resume transfers of United Kingdom (UK) captured detainees to the Afghan authorities in 2013 - that transfer route being to the Afghan National Defence Facility (ANDF) at Parwan – and the continuing review of such transfers.

UK policy is that detainees will not be transferred into facilities where there are substantial grounds for believing, assessed at the time of transfer, that there is a real risk that they will be subjected to torture or serious mistreatment.

In *Maya Evans* (2010) the Divisional Court commented that the requirement not to transfer detainees where there is a real risk of torture or serious mistreatment accords, so far as relevant, with the requirement of Article 3 of the European Convention on Human Rights (ECHR)

The ultimate question for the potentially transferring State is whether there is a 'proper evidential basis' for concluding that transferees are at real risk of mistreatment.

In *Maya Evans* the Court noted that the risk of torture or serious mistreatment in respect of detainees transferred to the Afghan authorities was not said to arise from circumstances specific to any individual transferee. The contention was that all transferees were at a risk, as a class, because of the methods used by the Afghan National Directorate of Security (NDS) in questioning and handling detainees under its control. The question was whether there was a 'consistent pattern of gross systematic violations of [detainees'] human rights whilst in detention'.

The UK Detention Oversight Team (DOT) is one of the mechanisms on which the Secretary of State relied to assess and mitigate the risk of mistreatment in Afghanistan of the UK's transferred detainees.

An April 2006 Memorandum of Understanding between the UK and the Afghan authorities provided that representatives of the Afghan Independent Human Rights Commission (AIHRC) and UK personnel were to have 'full access to any person transferred to Afghan custody. The International Committee of the Red Cross (ICRC) and relevant human rights institutions within the United Nations system were also to be allowed to visit such persons. Specifically, UK personnel were to have 'full access to question' any persons that are transferred to the Afghan authorities whilst such persons are in custody.

In autumn 2007, the United States, Canada, the UK, the Netherlands, Norway and Denmark signed an exchange of letters with the Afghan government intended to establish a common approach to detainee transfers. The letters provide that officials from each government should have access to Afghan detention facilities 'to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan' and, on request, access to interview any transferee in private. The letters guarantee the same access for the ICRC, United Nations human rights bodies and the AIHRC.

In early 2010, UK armed forces formalised the processes which it had been developing over some years and in April 2010 set up a dedicated and bespoke DOT to provide assurance that detainees transferred to the Afghan authorities would continue to be appropriately treated. At the time, the UK DOT consisted, on an interim basis, of the Force Provost Marshal and the Bri-

gade Provost Officer together with support staff but later it consisted of a member of the Force Provost Marshal or the Royal Military Police and a military legal adviser with medical support.

The UK DOT was established in order to provide oversight and first-party assurance of all former UK detainees who remain in Afghan pre-trial detention and to ensure that UK forces will not transfer detainees initially detained by UK forces to any nation or national representative where, at the time of transfer, there is a real risk of torture or serious mistreatment. The UK DOT's main effort is to inform decision-makers regarding the cessation of transfer where there is a risk that former UK detainees will face serious mistreatment or torture.

As noted by the Court in *Maya Evans,* tracking and monitoring also has a secondary, but powerful, purpose, namely: 'The existence of an effective system of monitoring not only provides a check after the event but should also serve to encourage compliant behaviour on the part of the NDS in the first place.' The Association for the Prevention of Torture describes the functions that monitoring visits fulfil as including prevention (i.e. deterring abuse by the very fact of its existence and preventing abuse by actively anticipating and addressing potential problems), direct protection (i.e. promptly responding to problems) and documentation of conditions to form a basis of judgement and justify recommendations.
In *Maya Evans* the Divisional Court accepted that the Secretary of State's policy reflects the international law test whether or not the European Convention on Human Rights applies. The Court noted that the Secretary of State's policy was not under challenge but accords, so far as relevant, with the requirements of Article 3.

The Court recognised the improvements over time in the UK's approach to monitoring, with its enhanced awareness of the importance of private visits and the establishment of a dedicated DOT.

The Court ruled, after some hesitation, that the operation of the UK's monitoring system, reinforced by certain stipulated safeguards, was sufficient to guard against the occurrence of abuse at NDS facilities in Lashkar Gah and Kandahar on such a scale as to give rise to a real risk of torture or serious mistreatment to transferred UK detainees.

The stipulated safeguards were as follows:

1. all transfers must be made on the express basis that the DOT is given access to each transferee on a regular basis, with the opportunity for a private interview on each occasion;
2. each transferee must in practice be visited and interviewed in private on a regular basis; and

3. the UK must consider the immediate suspension of further transfers if full access is denied at any point without good reason or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot reasonably and rapidly be dismissed as unfounded.

Public interest lawyers, who acted for Maya Evans, hailed the Court's stipulations as 'promis[ing] to profoundly change British detainee policy in Afghanistan for the better'. It is important to note that tracking and monitoring forms just one part of the basis for the Secretary of State's assessment of the risk to detainees evident at the time of transfer, although it is, of course, of considerable importance in making judgement as to whether it is appropriate and consistent with the policy for transfers to be made. For example, another part of the basis for the assessment might be assurances as to treatment of detainees, perhaps in the form of a memorandum of understanding or an exchange of letters. The parts are also inter-linked. For example, tracking and monitoring might act as a mechanism to test the veracity of any assurances given. The various steps to ensure that there was not a real risk are intended to operate together, and the various strands should not be viewed in isolation.

On 6 October 2010, written evidence from the Foreign and Commonwealth Office to the Foreign Affairs Commons Select Committee on the UK's Foreign Policy towards Afghanistan and Pakistan stated:

> 'Written arrangements governing conditions of detention combined with monitoring detainees once in Afghan custody, together with well-established contacts with Afghan representatives, are key elements of the UK's strategy for mitigating the risk of mistreatment. The robustness of these arrangements has been increased through the establishment of the Detention Oversight Team (…)'

Between April 2012 and summer 2013 no transfers of UK detainees to the Afghan authorities took place. There was a suspension, or moratorium, in place preventing transfers to the Afghan authorities at any location.

This caused increasing operational and diplomatic difficulties.

In 2013 challenges were also brought by some of the detainees who were being held in UK pre-transfer detention during this period when no transfers were taking place. They claimed that there was no power to detain those held by British forces in Afghanistan.

The UK was in the stark position where, if there was no ability to transfer and no power to detain, the detainees would have to be released, with all the obvious and serious immediate

risks to the UK, the International Security Assistance Force (ISAF) and Afghan security forces personnel, and civilians, the lack of justice served and the significant implications for future operations and the UK relationship with the Afghan government.

In June 2013 the Secretary of State considered whether there were substantial grounds for believing that there was a real risk at the point of transfer that UK detainees would be subjected to torture or serious mistreatment if they were transferred to ANDF Parwan. In addition, were ECHR found to apply, could transfers be deemed unlawful on the basis of the risk of flagrantly unfair trials (Article 6) at the hands of the Afghan authorities?

It is necessary to look in some detail at ANDF Parwan, and the role that the UK DOT would play together with the Afghan criminal justice system to consider the circumstances in their entirety.

ANDF Parwan is a national detention facility to which, in 2013, a number of ISAF partners were already transferring detainees. It is the principal Afghan detention facility for ISAF detainees. It was purpose-built by the US as the Detention Facility in Parwan (DFIP) in 2009 but was subsequently run by the Afghan National Army (ANA) for the investigation into alleged crimes connected to the insurgency or terrorist activity. It was built to provide self-contained, end-to-end detention, interviewing and investigation capabilities. The facility also includes an Afghan national security court (the Justice Centre in Parwan (JCIP), which was an entirely new facility) and has been run by the Afghans since its construction in 2009.

The UK would continue to conduct monitoring visits of all pre-trial former UK detainees transferred to ANDF Parwan by the DOT, keeping the risk of mistreatment under constant review. All transfers would be made on the express basis that the DOT would be given access to each detainee in accordance with the first *Maya Evans* stipulation.

The assessment was that the risk of torture or serious mistreatment at ANDF Parwan was very low; it was not believed that there was a real risk of torture or serious mistreatment at the ANDF Parwan facility.

However, the potential risk of torture or serious mistreatment in relation to the place or places at which a person might serve any sentence imposed by the Afghan courts was also considered. Post-sentencing, convicted detainees with sentences to serve would be held at either the Ministry of the Interior run Pol-e-Charki prison or the ANA run facility co-located at Pol-e-Charki. It was not judged that there was a risk of serious mistreatment or torture at Pol-e-Charki.

As referred to earlier, the risk of flagrantly unfair trials was also considered.

It was assessed that there was no real risk of a flagrant denial of justice at the JCIP.

The Secretary of State was advised that on the basis of the arrangements in place at ANDF Parwan, and the information received, the assessment was that there was not a real risk of torture or serious mistreatment at the ANDF Parwan facility. Conditions at ANDF Parwan would be actively monitored, not least through the US and through regular UK DOT inspections of UK detainees. The decision to transfer would be kept under review in accordance with MOD policy. Additionally, the Secretary of State was advised that there was no real risk of a flagrant denial of justice.

The Secretary of State agreed that transfers should commence to ANDF Parwan.

Twenty-one days' notice of the Secretary of State's intention to resume transfers was given to claimant lawyers.

There was no challenge to the Secretary of State's decision to commence transfers to ANDF Parwan.

During the debate following the presentations of the fourth session, the audience raised four main issues.

1. Principle of *non-refoulement* Found in IHL and its Aftermath

A participant questioned the argument made by a panellist as viewing Article 1 of the Geneva Conventions as a potential legal basis for the principle of *non-refoulement* in non-international armed conflicts (NIACs), especially with respect to post-transfer responsibility.

The panellist explained that the obligation to 'undertake to respect and to ensure respect for the [Geneva Conventions] in all circumstances' contained in common Article 1 is an obligation of means and not an obligation of result. Highlighting that common Article 1 is subject to many interpretations, the panellist said that he favours a more substantial approach which involves the obligation to take all measures that can be feasibly taken to fulfil the obligation. This is particularly true when it comes to an allied country supporting another State. Taking the example of Afghanistan, the United Kingdom (UK) is in a much better position to take a number of measures in order to ensure the treatment of detainees who were under UK custody than a State which is not present in Afghanistan. Consequently, as a State, your responsibility based on common Article 1 is commensurate to the practical possibility you have to influence the behaviour of the other party. He then explained that Article 1 could be read as support for interpreting the principle of *non-refoulement* into common Article 3. With regard to post-transfer responsibility, the panellist did not claim that there is an obligation to do post-transfer monitoring in all cases but certainly that doing post-transfer monitoring – especially with the second purpose (in order to ensure better treatment) – would be line with common Article 1. Moreover, since States make efforts to ensure the treatment of the detainees also after they have left their hands, the panellist explained that there is definitely State practice in that regard. He however acknowledged that States do not usually say what is the legal basis they consider for that to be necessary.

A participant reminded that, as an occupying power, you have the *non-refoulement* obligation not to transfer protected persons to the local authorities, but that under Article 49 of the fourth Geneva Convention (GC IV), you may not transfer them to your home country or any other country. Would the *non-refoulement* principle - being a *jus cogens* principle - prevail over the prohibition of Article 49 GC IV?

Staying with a more practical than legal observation, one of the panellists said that beyond the legal prohibition to return people, the situation of occupation is not so different from

extraterritorial application. States would somehow resolve these difficulties in both directions by resorting to capacity building and post-transfer monitoring in order to actually render the transfer possible in respect of the principle of *non-refoulement* rather than bringing all protected people back home.

2. Pre-Transfer Obligations and Challenges

Highlighting that the debate had crystallised around the systematic problems in Afghanistan detention facilities, another participant wondered whether this would come from the limited discussions experts had on the individualised risk assessment process that may or may not be required under International Humanitarian Law (IHL). The participant emphasised that according to Articles 12 GC III and 45 GC IV, the transferring authority has to have 'satisfied itself of the willingness and ability of [the] transferee Power to apply' the Convention. He wondered what the words 'satisfied itself' actually mean in this context.

Referring to Article 118 GC III as a model, one of the panellists explained that, at the time this provision was drafted, it was understood that the implicit *non-refoulement* contained in Article 118 should be done through an individualised assessment. Answering the participant's question, the panellist stated that it is up to the authority in charge to put this individualised assessment in place. He then explained that, when involved in a transfer operation, the International Committee of the Red Cross (ICRC) always asks every person that is supposed to be repatriated whether he or she agrees or not. The ICRC however reminds the State that doing so, it is not fulfilling the State's own obligation to listen directly to that person.

As a matter of example, the panellist stressed that in the European Union (EU)-Central African Republic (CAR) Transfer Agreement (hereafter, 'CAR agreement'), European Union Force Central African Republic (EUFOR RCA) must inform the person and give him/her the opportunity to express any concern and, before taking a final decision on the transfer, examine any concerns expressed (Article 3.3 RCA agreement).

The fact that the ICRC does not participate in a repatriation of a prisoner of war (POW) against his or her will was highlighted by a participant. One of the speakers confirmed this point, adding that, if the person does not want to be repatriated, the ICRC will not participate in the transfer, whatever the reason. Now, it is clear that if the person does not want to be repatriated for a reason which is not linked to the principle of *non-refoulement*, forced repatriation might be perfectly lawful, even if the ICRC would not participate. The question is maybe more delicate in the other sense when the repatriation would be forbidden under the principle of *non-refoulement* but the person nevertheless wants to go back.

3. Temporal Scope of Transfer Agreements and Monitoring Mechanisms

Recalling that Article 118 GC III does not contain the principle of *non-refoulement* as such, a participant however evoked the *lex specialis* character of the principle with respect to that provision. He then wondered whether there was any precedent of an agreement regarding the monitoring of people returning home. Once they are at home, there is no way to assess their conditions after repatriation.

A panellist replied that he was not aware of any monitoring agreement covering returned POWs. However, he insisted on the fact that the question is particularly acute for military operations abroad, which are slightly different situations from a factual point of view. Political reasons could also explain such transfers. The principle of *non-refoulement* actually encompasses two components. The first is a risk assessment before transferring the person. As recalled during the third panellist's presentation, the second aspect is a preventive dimension. It entails an active monitoring by the transferring power of the future conditions of detention by anticipating and addressing potential problems before the transfer. This second component – strengthened in the *Maya Evans* case - is the key concept to ensure the transfer will not cause mistreatments and will ultimately render it lawful.

