INTERNATIONAL LAW AND THE PROCEDURAL REGULATION OF INTERNMENT IN NON-INTERNATIONAL ARMED CONFLICT

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ABSTRACT

International Law and the Procedural Regulation of Internment in Non-International Armed Conflict

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'International humanitarian law' (IHL) has long differentiated between international and non-international armed conflicts, regulating the latter, at least at the level of treaty law, far less than the former. One of the starkest examples of this is in the case of administrative detention on security grounds or 'internment'. Thus, IHL applicable in international armed conflicts establishes a seemingly robust regime regarding internment. As such, it specifies the limited grounds on which an individual may be interned, the procedural safeguards that must be provided to internees, and the point at which the internee must be released. In the conventional IHL provisions applicable in non-international armed conflicts, on the other hand, no equivalent rules are made explicit. In addition, the application in such situations of international human rights law (IHRL), which also contains procedural rules applicable to detention, is considered by many to be very controversial. This has led to considerable confusion over the current state of the law governing detention in non-international armed conflict, and it is here that some of the most controversial practices and intractable debates within IHL of the last decade have developed. The present thesis seeks to clarify the law here and does so through a comprehensive examination of both IHL and IHRL. It begins with a discussion of the general context in which the thesis falls, i.e. the distinction between international and non-international armed conflicts. This is considered from an historical perspective, considering the basis for the distinction as well as its appropriateness in contemporary international law. Having considered this general question, the thesis then moves on to an examination of the current *lex lata* with regard to internment in non-international armed conflicts, with a comprehensive examination of both IHL and IHRL. Regarding IHL, it is shown that, whilst there remains a dearth of conventional and customary rules here, one can discern a general prohibition of internment that is not necessary as a result of the conflict. The application of the IHRL rules on detention in non-international conflicts and their interaction with relevant rules of IHL are then explored, with substantial reference to the practice of both states and human rights treaty bodies. It is shown that, absent derogation, human rights treaty rules continue fully to regulate detentions by states in relation to non-international armed conflicts, alongside the minimal rules of IHL. However, it is also demonstrated that the current law remains inadequate in this area. First, there is significant disagreement between the human rights treaty bodies on the extent to which derogation from these rules is permitted. Second, persons detained in non-international conflicts by non-state armed groups or by states with no human rights treaty obligations are protected by the far more basic customary rules in this area. The thesis, therefore, concludes with a set of concrete proposals for developing the law here, in a manner that builds upon and clarifies the current obligations of all states and non-state armed groups.

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TABLE OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58
ACiHPR	African Commission on Human and Peoples' Right
ACHR	American Convention on Human Rights (adopted 22 November 1969, entered into force 17 July 1978) (1969) OAS Treaty Series No 36
ADRDM	American Declaration on the Rights and Duties of Man (adopted by the Ninth International Conference of American States (1948)), OEA/Ser.L.V/I.4 rev 12
African J Intl & Comp L	African Journal of International and Comparative Law
AJIL	American Journal of International Law
ALI	American Law Institute
Am U L Rev	American University Law Review
API	Protocol Additional 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
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, opened for signature 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609
ArCHR	Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008)
ARB	Administrative Review Board
ASIL Proc	Proceedings of the American Society of International Law
AUMF	Authorization for Use of Military Force, Pub. L. 107–40, 115 Stat. 224 (18 September 2001) (United States)
Australian YB Intl L	Australian Yearbook of International Law

Boston College Intl & Comp L Rev	Boston College International and Comparative Law Review
Buff Hum Rts L Rev	Buffalo Human Rights Law Review
BYIL	British Yearbook of International Law
Case W Res J Intl L	Case Western Reserve Journal of International Law
Chinese J Intl L	Chinese Journal of International Law
CNDP	*Congrès national pour la défense du people*
Colum J Transnatl L	Columbia Journal of Transnational Law
CPA	Coalition Provisional Authority
CPN-M	Communist Party of Nepal-Maoist
Creighton L Rev	Creighton Law Review
CRRB	Combined Review and Release Board
CSRT	Combatant Status Review Tribunal
DC	District of Columbia
DRB	Detainee Review Board
DRC	Democratic Republic of the Congp
Duke J Comp & Intl L	Duke Journal of International and Comparative Law
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)
ECiHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
ECRB	Enemy Combatant Review Board
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
ELN	*Ejército de Liberación*

ESIL Proc	Proceedings of the European Society of International Law
FARC	*Feurzas Armadas Revolucionarias de Colombia*
FDLR	*Forces démocratiques de libération du Rwanda*
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
GCII	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
GCIII	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
GCIV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
Ga J Intl & Comp L	Georgia Journal of International and Comparative Law
Harv L Rev	Harvard Law Review
Harv Intl LJ	Harvard Journal of International Law
Harv Nat Sec J	Harvard National Security Journal
Hastings Intl & Comp L Rev	Hastings International and Comparative Law Review
HRC	UN Human Rights Committee
HRLR	Human Rights Law Review
IACiHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

ICJ	International Court of Justice
ICLR	International Community Law Review
IHL	International humanitarian law
IHRL	International human rights law
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICRC Guidance	N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva 2009)
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
ILSA J Intl & Comp L	International Law Students Association Journal of International and Comparative Law
Intl Affairs	International Affairs
Intl J Marine & Coastal L	International Journal of Marine and Coastal Law
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
Isr L Rev	Israel Law Review
Isr Ybk Human Rights	Israel Yearbook of Human Rights
JACL	Journal of Armed Conflict Law
JCSL	Journal of Conflict & Security Law
JICJ	Journal of International Criminal Justice
J Intl Humanitarian Legal Studies	Journal of International Humanitarian Legal Studies

J Nat Sec L & Ply	Journal of National Security Law and Policy
J of Peace Research	Journal of Peace Research
KLA	Kosovo Liberation Army
LJIL	Leiden Journal of International Law
LTTE	Liberation Tigers of Tamil Eelam
Melb UL Rev	Melbourne University Law Review
MJIL	Melbourne Journal of International Law
Mil L Rev	Military Law Review
MLC	*Mouvement national pour la libération du Congo*
MLLWR	Military Law and Law of War Review
MLR	Modern Law Review
MNF-I	Multi-National Forces in Iraq
MNFRC	Multi-National Force Review Committee
Neth YB Intl L	Netherlands Yearbook of International Law
NILR	Netherlands International Law Review
Nordic J Intl L	Nordic Journal of International Law
Notre Dame L Rev	Notre Dame Law Review
NWCR	Naval War College Review
NYU J Intl L & Pol	New York University Journal of International Law and Politics
NYU L Rev	New York University Law Review
OEF	Operation Enduring Freedom
PCIJ	Permanent Court of International Justice
PL	Public Law
POW	Prisoner of war
PR	Personal Representative

PRB	Periodic Review Board
PSA	Public Security (2nd Amendment) Act 1991 (Nepal)
PTA	Prevention of Terrorism Act 1979 (Sri Lanka)
RCD	*Rassemblement Congolais pour la Démocratie*
RBDI	*Revue belge de droit international*
Res	Resolution
Santa Clara J Intl L	Santa Clara Journal of International Law
SCR	Security Council Resolution
South African J Hum Rts	South African Journal of Human Rights
Suff Transnat L Rev	Suffolk Transnational Law Review
TADO	Terrorist and Disruptive Activities (Control and Punishment) Ordinance 2004 (Nepal)
UCLA Pacific Basin LJ	University of California, Los Angeles Pacific Basin Law Journal
UDHR	Universal Declaration of Human Rights, UNGA Res 217 A(III) (1948)
UN	United Nations
UNGA	UN General Assembly
UNITA	National Union for the Total Independence of Angola
UNSC	UN Security Council
UNGA	United Nations General Assembly
UNWGAD	UN Working Group on Arbitrary Detention
U Pa L Rev	University of Pennsylvania Law Review
U Rich L Rev	University of Richmond Law Review
Va J Intl L	Virginia Journal of International Law
Vand J Transnat L	Vanderbilt Journal of Transnational Law

VCLT	Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331
YJIL	Yale Journal of International Law
Yale LJ	Yale Law Journal
YIHL	Yearbook of International Humanitarian Law

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1. INTRODUCTION

Since its earliest elaborations, international humanitarian law (IHL) has treated differently international and non-international armed conflicts.[1] The consequence of this difference is that the former (conflicts between two or more states) have traditionally been regulated far more comprehensively than the latter (conflicts between states and non-state armed groups, or between such groups).[2] In light of the post-1945 shift that has seen non-international conflicts become the norm, this distinction seems particularly anachronistic.[3]

One clear example of this international/non-international dichotomy relates to the regulation of 'internment' or 'administrative detention', defined as a deprivation of liberty ordered by the executive on the basis of future security threat without criminal charge.[4] In international armed conflicts, IHL specifies the grounds that justify internment, the procedural safeguards that must be provided, such as initial and periodic administrative review, and the point at which internment must cease.[5] In non-international armed conflicts, however, no equivalent explicit rules exist in the applicable treaty provisions of IHL.[6] Consequently, conventional wisdom holds that IHL 'contains no indication of how [internment] is to be regulated.'[7] In addition, whilst international human rights law (IHRL) also stipulates certain procedural safeguards that must be adhered to when detaining,

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1 The distinction between categories of conflict in IHL will be discussed in detail in chapter two.