Another participant wondered whether – within transfer agreements – there is any temporal limitation for monitoring after the transfer was completed. Is there any precedent on which such a provision was not adhered to and, if any, what happened in case of violation of the agreement?

A speaker said that all the transfer agreements the EU has concluded contain a provision according to which the agreement will remain in force until the end of the EU force deployment. In the context of the EU military operation in the CAR (EUFOR RCA), the EU-CAR agreement stipulates that '[t]he expiry or the termination of this Agreement shall not affect the rights and obligations resulting from the implementation of the Agreement (…)' (Article 10.3 CAR agreement). This means that the country's authorities are supposed to keep complying with their obligations after the departure of the EUFOR RCA components. However, since there will be no European presence afterwards, how do we ensure this provision is effectively complied with on the ground? The agreement actually contains a range of mechanisms that allow EU representatives to visit detention facilities, to control registers and to undertake other measures in order to monitor conditions of detention. Furthermore, the CAR agreement also contains a provision specifying that '[t]he ICRC, or any other impartial humanitarian organisation mutually approved by the Parties, shall have a permanent right of access to the transferred persons' (Article 6.1 CAR agreement).

However, some problems might arise when people are transferred to third countries, the panellist explained. Within the context of Operation Atalanta (EUNAVFOR, European Union Naval Force), several persons who had been transferred to Mauritius and to the Republic of Seychelles were afterwards transferred to Somalia after EU authorisation. The EU can of course monitor in third countries, but it becomes increasingly more difficult in countries like Somalia, the speaker explained. Transfer agreements nevertheless routinely provide for this possibility to transfer persons to third States. These mechanisms are indeed crucial in order to make transfer agreements acceptable for the transferring States. The speaker finally stated he had no examples of non-compliance with respect to such mechanisms.

Recognising the progress that has been made by the International Security Assistance Force (ISAF) and the involved countries on the question of post-transfers monitoring in Afghanistan, one of the participants nevertheless highlighted the shortcomings in terms of access of human rights organisations to detention facilities, e.g. Bagram detention facility in Afghanistan. The participant also questioned the panellists about which measures the UK authorities have taken in order to avoid transfers to non-certified detention facilities of reoccurring, as well as which monitoring measures are planned from the UK side. The participant then asked the speakers to what extent the lessons learned in Afghanistan have been taken in the situation of CAR.

One of the panellists replied that monitoring is a very resource-intensive procedure. On this issue, he emphasised that the lack of consensus within the coalition - i.e. States' divergent viewpoints on what types of mechanisms are required - does not facilitate the debate. He nonetheless explained that individual risk would be considered by the UK and taken into consideration in the case of an individual transfer decision.

Regarding CAR, a panellist stated that the EU tried to learn from Afghanistan by forging the most comprehensive agreement possible. In the CAR agreement, two specific provisions relate to 'Registration, monitoring of the conditions of detention of transferred persons and access to detained person' (Articles 5 and 6). Article 5 allows representatives of the EU to visit all places containing transferred persons and Article 6 contains the ICRC's right of access to transferred persons. These provisions allow the EU - as well as other players - to visit the transferred persons,.

Finally, another participant suggested having only one team executing all monitoring tasks instead of having one team for each country. A speaker replied that, as far as the EU is concerned, a representative of the EU in the person of the Head of Delegation can monitor the visits. He nevertheless stated that the words 'representative of the EU' could easily be inter-

preted as referring to a member State representative, entailing troublesome situations. This was the case in Somalia where member State representatives had access to detention facilities.

4. Challenges with Respect to Legal Basis for Transfer Agreements

A participant raised a question regarding the potential challenges coming from the suspension of transfers in terms of legal basis. Were there any challenges brought to the fact that people had been detained during that period when transfer was no longer possible?

A panellist said there were not any challenges specifically to the power to detain during that period. The challenges initiated in the UK court, which were pure *habeas corpus* challenges actually then dematerialised at the point that it became apparent that there were detainees actually consenting to being transferred. And therefore, they were content to be transferred as opposed to continue with the *habeas corpus* challenges.

Panel Discussion: The Interplay between International Humanitarian Law and Human Rights Law when Detaining in Armed Conflict

THE EUROPEAN COURT OF HUMAN RIGHTS AND INTERNMENT IN EXTRA-TERRITORIAL NIACS

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Résumé

Avant l'affaire Hassan c. Royaume-Uni*, la Cour européenne des droits de l'homme s'est à plusieurs reprises prononcée sur la question de l'intervention d'un Etat tiers dans une situation d'urgence interne. La Cour n'a cependant statué sur la question que dans le cadre de situations impliquant un danger public ne constituant pas un conflit armé.*

Enonçant exhaustivement les cas dans lesquels une personne peut être privée de liberté, l'article 5 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH) ne dit mot de l'internement ou du réexamen de la détention. En vertu de l'article 15.1 de la CEDH, il est toutefois possible de déroger à son article 5 en cas « de guerre ou en cas d'autre danger public menaçant la vie de la nation ». *La jurisprudence de la Cour révèle toutefois que l'internement est permis à la double condition que (i) la situation justifie la nécessité de déroger et que (ii) l'Etat envisageant d'interner puisse justifier la nécessité – et non simplement l'utilité – de le faire.*

Est-il nécessaire de déroger à l'article 5 pour en modifier l'application normale ou y a-t-il un autre moyen d'y parvenir? Et peut-on en modifier l'application normale en se fondant simplement sur le droit international humanitaire (DIH) sans déroger à l'article 5 par ailleurs ? Si la dérogation s'avère nécessaire, alors surgit la question de savoir si un Etat peut déroger à cette disposition en dehors de son territoire national. L'Etat A, assistant l'Etat B en intervenant sur son territoire, peut-il se fonder sur une dérogation introduite par celui-ci ? Et a fortiori*, l'Etat A peut-il pour ce faire se fonder sur la législation nationale de l'Etat B dans le cadre d'un conflit armé non international (CANI)? L'arrêt* Hassan *répond à certaines de ces questions.*

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

Il convient de préciser que l'arrêt Hassan *concerne une situation de conflit armé international (CAI), non de CANI. De surcroît, dans le cadre de cette décision, la Cour attend de l'Etat qu'il invoque lui-même le DIH, pas qu'il l'applique* proprio motu. *Selon la jurisprudence* Hassan, *l'Etat pourrait invoquer le DIH dans trois cas : l'autorité pour détenir dans un CAI, les motifs de détention, et la possibilité de modifier l'application normale de la procédure d'*habeas corpus *– le droit d'une personne de contester la légalité de sa détention – sur la seule base du DIH. Ce dernier point constitue une vraie difficulté pour les instances des droits de l'homme, qui ont régulièrement affirmé – dans des contextes autres que de conflits armés – que la règle de l'*habeas corpus *ne peut souffrir aucune dérogation. Sur ce point, la Cour a énoncé que, dans le cadre d'un CAI, et pour autant que l'Etat ait invoqué expressément le DIH, une instance non judiciaire pourra procéder à l'examen de la détention. Suite à l'arrêt* Hassan, *un certain nombre de questions demeurent toutefois sans réponse. La Cour exigera-t-elle un examen de la détention des prisonniers de guerre ? Quid de la fin de la détention ? Et quand intervient-elle ?*

Si la Cour est assez claire à l'égard des CANIs purement internes (l'Etat devra déroger à l'article 5 afin de pouvoir interner), elle l'est beaucoup moins en ce qui concerne les CANIs se déroulant en dehors du territoire d'un Etat y étant impliqué, aussi appelés CANIs extraterritoriaux. S'agissant de ces derniers, la Cour n'est pas claire quant à l'exigence de déroger à l'article 5 afin de pouvoir interner. Il est probable que suite à l'arrêt Hassan, *la Cour européenne exige que l'Etat impliqué dans un CANI extraterritorial soit en mesure de déroger en dehors de son propre territoire. La question de savoir si cet Etat étranger devra se fonder sur sa propre législation ou s'il pourra s'appuyer sur celle de l'Etat territorial, reste cependant en suspens.*

I am one of the co-authors, with my colleague Noam Lubell, of the third party intervention in *Hassan*. It looks as if the European Court of Human Rights (ECtHR) paid quite a lot of attention to the third party intervention. In order to understand this case, it is important to know where the ECtHR was coming from. The Court has a history of dealing with this issue in the context of domestic emergencies, but not in the context of armed conflicts. At the time this panel was put in place, we did not know when we would get the judgement in the *Hassan* case.

Article 5 of the European Convention on Human Rights (ECHR), unlike any other human rights instrument, lists exhaustively the only permitted grounds of detention. The provision does not include internment and does not include requirement of effective review procedure. A derogation from certain provisions of the ECHR is possible only in situations of 'war or other public emergency threatening the life of the nation.' It is important to remember that the derogation does not mean eliminating a right, but modifying the normal application of the right. Article 5 is potentially derogable.

What was the Strasbourg case law on Article 5 and derogation before the *Hassan Case*? The case law shows that on condition that the situation justifies the need for derogation *and*, separately, on condition that you can justify the need (not merely the convenience) of interning people, then internment will be permitted.

The ECtHR has therefore no problem *in principle* with internment but it used to address the issue of internment in the context of where a State has derogated. It is clear that the State has to derogate in order to be able to justify internment. The Court required, in the case of internment, some provision on the necessary safeguard against the risk of ill-treatment and it seems to require some form of review. However, the very nature of internment means that it will not be reviewed by a court. The leading cases are *Lawless v. Ireland* (1957-1961) and *Ireland v. UK* (1978), which are relatively old cases.

Before the *Hassan* case, a range of questions have been raised by the case law. The first is whether you have to derogate to modify Article 5 or whether there is another way you could modify it. Could you rely on IHL on the grounds that it is one of the obligations binding member States that needs to be taken into account because the ECtHR insists that Human Rights Law is part of the wider framework of international law? So, could you modify Article 5 simply by reliance on International Humanitarian Law (IHL) as opposed to derogation? If the answer to that was 'no, you need to derogate', the question that arose was: can we derogate outside national territory?

Could State A, which is assisting State B in B's territory, rely on a derogation by State B? If Afghanistan had derogated under the International Covenant on Civil and Political Rights (ICCPR), could the UK have relied on that derogation without making its own, either before the Human Rights Committee or before the ECtHR? The second question is: in extra-territorial non-international armed conflicts (NIACs), can an intervening State rely on the host State or the territorial State's domestic law? If Afghanistan had had a law on internment (which it did not have), could the UK possibly, by a derogation, then have invoked an Afghan law on internment? Many of these questions are addressed by *Hassan*.

The *Hassan* case was first of all about a situation of international armed aonflict (IAC), not a NIAC one. The judgment of the ECtHR is if, *but only if* - and this is slightly odd - the respondent State invokes IHL, then Strasbourg will allow it to have some sort of effect. What Strasbourg will not do, is *proprio motu* use IHL. Why not? It is not clear, but they will not. They will allow a State to use IHL to address three issues: the *first* is the authority to detain in an IAC, the *second* is the grounds of detention and the *third* is the fact that you can modify the normal *habeas corpus* requirement simply by reliance on IHL.

The third issue is a real problem for a human rights body, because many human rights bodies have said - not in the context of armed conflict - that the *habeas corpus* provision, in effect, is non-derogable. It is generally the opinion of human rights bodies that you cannot modify the *habeas corpus* requirement. On this point, Strasbourg has clearly said that they will allow review to be conducted by a body that is not a court, when it is an IAC *and* when the State has invoked IHL. However, the *Hassan* judgment still leaves open a range of questions, including in IACs. We still do not know whether the ECtHR is going to require some kind of review for the detention of prisoners of war (POWs) and we do not know what the procedural rights are. The implication of *Hassan* is a mixture of human rights and IHL, even if we do not know what the mixture is. The Court did not want to address - because it was not relevant considering the facts - the issue of the end of detention: what is the test for ending it? We also do not know whether the State can rely on IHL in an IAC for things it does in its own territory - for example, if it interns enemy aliens. There are still a lot of questions even in IACs.

What about extraterritorial NIACs? There is an important paragraph – and I do not know what it means:

> 'It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.' (*Hassan v. UK*, paragraph.104).

The key question, is when the Court said that, was it thinking of internal armed conflicts - e.g. Northern Ireland and Eastern Turkey - *or* were they thinking as well of extraterritorial NIACs? We do not know. My view is that, with regard to a NIAC in the State's own territory: the Court is going to require that States derogate in order to intern. For Strasbourg, this is the *Lawless v. Ireland* case. This is not an IHL question, I suspect. That means that the State will have to establish the need for internment, but also to establish safeguards against the risk of ill-treatment. The State will also need some kind of review system, but obviously not a court.

There is nothing but questions regarding NIACs outside the own territory of the State. Can you rely on IHL? Does it means relying on customary law? It was easy in *Hassan* because they could point to treaty law (Article 3 common or second Additional Protocol). I think Strasbourg is going to be much more reluctant to rely on an argument based on customary law. I think the logic of *Hassan* means that the State is going to have to be able to derogate outside its own territory. If the State can exercise its jurisdiction outside the territory, it must be able to derogate outside its territory. We still do not know if the State is going to be able to rely on the host State's domestic law (if any) on internment or if it needs to have its own legislation.

With regards to the ECHR and detention in extra-territorial NIACs, if the State wants to invoke IHL, it will have to plead it. I suspect that the State is going to have to derogate. This means derogate, and then, invoke IHL. Possibly, if the host State has a law on internment, it would be best to plead it as an alternative. So, derogate, invoke IHL and, on the alternative, the host State's law on internment. If that does not work before the Strasbourg Court, then in effect, what is going to have to happen, is that the State derogates and then it introduces national legislation, giving it the authority to intern extraterritorially. I have no doubt that Strasbourg will at the end of the day allow the State to intern. The problem is finding what Strasbourg expects you to do in order to be able to do it. However, if it means derogating and passing your own legislation, is that not better than not interning?

THE HUMAN RIGHTS COMMITTEE'S GENERAL COMMENT ON ARTICLE 9, (PERTAINING TO THE RIGHT TO LIBERTY AND SECURITY) AND ITS RELEVANCE TO SECURITY DETENTION

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Résumé

L'Observation générale n°35 (2014) du Comité des droits de l'homme des Nations unies (CDH) porte sur l'article 9 (ayant trait à liberté et sécurité de la personne) du Pacte international relatif aux droits civils et politiques (PIDCP) et remplace l'Observation générale de 1982. Dans l'Observation générale n°35, le CDH offre une orientation interprétative des problèmes de détention pour raisons de sécurité en situation de conflit armé ou en dehors et, ce faisant, aborde la relation épineuse *entre le droit international humanitaire (DIH) et le droit international des droits de l'homme (DIDH).*

Sans évoquer les situations de conflit armé, le CDH envisage la détention de sûreté de manière extrêmement restrictive, la considérant a priori *comme arbitraire, d'autres mécanismes tels que le système pénal étant disponibles. Une telle détention – qui ne doit pas excéder le délai absolument nécessaire – ne pourrait être envisagée que dans des circonstances exceptionnelles, lorsqu'une « menace immédiate, directe et inévitable est invoquée pour justifier la détention d'une personne considérée comme présentant une telle menace » (paragraphe 15). De plus,* « la charge de la preuve incombe à l'État partie, qui doit montrer que la menace émane de l'individu visé » *(paragraphe 15) sans qu'aucune autre mesure ne puisse être prise. Plus la détention sera longue, plus la charge de la preuve augmentera. D'autres garanties, telles que le réexamen rapide et régulier de la régularité de la détention par un organe indépendant et impartial,* « l'accès à un conseil indépendant *(…) et la communication au détenu (…) de la nature des preuves sur lesquelles la décision est fondée » sont également exigées par le CDH dans son observation générale. Il importe d'observer que, selon le texte du CDH, la détention pour raisons de sécurité est permise pendant ou en dehors une situation d'urgence sans devoir déroger au PIDCP.*

Dans son observation générale n°35, le CDH utilise un langage similaire à celui des textes de DIH applicable aux conflits armés internationaux (CAI), faisant appel à des expressions telles que l' « absolue nécessité » (art. 42 CG IV) ou d' « impérieuses raisons de sécurité » (art. 78 CG IV) afin de souligner le caractère exceptionnel de la détention de sûreté. A l'instar de ce que

1 This contribution has been written by the author on his personal capacity.

stipule le texte du CDH, ce type de détention devra toujours faire l'objet d'un réexamen dans les plus brefs délais par « un tribunal ou un collège administratif compétent » *(art. 43 CG IV). Le DIH constitue-t-il toutefois un corps juridique approprié sur lequel puisse se fonder le CDH ? Cette interprétation fusionnelle du DIDH et du DIH conduit par exemple à se demander si le CDH n'offre pas clairement aux Etats la possibilité de recourir à des organes non judiciaires dans le cadre de l'article 9(4) du PIDCP.*

Le paragraphe 64 de l'Observation générale n°35 dispose que l'article 9 – aussi applicable dans les conflits armés – peut faire l'objet d'une interprétation à la lumière du DIH, ce dernier constituant le seuil en deçà duquel les dérogations ne peuvent descendre. Si le DIH est utile aux fins d'interprétation de l'article 9 en cas de CAI, il serait toutefois inexact de lire l'Observation générale comme indiquant que le DIH constituerait également la (seule) base interprétative de cette disposition dans le cadre d'un CANI. En cas de CAI, les garanties prévues par l'article 9 pourraient donc être largement dépassées dans la mesure où la CG IV prévoit un régime de privation de liberté basé sur le statut d'interné (réexamen de la détention tous les 6 mois seulement, pas d'accès à un avocat, pas de droit à être informé sur les raisons de l'arrestation au moment de celle-ci, etc).

En ce qui concerne les dérogations, le CDH dispose qu' « [en dehors des CAI], *les conditions de stricte nécessité et de proportionnalité s'appliquent à toute mesure dérogatoire concernant la détention pour raisons de sécurité, qui doit être d'une durée limitée et être accompagnée de procédures empêchant une application arbitraire (…) y compris le réexamen par un tribunal (…)* » *(paragraphe 66). Bien qu'une certaine lecture de l'Observation générale aille en ce sens, il est improbable que le CDH ait voulu dire que dans le cadre d'un CANI, l'Etat doive se fonder sur le régime dérogatoire de l'article 4 PIDCP – et non le DIH – afin de pouvoir procéder à la détention pour raisons de sécurité.*

L'Observation générale n°35 atteste du fait qu'aujourd'hui, le CDH a son mot à dire en ce qui concerne la relation DIH-DIDH. Cependant, sans prendre à bras le corps la question, il convient de relever qu'en dehors des contextes des CAI, le CDH a produit une sorte de cadre commun des garanties applicables à la détention de sûreté, se situant à la fois au-dessus de ce que requiert le DIH et en deçà de ce qui est exigé par le DIDH.

Author's note: At the time of my presentation at the Colloquium, the United Nations Human Rights Committee (HRC) was in the process of drafting General Comment 35 on Article 9. Soon after my presentation, the HRC adopted the General Comment. What follows are remarks that reflect on the finalised text and not the draft text.

Introduction

The United Nations Human Rights Committee's (HRC) General Comment 35 focuses on Article 9 of the International Covenant on Civil and Political Rights (the right to liberty and security) and stretches over 68 paragraphs.[2] The new General Comment replaces the Committee's four paragraph General Comment 8 from 1982.[3]

The main focus of this presentation is on the interpretive guidance that General Comment 35 provides for security detention both within and outside the context of armed conflict. In providing this guidance, the HRC grappled with some of the most difficult issues that rest at the intersection of International Humanitarian Law (IHL) and International Human Rights Law (IHRL). As Yves Sandoz noted in his opening remarks to the Colloquium, the General Comment 35 drafting process was one of several significant international law projects that attempt to give greater precision to the rights and obligations States have when detaining individuals in times of armed conflict.[4] In this light, the General Comment is a contribution to recent court rulings and the work of various other initiatives, such as the Copenhagen Process on the Handling of Detainees in International Military Operations and the International Committee of the Red Cross (ICRC)'s ongoing work on contemporary challenges in International Humanitarian Law.[5]

The new General Comment, similar to the previous one, clearly permits security detention when properly regulated.[6] What is new compared to its 1982 predecessor is the General Comment 35's elaboration on what it means for security detention to be properly regulated. In assessing these elaborations, I will draw attention to 1) the latitude the HRC gives to security detention and how the HRC grants that latitude; 2) the application of Article 9 in extraterritorial non-international armed conflict (NIAC); and 3) how assertive the HRC is in defending International Human Rights Law (IHRL) when it finds itself in "competition" with IHL.

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2 United Nations Human Rights Committee, General Comment No. 35 (Article 9: Liberty and security of person), October 2014.

3 United Nations Human Rights Committee, General Comment No. 8 (Article 9: Right to Liberty and Security of Persons), June 1982.

4 Cross reference to Opening Remarks (Citation forthcoming.)

5 See, for example, *Hassan v. U.K.*, ECtHR, Application no. 29750/09, Judgment of Grand Chamber, 16 September 2014; and *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB). See, also, Bruce 'Ossie' Oswald, "Some controversies of detention in multinational operations and the contributions of the Copenhagen Principles", in: *International Review of the Red Cross* (2013), Volume 95, Number 891/892; and International Committee of the Red Cross (ICRC), *Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict: Regional Consultations 2012-13* Background Paper, at: <https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf.>

6 Compare paragraph 15 of General Comment No. 35 to paragraph 4 of General Comment No. 8.

Article 9 Security Detention: What is Permitted?

The HRC approaches the topic of security detention with extreme caution and grants States only limited latitude in using security detention. Without making mention of armed conflict, the HRC observes that security detention is normally arbitrary, as other mechanisms, including criminal justice systems, would be available. The General Comment states that only under the most exceptional circumstances, and where a present, direct, and imperative threat is invoked to justify security detention, the burden is on the State to prove that there is a need for a person to be held in security detention, and that burden increases with the length of detention. The General Comment holds that '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 comply with the guarantees provided for by Article 9 in all cases.'[7]

To further guard against arbitrary detention, if an individual is held in security detention, the individual must have access to a '[p]rompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary.' [8] Later in the text, the HRC observes that in exceptional circumstances, under Article 9(4), 'legislation may provide for proceedings before a specialized tribunal, which must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.'[9]

The HRC also states the need for '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.'[10]

As a general principle, despite the exceptional nature of security detention and the safeguards put forth by the HRC, the HRC does not appear to interpret Article 9 as requiring security detention to take place only under the International Covenant on Civil and Political Rights (ICCPR)'s Article 4 derogation regime in time of public emergency which threatens the life of the nation. According to the General Comment it seems therefore that Security detention is permitted both inside and outside the context of an emergency situation without the need to derogate from the ICCPR.

Moreover, while the new General Comment reaffirms in paragraph 67 its previous observations that 'the right to take proceedings *before a court* to enable the court to decide without delay

7 General Comment No. 35, *op. Cit,*. paragraph 15.
8 *Ibid*., paragraph 15.
9 *Ibid*., paragraph 45.
10 *Ibid*., paragraph 15.

on the lawfulness of detention must not be diminished by measures of derogation' (emphasis added), the HRC nonetheless appears to permit a *non-judicial* tribunal to pronounce on the lawfulness of an individual's security detention.[11]

The need for judicial oversight of detention, which is captured in Article 9(4), has a long history. Suffice it to say that in times of emergency States often seek to expand their powers, which often leads to excesses and abuse. This makes detention oversight in emergency situations particularly important for the protection of human rights - something the HRC emphasised in its General Comment 29, when it held that effective judicial review was a non-derogable right in the context of security detention.[12] General Comment 35 however seems to take a step back from this strict position. The HRC does not elaborate how this determination was made, though it appears to reflect a compromise achieved after extensive negotiations.

To define the grounds and procedures for security detention without derogation, the HRC also appears to have leaned on the rules for internment found in the IHL of international armed conflict (IAC). This is indicated by the similar language and concepts for internment that IHL and the General Comment share. Article 42 of the fourth Geneva Convention requires the detaining authority to intern only when 'absolutely necessary'[13]. Article 78 permits internment when necessary, 'for imperative reasons of security'[14]. The ICRC Commentary recalls that the Convention describes internment as an 'exceptionally severe' measure.[15] Article 132, also similar to the General Comment, requires that '[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.'[16] Article 43 entitles an internee to have his or her internment be 'reconsidered as soon as possible by an appropriate court or administrative board'[17] and, according to the ICRC's Commentary, any use of administrative boards must offer 'the necessary guarantees of independence and impartiality.'[18] IHL also states that the rejection of an appeal must be periodically reviewed.[19]

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11 Ibid., paragraphs 15 and 45.

12 United Nations Human Rights Committee, General Comment No. 29 (Article 4: States of Emergency), 2001, paragraph16 and footnote 9.

13 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 42.

14 *Ibid*. Article 78.

15 International Committee of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of Wa*r (Jean Pictet ed. 1958), p. 261.

16 Geneva Convention (IV), *op.cit.* Article 132.

17 *Ibid*., Article 43.

18 *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, op. cit.* (Jean Pictet ed. 1958), p. 260.

19 Geneva Convention (IV), *op.cit*., Articles 43 and 78.

If the HRC did in fact rely on the IHL of IAC for insight or, by analogy, to protect individuals from arbitrary security detention, including during times outside situations of armed conflict, questions remain as to whether IHL was the appropriate body of law on which the HRC should have relied. Another related matter to consider is this: States often use non-judicial tribunals to deliberately avoid the due process guarantees of courts and, therefore, the HRC appears to be bending toward State interests. The end result may be both a bleeding of IHL into IHRL and that States can now more forcefully argue that Article 9(4) permits the use of non-judicial tribunals. While these issues may raise concerns that the HRC is providing States with too much latitude to use security detention, such concerns could be softened if the HRC employs a very high standard for assessing the lawfulness of non-judicial security detention tribunals.

Article 9's Relationship with International Humanitarian Law and Derogations

The first mention that General Comment 35 makes of Article 9's relationship with IHL comes at the end, at paragraph 64. The HRC observes that Article 9 continues to apply in times of armed conflict and that IHL is relevant for the purposes of interpreting Article 9. The HRC also observes that when States derogate in the context of armed conflict, derogation measures cannot fall below the applicable rules of IHL. There is nothing particularly new about these observations, but it cannot be ignored that while Article 9 can "fall back" on IHL's detailed rules on security detention in IAC, Article 9 has no (or very little) IHL to fall back on when it comes to NIAC. For this reason I think it is inaccurate to read the General Comment as suggesting that IHL is sufficient for interpreting Article 9 in the context of *all* armed conflict. Rather, the General Comment is clear that IHL is most certainly relevant to a State's interpretation of Article 9 in the context of IAC, whereas NIAC is another matter.

If this is correct then, from the worst case scenario perspective of maintaining international human rights standards, the third sentence in paragraph 64 ('Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary') indicates that Article 9 in an IAC could be largely hollowed out under the fourth Geneva Convention, which permits a detention regime that requires an internee status review proceeding only every six months; does not require a review to be before a court; does not afford internees access to lawyers; and has no rules pertaining to the access that detainees have to the evidence against them. An internee also has no right under the fourth Geneva Convention to be informed of the reasons for arrest at the time of arrest – although under Protocol I there is an obligation on the detaining authority to 'promptly' inform the detained individual, in a language he or she understands, of the reasons why the measures were taken.[20] Under this

20 Protocol I Additional to the Four Geneva Conventions, Article 75(3).

interpretation, Article 9 would similarly be redefined by the rules of the third Geneva Convention in the context of prisoners of war (POWs).