2 E Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP, Oxford 2010) 1. The term 'non-state armed group/party' will be adopted throughout this thesis to refer to the non-state party to non-international armed conflicts, whereas the terms 'non-state armed forces/fighters' will be used to refer specifically to the military wing of the non-state party.

3 E Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts' (2007) 20 LJIL 441, 442.

4 J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 375–6.

5 See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (hereinafter 'GCIV'), arts 42–3 and 132. These rules are discussed in detail in chapter three.

6 See section 4.2.

7 LM Olson, 'Guantánamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards' (2009) 42 Case W Res J Intl L 197, 208.

disagreement exists over both the application of those rules in armed conflict,[8] as well as the relationship between IHL and IHRL.[9]

These controversies regarding the legal rules applicable to internment in non-international armed conflicts are particularly worrying, for not only is internment a recognised measure in non-international conflicts,[10] but reports of arbitrary deprivations of liberty in such situations are common, e.g., in Colombia,[11] Nepal,[12] Haiti,[13] and Sudan.[14] Indeed, the lack of clarity in the legal rules here accounts, in part, for the considerable divergence in the views regarding the applicable legal framework governing detentions by the United States in its military operations against al-Qaeda, considered by the US to constitute a non-international armed conflict.[15] The US has argued that the detention

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[8] See, e.g., UN Human Rights Committee (HRC), 'Second Periodic Report: Israel', CCPR/C/ISR/2001/2, 4 December 2001, [8]; HRC, 'Concluding Observations: United States of America', CCPR/C/US/CO/3/Rev.1, 18 December 2006, [10].

[9] The literature on this is vast: see, e.g., R Provost, *International Human Rights and Humanitarian Law* (CUP, Cambridge 2002); N Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Isr L Rev 356; MJ Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Isr L Rev 453; F Ni Aolain, 'The No Gaps Approach to Parallel Application in the Context of the War on Terror' (2007) 40 Isr L Rev 563; BA Schabas, '*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus Ad Bellum*' (2007) 40 Isr L Rev 592; C Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 IRRC 501; I Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Laws of Armed Conflict' (2009) 14 JCSL 449; M Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) 14 JCSL 459; LM Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict (2009) 40 Case W Res J Intl L 437.

[10] See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, opened for signature 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (hereinafter 'APII'), art 5.

[11] Inter-American Commission on Human Rights, 'Third Report on the Human Rights Situation in Colombia' (26 February 1999) OEA/Ser.L/V/II.102 Doc 9 rev 1, ch IV, [120]–[132] <http://www.cidh.org/countryrep/colom99en/table%20of%20contents.htm> accessed 3 February 2014.

[12] PJC Schimmelpenninck van der Oije, 'International Humanitarian Law from a Field Perspective—Case Study: Nepal' (2006) 9 YIHL 394, 406.

[13] UNSC Res 1576 (2004), preamble [9].

[14] UNGA Res 55/116 (2000), [2(a)(ii)].

[15] US Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force' (undated; made public on 4 February 2013) 3, available at <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_

authority conferred upon the President by the US Congress must be elaborated by drawing by analogy from the IHL rules applicable in international armed conflicts:

> The laws of war have evolved primarily in the context of international armed conflicts between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, novel type of armed conflict against armed groups such as al-Qaida and the Taliban. Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict.[16]

The UN Human Rights Committee, on the other hand, considers Article 9 of the International Covenant on Civil and Political Rights (ICCPR), setting out the key procedural safeguards for detainees under IHRL, to be the governing framework in such situations.[17] This offers a more robust set of protections than drawing by analogy from the IHL rules applicable in international armed conflicts, seen, e.g., in the Committee's demand that Guantanamo detainees be provided access to *habeas corpus*, in accordance with Article 9(4) ICCPR.[18] Others have gone further, arguing that these supposed gaps in the current law of non-international armed conflict are, in fact, sufficiently filled by domestic *criminal* law, and that it is only on this basis that detentions in such situations should be carried out.[19]

DOJ_White_Paper.pdf> accessed 21 November 2013. US federal courts similarly view the conflict as a non-international armed conflict: *Gherebi v Obama*, 609 F Supp 2d 43 (DDC 2009) 57, fn 8; *Hamlily v Obama*, 616 F Supp 2d 63 (DDC 2009) 73. The classification of such situations as non-international conflicts is discussed in more detail in section 2.2.1.2.

[16] 'Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay', *In Re: Guantanamo Bay Detainee Litigation*, Misc No 08-442 (TFH) (DDC 13 March 2009) 1 <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> accessed 3 February 2014.

[17] HRC (n 8) [18].

[18] Ibid.

[19] See, e.g., DN Pearlstein, 'Avoiding an International Law Fix for Terrorist Detention' (2008) 41 Creighton L Rev 663. Such arguments have been criticised, however, for their alleged impracticalities, e.g. regarding evidence collection: MC Waxman, 'Administrative Detention of Terrorists: Why Detain and Detain Whom?' (2009) 3 J Nat Sec L & Pol 1, 10–11; JB Bellinger and VM Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law' (2011) 105 AJIL 201, 212.

These disagreements regarding the current *lex lata* have led to a number of proposals in recent years on how the current rules applicable to internment in non-international conflicts might be developed. These have included proposals by commentators,[20] international organisations,[21] and states.[22]

It is on these issues that this thesis focuses, providing the first in-depth analysis of the present state of international law regarding the procedural regulation of internment in non-international armed conflicts. In so doing, a comprehensive examination of the relevant rules under both IHL (chapters three and four) and IHRL (chapter five), as well as their interaction and practical application in situations of non-international armed conflict (chapters six and seven), is undertaken so as to demonstrate where the law currently stands in this area. The focus here is on the primary rules applicable to *both* states and non-state armed groups that are party to non-international conflicts.[23] That examination is then utilised to conclude the thesis in chapter eight with a set of proposals for how the law might most appropriately be developed.

Importantly, the thesis begins in chapter two with a discussion of the context within which the problem being addressed falls, i.e. the general distinction between international

[20] See, e.g., Chatham House and ICRC, 'Meeting Summary: Procedural Safeguards for Security Detention in Non-International Armed Conflict', London, 22–3 September 2008 <http://www.chathamhouse.org.uk/files/15558_il220908summary.pdf> accessed 10 December 2013; Olson (n 9); J 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* (Oxford University Press 2012).

[21] See, e.g., 31st International Conference of the Red Cross and Red Crescent 2011, 'Resolution 1: Strengthening Legal Protection for Victims of Armed Conflict', [6] <http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm> accessed 21 November 2013 (placing on the ICRC's agenda the formulation of new guidance on detention in non-international conflicts); Pejic (n 4) (adopted by the ICRC as their official policy).

[22] See, e.g., 'The Copenhagen Process on the Handling of Detainees in International Military Operations, The Copenhagen Process: Principles and Guidelines' (October 2012) <http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines. pdf> accessed 21 November 2013.

[23] The rules governing internment by non-state armed groups have been given insufficient attention in certain commentaries: see, e.g., Bellinger and Padmanabhan (n 19).

and non-international armed conflicts. This will be explored from an historical perspective, considering how the distinction has developed over time and its appropriateness in contemporary international law. In so doing, a greater understanding of IHL's differentiated approach to the regulation of internment is then possible, which will prove especially important in chapter eight when considering how the law should develop. Before that, however, a few words should be said about the scope of the present enquiry and the methodology adopted.

1.1 Aims and Scope of Enquiry

The aim of the current thesis is two-fold. First, it seeks to provide the first comprehensive examination of the current *lex lata* regarding the procedural regulation of internment in non-international armed conflict. Second, after highlighting the deficiencies in the current law, it offers a proposal for developing the law, in a manner that builds upon, rather than replaces, the current legal rules.