The dearth of IHL rules for security detention in NIAC versus the rules that exist in the IHL of IAC also influences how the HRC interprets Article 9 derogations. The HRC observes that the IHL of IAC provides limits on how much States can erode Article 9. The HRC states:

> 'During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention.'[21]

Compare that approach to what the HRC says about Article 9 derogations outside IACs:

> 'Outside [international armed conflict] 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, as explained in paragraph 15 above, including review by a court within the meaning of paragraph 45 above.'[22]

One way to read this paragraph is to see the HRC as telling States to rely on the Article 4 derogation regime (and not IHL), to employ security detention in a NIAC. This makes sense given the IHL lacuna in NIAC. However, I do not think the HRC is going quite this far. For reasons discussed above, I read the General Comment as saying that security detention is permissible without derogations up to a certain point both inside and outside times of emergency, but if a State wants to add additional restrictions on top of that in the context of NIAC, then derogation is required.

Did the Committee Properly Defend Human Rights?

Much ink has been spilled, and will continue to be spilled, about the relationship between IHL and IHRL in the context of security detention. The relationship is often assessed through debates over the application of the doctrine of *lex specialis*;[23], and there continues to be debates about whether the IHL of NIAC provides an implicit authority to detain. In addition to these discussions, General Comment 35 injected the HRC into a broader debate about *who* is participating in authoritative conversations about how IHL and IHRL should be interpreted.

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21 General Comment No. 35, *op.cit.*, paragraph 66.

22 *Ibid.*, paragraph 66.

23 See, Marko Milanovic, "The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law," in: Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights*, (Cambridge University Press), Forthcoming.

IHL and its interpretation have long been the primarily responsibility of government lawyers and the International Committee of the Red Cross. This is changing however, and with it comes a reasonable degree of uncertainty. At this year's Colloquium, it has been nearly impossible to discuss NIAC detention without venturing into Human Rights Law. This was due in large part to new European Court of Human Rights judgments and the impact they are having on how militaries conduct battlefield operations.[24] The new General Comment 35 also ventures into the territory of IHL and, in doing so, sends the message: the HRC can come up with rules of the battlefield just like the IHL folks. We deserve a seat at the table. IHRL is, after all, applicable in times of armed conflict.

The HRC appears to give considerable deference to IHL in General Comment 35, especially with respect to IAC. At the same time, the HRC by no means ignores IHRL, allowing for access to legal advice, and setting out standards on access to evidence not found in IHL.[25] However, the question remains as to whether the HRC missed an opportunity to assert with greater force fundamental IHRL safeguards of Article 9, and to do so regardless of whether security detention is occurring in the context of NIAC, IAC, or neither. The HRC could have said, with its years of hearing cases about detention and torture, that it is in the best position to know how to prevent torture and arbitrary detention inside or outside armed conflict and, therefore, IHL needs to be updated and interpreted through IHRL and not the other way around.

Understandably, this may have been too far a legal and political step to take. As it is, the General Comment's views on security detention are sure to be criticised from various sides for allowing States to do both too much and too little in the way of security detention; the HRC is likely to be accused of giving too much deference to IHRL in armed conflict and for not giving it enough. I do not want to suggest that the HRC has bent IHRL entirely to the will of IHL. Nonetheless, it could be argued that outside the context of IAC, the General Comment represents an odd mixture of IHL concepts and IHRL safeguards that come together to create a "bottom floor" for security detention rights that is both above what IHL requires and below what IHRL requires.

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24 *Hassan v. U.K.*, ECtHR, Application no. 29750/09, Judgment of Grand Chamber, 16 September 2014; Al Skeini v. U.K., ECtHR, Application no. 55721/07, Judgment of Grand Chamber, 7 July 2011. See, also, *Jaloud v. The Netherlands*, ECtHR, Application no. 47708/08, Judgment of Grand Chamber, 20 November 2014.

25 For critiques on access to evidence and other issues, see International Commission of Jurists, *Comments on Draft General Comment 35 on Article 9 of the International Covenant on Civil and Political Rights as Finalized at First Reading by the Human Rights Committee in March 2014 During its 110th Session*, 1 June 2014.

THE INTERPLAY BETWEEN IHL AND HUMAN RIGHTS IN RELATION TO THE EXPERIENCES OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE

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Summary

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) was established in 1987 on the basis of the European Convention of the same name (hereafter, the Convention). Its aim is to 'examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment' (Article 1). This provision offers the CPT the opportunity to visit numerous detention facilities. For this purpose, CPT delegations benefits from unlimited access to every place of detention and have the right to free movement inside the premises, the right to talk to detainees in private, as well as to gather/have access to the detainees' files. After each visit, the CPT produces a detailed report containing its observations, remarks, recommendations and requests for information to the State concerned.

Visits are carried out by CPT members accompanied by staff members of the Secretariat based in Strasbourg. Two categories of visits exist: periodic visits, carried out every four years, and ad hoc *visits. Before visiting a place of detention, the CPT must notify its intent to the State concerned. Cooperation with national authorities as well as confidentiality are two main pillars of the Committee's mandate which allow it to work in the approved manner.*

The State itself may ask for the publication of the report and its response. Some countries have shown reluctance to allow the publication of reports. However, when a country is not cooperating at all or when it does not improve the situation following the report, the CPT may put the State under pressure by way of a public statement. Until now, only six public statements have been published. The CPT publishes a yearly report on its activities. Up to now, 365 visits have been conducted and 313 reports have been published by the CPT. Alongside this contextual work, special agreements have been concluded – e.g. agreement with the International Criminal Tribunal for the former Yugoslavia. Nevertheless, the reports written following the visits conducted by virtue of this agreement were not published. In 2006, CPT-NATO (North Atlantic Treaty Organiza-

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

tion) agreements were concluded in order to visit Camp Bondsteel in March 2007. To date, this report has not been published.

*Interestingly, the Convention specifies that the CPT 'shall not visit places which representatives or delegates of Protecting Powers or the ICRC - International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and [their Additional Protocols]' (Article 17.3). At the time this provision was added to the Convention, State parties wanted to foster complementarity between the Committee and the ICRC. Today, in a post-*Hassan *case world, some are wondering whether this relationship may be taken a step further. Against this backdrop, a debate on the CPT authority to visit detention facilities run by foreign forces in an extraterritorial non-international armed conflict (NIAC) is likely to emerge. The question - which was already raised in the context of the British operations in Iraq - is clearly linked to the Court's jurisdiction over such a legal issue.*

After several years, the CPT has definitely contributed to the creation of one of the major databases as far as the conditions of detention in the Council of Europe's member States are concerned. In terms of human rights monitoring, the CPT mechanism has proved its worth. In some countries, torture was frequently used but today, allegations of torture have decreased dramatically. Moreover, there is a complementarity between the CPT and the European Court of Human Rights. Today, the Court's case law on Article 3 is, to a large extent, based on CPT reports.

Fonctionnement du Comité européen pour la prévention de la torture (CPT)

Avant toute chose, j'aimerais rappeler quelques éléments en ce qui concerne le Comité pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du Conseil de l'Europe (CdE) et son fonctionnement. Le CPT est né par une Convention du CdE du même nom en 1987 et dont l'objectif est énoncé en son article 1 : « Par le moyen de visites, le Comité examine le traitement des personnes privées de liberté en vue de renforcer, le cas échéant, leur protection contre la torture et les peines ou traitements inhumains ou dégradants ». Un énoncé très simple, qui offre donc la possibilité au CPT de se rendre dans tous les lieux de privation de liberté, aussi bien des établissements pénitentiaires que des centres de détention pour mineurs, des postes de police, des centres de rétention pour étrangers, des hôpitaux psychiatriques, des foyers sociaux.

C'est donc un vaste sujet par rapport à un nombre important de lieux de détention. Pour ce faire, les délégations du CPT jouissent d'un accès illimité à tout lieu de détention et ont le droit de se déplacer sans restriction au sein de ces établissements, de s'entretenir sans témoin

avec les personnes privées de liberté et de réunir et d'avoir accès à toutes les informations et tous les dossiers relatifs à ces mêmes personnes. Après chaque visite, le CPT établit un rapport détaillé reprenant, à l'attention de l'Etat concerné, non seulement ses constatations mais aussi ses recommandations, ses commentaires, et ses demandes d'informations. Le CPT demande à chaque Etat concerné une réponse détaillée. Le rapport et la réponse de l'Etat constituent le point de départ d'un dialogue permanent avec chacun des Etats concernés.

Les visites sont effectuées par plusieurs membres du CPT, accompagnés par des membres du Secrétariat basé à Strasbourg, qui est une des unités des Droits de l'homme au sein du Conseil de l'Europe. Il y a deux types de visites. D'une part, il existe les visites périodiques, effectuées en moyenne tous les quatre ans. D'autre part, il y a les visites *ad hoc*, lorsqu'elles sont exigées par les circonstances. Préalablement à une visite, le CPT est obligé de notifier son intention de visiter. Et dès que cette notification a été faite, le CPT dispose d'un accès illimité à tout lieu de détention dans l'Etat concerné. Le travail du CPT est basé sur deux fondements essentiels : la coopération et la confidentialité. La coopération avec les autorités nationales est un des moteurs du bon fonctionnement de la Convention. La confidentialité constitue la seconde caractéristique, tout aussi essentielle. Je crois pouvoir dire que le prix à payer pour l'accès illimité, c'était, dans un premier temps, cette confidentialité. Je dis bien dans un premier temps, parce ce qui nous intéresse, c'est la publication des rapports.

C'est l'Etat qui peut lui-même demander la publication du rapport et de sa réponse et, jusqu'à présent, tous les Etats ont accepté ces publications. Vous constaterez cependant, en allant visiter le site du CPT, que tous les rapports ne sont pas encore publiés à ce jour. Certains pays ont fait preuve de beaucoup de réticences ; et je pense par exemple à la Fédération de Russie qui a longtemps retardé la publication d'un certain nombre de rapports. Maintenant elle a commencé à publier et nous espérons que les rapports seront de plus en plus souvent publiés. Mais il y a à cela aussi une possibilité qui s'ouvre : si le pays ne coopère pas, ou refuse d'améliorer la situation, le CPT a la possibilité d'établir une déclaration publique. Jusqu'à présent, six déclarations publiques ont été établies : trois visant la situation dans le Caucase du nord, deux visant la Turquie et une visant la Grèce. Six déclarations publiques ont été faites en 25 ans de fonctionnement. Je crois donc qu'il n'y a pas eu de surenchère quant à cette possibilité. Il existe aussi les rapports annuels qui permettent au CPT d'évaluer une situation particulière. Chaque rapport annuel contient une partie substantielle sur un sujet donné ; c'est ce qui est appelé « Les normes du CPT ».

Accords *ad hoc* et complémentarité avec le CICR

Jusqu'à présent, il y a eu 365 visites menées par le CPT. Sur la totalité des visites, 145 visites *ad hoc* ont été menées – donc un peu moins de la moitié des visites exigées par les circons-

tances. Et sur l'ensemble de ces 365 visites, 313 rapports ont été rendus publics. Il existe des rapports autres que ceux visant des pays. Il y a en effet des accords particuliers qui ont été pris, par exemple avec le Tribunal pénal international pour l'ex-Yougoslavie. Nous avons en effet, à travers des accords particuliers pris avec le Tribunal, visité des détenus qui exécutaient des peines auxquelles ils avaient été condamnés par le Tribunal. Ces rapports de visites ont été réalisés par le CPT. Malheureusement, ils n'ont pas été publiés par le Tribunal. C'est la même chose pour un rapport qui concerne le Kosovo. En 2006, nous avons été amenés à négocier un accord avec l'Organisation du traité de l'Atlantique nord (OTAN). Cet accord avait été pris afin de visiter les lieux de détention de la KFOR (Kosovo Force) et, plus particulièrement, les lieux de détention de civils. En vertu de ces accords, une visite a été organisée à Camp Bondsteel en mars 2007. Cette visite fut donc menée dans un lieu de détention géré par l'armée américaine dans le cadre de la KFOR. Malheureusement, en dépit des engagements pris par l'OTAN jusqu'à présent, ce rapport n'a jamais été publié. Et je le regrette, car cela m'empêche de vous en donner un certain nombre d'éléments quant au contenu. En l'absence d'accord, nous sommes liés par cette confidentialité qui s'impose quant à la publication.

Mais je crois aussi devoir attirer l'attention sur le fait que la Convention prévoit au départ que le CPT ne visite pas les lieux de détention qui sont visités par le Comité international de la Croix-Rouge (CICR) (article 17.3). En effet, c'est une disposition tout à fait particulière qui a été ajoutée à la Convention en 1987 et qui énonce donc que le CPT ne visitera pas les lieux qui sont visités habituellement et effectivement par le CICR. Je crois que la volonté des Etats parties était à l'époque de ne pas faire de surenchère entre visites différentes et plutôt de viser la complémentarité entre le CPT et le CICR.

Bilan des activités du CPT

Maintenant, quelques réflexions afin d'évaluer le travail qui a été accompli après tant d'années. Je crois pouvoir dire que le CPT a permis de produire l'une des bases de données les plus importantes en ce qui concerne les conditions de détention dans tous les pays membres du Conseil de l'Europe. En ce qui concerne l'effectivité du respect des droits fondamentaux, le contrôle effectué par le CPT est, dans l'ensemble, un contrôle qui a marqué et qui a fonctionné. Pendant les 12 ans durant lesquels j'ai été membre du CPT, j'ai par exemple suivi de très près l'évolution de la situation en Turquie et je peux dire qu'entre le début, les premières missions qui ont été faites en Turquie et les dernières missions, il y une différence énorme. En effet, la torture était couramment pratiquée et notamment dans les lieux de détention de police. Aujourd'hui, les allégations que nous recueillons dans le cadre de visites en Turquie ne diffèrent pas de celles que nous recueillons dans d'autres pays européens en ce qui concerne le comportement de la police.