A number of points must be highlighted, however, regarding the scope of enquiry of the current thesis. First, the enquiry is not into substantive treatment standards for internees nor the conditions of detention, but rather the deprivation of liberty itself. Thus, the terms 'procedural regulation' and 'procedural rules' are used throughout, in contradistinction to substantive treatment standards, to refer to the grounds justifying internment, the mechanisms for reviewing internment, and the point at which internment must cease.[24]

Second, as noted above, this thesis concerns internment (i.e. preventive, security detention ordered by the executive), as opposed to other forms of detention that may occur in non-international conflicts, such as penal detention. It is also worth noting that, in

[24] Chapter three will demonstrate that this framework of rules is set out in the relevant IHL provisions in international armed conflicts.

examining this issue, the thesis does not differentiate between initial capture and any subsequent formal decision to intern; rather, a person is considered interned from the moment of capture.[25]

Third, the enquiry is restricted to internment in *non-international armed conflicts*, which can be defined primarily as 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[26] However, it is important to note that the precise contours of that category of conflicts are unclear. Jelena Pejic, for example, notes that the following seven scenarios have all, validly or not, been categorised as non-international conflicts: traditional intra-state conflicts between the state and non-state armed groups; conflicts between two or more non-state groups in a single territory; traditional intra-state conflicts between a state and non-state group that 'spill over' into an adjacent state; conflicts in which multinational forces assist a 'host state' in countering non-state groups on the latter's territory; conflicts in which forces acting under the aegis of the UN or another international organisation assist in 'stabilising' the host state against non-state forces; conflicts between states and non-state armed groups which operate from the territory of an adjacent state, without the latter state's authority or control; and global conflicts between states and transnational non-state groups that are not confined to particular territories.[27] Some of these scenarios are more widely recognised than others as situations that can constitute non-international armed conflicts,[28] subject to the thresholds established in jurisprudence being met.[29]

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[25] Thus, those states involved in the post-2001 conflict in Afghanistan that held persons for no more than 96 hours are, for the purposes of this thesis, considered to have thereby interned such persons (assuming, of course, they were held on security rather than criminal grounds): see section 6.2.2.2.

[26] *Prosecutor v Duško Tadić* (Decision on the Defence Motion Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), [70].

[27] J Pejic, 'The Protective Scope of Common Article 3: More Than Meets the Eye' (2011) 93 IRRC 189, 193–5.

[28] See, e.g., ibid, 196–7 (noting the ICRC's rejection of the US' claim that the final scenario can constitute a single, global non-international armed conflict).

The precise contours of the category of non-international armed conflict and the appropriateness of classifying as such the scenarios above are beyond the scope of the present thesis. Instead, for the purposes of this enquiry, it is sufficient that, when examining state practice in a particular situation, the state(s) involved considered it to constitute a non-international armed conflict to which IHL applied. Moreover, when examining other practice, such as that of human rights treaty bodies, it is sufficient that either the treaty body itself considered the situation to constitute a non-international conflict, or that the situation was generally recognised as such.

Fourth, reasons of space prevent engaging with a number of related issues. For example, complex questions surround the issue of attribution of particular conduct, including detention operations, in situations involving multinational forces operating under the aegis of an international organisation.[30] Such considerations, however, are excluded from the present enquiry, which is limited to an examination of the primary rules applicable to states and non-state groups. Moreover, whilst the regulation of the point of release of internees does form part of the scope of enquiry, questions relating to transfer or repatriation of internees are not addressed.[31] Finally, as noted, the thesis deals with the procedural rules applicable to internment, defined as the grounds permitting internment, the review mechanisms provided, and the point at which internment must cease. A number of other indirect safeguards that protect persons from arbitrary deprivations of liberty

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29 *Prosecutor v Duško Tadić* (Trial Judgment) IT-94-1-T (7 May 1997), [562] (stating that the two thresholds that must be met in order for a particular situation to be classified as a non-international armed conflict relate to 'the intensity of the conflict and the organisation of the parties to the conflict').

30 See, e.g., Chatham House and ICRC (n 20) 8. This issue was faced by the European Court of Human Rights in *Behrami and Behrami v France, Saramati v France, Germany and Norway*, App Nos 71412/0 and 78166/01, Admissibility Decision (Grand Chamber), 2 May 2007; M Milanović and T Papić, 'As Bad As It Gets: The European Court of Human Rights' (ECtHR) *Behrami and Saramati* Decision and General International Law' (2009) 58 ICLQ 267.

31 On this, see, e.g., ECtHR, *Othman v UK*, App No 8139/09, 17 January 2012, [231]–[235]; C Droege, 'Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges' (2008) 90 IRRC 669; RM Chesney, 'Leaving Guantanamo: The Law of International Detainee Transfers' (2006) 40 U Rich L Rev 657; J Yoo, 'Transferring Terrorists' (2004) 79 Notre Dame L Rev 1183.

cannot, however, also be addressed. These include, *inter alia*, requirements relating to the place of detention, access of the International Committee of the Red Cross to detainees, and information for members of the detainee's family.[32]

1.2 Methodology

The majority of this thesis seeks to determine the current rules of international law that apply in this area, looking especially at IHL and IHRL. It is in these areas in particular that commentators and tribunals have often adopted methodologies that seem to depart from the traditional positivist, consent-based model of international legal obligation.[33]

Without passing judgment on the validity of such approaches,[34] the current thesis seeks to adhere to the more traditional tests for establishing the existence and content of international legal norms. Indeed, by dealing in chapters three to seven with the *lex lata* and chapter eight with the *lex ferenda*, the thesis specifically aims to maintain a separation between the two. For example, in interpreting applicable treaty rules, emphasis is placed on the ordinary meaning of the terms in their context and in light of their object and

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[32] Pejic (n 4) 384–5 and 389–91.

[33] See, e.g., *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, [218]–[219] (finding common Article 3 of the 1949 Geneva Conventions to reflect custom without reference to state practice or *opinio iuris*); *Prosecutor v Zoran Kupreškić* et al (Trial Judgment) ICTY-95-16 (14 January 2000), [527] (stating that customary IHL can form with scant practice by virtue of the Martens Clause, relying on *opinio iuris* as the decisive element where the 'imperatives of humanity or public conscience' so dictate); T Meron, 'The Geneva Conventions as Customary Law' (1987) 81 AJIL 361 (noting the trend in jurisprudence towards greater reliance on *opinio iuris* in the absence of state practice); FL Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146 (similarly recognising the same trend in jurisprudence, based on the ICJ's *Nicaragua* judgment); J Dingwall, 'Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts' (2004) 9 JCSL 133, 136–8 (arguing in favour of a less stringent test for the emergence of customary IHL).

[34] These approaches have been criticised: see, e.g., AA D'Amato, 'Trashing Customary International Law' (1987) 81 AJIL 101. Attempts at reconciling so-called 'traditional' and 'modern' conceptions of custom have been made: see, e.g, AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757.

purpose.[35] Reliance is also placed on the *travaux* of the provisions as well as subsequent practice of the states parties,[36] in order to discern 'what was the intention of the parties'.[37]

International jurisprudence will also be referred to in interpreting treaty provisions. For example, when interpreting IHL treaties, the jurisprudence of international criminal tribunals is important, offering the first recent elaborations of the rules of IHL on which the international crimes within their jurisdiction are based.[38] Similarly, when interpreting human rights treaties, reference is made to the jurisprudence of human rights treaty bodies. This is not only because those bodies offer authoritative interpretations of their respective treaties, but also because it is before those bodies that the detention operations of states in non-international conflicts will in practice often be judged.[39] Indeed, notwithstanding the variations in the binding character of decisions of human rights treaty bodies,[40] there is a clear trend towards relying on the authoritative interpretations by those bodies of their respective treaties.[41]

Furthermore, when discussing whether particular norms have crystallised as custom, the traditional, cumulative test of state practice and *opinio iuris* is adhered to.[42] In

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[35] Vienna Convention on the Law of Treaties (adopted 23 May 1969, opened for signature 23 May 1969, entered into force 28 January 1980) (hereinafter 'VCLT'), art 31(1).

[36] Art 31(3)(b) VCLT (subsequent practice) and art 32 VCLT (*travaux*).

[37] Sir H Lauterpacht, *The Development of International Law by the International Court* (reissue, CUP, Cambridge 1982) 27.

[38] See, e.g., G Mettraux, *International Crimes and the* Ad Hoc *Tribunals* (OUP, Oxford 2005) (for general discussions of the development of IHL by the *ad hoc* tribunals); S Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 EJIL 219, 232–3 (on the importance of international criminal law in developing the law of non-international armed conflict).

[39] See section 7.1.

[40] Compare, e.g., the binding nature of judgments of the European Court of Human Rights, with the non-binding nature of 'views' and general comments of the UN Human Rights Committee, 'Selected Decisions of the Human Rights Committee under the Optional Protocol: Volume II' (1985), CCPR/C/OP/1, 1–2, [8].

[41] See, e.g., *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Merits Judgment [2010] ICJ Rep 639, [66]–[68]; S Ghandhi, 'Human Rights and the International Court of Justice: The *Ahmadou Sadio Diallo* Case' (2011) 11 HRLR 527, 533–8.

[42] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, [74].

conformity with the ICJ's approach to custom, it is 'sufficient that the conduct of states should, in general, be consistent' with the purported customary rule, and that inconsistent practice is treated by other states as a breach of the rule and defended by the offending state 'by appealing to exceptions or justifications contained within the rule itself'.[43] For the purposes of finding state practice and *opinio iuris*, a number of different sources are taken into account. For example, when considering state practice, in addition to actual operational practice, official statements of the executive, domestic legislation, domestic judicial decisions, and military manuals are also taken into account. Doctrine and jurisprudence confirms the validity of such sources of state practice.[44] Indeed, these sources are especially important in this area, given the often scant publicly-available information regarding actual operational practice in armed conflict.[45] Moreover, reliance is also placed on a number of different sources for *opinio iuris*, including, e.g., UN resolutions, where these are clearly phrased as a statement as to the current legal norms applicable in a particular situation.[46]

The aim is, therefore, to adhere to the traditional rules applicable to treaty interpretation and the emergence of custom, whilst taking account of the wide range of processes and fora in which states and authoritative bodies now frequently express their views regarding the state of the law. Further discussion of the methodology adopted will be engaged with at various points throughout the thesis.

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[43] *Nicaragua* (n 33) [186].

[44] See, e.g., *North Sea Continental Shelf Cases* (n 42) [47]; *Nicaragua* (n 33) [190]; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment [2002] ICJ Rep 3, [56]–[58]; Report of the International Law Commission to the General Assembly on its Second Session, 5 June – 29 July 1950, Document A/1316 [1950] Ybk of the ILC, Vol II, 369–72; M Akehurst, 'Custom as a Source of International Law' (1975) 47 BYIL 1, 1–3; MN Shaw, *International Law* (CUP, Cambridge 2012) 81–4. For a minority view, that state practice is restricted to physical acts of states, see AA D'Amato, *The Concept of Custom in International Law* (Cornell University Press, Ithaca 1971) 88.

[45] *Tadić* (n 26) [99].

[46] *Nicaragua* (n 33) [188]; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion [1996] ICJ Rep 226, [70]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [86]–[88]; Shaw (n 44) 88–9.

2. THE DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

Before moving on to the central enquiry of this thesis, the present chapter will consider the historical basis and reasons for the general distinction in IHL between international and non-international conflicts. This is necessary for two reasons. First, as will be shown, the lack of clarity regarding the procedural regulation of internment in non-international armed conflict arises out of IHL's general distinction between categories of conflict. This chapter therefore provides the context for the thesis. Second, whether the distinction *should* exist with regard to the procedural regulation of internment will be considered in chapter eight. As such, the reasons for, as well as the arguments in favour of and against the distinction generally must first be examined; only then can its desirability in the specific area of internment be assessed.

The first section below (2.1) will give an historical overview of this distinction in IHL. Section 2.2 will then note the main criticisms that have been made of it, with section 2.3 then considering the various justifications advanced for its preservation.

2.1 Overview and Historical Basis

Until the adoption of the four Geneva Conventions of 1949,[1] the distinction between international and non-international conflicts arose from the fact that treaty law was concerned only with conflicts between states and did not regulate civil conflicts within a

[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (hereinafter 'GCI'); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (hereinafter 'GCII'); 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 'GCIII'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (hereinafter 'GCIV'). These abbreviations will be used throughout the thesis.

state.[2] Although there have long existed customary laws of war, the project of codifying these did not begin until the mid-nineteenth century,[3] with the adoption of the 1856 Paris Declaration Respecting Maritime Law.[4] At this point in history, international law was presumed to regulate only the reciprocal relationships between states, and treaties dealt only with issues related to that subject matter; *intra*-state issues were therefore excluded.[5] Thus, as the first edition of *Oppenheim* states, '[i]nternational Law is a law between States only and exclusively'.[6] Naturally, therefore, when the first IHL treaties were adopted, the question of their application to intra-state conflicts did not arise.[7] Instead, they were applicable only in situations of 'war',[8] and '[t]o be considered war, the contention must be going on *between States*'.[9]

During the nineteenth century, however, the customary doctrines of insurgency and

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2 See, e.g., Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes in Weight, Signed at St Petersburg (opened for signature 11 December 1868, entered into force 11 December 1868) 138 CTS (1868–9) 297–9; 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land with Annex: Regulations respecting the laws and customs of war on land (opened for signature 29 July 1899, entered into force September 1900) 187 CTS (1898–9) 429–43, art 2.

3 Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn CUP, Cambridge 2010) 14. Although certain earlier bilateral treaties included provisions on the conduct of hostilities, e.g. the 1785 Treaty of Amity and Commerce between the United States and Prussia: A Roberts and R Guelff, *Documents on the Laws of War* (3rd edn, OUP, Oxford 2000) 4.

4 1856 Paris Declaration Respecting Maritime Law (opened for signature 16 April 1856, entered into force 16 April 1856) 115 CTS (1856) 1–3.

5 This inter-state structure of international law was closely linked with the nineteenth century consolidation of positivism and the separation by scholars such as Vattel of the law of nations as inter-state law from the law of nature as applicable to individuals: K Parlett, *The Individual in the International Legal System* (CUP, Cambridge 2011) 10–16.

6 L Oppenheim, *International Law, A Treatise: Volume II, War and Neutrality* (Longmans, Green & Co, London 1906) 266. Similarly, see J Westlake, *Chapters on the Principles of International Law* (CUP, Cambridge 1894) 1 ('[i]nternational law is the body of rules prevailing between states').

7 Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva 1987) [4342]; E Crawford, 'Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20 LJIL 441, 444; LC Green, *The Contemporary Law of Armed Conflict* (Melland Schill Studies in International Law 3rd edn Manchester University Press, Manchester 2008) 66.

8 See above, n 2.

9 Oppenheim (n 6) 58 (emphasis in original; footnotes omitted). Similarly, see R Phillimore, *Commentaries upon International Law: Volume III* (T & JW Johnson & Co, Philadelphia 1857) 67 ('[a] War between private individuals who are members of a society cannot exist').

belligerency emerged, which addressed, to differing degrees, civil war.[10] Nonetheless, these doctrines remained constrained by the state-centric nature of international law. In particular, they tended to be relevant mainly to those internal conflicts that affected the interests of third states, being invoked by such states to regulate their relations with the parties to the conflict.[11] Moreover, even under the doctrine of belligerency, whereby insurgents could be recognised as belligerents either by the state against which they were fighting (leading to the application between them of the *ius in bello*) or by a third state (leading to the application of the law of neutrality), recognition remained at the discretion of the relevant state.[12] Humanitarian concerns were, therefore, somewhat side-lined. Indeed, recognition of belligerency fell into disuse in the twentieth century, and it was the refusal by states in particularly atrocious civil wars, e.g. in Spain, to recognise the belligerent status of their opponents, which highlighted the need for a more robust method by which to regulate these conflicts; the consequence was a renewed demand, particularly by the International Committee of the Red Cross (ICRC), for treaty rules in this area.[13]

With the adoption of the 1949 Geneva Conventions, the distinction between international and non-international conflicts was codified. Thus, whilst common Article 2 states that the Conventions apply in armed conflicts 'between two or more of the High Contracting Parties' (international armed conflicts),[14] the single common Article 3 sets out the entire regime applicable in 'armed conflict[s] not of an international character' (non-

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[10] SC Neff, *War the Law of Nations: A General History* (CUP, Cambridge 2005) 258–75.

[11] RA Falk, 'Janus Tormented: The International Law of Internal War' in JN Rosenau (ed), *International Aspects of Civil Strife* (Princeton University Press, Princeton 1964) 208; AP Higgins (ed), *Hall's Treatise on International Law* (8th edn, Clarendon Press, Oxford 1924) 39.

[12] There was some disagreement as to whether states were *bound* to recognise belligerency where the conflict reached a certain level of severity: R Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' (2009) 91 IRRC 35, 51. However, a consensus seemed to form that it was within the discretion of the state: WE Hall, *A Treatise on International Law* (3rd edn, Clarendon Press, Oxford 1890) 34; H Lauterpacht, *Recognition in International Law* (CUP, Cambridge 1947) 246; Neff (n 10) 264–6.

[13] L Moir, *The Law of Internal Armed Conflict* (CUP, Cambridge 2002) 19–21.

[14] Common art 2(1) GCI–IV.

international armed conflicts).[15] Although marking the first time that treaty law had been applied to non-international conflicts,[16] and thus an important development in IHL, the brevity of common Article 3 exemplifies the limited degree to which such conflicts have traditionally been regulated by international law.[17]

As the first treaty provision on non-international conflicts, common Article 3 was one of a number of developments at the time that reflected the expansion of the subject matter of international law to include purely intra-state matters. Other developments included the emergence of international human rights law (IHRL), reflected in provisions of the UN Charter,[18] the 1948 Universal Declaration of Human Rights (UDHR),[19] and the 1948 Genocide Convention.[20] Lea Brilmayer has opined that these post-war developments represented a shift in international law from traditional contractual notions of legal obligation to the rise of non-reciprocal 'pledges' by states to conform to morality.[21] Importantly, these 'pledges' were intra-state in the strictest sense, in that the obligations thereunder rested on states *vis-à-vis* their own nationals (and non-nationals within their

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[15] Common art 3, *chapeau*, GCI–IV.

[16] Moir (n 13) 30.

[17] E Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP, Oxford 2010) 1.

[18] Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), art 1(3). See H Lauterpacht, *International Law and Human Rights* (unaltered reprint of 1950 edition by Stevens & Sons Ltd, Archon Books, 1968) 61 (noting that this constituted 'individuals subjects of the law of nations').