Il y a donc une évolution notable, en fonction des visites qui ont pu être effectuées. Le second élément venant s'ajouter à cela est la synergie existant entre le Cour européenne des droits de l'homme et le CPT. La Cour est un organe de contrôle judicaire *a posteriori*. Le CPT est un organisme non judiciaire à titre préventif. Et il y une complémentarité, voire une synergie, qui s'est installée au fil du temps. J'en veux pour preuve notamment que toute la jurisprudence de la Cour européenne en ce qui concerne l'article 3 se base aujourd'hui presque systématiquement sur les rapports faits par le CPT. Et il y a donc, en ce qui concerne le fonctionnement de l'un et de l'autre, un parallélisme qui a été établi.

Débat autour de visites du CPT dans le cadre de conflits armés non internationaux (CANIs) extraterritoriaux

Enfin, la question s'est posée de savoir si cette complémentarité avec le CICR peut, aujourd'hui, prendre une autre dimension. Pourquoi poser cette question maintenant ? Car je crois qu'elle s'impose à nous suite à l'arrêt *Hassan*. L'arrêt *Hassan* m'a rappelé qu'à l'époque, au début des opérations militaires et notamment celles des forces britanniques en Irak, nous avons eu un large débat au sein du CPT pour savoir s'il n'entrait pas dans nos possibilités d'obtenir les permissions nécessaires pour visiter les lieux de détention gérés par les forces britanniques dans le cadre du conflit. Finalement, il n'y a pas eu d'accord politique au sein du Conseil de l'Europe pour ce faire. Une des questions soulevées fut celle de savoir si la Cour pourrait être tenue pour compétente dans le cadre d'un contentieux éventuel. Aujourd'hui, cet arrêt nous rappelle qu'en effet la Cour pourrait être considérée comme compétente. Et je crois qu'il est possible que le débat naisse à nouveau au sein du CPT, concernant le fait que des visites se fassent dans les lieux de détention gérés à l'étranger par des forces de pays européens qui sont des Etats parties du Comité européen.

THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW WHEN DETAINING IN EUFOR RCA

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Résumé

Cette contribution aborde la relation entre le droit international humanitaire (DIH) et le droit international des droits de l'homme (DIDH) sous l'angle de la problématique de la détention dans le contexte de l'opération de l'Union européenne (UE) déployée en République centrafricaine (RCA) : l'EUFOR RCA. Cette opération fut déployée du 1er avril 2014 au 15 mars 2015 sur base de la décision du Conseil 2014/73/PESC dans le but de mener une « opération militaire de transition en RCA (…) afin de contribuer à la création d'un environnement sûr et sécurisé, avec un transfert à la mission internationale de soutien à la Centrafrique sous conduite africaine (MISCA) (…) conformément au mandat défini dans la résolution 2134 (2014) du [Conseil de sécurité des Nations Unies (CSNU)] » (article 1(1)).

Qualification et droit applicable

Durant la planification de l'opération, deux questions liées à la gestion de la détention surgirent. La première question était de savoir s'il existait un conflit armé en RCA. En raison du critère d'organisation des groupes impliqués dans le pays, la réponse à cette question demeurait floue. Il fut néanmoins admis que la situation constituait probablement un conflit armé ; constat qui fut consolidé par les multiples références au DIH dans la résolution 2134 du CSNU. La seconde question s'étant posée dans ce contexte avait trait au potentiel statut de partie au conflit de l'EUFOR RCA dans l'hypothèse où un conflit armé existait dans le pays. Eu égard au mandat, à la mission et à l'approche privilégiée par l'opération, il apparut que, depuis son déploiement, l'EUFOR RCA n'était pas engagée dans le conflit armé mais qu'un engagement de ce genre n'était pas à exclure si elle en venait à être impliquée dans des actions de combat à l'encontre d'une partie au conflit. Par conséquent, le DIDH constituait sans conteste la principale législation applicable – à tout le moins concernant la détention par l'EUFOR RCA. Plusieurs indices donnaient toutefois à penser que l'application latente du DIH pourrait devenir substantielle dans certaines circonstances. Sur ce point, la résolution 2134 du CSNU autorise l'EUFOR RCA à prendre « toutes les mesures nécessaires » *(paragraphe. 44) et requiert par ailleurs le respect du DIDH et du DIH (paragraphe 48) sans toutefois évoquer la détention.*

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Autorisation de détenir de l'EUFOR RCA et accord de transfert des détenus

L'accord conclu entre l'UE et la RCA concernant les modalités de transfert à la RCA de personnes privées de leur liberté par l'EUFOR RCA (ci-après l'Accord de transfert) liste les trois modalités principales de gestion de la détention dans ce contexte que constituent la détention pour raisons de sécurité, la détention en vue de poursuites pénales et la détention sur base du DIH (considérants 4 à 7).

(A) Le quatrième considérant de l'Accord de transfert dispose que la détention de personnes « pour une courte durée peut s›avérer nécessaire […] pour permettre leur remise aux autorités de la RCA, notamment lorsque ces personnes sont suspectées d›avoir commis des crimes ou des délits graves *[selon le droit centrafricain] ou pour assurer la sécurité de l'EUFOR RCA et de son personnel ». Ce type de détention est autorisé pour 96 heures maximum et devra s'arrêter dès qu'il ne s'avère plus nécessaire. Au-delà de ce délai, deux autres modalités de détention (B et C) sont encore possibles.*

(B) Tout d'abord, la détention aux fins de poursuites pénales se décline elle-même en trois scénarios différents. (i) Le premier d'entre eux est le transfert du détenu aux autorités centrafricaines. La plupart des transferts eurent lieu en vertu de ce scénario, essentiel en l'absence de tout autre mécanisme international permettant des poursuites pénales dans ce contexte (sauf exception, voir infra*). (ii) Le deuxième scénario est la possibilité de prolonger la détention sur autorisation des autorités de la RCA lorsque le transfert immédiat de la personne est impossible (article 3(4) de l'Accord de transfert). Dans cette éventualité, ces dernières prendront toutefois part au réexamen de la détention. (iii) Le troisième scénario est prévu par l'article 7 de l'Accord de transfert et consiste en des poursuites menées par la Cour pénale internationale (CPI).*

(C) Enfin, la troisième modalité de détention prévue par l'Accord de transfert (7ème considérant) constitue « l'internement décidé par l'EUFOR RCA dans le cadre du droit des conflits armés » après l'initiale détention pour raisons de sécurité (A). Le langage de l'Accord de transfert reflète ici l'éventualité que l'EUFOR RCA soit engagée dans le conflit armé, impliquant la possibilité pour cette dernière d'invoquer le DIH comme base pour la détention. En outre, concernant le traitement des personnes transférées, l'article 4, paragraphes 2 et 3 de l'Accord renvoie à l'obligation pour la RCA de respecter certaines règles de DIH dans le cadre des transferts, notamment le deuxième Protocole additionnel aux Conventions de Genève de 1949 ainsi que l'article 3 commun à ces Conventions. Mais le cadre juridique de l'EUFOR RCA vise donc principalement le plein respect du DIDH en prévoyant à cet effet des mécanismes (B et C) permettant, sous conditions, une détention au-delà de 96 heures. Mentionnant par ailleurs le DIH comme potentielle base pour la détention, l'Accord de transfert ne donne cependant pas plus d'indications quant à la gestion de la détention dans pareil scénario.

Introduction: EUFOR RCA

This contribution aims to explain how the issue of detention was addressed in the framework of the European Union (EU) military operation in the Central African Republic (CAR) (EUFOR RCA), in particular as regards the interplay between International Humanitarian Law (IHL) and Human Rights Law (HRL).

This operation was established by Council Decision 2014/73/CFSP of 10 February 2014.[2] Pursuant to Article 1(1) of this decision, the EU

> 'shall conduct a military bridging operation in the CAR, EUFOR RCA, to contribute to the provision of a safe and secure environment, with a handover to the African-led International Support Mission in the CAR (AFISM-CAR) within four to six months of Full Operating Capability, in accordance with the mandate set out in UNSC Resolution 2134 (2014) and concentrating its action in the Bangui area'.

EUFOR RCA was launched on 1 April 2014[3] and was subsequently extended until 15 March 2015.[4]

United Nations (UN) Security Council Resolution 2134 of 28 January 2014 *inter alia* states that the Security Council:

> 43. '*Authorizes* the European Union to deploy an operation in the CAR as referenced in the letter dated 21 January 2014 from the High Representative of the European Union (S/2014/45) [5];
>
> 44. *Authorizes* the EU operation to take all necessary measures within the limits of its capacities and areas of deployment from its initial deployment and for a period of six months from the declaration of its full operational capacity;
>
> (…)
>
> 48. *Emphasizes* the need for all military forces in CAR, while carrying out their mandate, to act in full respect of the sovereignty, territorial integrity and unity of CAR and in full compliance with applicable International Humanitarian Law, Human Rights Law and Refugee Law and mentions the importance of training in this regard'.

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2 *Official Journal* L 40, 11 February 2014, p. 59.

3 Council Decision 2014/183/CFSP of 1 April 2014, in: *Official Journal* L 100, 3 April 2014, p. 12.

4 Council Decision 2014/775/CFSP of 7 November 2014, adopted following UN Security Council Resolution 2181 of 21 October 2014, in: *Official Journal* 325, 8 November 2014, p. 17

5 That letter mentions the EU's agreement on a contribution to the efforts to stabilise the security situation in CAR in the form of a military operation to contribute to the protection of civilians, in coordination with the French forces and the African Union.

Qualification Questions and Applicable Law

Two qualification questions impacting on the handling of detention arose early in the course of the planning of the operation. The first was whether there was an armed conflict in CAR and the second whether, if there was an armed conflict, EUFOR RCA would be engaged in that conflict as a party to it.

As regards the first question, it was not entirely clear whether an armed conflict existed, in particular because of questions as to the level of organisation of the groups involved in the violence. Nevertheless, it was assessed that the situation in CAR probably did constitute an armed conflict. This also appeared to have been the position reflected in UN Security Council Resolution 2134, as it contains several references to violations of IHL committed in CAR.

As regards the second question, it was assessed that EUFOR RCA would not be a engaged in this armed conflict from the outset, taking into account its mandate, mission and intended approach to the conduct of the operation, but that it could become so engaged if on the ground it became involved in significant combat actions against a party to the conflict.

Therefore, in terms of applicable law the starting point was HRL (there was no real discussion about its applicability, at least not in relation to detention)[6] but with the possibility that IHL would also become applicable.

In this respect, some further elements should be mentioned regarding Resolution 2134. In particular, while this resolution provides for all necessary measures (paragraph 44), it also requires '*full compliance with*' applicable IHL and HRL (paragraph 48) and does not contain any specific provisions on detention[7]. Furthermore, no attempts were made to seek a derogation from HRL as regards detention powers.

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6 This is consistent with the approach which the EU has adopted in most of its operations: see e.g. F. Naert, "Observance of International Humanitarian Law by Forces under the Command of the European Union", in: Vol. 95 No. 891-892 International Review of the Red Cross 2013, pp. 637-643; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp, Intersentia, 2010); Frederik Naert, "Observance of International Humanitarian Law by Forces under the Command of the European Union", in: Stanisla Horvat and Marco Benatar (eds.), *Recueil of the XIXth International Congress of the International Society for Military Law and the Law of War, 19th Congress* (Québec City, 1-5 May 2012); *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments* (Brussels, International Society for Military Law and the Law of War, 2013), pp. 373-404 and F. Naert, "Applicability/Application of Human Rights Law to International Organisations Involved in Peace Operations – a European/EU Perspective", in the *Proceedings of the 2011 edition of the Bruges Colloquium*, pp. 45-56.

7 The possibility to seek specific provisions on detention was considered but not pursued. One concern invoked against this option was that the mention of one particular power might lead to interpretations *a contrario* that could exclude recourse to other powers, despite the *'all necessary measures'* language.

Thus, as regards detention, it was necessary to ensure full compliance with HRL, with the exception of any derogations/qualifications derived from IHL if it became applicable.

EUFOR RCA Detention Powers and the Detainee Transfer Agreement with CAR

On the basis of the above legal framework and analysis, the EUFOR RCA Operation Plan specifies the cases in which EUFOR RCA may detain persons as well as the conditions for any such detention. As this Operation Plan is classified and is not in the public domain, not much can be divulged about its content.

However, most of the key elements regarding detention are also reflected in the Agreement between the European Union and the Central African Republic concerning detailed arrangements for the transfer to the Central African Republic of persons detained by the European Union military operation (EUFOR RCA) in the course of carrying out its mandate, and with regard to the guarantees applicable to such persons (hereinafter 'the Transfer Agreement'), which is in the public domain.[8]

The fourth to seventh recitals of the Transfer Agreement reflect the basic options for detention by EUFOR RCA:

> 'WHEREAS it may prove necessary to detain persons for a short period in order to fulfil the mandate of EUFOR RCA, in particular to allow their transfer to the CAR authorities, in particular when they are suspected of having committed serious crimes or offences under CAR criminal law or in order to ensure the safety of EUFOR RCA and its personnel;
>
> WHEREAS EUFOR RCA shall carry out the detention of those persons under United Nations Security Council Resolution 2134 (2014), in particular paragraph 44 thereof, in accordance with the applicable rules of international human rights law and of international humanitarian law and shall ensure that, where possible, the competent CAR authorities are informed of such detention;
>
> WHEREAS the detention of those persons by EUFOR RCA may be followed by their transfer to the competent CAR authorities, in compliance with the applicable rules of international law, or by their release;
>
> WHEREAS the detention of those persons by EUFOR RCA may also be followed by their being interned as decided by EUFOR RCA under the law of armed conflicts, or by their being held in the custody of EUFOR RCA with the authorisation of the CAR judicial authorities;'

8 *Official Journal* L 251, 23 August 2014, p. 3.

Moreover, the final recital emphasises the determination of the parties 'to respect and guarantee the fulfilment of their legal obligations, in particular under the applicable international humanitarian law and international human rights law, and recalling in this regard the provisions of paragraph 48 of United Nations Security Council Resolution 2134 (2014)'.

In essence, EUFOR RCA may have recourse to three types of detention.

1. Security detention

The fourth recital of the transfer Agreement acknowledges that 'it may prove necessary to detain persons for a short period in order to fulfil the mandate of EUFOR RCA'. It adds that this may be in particular to allow their transfer to the CAR authorities, in particular when they are suspected of having committed serious crimes, or in order to ensure the safety of EUFOR RCA and its personnel. This detention is allowed for a period not exceeding 96 hours and must cease as soon as it is no longer necessary. After this period, further detention is only possible in the two other cases discussed below.