[19] Universal Declaration of Human Rights, UN General Assembly Resolution 217 A(III), UN Doc A/810 at 71 (1948). Although non-binding, the UDHR had important 'moral authority': H Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 BYIL 354, 370–5.

[20] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, opened for signature 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[21] L Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements' (2007) 77 BYIL 163. Others have similarly noted the non-traditional structure of human rights obligations: see, e.g., GG Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYIL 203, 277; T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP, Oxford 1989) 238–9; B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217, 242–3; O Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 11 Yale LJ 1935, 1938; J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325.

jurisdiction). The novelty therefore laid in the absence of any necessary inter-state element, in contrast to previous developments in international law concerning individual protection, e.g., regarding the minimum standard of treatment of aliens.[22]

The adoption of common Article 3 in 1949 must be seen as part of this broader trend in international law, with the emergence of intra-state structures of obligation providing the necessary foundations for the adoption of a treaty provision on non-international armed conflicts. The premise underpinning both IHRL and the law of non-international armed conflict is, after all, that it is the relationship between a state and those within its jurisdiction that is to be regulated.[23] Indeed, Theodor Meron has highlighted this close relationship between the post-war emergence of human rights law and the adoption of common Article 3:

> This Article [common Article 3] is a clear demonstration of the influence of human rights law on humanitarian law. The inclusion in the United Nations Charter of the promotion of human rights as a basic purpose of the Organization, the recognition of crimes against humanity as international crimes, the conclusion of the 1948 Genocide Convention and the regulation by a multilateral treaty of non-international armed conflicts for the first time in 1949, all stemmed from this influence.[24]

The novelty of these broader developments, however, meant that common Article 3 would prove the most contentious article during the 1949 diplomatic conference.[25] Indeed, at the heart of many of the debates regarding draft common Article 3 was not so much concern

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[22] AH Roth, *The Minimum Standard of International Law Applied to Aliens* (AW Sijthoff's Uitgeversmaatschappij NV, Leiden 1949) 23; Simma (n 21) 242–3; M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP, Oxford 2013) chs 1 and 2. Although, there were piecemeal developments during the inter-war period by which purely intra-state matters were regulated by international law, e.g. minority protection: Treaty of Peace between the United States, the British Empire, France, Italy, Japan and Poland, 28 June 1919 (entered into force 10 January 1920) 225 CTS 412.

[23] H Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 JCSL 265, 275.

[24] T Meron, *The Humanization of International Law* (The Hague Academy of International Law, Martinus Nijhoff, The Hague 2006) 7 (footnotes omitted).

[25] B de Schutter and C Van Der Wyngaert, 'Coping with Non-International Armed Conflicts: The Borderline Between National and International Law' (1983) 13 Ga J Intl & Comp L 279, 284 (noting that common Article 3 was the most debated provision at the conference).

with extending *humanitarian law* to internal conflicts but rather more generally with extending *international law* to intra-state matters. This is evidenced by the comments of the Burmese delegation, unofficial representative of the Asian bloc,[26] which objected to the inclusion of any provision relating to non-international armed conflicts.[27] A central concern of the Burmese delegation was that '[i]nternal matters cannot be ruled by international law or Conventions … It is not the object of the Conference to intervene in matters essentially within the domestic jurisdiction of any State.'[28] Such objections did not prevail, however, largely because they ignored the contemporaneous development of intra-state structures of obligation in international law. Indeed, in response to similar objections by the UK,[29] the Soviet delegate made clear the importance of recent developments in laying the foundation for the adoption of common Article 3:

> This theory [that international law does not regulate internal matters] was not convincing, since although the jurists themselves were divided in opinion on this point, some were of the view that civil war was regulated by international law. Since the creation of the Organization of the United Nations, this question seemed settled. Article 2 of the Charter provided that Member States must ensure peace and world security. They could therefore not be indifferent to the cessation of hostilities, no matter the character or localization of the conflict. Colonial and civil wars therefore came within the purview of international law.[30]

The post-war emergence of intra-state structures of obligation thus played an important role in the adoption of common Article 3. In this sense, although it is true that, generally, there was no cross fertilisation between IHL and IHRL at this time,[31] there was an

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[26] DA Elder, 'The Historical Background of Common Article 3 of the Geneva Conventions of 1949' (1979) 11 Case W Res J Intl L 37, 50 (referring to Burma as the 'self-styled Asian representative' at the conference).

[27] The main objections of Burma can be found in *Final Record of the Diplomatic Conference of Geneva of 1949: Vol II, Section B* (ICRC, 1963) at 327–30.

[28] Ibid, 330.

[29] Ibid, 10.

[30] Ibid, 14.

[31] R Kolb, 'The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions' (1998) 38 IRRC 409.

important structural relationship between IHRL and the law of non-international armed conflict. As reflected in the quote by Meron above, these post-war developments in IHL and IHRL were not coincidental but intimately connected.[32] The incorporation of intra-state matters into the realm of international law rendered anachronistic the historical basis for differentiating between international and non-international conflicts. What is more, common Article 3 was based on the proposed (but eventually unsuccessful) preamble to the Geneva Conventions.[33] The new treaty law of non-international armed conflict was, therefore, modelled on the law applicable in international armed conflicts, with the result that, whilst codifying the distinction, the Geneva Conventions partially narrowed it. Indeed, this provenance of common Article 3 helps to explain why it lays down only the most basic and open-ended norms. In addition, the novelty of these broader developments in international law meant that any provision regarding internal conflicts was necessarily going to be very limited, as many states were concerned as to the consequence of such a provision for their sovereignty.[34]

Subsequent developments further narrowed the distinction between international and non-international armed conflicts. In 1977, two Additional Protocols to the Geneva Conventions were adopted, the first codifying rules applicable in international conflicts,[35] the second doing the same for non-international conflicts.[36] These had important

[32] See above, text to n 24.

[33] JS Pictet (ed), *Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva 1952) 23. A brief look at some of the proposals for the preamble reveals their similarity to common Article 3: see, e.g., those of the Soviet delegation in *Final Record of the Diplomatic Conference of Geneva of 1949: Vol II, Section A* (ICRC, 1963) at 366, and the Stockholm draft in *Final Record of the Diplomatic Conference of Geneva of 1949: Vol I* (ICRC, 1963) at 113.

[34] See section 2.3.1 below on these sovereignty concerns.

[35] Protocol Additional 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 'API').

[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, opened for signature 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (hereinafter 'APII').

implications for the distinction between types of conflict. First, Article 1(4) API lifted 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' out of the category of non-international conflicts and brought them under the umbrella of international armed conflicts.[37] Second, a number of the rules in Additional Protocol II (APII) were based on those applicable in international armed conflicts.[38] However, it comprises only fifteen substantive provisions, compared with the seventy contained in Additional Protocol I (API). Moreover, it applied only to non-international conflicts between a state and those non-state groups that, 'under responsible command, exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations' and to implement the Protocol.[39]

The law applicable in non-international conflicts has continued to develop under both conventional and customary law since the adoption of the Additional Protocols. Regarding conventional law, a number of weapons treaties now apply equally in all conflicts.[40] At the level of custom, it has increasingly been argued that a large number of rules of IHL now apply in non-international conflicts, most notably by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICRC.[41] The latter, for

[37] Such conflicts previously were considered non-international in character: D Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 *Recueil des Cours* 117, 133.

[38] S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 64.

[39] Art 1(1) API.

[40] See, e.g., Convention on the Prohibition of the Development, Production and Stockpiling of Bateriological (Biological) and Toxin Weapons and on their Destruction (opened for signature 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997) [1997] ATS 3; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on the Destruction (opened for signature 18 September 1997, entered into force 1 March 1999) [1999] ATS 3.

[41] Regarding the ICTY, see, e.g., *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) [127] (noting that certain rules on the

example, in its Study on *Customary International Humanitarian Law*, recognised 167 customary rules, with 147 applicable in all armed conflicts.[42]

These developments notwithstanding, important differences remain between the law applicable in international and non-international armed conflicts, and states have consistently expressed their desire to preserve the general distinction.[43] Indeed, notwithstanding its finding that a number of rules now apply under custom in all armed conflicts, the ICTY confirmed that the distinction is still relevant, stating that 'only a number of rules and principles governing international armed conflicts have gradually been extended to apply in internal conflicts' and that 'this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain' have been extended.[44]

One example where the difference between the law of international and non-international armed conflict remains stark relates to combatant status and immunity from domestic prosecution for 'ordinary' (i.e. IHL-compliant) acts of war, which is granted to combatants in international armed conflicts.[45] A non-state fighter in a non-international conflict, by contrast, may be prosecuted under domestic law merely for participating in

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means and methods of warfare previously applicable only in international conflicts now also apply under custom in non-international conflicts). Regarding the ICRC, see J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volumes I & II: Rules & Practice* (CUP, Cambridge 2005).

[42] J Pejic, 'Status of Armed Conflicts' in E Wilmshurst and SC Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP, Cambridge 2007) 78.

[43] See, e.g., Rome Statute of the International Criminal Court (adopted 17 July 1998, opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (arts 8(2)(a) and (b) give the Court jurisdiction over specific war crimes committed in international conflicts, whilst the much shorter arts 8(2)(c) and (e) relate to war crimes in non-international conflicts). Noting the continued importance of the distinction, see, e.g., GH Aldrich, 'The Laws of Wars on Land' (2000) 84 AJIL 42, 61–2; S Boelart-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Mechanism for all Armed Conflicts?' (2000) 5 JCSL 63, 103; C Byron, 'Armed Conflicts: International or Non-International?' (2001) 6 JCSL 63, 65–6; Crawford (n 17) 47.

[44] *Tadić* (n 41) [126].

[45] Art 43(2) API; Dinstein (n 3) 37.

hostilities, even if in full compliance with IHL.[46] This remains the case under customary international law.[47] As will be shown in chapter four, the distinction also remains important for the procedural regulation of internment. Notwithstanding developments in IHL, therefore, the distinction between categories of conflict continues to have important consequences for the applicable rules.

2.2 Criticisms of the Distinction

The distinction between international and non-international armed conflicts has become the subject of increasing criticism. Alison Duxbury argued that it challenges two claims of IHL:

> First, it undermines international humanitarian law's claim that it is a pragmatic body of law. Second, it creates silences about other types of conflict and violence that are not defined as armed conflicts or are excluded from the ambit of international armed conflict. This … undermines the law's claim to humanity.[48]

It is on these two bases that criticisms of the distinction have primarily focused, and a number of commentators have argued in favour of the elimination of what remains of the distinction between the two categories of conflict.[49] Each of these grounds for criticising the distinction will be examined in turn.

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[46] H Lauterpacht, *Oppenheim's International Law, A Treatise: Volume II, Disputes, War and Neutrality* (7th edn, Longhams, London 1952) 211; JS Pictet (ed), *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* (ICRC, Geneva 1960) 40; Crawford (n 17) 68–76; *United States v Marilyn Buck* [1988] 690 F Supp 1291 (US District Ct for the Southern District of New York).

[47] Henckaerts, *Vol I* (n 41) 12–13. This is discussed further below: see section 2.3.1.

[48] A Duxbury, 'Drawing Lines in the Sand – Characterising Conflicts for the Purposes of Teaching International Humanitarian Law' (2007) 8 MJIL 259, 268.

[49] JG Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 313; RE Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 U Pa L Rev 675, 755–6; D Wilmott, 'Removing the Distinction between International and Non-International Armed Conflict in the *Rome Statute of the International Criminal Court*' (2004) 5 MJIL 196; Duxbury (n 48); Crawford (n 7); K Mastorodimos, 'The Character of the Conflict in Gaza: Another Argument Towards Abolishing the Distinction between International and Non-International Armed Conflicts' (2010) 12 ICLR 437.

2.2.1 IHL's claim to pragmatism

IHL depends for its effectiveness on being a pragmatic body of law. The legal distinction between categories of conflict, however, risks undermining this, thereby creating a disincentive to comply with the law. There are two grounds in particular on which this claim can be made, and each will be discussed briefly.

2.2.1.1 The distinction is anachronistic

First, IHL's distinction between categories of conflict and its focus on international conflicts seems outdated. In the post-1945 period, internal conflicts have become the norm rather than the exception: of the 225 armed conflicts that occurred between 1946 and 2001, only 42 were inter-state.[50] The result is that the majority of (treaty) rules of IHL apply only in a minority of situations.[51] Indeed, this was acknowledged during the drafting of the 1977 Additional Protocols.[52] This notwithstanding, the delegates adopted only minimal rules for such conflicts, and, as noted above, the continued evolution of the law of non-international armed conflict has only partially eliminated the distinction in IHL.

2.2.1.2 The distinction cannot be applied in practice

Second, the distinction further undermines IHL's claim to pragmatism as a result of the falsity of rigidly bifurcating armed conflicts into the categories of inter-state and intra-state:

> Armed conflicts are in reality not as clearly defined as the legal categories. Some of them may not exactly tally with any of the concepts envisaged in international humanitarian law. This raises the question of whether those categories need to

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[50] NP Gleditsch *et al*, 'Armed Conflict 1946–2001: A New Dataset' (2002) 39 J of Peace Research 615, cited in Crawford (n 17) 14 (fn 30–1). Similarly, see *Tadić* (n 41) [96]–[97].

[51] Crawford (n 7) 442.

[52] See, e.g., *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77): Volume V* (Federal Political Department, Bern 1978) 131–2 (Federal Republic of Germany); ibid, 184 (Canada).

> be supplemented or adapted with a view to ensuring that these situations do not end up in a legal vacuum.[53]

By establishing two categories of armed conflict and stipulating different rules for each, IHL requires us to classify conflicts before we can determine the relevant legal rules, and yet many situations have both international and non-international aspects. Indeed, this difficulty was faced by the ICTY when attempting to classify the conflicts arising from the dissolution of the former Yugoslavia.[54] There is, therefore, a significant divergence between war in practice and war as it is conceived in law. For IHL to succeed in limiting abuses during conflict, the legal conception of war must reflect war as it exists in practice. Indeed, the history of IHL reflects an acknowledgment of this need to align legal concept with actual practice, seen in particular in the substitution of the legal concept of 'war' for the practical concept of 'armed conflict' in 1949.[55]

A topical example of the difficulty with classifying conflicts according to one of the two legal categories are so-called 'transnational armed conflicts' between states and non-state armed groups that transcend the borders of a single state.[56] Whether to treat such situations as single armed conflicts and, if so, of what character, has been the subject of significant debate. The United States, for example, has taken the view that it is in a single, global armed conflict with al-Qaeda.[57] This, however, has been refuted, on various

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[53] S Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 IRRC 69, 83.

[54] *Prosecutor v Duško Tadić* (Appeals Judgment), IT-94-1-A (15 July 1999) [83]–[162]. For different views on this, see, e.g., T Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554; C Greenwood, 'International Humanitarian Law and the *Tadic* Case' (1996) 7 EJIL 265; T Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua*'s Fallout' (1998) 92 AJIL 236; Byron (n 43) 66–79.

[55] C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 ICLQ 283, 295 and 304. Similarly, see *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume V: Protection of Victims of Non-International Armed Conflicts* (ICRC, Geneva 1971) 13.

[56] On these, see Vité (n 53) 88–93.

[57] HRC, 'Universal Periodic Review: United States of America', A/HRC/WG.6/9/USA/1 (23 August 2010) [82]; HH Koh, 'The Obama Administration and International Law', Remarks at the Annual Meeting of

grounds, by commentators.[58] Moreover, even if considered an armed conflict, difficulty arises with categorising such conflicts according to IHL. On the one hand, they appear similar to international armed conflicts, in that they reach beyond the territory of one state. On the other hand, since one of the parties is a non-state group, they share characteristics with non-international conflicts.[59] This has led to significant disagreements over how military operations of this nature should be regulated.[60] In addition, concerns have also been expressed that a consequence of the rise in cases at the penumbra of the legal categories will be the emergence of 'legal black holes' into which such cases fall, with no accountability for those involved.[61]

The case of transnational armed conflicts exemplifies the difficulty with applying the legal distinction between international and non-international conflicts in practice. The difficulty arises because conflicts in practice operate along a spectrum, involving different actors, levels of violence and geographical reach. As Michael Reisman argues, 'the terms "international" and "noninternational" conflict import a bipartite universe that authorizes

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ASIL, Washington, DC, 25 March 2010 <http://www.state.gov/s/l/releases/remarks/139119.htm> accessed 6 December 2013.

[58] See, e.g., HRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Study on Targeted Killings', A/HRC/14/24/Add.6, 28 May 2010, [53]; N Lubell, 'The War (?) Against Al-Qaeda' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 430–41.

[59] The US considers this conflict to be non-international in character: US Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force' (undated; made public on 4 February 2013) 3, available at <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf> accessed 21 November 2013.

[60] See, e.g., suggestions that a third category of armed conflict be recognised to encompass transnational conflicts: RS Schöndorf, 'Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?' (2004) 37 NYU J Intl L & Pol 1; GS Corn, 'Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognise a Hybrid Category of Armed Conflict' (2007) 40 Vand J Transnat L 295. Other commentators argue that such conflicts can be addressed by the current categories: D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 70–9. Although cf N Lubell and N Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 JICJ 65, 79–80.

[61] J Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 ICLQ 1; Vité (n 53) 83.

only two reference points on the spectrum of factual possibilities.'[62] This also has consequences for the enforcement of IHL via international criminal law, seen in the example above of the difficulty faced by the ICTY regarding the conflicts in the former Yugoslavia.[63] Deidre Wilmott criticises the distinction on this basis, calling for its elimination so as to free international tribunals from having to consider complex questions of conflict characterisation.[64]

2.2.2 IHL's claim to humanitarianism

In addition to the pragmatic concerns raised above, the legal bifurcation of armed conflicts also raises concerns regarding IHL's goal of humanising armed conflict. First, as noted, non-international armed conflicts now represent the principal form of conflict. Second, due to the fratricidal hatred they often engender, internal conflicts can be more atrocious than their inter-state counterparts.[65] Thus, by focussing its attention on international armed conflicts, rather than these potentially more vicious, and certainly more common, non-international conflicts, IHL's claim to protect victims of conflict is undermined.