2. Detention in view of criminal prosecution

Under this type of detention, 3 cases can be distinguished.

The first case is transfer to the CAR authorities. This was essentially both a necessary and preferable option, given that neither the EU operation nor the follow-up EU or UN operation/presence was envisaged to have any powers to prosecute suspected criminals. Therefore, except as regards persons who could be tried by the International Criminal Court (ICC) (see below), any prosecution would, in principle, have to take place in CAR under CAR criminal law. Indeed, the EU is also engaged in capacity building to help the CAR authorities to restore the necessary capacities to prosecute, try and imprison suspected criminals.

Most of the Transfer Agreement deals with this scenario. Those provisions build on experience gained with such transfer agreements in other military operations and will be familiar to anyone who has some experience with such agreements. They are therefore not discussed further here – see the contribution by Eric Chaboureau for EU practice in this respect.

By contrast, the second case is an innovation and consists of prolonged detention by EUFOR with the authorisation of the competent CAR authorities. This mechanism is provided for in Article 3(4) of the Transfer Agreement:

> 'If a person detained by EUFOR RCA is not transferred to the CAR as quickly as possible, he or she may continue to be detained by EUFOR RCA, provided that the competent judicial authorities of the Central African Republic have authorised such continuing de-

tention. During the provisional detention, the person concerned shall benefit from the rights and guarantees conferred by international law on persons in provisional detention.'

The aim of this provision is that where immediate transfer is not possible, CAR judicial authorities are nonetheless involved and to ensure in this way judicial review of detention exceeding the 96 hour period. This could be put in practice sooner than a normal transfer because it does not require all elements of the CAR penal system to be up and running. Moreover, it has the advantage of already involving the CAR judicial authorities at an early stage of detention.

The third case concerns prosecution by the International Criminal Court. As the ICC had opened investigations into the situation in CAR,[9] it was deemed useful to also address this scenario. In this respect, Article 7 of the Transfer Agreement provides that:

'EUFOR RCA may transfer to the International Criminal Court persons detained by EUFOR RCA in respect of whom the International Criminal Court has issued a warrant of arrest pursuant to Article 58 of its Statute. EUFOR RCA shall inform the CAR of each transfer in advance'.

3. Detention under IHL

Finally, the Transfer Agreement (seventh recital) recognises that initial security detention by EUFOR RCA 'may also be followed by their being interned as decided by EUFOR RCA under the law of armed conflict'.

This wording was included in order to reflect that EUFOR RCA could become engaged in the armed conflict. In that instance it would be subject to IHL and entitled to invoke any detention authority available under IHL. The Transfer Agreement does not further address this detention, as it is an internal matter for EUFOR RCA. Moreover, as indicated above, the assessment was that EUFOR RCA was not going to be so engaged from the outset. Nevertheless, it was deemed useful to acknowledge this possibility in the Transfer Agreement, at the very least in order not to exclude it but potentially also in order to reinforce this detention authority by its recognition in this international agreement.

It may be added that Article 4, paragraphs 2 and 3 of the Transfer Agreement *inter alia* refer to IHL rules (as well as HRL rules) among the obligations to be complied with by CAR in relation to any detainee transferred by EUFOR RCA:

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9 See ICC-01/05, at: <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/Pages/situation%20icc-0105.aspx>

'2. To this effect, the persons covered by this Agreement shall benefit from guarantees identical to those (…) provided for by the common Article 3 of the Geneva Conventions of 12 August 1949 and their Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) adopted on 8 June 1977, in accordance with the applicable rules of International Humanitarian Law.

3.The CAR shall treat transferred persons of under 18 years of age in accordance with International Humanitarian Law and International Human Rights Law, in particular the Convention of the Rights of the Child of 20 November 1989 and the optional protocol thereto of 25 May 2000 on the involvement of children in armed conflict. (….)'

Beyond this, no specific IHL detention transfer provisions were included because it was considered that if the transfer of a person detained by EUFOR under IHL was necessary, that person could most likely be transferred as a criminal detainee (since the armed conflict was a non-international one and anyone detained would most likely have been suspected of some criminal offence, in particular committing violence without legal justification[10]).

Final Remarks

The detention framework for EUFOR RCA is focused on ensuring full compliance with HRL. To this effect, it includes an innovative approach under which EUFOR RCA could detain suspected criminals beyond a 96-hour period with the authorisation of CAR judicial authorities if immediate transfer to CAR is not possible.

The possibility for EUFOR RCA to detain under IHL if it became applicable was reserved and this was recognised in the Transfer Agreement, without the latter further regulating this scenario.

10 On the assumption that EUFOR RCA would not be engaged in combat against CAR government forces, bearing in mind that the operation took place at the invitation of the CAR authorities (even if it also has a UN Security Council Chapter VII mandate).

Panel discussion
The interplay between international humanitarian law and human rights law when detaining in armed conflict

A wide range of questions and answers followed the last session.

1. The Relationship between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) in the Context of Transfer Agreements

One of the participants asked what room there was for IHL within transfer agreements. She questioned the relationship between IHL and IHRL by asking to what extent it was construed as a two phase process in terms of application.

A panellist reminded her that IHRL continues to apply in armed conflicts. He explained that, in the Central African Republic (CAR), the European Union (EU) did not conclude a separate transfer arrangement for IHL detention because it considered that since the situation was a non-international armed conflict (NIAC), any persons the EU detained under IHL could presumably be prosecuted for having taken up arms, or for having committed war crimes or other offences. Consequently, the EU deemed the criminal law model applicable even in cases where an IHL detention could be envisaged and a transfer arranged. However, the EU has the additional option to detain people for a longer time.

A participant then wondered whether there is scope for using this kind of transfer agreement in other contexts. One of the panellists explained that in CAR, the EU relied on judicial review by the local authorities, rather than using domestic substantive law, as a means to ensure that the judicial review required by Article 5 was observed. The panellist then pointed out that, in his view, the question is whether States can use these kinds of transfer agreements as a tool to provide the legal basis which you might need for IHL detention in a NIAC or other context.

One of the participants then asked to what extent it is possible – in an extraterritorial NIAC – to solve some ECHR or general human rights problems by having a huge bilateral agreement with a consenting country which covered all the problematic points.

A panellist answered that if it is a fully-fledged international agreement, it can be considered as law under the terms of the European Convention on Human Rights (ECHR), in the sense of what is required as a legal basis for some of the issues. He, however, underscored that the ECHR would have to be compliant with the outcome.

The panellist then emphasised that within the framework of a multilateral operation, the bilateral agreements concluded by each nation might generate impediments to such a solution. He explained that for the EU, it was easier because of its clear treaty base allowing it to conclude international agreements. That might not be so obvious for the North Atlantic Treaty Organization (NATO), and it might also be a question of what the status of such an agreement would be *vis-à-vis* individuals in the countries concerned. A number of questions thus remained unanswered but could certainly be explored. Another panellist intervened, saying this question touches on the political problem we face with States' decision-making during detention operations.

2. Authority to Detain in NIAC within EU Transfer Agreements

A participant asked the panellists whether the member States of the EU view the law of war detention – enshrined in Article 3 of the European Union-Central African Republic (EU-CAR) Agreement – as an additional basis for detention in a NIAC, which does not have to go through either domestic State law or human rights procedures. It seems new as a position common to European States.

Confirming this was something the EU member States had signed up to, a panellist said he was not sure to what extent they systematically all take that as a standard position. The wording of the Agreement also leaves it open as to whether additional requirements might arise when this procedure is invoked. The EU actually wanted to preserve that possibility and to avoid the agreement to be read in a way that would exclude that option. However, the fact that this option is mentioned in the agreement does not necessarily answer all the questions when it comes to effectively making use of this possibility.

A participant asked questions about the process which led to the adoption of the EU-CAR Agreement, whether there was a lot of discussion on such a power to detain, what exactly it meant and what are the specific grounds for detention. Two of the panellists affirmed there were very few remarks on the possibility for the member States to detain in NIACs. They also emphasised that the lack of discussion on this point during the debates does not mean that each particular State did not consult with its experts. What is clear, is that member States were given an opportunity to consider it and to request any changes they might wish. One of the panellists however said that, during the negotiations on the possibility for the EU to detain people longer than 96 hours, two States raised concerns at the proposal made by the negotiators about relying on central African criminal law for detention on EUFOR's premises. The member States rejected this possibility on the basis that the rights and guarantees laid down in the CAR's Criminal Procedure Code (CPC) are not as high as the ones enshrined in the member States' criminal procedure.

With respect to the issue of holding a person on behalf of the host State's judicial decision, a participant raised the question of what the EU would do if the judicial authorities of the country were not following their own procedures – in this case, the CAR not observing its Penal Code. He took the example of the EU having a judicial order delay of 15 days. What if the 15–day delay passes without a new detention order by a judicial authority of the CAR, nor an order to release? What would the EU do in such a situation?

A panellist replied that it is an authorisation for the EU and that if it considers that there is a problem with the decision, whether it is a lack of extension or even a problem with the initial decision, it does not oblige the EU to implement it. Consequently, if there are reasons to think that there is a serious problem with the decision, EU agents would either try to have that rectified or they would no longer rely on that, and – as a consequence – release the person. He then acknowledged that the detail of this issue must be subject to further implementing which should clarify some issues.

3. Issues Pertaining to the Right to Visit Detainees

A panellist wondered whether, at the time of drafting the EU-CAR Agreement, the drafters thought about visits to detention facilities which could have been organised by the European Committee for the Prevention of Torture (CPT).

Another panellist replied that the case of the CPT was not specifically addressed. However, the right of visit enshrined in the EU-CAR agreement (Article 6) includes the International Committee of the Red Cross (ICRC) but also ' other impartial humanitarian organization[s]'. There are wider rights for visits, not only for the ICRC and the EU itself: the doors are clearly left open for other relevant organisations. Those visits include private interviews, through an interpreter if necessary, without anyone else being present. Article 6 of the Agreement actually goes into quite a lot of detail.

4. General Perspective on the Relationship between IHL and IHRL

Regarding the wider question of the interplay between IHRL and IHL, a participant said that she was coming round to the view that we should stop trying to fit IHL applicability to NIAC and resort instead to Human Rights Law. She then asked the panellists where we stand now regarding the relationship between IHL and IHRL.

A panellist replied it is crucial not to put this relationship into one box. This issue cannot be only academic. She explained that the entities that need to know about this have completely different perspectives. On the one hand, we have the military operational perspective – which was not used to applying human rights – and, on the other hand, we have the human rights

courts, whose perspective is: 'To what extent are we required to take account of IHL to modify IHRL?' The former perspective is based on the planning of the operation, whilst the latter intends to identify which elements need to be taken into account in order to establish whether there is a violation. These two areas are completely different. Moreover, it is of the utmost importance that each group remembers that the question is different for different players. The key players are not ministries of foreign affairs, not even the International Court of Justice, and certainly not academics. The real key players are human rights monitoring bodies and armed forces in the field. They must be the ones leading the way to finding how to accommodate IHL and IHRL. Moreover, any solution has to be accepted by both groups. A solution which is not likely to be accepted by both groups is not going to work. She explained that human rights bodies have an obligation to take into account the fact that, for the person in the field, the rules guide a decision before the act is engaged in. It is not a means of determining if there has been a violation. It is not certain that human rights bodies think in those terms, she concluded.

With respect to non-State armed groups (NSAGs), a panellist further noted that it is probably unrealistic to expect that States would recognise a right of NSAGs to detain. If that is the case, explained the panellist, it is may not be such a problem that there are also higher obligations under IHRL on the States than there are on the armed groups. In other words, States have that right to detain – maybe they need to adopt their legislation to use it – but, at the same time, they would be bound by higher standards. Whereas the armed groups would only be subject to IHL rules, would not be entitled to detain but would be subject to the minimum rules that would apply in that context.

Concluding Remarks

Yves Sandoz
Member of the International Committee of the Red Cross

Over the last two days, we have covered a single issue across a variety of legal and optional contexts. Detention, we have seen, is an ordinary and expected occurrence in armed conflict. It is one that might be carried out by a variety of players and in a variety of circumstances. As the contexts and players involved in detention shift, so does our degree of certainty about how international law protects these detainees.

We started with the greatest certainty: international armed conflict and the detention of prisoners of war and civilians. We saw a robust and detailed IHL regime. It is one that – like any law – still requires interpretation and application to specific situations, but one that nonetheless authoritatively guides detention operations.

We discussed treatment of these detainees, the conditions in which they must be held, the grounds on which they may be detained, and the procedural safeguards to which they are entitled. We discussed the timing and the circumstances of their release. In addition, we discussed the responsibility to ensure respect for IHL when transferring these detainees from one authority to another.

However, almost immediately, we moved into areas of less clarity and less certainty. As we shifted away from international armed conflict to non-international armed conflict, from State armed forces to non-State armed groups, and from purely internal NIAC detention to extraterritorial non-international armed conflict (NIAC) detention, the applicability of IHL and its bedrock principles remained unquestioned, but the clarity of the Geneva Conventions and their multitude of rules quickly faded away.

As the types of conflict changed, so did the legal regimes we relied upon. Human Rights Law and standards ensured that a large number of vulnerabilities faced by detainees were addressed, if only by soft law in some cases. However, in certain areas, particularly grounds and procedures for internment, the precise contours of the protections that should apply in NIAC remained unclear.

As our focus on the detaining authority shifted away from the State and towards the non-State armed group, we saw that the varying capabilities of these posed a challenge for articulating workable standards. We had to grapple with how potentially limited capabilities on the non-State side would be reconciled with the principle of equality of belligerents in IHL.

Finally, as the territory on which the armed conflict was taking place shifted away from the territory of the detaining State to the territory of a host State, questions arose as to the reach of International Human Rights Law and the source of the grounds and procedures for detention, amongst others.

On Monday, the International Committee of the Red Cross (ICRC) will meet with States for three days to discuss many of the issues we have addressed today. What we know for certain, is that at the end of the meeting, the puzzle we have laid out here will not be solved. However, we will have moved forward in an effort to fill the protective gap left by these enduring debates.

As we go forward confronting these challenges and seeking to strengthen the legal protection of detainees in these different contexts and with respect to these different detaining authorities, it pays to keep in mind that for the detainee, whoever the player, whatever the territory, however the conflict is classified, the basic needs and vulnerabilities remain largely the same. This law exists for them and they deserve our focused attention to strengthening the legal protection they enjoy.

J'aimerais ajouter quelques mots en français pour terminer.

Quand on travaille dans les domaines du droit international humanitaire et des droits de l'homme, on se sent parfois dans la peau de Don Quichotte, tant les problèmes auxquels on s'attaque paraissent insurmontables, et souvent dans celle de Sisyphe, car il faut sans cesse reprendre ce que l'on croyait acquis. Les défenseurs du droit international humanitaire et des droits de l'homme gravissent des montagnes dont ils savent qu'ils n'atteindront jamais le sommet, sachant par avance qu'ils ne pourront jamais s'estimer pleinement satisfaits.

C'est particulièrement vrai dans le domaine de la détention. Les besoins sont et resteront immenses, si divers que soient les raisons, les lieux et les responsables de la détention. Mais ce n'est pas l'immensité de la tâche qui doit nous décourager. En se concentrant sur la détention dans les conflits armés non internationaux, le projet en cours s'attaque à un problème concret, à une situation où des clarifications et des incitations sont nécessaires. Si modestes soient les résultats que l'on peut espérer des efforts actuellement entrepris, ceux-ci restent pleinement justifiés. Dans le domaine humanitaire, on n'avance que pas à pas et l'on ne saurait renoncer, en l'occurrence, à tout entreprendre pour améliorer tant soit peu l'existence des innombrables personnes qui sont détenues lors des conflits armés non internationaux, bien souvent dans des conditions très précaires, apportant aussi, ce faisant, un peu de soulagement à leurs familles. Il reste à espérer que les gouvernements, en premier lieu, sauront répondre aux attentes placées en eux.

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Detention in Armed Conflict

15th Bruges Colloquium – October 16 and 17, 2014

Simultaneous translation into French and English will be provided
Traduction simultanée anglais/français

DAY 1: Thursday, 16 October 2014

9:00 – 9:30 **Registration and Coffee**

9:30 – 9:40 **Welcome address by Thierry Monforti**, Director of the Academic Service and Admissions, College of Europe

9:40 – 9:50 **Welcome address by Mr. François Bellon**, Head of Delegation, ICRC Brussels

9:50 – 10:10 **Keynote address by Yves Sandoz**, Member of the International Committee of the Red Cross

10:10 – 10:30 Coffee break

Session One: DEPRIVATION OF LIBERTY IN INTERNATIONAL ARMED CONFLICT
Chairperson: **Elzbieta Mikos-Skuza**, IHFFC, University of Warsaw

10:30 – 10:50 **Internment and criminal detention in armed conflict**
Speaker: **Jérôme de Hemptinne**, Special Tribunal for Lebanon, Université catholique de Louvain

10:50 – 11:10 **Protections for persons deprived of their liberty in international armed conflict**
Speaker: **Lawrence Hill-Cawthorne**, University of Reading

11:10 – 11:30 **Internment of civilians in armed conflict**
Speaker: **Vaios Koutroulis**, Université Libre de Bruxelles

11:30 – 12:15 **Discussion**

12:15 – 14:00 **Sandwich lunch**

Session Two: DEPRIVATION OF LIBERTY IN NON-INTERNATIONAL ARMED CONFLICT
Chairperson: **Knut Dörmann**, ICRC Legal Division

14:00 – 14:20 **Legal framework for detention by states in non-international armed conflict**
Speaker: **Marco Sassòli**, University of Geneva

14:20 – 14:40 **Detention by non-state armed groups**
Speaker: **Elisabeth Decrey Warner**, Geneva Call

14:40 – 15:00 **The challenges in strengthening protection for persons deprived of their liberty in non-international armed conflict**
Speaker: **Ramin Mahnad**, ICRC Legal Division

15:00 – 15:45 **Discussion**

15:45 – 16:00 **Coffee break**

Session Three: DETENTION OPERATIONS ABROAD
Chairperson: **Steven Hill**, NATO SG Legal Office

16:00 – 16:20 **NATO operational perspective**
Speaker: **Andres Muñoz**, SHAPE Legal Office

16:20 – 16:40 **The legal basis for detention in extraterritorial NIACs – the *Mohammad Serdar Case***
Speaker: **Françoise Hampson**, University of Essex

16:40 – 17:00 **Review of detention in extraterritorial operations**
Speaker: **Marten Zwanenburg**, Ministry for Foreign Affairs of the Netherlands

17:00 – 17:45 **Discussion**

19:30 – 22:30 **Dinner (registration required)**

DAY 2: Friday, 17 October 2014

Session Four: TRANSFERS FROM ONE AUTHORITY TO ANOTHER
Chair person: **Stéphane Kolanowski**, ICRC Brussels

9:00 – 9:20 **The principle of non-refoulement in relation to transfers**
Speaker: **Laurent Gisel**, ICRC Legal Division

9:20 – 9:40 **Transfer agreements: the EU experience**
Speaker: **Eric Chaboureau**, EEAS Legal Division

9:40 – 10:00 **Post-transfer monitoring mechanisms**
Speaker: **Jeremy Kitt**, UK Ministry of Defence

10:00 – 10:45 **Discussion**

10:45 – 11:00 **Coffee break**

11:00 – 12:30 **THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW WHEN DETAINING IN ARMED CONFLICT**
Moderator: **Elizabeth Wilmshurst**, Chatham House

Panellists:

Françoise Hampson	University of Essex
Jonathan Horowitz	Open Society Foundations
Frederik Naert	Council of the EU legal service, University of Leuven
Marc Neve	barrister and former member of the European Committee for the Prevention of Torture

12:30 – 13:00 **CONCLUDING REMARKS AND CLOSURE**
Yves Sandoz, Member of the International Committee of the Red Cross

CURRICULUM VITAE DES ORATEURS
SPEAKERS' CURRICULUM VITAE

François Bellon is the Head of the ICRC Delegation to the European Union, NATO and the Kingdom of Belgium, in Brussels since August 2010. Mr Bellon joined the ICRC in 1984, and has occupied numerous positions within the ICRC. Prior to Brussels, he has been the Head of ICRC Regional Delegation for the Russian Federation (2006-2010), the Head of Delegation in Israël (2002-2005), in Georgia (1999-2002), in Budapest (1997-99), and in the Federal Republic of Yougoslavia (1994-97). Before that, Mr Bellon did several ICRC field missions in Azerbaijan (Nagorni Karabakh), Moldova, Bosnia-Herzegovina, Sri Lanka, Pakistan, Iraq and Lebanon. He also served at the ICRC Headquarters at the Middle East and North Africa Desk as well as in the Legal Division. He holds a Master in Law from the Lausanne University in Switzerland and completed a Postgraduate course in conflict management and emergency response at the Complutense University in Madrid.

Thierry Monforti is the Director of the Academic Service and Admissions at the College of Europe in Bruges since 1994. He is a lecturer on the functioning of the European Union. Thierry Monforti is in charge of the organisation of the academic year including timetabling, conferences and colloquia. Amongst other things, Thierry Monforti manages the academic rules in the framework of the Academic Council (applicability, prevention of conflicts and appeal procedures, follow up of the Bologna Process), represents the College of Europe in diverse negotiations with European Institutions and National Administrations, conferences or other official events and implements several policies, procedures and selection of the students body (in both campuses, Bruges and Natolin) including programmes in cooperation with the European Commission. In 2008, Thierry Monforti also contributed as an expert for an OECD panel about the setting up of a regional school of Administration in the Balkans. He also worked as a consultant for the European Copyright Agency (Alicante). Until December 2004, Thierry Monforti organised monthly intense seminars for EU officials (European Commission and EP) in cooperation with DG ADMIN. Between 1992 and 1994, Thierry Monforti was Academic Assistant to the Rector of the College of Europe. In 2012, he awarded the medal of the European Merit from the 'Fondation du Mérite Européen', chaired by Former President of the European Commission and Prime Minister of Luxemburg, Jacques Santer.

Né le 27 janvier 1944, **Yves Sandoz** est marié et père de trois enfants. Il a fait ses études à Neuchâtel et obtenu la licence puis le doctorat en droit de l'Université de cette ville. Entre 1968 et 1973, il a effectué des missions pour le CICR, notamment au Nigéria, en Israël (et dans les territoires occupés) en Jordanie, au Liban, au Bangladesh et au Yémen du Sud (avant

la réunification). Il a pendant cette période poursuivi la rédaction de son travail de doctorat et assuré la réédition d'un Commentaire du Code pénal suisse. Il a rejoint le CICR en 1975, au sein de la Division juridique et est resté rattaché à l'Institution jusqu'à fin 2000, dont 18 ans en tant que Directeur du droit international et de la doctrine. Il a également poursuivi des activités académiques, à travers de nombreux cours dans différentes Universités et Hautes écoles, des séminaires et de nombreuses publications. Il a quitté l'administration du CICR à la fin de l'année 2000 et élaboré le concept d'un Centre Universitaire du droit international humanitaire (CUDIH) au lancement duquel il a participé. Il donne depuis 2002 le cours général (francophone) de droit international humanitaire dans le cadre du Diplôme d'Etudes approfondies (DEA) organisé par ce Centre et un cours semestriel en droit international humanitaire à l'Université de Fribourg. Il donne également un séminaire bloc de trois jours au Collège d'Europe, à Bruges, et collabore avec de nombreuses autres Universités ou Hautes écoles. Il participe fréquemment à des séminaires ou conférences d'experts dans le domaine du droit international général, pénal et, surtout, humanitaire. Il est membre du CICR depuis octobre 2002 et fait partie de sa Commission de contrôle. Il est également membre l'Institut international des droits de l'homme ainsi que de l'Institut international de droit humanitaire et de nombreuses associations de droit international. Il est l'auteur d'une centaine de publications, essentiellement dans le domaine du droit international humanitaire.

Elzbieta Mikos-Skuza is an associate professor in Public International Law at the Faculty of Law and Administration of the University of Warsaw and NOHA (Network on Humanitarian Action) Director at the same university. She served as Faculty's Vice-Dean in 2008 – 2012. Elzbieta Mikos-Skuza is also Visiting Professor of the College of Europe (Natolin). For thirty years she has been volunteering with the Polish Red Cross. In 2004 – 2012 she was a Vice-President of the Polish Red Cross and in 1999 – 2012 – President of the Polish Red Cross Commission for Dissemination of International Humanitarian Law. Elzbieta Mikos-Skuza is also a member of the International Humanitarian Fact Finding Commission established under 1977 Protocol Additional I to the 1949 Geneva Conventions on the protection of victims of war and of the San Remo International Institute of Humanitarian Law. She is the author and co-author of numerous publications on Public International Law and International Humanitarian Law, including the collection of IHL documents published in Polish language.

Jérôme de Hemptinne worked for nine years at the International Criminal Tribunal for the former Yugoslavia where he was, among other things, Chef de Cabinet for the President. In 2006, he joined the Office of the Legal Counsel of the United Nations in New York. Since 2008, Jérôme de Hemptinne has been Senior Legal Officer at the Special Tribunal for Lebanon and is teaching International Humanitarian Law at the Academy of Humanitarian Law and Human Rights (Geneva) and at the Universities of Louvain (Belgium) and Strasbourg (France).

Lawrence Hill-Cawthorne is a Lecturer in the Law School at the University of Reading, having taken up this post in September 2013. Prior to joining Reading, he was a Graduate Teaching Assistant in Public International Law at the University of Oxford, where he completed his BCL, MPhil and doctorate. Other previous positions include British Research Council Fellow at the John W Kluge Center, Library of Congress, Washington DC, Convenor of the Oxford Public International Law Discussion Group, and Treasurer & Member of the Executive Committee of Oxford Pro Bono Publico. Lawrence's research interests lie in the field of public international law and, more specifically, international humanitarian law, human rights law and international criminal law. He is particularly interested in the relationship of these different areas to general international law.

Vaios Koutroulis is Lecturer at the International Law Centre of the Université Libre de Bruxelles since 2013. He studied law at the University of Athens and the Université Libre de Bruxelles (ULB). He received his PhD in 2011 for a thesis on the relations between *jus contra bellum* and *jus in bello*, currently under publication from Bruylant editions (Brussels). Vaios teaches at the *Université Libre de Bruxelles*, the Catholic University of Lille and the Royal Belgian Military School. His courses include law of armed conflict, international criminal law, law of international responsibility, and public international law. He was also an adviser to the Counsel and Advocate of Belgium in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice. His publications focus mainly on *jus in bello* and *jus contra bellum* and include a monograph on belligerent occupation published by Pedone editions (Paris).

Knut Dörmann is Head of the Legal Division of the International Committee of the Red Cross (ICRC), since December 2007. He had been Deputy Head of the Legal Division between June 2004 and November 2007 and Legal Adviser at the Legal Division between December 1998 and May 2004. He was a member of the ICRC Delegation to the Preparatory Commission of the International Criminal Court. He holds a Doctor of Laws (Dr. Iur.) from the University of Bochum in Germany (2001). He was Managing Editor of Humanitäres Völkerrecht - Informationsschriften (1991-1997). Prior to joining the ICRC, he was Research Assistant (1988-1993) and Research Associate (1993-1997) at the Institute for International Law of Peace and Armed Conflict, University of Bochum. Knut Dörmann is and has been a member of several groups of experts working on the current challenges of international humanitarian law. He has extensively presented and published on international law of peace, international humanitarian law and international criminal law. He received the 2005 Certificate of Merit of the American Society of International Law for his book *Elements of War Crimes under the Rome Statute of the International Criminal Court*, published by Cambridge University Press.