These humanitarian concerns have been a catalyst for many of the developments in the law of non-international armed conflict mentioned in section 2.1, which have reduced the extent of to which international and non-international conflicts are treated differently. The ICTY, for example, in holding that a number of treaty rules now apply under custom in all armed conflicts, stated:

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[62] WM Reisman, 'Application of Humanitarian Law in Noninternational Armed Conflicts' (1991) 85 ASIL Proc 83, 85; Aldrich (n 43) 62; Crawford (n 7) 450. A similarly false dichotomy arguably exists in IHL's distinction between non-international conflicts and internal tensions not reaching the level of armed conflict: F Bugnion, '*Jud Ad Bellum, Jus In Bello* and Non-International Armed Conflicts' (2003) 6 YIHL 167, 183 (fn 53).

[63] See above, text to n 54.

[64] Wilmott (n 49) 205.

[65] Pictet, *GCI* (n 33) 39; R Müllerson, 'International Humanitarian Law in Internal Conflicts' (1997) 2 JACL 109, 109.

> A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach … It follows that in the area of armed conflict the distinction between inter-State wars and civil wars is losing its value as far as human beings are concerned.[66]

The ICTY was clearly of the view that the distinction between international and non-international conflicts should be reduced in order better to protect victims of the latter. As noted above, however, notwithstanding this recognition, important differences remain between the rules applicable in each type of conflict.

In light of these practical and humanitarian concerns with the distinction between international and non-international conflicts, it must be asked why it has nonetheless been preserved. It is to this that we now turn in the following section.

2.3 Reasons for Preserving the Distinction

2.3.1 Sovereignty concerns

It was explained in section 2.1 that the historical basis for the distinction between types of conflict lies in the traditional limitation of international law to inter-state matters. It was also noted, however, that the adoption of common Article 3 was part of a more general expansion in the applicability of international law to intra-state matters. This development continued over subsequent decades, encouraging the further evolution in the law of non-international armed conflict, itself based on that applicable in international conflicts. Given that the historical basis for the distinction has consequently been lost, the question arises as to why the distinction has nonetheless been preserved, albeit in a less stark form. Various arguments have been advanced for preserving what remains of the distinction, all of which can be considered to fall under the general category of 'sovereignty concerns': states are of the view that 'equating non-international and international armed conflicts

[66] *Tadić* (n 41) [97].

would undermine State sovereignty'.[67] Indeed, Theodor Meron has described the general reluctance of states to legislate for non-international armed conflicts as 'an apex in the glorification of non-intervention.'[68]

The decisive role played by sovereignty concerns is clear from the *travaux* of the diplomatic conferences. In 1949, for example, the UK delegate made clear its objection to what would become common Article 3, arguing that it would 'strike at the root of *national sovereignty*'.[69] France raised similar objections to a proposal by the Soviet Union, which would have applied a large number of the provisions of the Conventions to non-international conflicts.[70] Sovereignty concerns also played a significant role at the 1974–7 diplomatic conference during the drafting of APII.[71] Indeed, certain newly-independent states that saw their stability as threatened by insurgencies were especially concerned.[72] These concerns resulted in Article 3(1) APII, which states that '[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State'. Article 3(2) APII then states that '[n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party'. The *travaux* of these provisions demonstrate that they were a result of the concern of states that bringing non-international

[67] Akande (n 60) 37. Similarly, see WA Solf, 'Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict' (1983) 13 Ga J of Intl & Comp L 291, 291; Stewart (n 49) 316–17; Wilmott (n 49) 200–201; Duxbury (n 48) 268–9.

[68] T Meron, 'Application of Humanitarian Law in Noninternational Armed Conflicts' (1991) 85 ASIL Proc 83, 84.

[69] *Final Record: Vol II-B* (n 27) 10 (my emphasis).

[70] Ibid, 98–9.

[71] See, e.g. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977): Volume VIII* (Federal Political Department, Bern 1978) 205 (Argentina); ibid, 206 (German Democratic Republic); ibid, 208 (Belgium); ibid, 230 (Yugoslavia); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977): Volume VII* (Federal Political Department, Bern 1978) 81 (India); ibid, 71 (Indonesia); ibid, 72 (Chile); *Official Records: Vol V* (n 52) 103 (Romania).

[72] See, e.g., *Official Records: Vol VII* (n 71) 80 (Ghana); ibid, 81 (India); *Official Records: Vol V* (n 52) 197 (Senegal).

conflicts within the realm of international legal regulation would undermine their sovereignty.[73]

In many instances, both in 1949 and 1974–7, sovereignty concerns were invoked in a very general, abstract way, simply stating, for example, that legislating for non-international conflicts 'would constitute interference in the internal affairs of that State'.[74] However, these concerns have also manifested in more specific objections to the drafting of rules for internal conflicts. In particular, states have consistently expressed concern at two alleged consequences of developing rules for these situations. First, it has been argued that attempting to regulate non-international conflicts would unduly restrict the latitude a state has in quelling internal rebellion.[75] This fear was expressed by certain states during the 1949 diplomatic conference in response to the Stockholm draft proposing the application of the Conventions *in toto* to non-international conflicts.[76] Indeed, it was recorded that the proposals to limit the kinds of non-international conflicts to which the Conventions would be extended had a shared concern

> … that it would be dangerous to weaken the State when confronted by movements caused by disorder, anarchy and banditry, by compelling it to apply to them, in addition to its peacetime legislation, Conventions which were intended for use in a state of declared or undeclared war.[77]

This concern is reflected in Article 3(1) APII, which states that nothing in the Protocol restricts the state's responsibility, 'by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.'

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[73] See, e.g., *Official Records: Vol VIII* (n 71) 301 (Belgium).

[74] See, e.g., *Official Records: Vol VIII* (n 71) 205 (Argentina); *Official Records: Vol VII* (n 71) 72 (Chile); *Official Records: Vol V* (n 52) 103 (Romania).

[75] JS Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva 1958) 44.

[76] See, e.g., *Final Record: Volume II-B* (n 27) 13 (Canada); ibid, 10 (France); ibid, 10–11 (Greece).

[77] *Final Record: Volume II-B* (n 27) 121.

It is submitted that this specific concern cannot justify the general distinction between international and non-international conflicts, in light of the criticisms of it discussed above. First, whilst this argument may justify the exclusion of particular rules from application in non-international conflicts, it cannot justify the exclusion of many other rules. For example, extending combatant immunity to non-international conflicts might enable rebels continuously to return to hostilities, given that states would not be able to prosecute them for rebellion. However, with regard to the rules with which the current thesis deals—on the procedural regulation of internment—the same argument cannot justify their exclusion from non-international conflicts, for it cannot reasonably be claimed that a state's ability to respond to a rebellion would be undermined by requiring them to apply these rules. This is particularly the case given that, as will be shown in chapter three, these rules leave considerable discretion to states.

Second, as will be discussed in more detail below, far from restricting a state's ability to respond to rebellion, extending IHL *in toto* to non-international armed conflicts could serve to broaden the scope of permissible state action, given the nature of many of the rules of IHL and their implications for otherwise applicable rules of IHRL.[78] In consequence, this argument cannot justify the general distinction between international and non-international armed conflicts but, at best, can justify the exclusion of only certain rules of IHL from the latter.

A second specific objection frequently voiced by states to eliminating the distinction between types of conflict is that, as a result of IHL's equal application to all parties to conflicts,[79] the non-state armed group will obtain an elevated status that, if only implicitly,

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[78] See section 2.3.2.

[79] On this, see C Greenwood, 'Historical Development and Legal Basis' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn OUP, Oxford 2008) 10–11.

appears to legitimise their actions.[80] This can be seen in the UK delegate's comments at the 1949 diplomatic conference regarding draft common Article 3, when he noted that 'the application of the Conventions [to internal conflicts] would appear to give the status of belligerents to insurgents, whose right to wage war could not be recognized.'[81] Indeed, these concerns are reflected in common Article 3(4), which makes clear that the legal status of the parties to the conflict is not altered by IHL. David Elder referred to this 'non-effect' clause as 'the *sine qua non* of any reference to non-international conflicts in the Geneva Conventions.'[82] Similar concerns were also expressed at the 1974–7 diplomatic conference during the drafting of APII.[83]

It is useful to separate this concern into the status of non-state armed groups under international law and under municipal law. Regarding the former, it must be noted that the mere adoption of international rules binding on non-state armed groups need not in any way affect the status of those groups under international law, for it is not the inherent legal personality of those groups that enables international law to bind them, but rather the legislative jurisdiction of states that have determined that they shall be bound by certain treaty rules.[84] Indeed, this is the ultimate expression of the special standing of states in international law and the subordination of non-state groups thereto, for the former are able to create obligations directly binding on the latter without their consent.[85]

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[80] This is frequently invoked as one of the major reasons for IHL's distinction between international and non-international conflicts: Pictet, *GCI* (n 33) 43–4; Solf (n 67) 59; Reisman (n 62) 87; Aldrich (n 43) 59; Bugnion (n 62) 168; D Fleck, 'The Law of Non-International Armed Conflicts' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP, Oxford 2008) 611–12.