Marco Sassòli, a citizen of Switzerland and Italy, is Professor of international law and Director of the Department of international law and international organization at the University of Geneva. From 2001-2003, Marco Sassòli has been professor of international law at the Université du Québec à Montreal, Canada, where he remains Associate Professor. He is Commissioner of the International Commission of Jurists (ICJ). Marco Sassòli graduated as doctor of laws at the University of Basel (Switzerland) and was admitted to the Swiss bar. He has worked from 1985-1997 for the International Committee of the Red Cross (ICRC) at the headquarters, inter alia as deputy head of its legal division, and in the field, inter alia as head of the ICRC delegations in Jordan and Syria and as protection coordinator for the former Yugoslavia. During a sabbatical leave in 2011, he joined again the ICRC, as legal adviser to its delegation in Islamabad. He has also served as executive secretary of the ICJ, as registrar at the Swiss Supreme Court, and from 2004-2013 as chair of the board of Geneva Call, an NGO engaging non-State armed actors to respect humanitarian rules.

Elisabeth Decrey Warner is the Executive President and co-founder of Geneva Call. For over 30 years, she has worked with NGOs on issues relating to refugees, torture, disarmament and humanitarian norms. Her work was recognized in 2005 when she was nominated for Switzerland as one of the 1000 Women for the Nobel Peace Prize. Ms Decrey Warner was a member of the Parliament of the Republic and Canton of Geneva for 12 years and was elected its President in 2000. She is currently a member of the Advisory Board of the Geneva Centre for the Democratic Control of Armed Forces (DCAF) as well as of the Geneva International Center for Humanitarian Demining (GICHD).

Ramin Mahnad has been with the ICRC since 2006 and currently serves as Legal Adviser within the Legal Division in Geneva. In this capacity, he heads the ICRC's project on strengthening international humanitarian law protecting persons deprived of their liberty in armed conflict. Prior to his posting in Geneva, Ramin served as Deputy Legal Adviser to the ICRC regional delegation in Washington, D.C., as well as Legal Adviser to the delegations in Afghanistan and Sri Lanka. Before joining the ICRC, Ramin spent two years in private practice in New York where he worked on litigation matters before U.S. federal courts. Ramin earned his J.D. at the George Washington University Law School in Washington, D.C. He also holds a *Diplome d'Etudes Approfondies* (D.E.A.) in International Law from the Graduate Institute of International Studies, Geneva, and a B.A. in Political Science from the University of California, Berkeley.

Steven Hill is Legal Adviser and Director of the Office of Legal Affairs at NATO. As the senior lawyer in NATO, he advises the Secretary General and International Staff on all legal aspects of NATO operations and coordinates NATO activities in the legal field. Mr. Hill came to NATO after serving as Counselor for Legal Affairs at the U.S. Mission to the United Nations. Prior to

his work in New York, Mr. Hill led the legal unit at the International Civilian Office in Kosovo. In both roles, his responsibilities included a strong policy component focused on supporting the rule of law in conflict- and post-conflict situations. He previously worked in the Office of the Legal Adviser at the U.S. Department of State, where he advised on the law of armed conflict, human rights law, economic sanctions, and the law governing diplomatic premises. He was responsible for negotiating a wide range of bilateral and multilateral instruments, including as chief U.S. negotiator for the landmark U.N. Convention on the Rights of Persons with Disabilities. He was assigned to the U.S. Embassy in Baghdad from 2004 to 2005. He also served as Counsel in proceedings before the International Court of Justice in 2003 and in several cases before the Inter-American Commission on Human Rights from 2006 to 2007. Mr. Hill also actively engages in teaching and research on international law, including as Visiting Professor of Law at the Hopkins-Nanjing Center in China during the 2010-2011 academic year. Mr. Hill graduated from Yale Law School and Harvard College.

Andres B. Munoz Mosquera was born in Poissy, France, on 20 May 1965. After his secondary education joined the Spanish Armed Forces where he served in two cavalry regiments as "Secretario de Causas" until 1991 when he was appointed to the Defence Staff, during that time Mr Munoz Mosquera was a permanent participant in the Spanish inter-ministerial delegation before the International Telecommunications Union (ITU) until 1999. Mr Munoz-Mosquera joined the Supreme Headquarters Allied Powers Europe (SHAPE) in February 2006 as a civilian, where he is the International Branch Chief from a previous NATO assignment at the NATO Joint Command South West (JCSW) Legal Office, in Madrid, that he joined in April 2000. Mr Munoz Mosquera has been deployed twice in Bosnia Herzegovina (1994 and 1997). In 1994 he performed press information duties at General Rose's staff and was involved in the anti-sniping agreements and exchange of prisoners and corpses in Sarajevo. In year 1997 his duties were related to identification and collection of evidence related to war crimes committed during the war period. During his active duty Mr Munoz Mosquera pursued law and international relations studies. He also holds a Masters in Legal Practice by the Law and Business Institute of Madrid, an *honoris causa* Master in International Relations and Trade by the UNICIT of Managua, Nicaragua. Mr Munoz Mosquera is a graduate of the Fletcher School of Law and Diplomacy (Tufts University, Boston, MA, USA). In 1996 Mr Munoz Mosquera was awarded the Honor Graduate for his academic achievement at the IRFMS course at the Keesler Technical Centre, Biloxi, MS, USA. Mr Munoz Mosquera is author of three books ("International law and the Arab-Israeli Conflict"; "International Law and International Relations, The Stepsisters"; and "Peacekeeping Regimes") and of several articles in specialized legal reviews. He is also co-author of other publications. He was a visiting professor of the UNICIT in Nicaragua and is a permanent professor of the OSCE course (REACT Expert on post conflict – Helsinki Spain – Univ Complutense). Mr Munoz Mosquera is a member of the Society of the Military Law and Law of War, the Madrid

Bar Association and a CCBE European Lawyer. Mr Munoz Mosquera has been awarded several decorations, among them is the French Republic medal of the Ex-Yugoslavia, the NATO Meritorious Medal and he is Caballero de la Orden de San Hermenegildo.

Françoise Hampson is a Professor of Law at the Human Rights Centre of the University of Essex. She was a member of the steering group and the group of experts for the ICRC study on customary international humanitarian law. She has taught on courses and participated in conferences for members of the armed forces in Australia, Canada, Ghana, the UK and the USA, as well as at the International Institute of Humanitarian Law in San Remo, Italy. She is a member of the IHL Military Department Training Advisory Committee. She was a member of the UN Sub-Commission on the Promotion and Protection of Human Rights from 1998-2007. She is an expert on the European Convention on Human Rights and has been the legal representative of applicants before the European Court of Human Rights in many cases arising out of military operations. In recognition of their litigation on behalf of Turks of Kurdish origin, she and her colleague Professor Kevin Boyle were given the award Human Rights Lawyer of the Year in 1998. She produced an expert report for the Steering Committee on Human Rights of the Council of Europe on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions. Her publications are in the fields of the law of armed conflicts and human rights law. In 2005, she was awarded an OBE for services to international law and human rights.

Marten Zwanenburg is legal counsel with the International Law Division of the Ministry of Foreign Affairs of the Netherlands, where he advises primarily on international law concerning the use of force and International Humanitarian Law. He previously worked in the Directorate of Legal Affairs of the Ministry of Defense. He also teaches a course on UN peacekeeping in the Master of Advanced Studies in International Public Law program at Leiden University. Marten has published widely on International Humanitarian Law and collective security law. Marten is an editor of the Military Law and the Law of War Review.

Stéphane Kolanowski holds a Law Degree and a Master in Laws (LL.M.) in Public International Law. He joined the ICRC Legal Division (Geneva) in 1997, where he worked on different issues, such as Human Rights as well as on some arms related issues. In 1999, he participated in the build-up of the ICRC Delegation to the EU, NATO and the Kingdom of Belgium, a Delegation in which he is still working today as the Senior Legal Adviser. He is responsible for following relevant legal developments in EU and NATO policies and operations and for promoting and disseminating International Humanitarian Law for several audiences. Since 2013, Stéphane is visiting professor at the College of Europe. He has published articles on International Humanitarian Law, and participated in several conferences and seminars. He is also at the origin of the "Bruges Colloquium" in International Humanitarian Law.

Laurent Gisel has been working for the International ICRC since 1999. From 1999 to 2005, he carried out assignments in Israel and the Occupied Territories, Eritrea, Afghanistan and Nepal. From 2005 to 2008, he served as Diplomatic Adviser to the ICRC Presidency. Since 2008, Laurent Gisel works in the ICRC Legal Division. As Legal Adviser to the Operations from 2008 to 2012, he covered notably the Western countries, Iraq and Afghanistan. He is currently working in the Thematic Legal Advisers' Unit. Prior to joining the ICRC, Laurent Gisel became attorney-at-law in Geneva and worked at the Public and Administrative Law Court of the Canton de Vaud. He holds a degree in law from the University of Geneva and a Master in international law from the Graduate Institute of International Studies (Geneva, Switzerland).

Eric Chaboureau graduated from the *Institut d'Etudes Politiques* in Paris and holds a LL.M. degree from the *Université de Paris II*. He obtained his *Brevet technique de l'Enseignement Militaire Supérieur Scientifique et Technique*. After training at the Administration School of Maritime Affairs in Bordeaux, he boarded for seven month the helicopters carrier *Jeanne d'Arc* as a student officer. He was Deputy Director for Coastal Maritime Affairs of the French South-Western region in Bordeaux, before joining the Ministry of the Sea in Paris, where he held several positions before being appointed Head of the Defence Office of the Ministry (1994 - 1997). Officer in charge of the legal and financial affairs at the Western European Union Military Staff in Brussels from 1997 to 2001, he joined in 2001 the EU Council Legal Service in Brussels. Specialized in legal affairs related to European Defence issues (law of the institutions, use of force, collective security, status of troops, financial and logistical aspect of missions), Eric Chaboureau has also experience in legal issues related to disarmament (2003 – 2006) and the law of the sea. Eric Chaboureau is now Legal advisor within the EEAS Legal Division.

Having graduated from the University of Essex and completed the Legal Practice Course at BPP Law School, **Jeremy Kitt** was a Government Legal Service (GLS) Legal Trainee qualifying as a solicitor in 2002. Staying with the GLS, Jeremy prosecuted as part of the Customs & Excise Prosecutions Office having the conduct of Her Majesty's Customs & Excise prosecutions of all types (in particular, drugs, excise and money laundering) and complexity including serious and sensitive casework from 2002 until 2005. Jeremy joined the Ministry of Defence Central Legal Services in 2005, first in the Personnel & Pensions Law Team and from 2008 in the Command, Discipline & Constitutional Division before joining the Operational & International Humanitarian Law Division in 2013. As CLS-OIHL1, Jeremy has primary responsibility for operational and IHL issues relating to UK operations in Afghanistan.

Elizabeth Wilmshurst is Associate Fellow, International Law, at Chatham House (the Royal Institute of International Affairs). She was a legal adviser in the United Kingdom diplomatic service until 2003, and then a visiting professor at University College, London University in

international criminal law. She is editor of *International Law and the Classification of Conflicts* (Oxford, 2012) and co-editor of *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, 2007); and a co-author of *An Introduction to International Criminal Law and Procedure* (Cambridge, three editions).

Jonathan Horowitz works at the Open Society Justice Initiative on issues relating to human rights, national security and counterterrorism, and international humanitarian law. He has conducted research in Kenya, worked on legal submissions relating to national security detentions in Spain and Egypt, and leads the drafting process for a set of guidelines on human rights and countering terrorism for the African Commission on Human and Peoples' Rights. Prior, Mr. Horowitz worked at the U.S. Embassy in Kabul, Afghanistan on detainee affairs; documented and reported on detainee and "night-raid" abuses in Afghanistan; and was an investigator for habeas lawyers representing Guantanamo Bay detainees. Mr. Horowitz also worked briefly for the International Criminal Court as a Sudan/Chad analyst; served as a consultant for Human Rights Watch; and documented violations of international human rights and humanitarian law in Sudan for the United Nations from 2005 to 2007. Mr. Horowitz obtained his LLM from the University of Essex and has published on the application of human rights in times of occupation; armed conflict-related detention issues; and human rights fact-finding methodologies. He is also the author and co-author of several reports on human rights abuses in the context of armed conflict and counterterrorism.

Frederik Naert is a member of the Legal Service of the Council of the European Union, where he deals with EU external relations, including EU military operations. He is also an affiliated senior researcher at the Institute for International Law of Leuven University. He was previously a legal advisor at the Belgian Ministry of Defence/Defence Staff (2004-2007) and a research and teaching assistant at Leuven University (1998-2004). He studied law at Leuven University and at the University of Melbourne. Frederik Naert is the author of *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia, 2010) and is the Director of the *Military Law & Law of War Review*. He has *inter alia* published on peace operations, international humanitarian and human rights law and EU external relations law. He has also lectured and spoken on these subjects at international conferences.

Marc Neve est avocat au barreau de Liège (Belgique). Il est spécialiste agréé en droit pénal et en droits de l'homme par l'Ordre des Barreaux Francophones et Germanophones. Marc Nève est chargé de formation en droit pénal, droit de la procédure pénale et droit de l'exécution des peines au sein de l'école du stage du Barreau de Liège. Depuis 1977, Marc Nève est membre de la «Commission prisons» de la Ligue des Droits de l'Homme dont il a assuré la présidence durant

plusieurs années et est membre de l'Observatoire International des Prisons (section belge). Entre mars 2000 et novembre 2012, il a été membre du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du Conseil de l'Europe. Ancien vice-président du CPT (2004-2006, fin 2009-début 2010), Marc Nève a effectué plusieurs missions en matière de respect des droits de l'homme et de maintien de l'état de droit (notamment Turquie, Ukraine, Azerbaïdjan, Géorgie, Arménie). Depuis la fin de son mandat au sein du CPT, il est régulièrement intervenu en qualité d'expert pour le service en charge de l'exécution des arrêts de la Cour européenne des droits de l'homme. Ancien président d'Avocats sans frontières (ASF), Marc Nève a participé à plusieurs missions et projets avec ASF (Rwanda, Turquie), et a été associé à la mise en place d'un groupe de travail consacré à la justice pénale internationale. A ce titre il a suivi les travaux relatifs à la Cour pénale internationale.