[81] *Final Record: Volume II-B* (n 27) 10. Similarly, see ibid, 329 (Burma).

[82] Elder (n 26) 68. Similarly, see S Junod, 'Additional Protocol II: History and Scope' (1983) 33 Am U L Rev 29, 30.

[83] See, e.g., *Official Records: Vol VIII* (n 71) 212 (Indonesia); ibid, 335 (Iraq).

[84] S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369. See the discussion on this in section 4.4.

[85] *Jurisdiction of the Courts of Danzig* (1928) PCIJ Series B, No 15, 17.

Regarding states' concerns with the status of non-state groups under domestic law, common Article 3(4) renders this moot for the current law of non-international armed conflict, with states left free to prosecute insurgents for the act of rebellion. However, that would not be the case were IHL extended *in toto* to non-international conflicts, for the principle of combatant status/immunity would carry over and, assuming they satisfied the conditions for this, the position of non-state fighters *vis-à-vis* domestic law would be affected, as they would enjoy immunity from domestic prosecution for their 'ordinary' acts of war.[86] As Emily Crawford notes, the 'accepted wisdom' behind the refusal to grant immunity to non-state fighters is that this 'is fundamentally at odds with the modern system of the international law of sovereign states.'[87] As the Pakistani delegate's comments at the 1974–7 diplomatic conference are recorded: 'In his [the Pakistani delegate's] country insurgents would be executed, and any attempt to impose international legislation … would, in his opinion, constitute interference with the sovereign right of States.'[88] It must be noted, however, that this objection can only justify the exclusion of combatant status and immunity from non-international armed conflicts; it cannot justify the *general* distinction between types of conflict in IHL.

Various considerations are at play in the question of whether to extend combatant immunity to non-state fighters in non-international conflicts. First, it was argued by the Burmese delegate to the 1949 diplomatic conference that offering non-state fighters combatant immunity could eliminate a disincentive against revolt and thus promote conflict.[89] However, it is not at all clear that this argument is empirically sound.[90] Indeed,

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[86] See above, text to nn 45–7.

[87] Crawford (n 17) 154. Some states have, nevertheless, advocated extending combatant status to non-international conflicts: see, e.g., *Official Records: Vol VIII* (n 71) 359 (Sweden).

[88] *Official Records: Vol VIII* (n 71) 360. Similarly, see ibid, 362 (Spain).

[89] *Final Record: Volume II-B* (n 27) 329.

[90] N Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 Colum J Transnat L 1, 12.

one can equally argue that offering such immunity creates an incentive, currently lacking in the law, for non-state fighters to adhere to IHL; presently, the prospect of prosecution under domestic law for mere participation in hostilities risks undermining the deterrent effect of prosecutions under international law for violations of IHL.[91] Thus, in treating members of the National Liberation Army in Algeria as combatants and avoiding prosecutions thereof except where they committed atrocities, the commander-in-chief of the French Forces in Algeria acknowledged that the alternative often meant rebels fought with greater ferocity.[92]

Second, Emily Crawford has noted that the practice of offering *ex post facto* immunity via amnesties for domestic law violations (e.g. rebellion) following internal conflicts is becoming increasingly common.[93] An *ex ante* immunity would not, therefore, necessarily constitute a fundamental change in practice. Indeed, amnesties can often help with post-conflict reconciliation, particularly where tied to transitional justice mechanisms such as truth and reconciliation commissions.[94] Of course, from the perspective of states, the gap between *ex ante* immunity and *ex post facto* amnesty remains significant, with the former eliminating the discretion that states currently enjoy in this area.

There are, therefore, a number of complex considerations that arise when considering whether to extend combatant status and immunity to non-state fighters in non-international conflicts. In any event, as noted, the concern that eliminating the distinction between types of conflict could elevate the status of non-state fighters can only justify the

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[91] Bugnion (n 62) 194–5; Stewart (n 49) 346–7; Crawford (n 17) 157–8.

[92] Superior Army Command, 10th Military Region, Memorandum of 19 March 1958, ICRC Archives, file 225 (12), cited in Bugnion (n 62) at 195 (fn 80).

[93] Crawford (n 17) 104–9. For an interesting example, see *Kwoyelo v Uganda*, 150 ILR 802 (Ugandan Constitutional Court).

[94] Crawford (n 17) 111–12.

exclusion of combatant status from non-international conflicts; it cannot justify the exclusion of other rules, such as those relating to the procedural regulation of internment.

2.3.2 Humanitarian concerns

The preceding section discussed the key sovereignty-based concerns with eliminating the distinction between international and non-international conflicts. This final section will now discuss a more recent argument advanced by certain commentators, whereby the preservation of what remains of IHL's distinction is considered essential in safeguarding the rights of victims in such conflicts. It was noted above that a major criticism of the distinction has been its inconsistency with the humanitarian premise of IHL: by focusing on international conflicts, and marginalising non-international conflicts, IHL has failed sufficiently to protect victims of the latter.[95] The solution to this problem that traditionally has been adopted both in practice and jurisprudence is gradually to eliminate the distinction between types of conflict by extending the rules applicable in international conflicts to non-international conflicts.[96] This has similarly been the approach advocated by commentators that are concerned to increase the protections afforded to victims of internal conflicts.[97]

That humanitarian concerns with internal conflicts have traditionally been addressed by drawing from the rules applicable in international conflicts arose from the assumption that, but for IHL, no other rules of international law applied to regulate the conduct of

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[95] Section 2.2.2.

[96] See, e.g., *Tadić* (n 41) [97]; Sivakumaran (n 38) 64. Those states that have sought to increase the protections for victims in internal conflicts have similarly advocated extending most or all of the rules of IHL to them: see, e.g., *Final Record: Volume II-B* (n 27) 326 (Soviet Union); *Final Record: Volume I* (n 33) 47 (ICRC); *Official Records: Vol V* (n 52) 91 (Norway); *Official Records: Vol VII* (n 71) 321–2 (Holy See).

[97] See, e.g., Duxbury (n 48) 268; Crawford (n 7); Mastorodimos (n 49).

states in internal conflicts.[98] However, the emergence of IHRL has now changed this.[99] Although this has been a topic of some dispute in the past, it is now trite to note the mainstream view that IHRL, absent derogation, continues to apply in armed conflict, including non-international conflicts.[100] Were the distinction between international and non-international conflicts eliminated, the entirety of IHL would then apply alongside IHRL in non-international conflicts, raising the question of how these rules would interact. The precise relationship between IHL and IHRL will be discussed in detail in chapter six; suffice it to say here that the ICJ has demonstrated how the human right not arbitrarily to be deprived of one's life may be interpreted in armed conflict such that what is 'arbitrary' is determined not according to the usual IHRL standards developed in jurisprudence, but rather the IHL rules on the conduct of hostilities as the *lex specialis*.[101] However, IHL is generally more permissive than IHRL as the latter has been elaborated in jurisprudence. Thus, it is generally accepted that IHL permits the lethal targeting of combatants at any time on the basis of status alone, without the requirement that it actually be necessary in the prevailing circumstances.[102] This status-based approach to combatant targeting is premised on the presumed threat that is posed by the *group*, 'whether or not he or she *personally* endangers the lives or interests of the other party to the conflict.'[103] Indeed,

[98] D Kretzmer, 'Rethinking Application of IHL in Non-International Armed Conflicts' (2009) 42 Isr L Rev 8, 18–21.

[99] Ibid, 21.

[100] This is discussed in detail in section 5.1. See, e.g., C Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 IRRC 501, 503–9; N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP, Oxford 2010) 237–40. For the ICJ's jurisprudence confirming this, see *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [106]; *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 116, [216]–[217].

[101] *Legality of Nuclear Weapons*, ibid, [25].

[102] See, e.g., G Solis, 'Targeted Killing and the Law of Armed Conflict' (2007) 60 NWCR 127, 130; Dinstein (n 3) 34.

[103] D Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 EJIL 171, 190–1. Similarly, see M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd edn, Basic Books, New York 2000) 144–5.

when the ICRC argued that the force used against otherwise legitimate targets (including combatants) 'must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances',[104] it was heavily criticised for its alleged failure accurately to reflect the *lex lata*.[105]

This liberal approach to targeting under IHL contrasts starkly with the equivalent rules in IHRL as they have been developed in jurisprudence. There, it is required that the use of lethal force only be employed where it is necessary in the prevailing circumstances for the achievement of a legitimate aim, such as in self-defence, and where proportionate to that aim.[106] Thus, unlike in IHL, under IHRL nobody may be targeted solely on the grounds of status.

By virtue of the ICJ's *lex specialis* approach, extending more of the rules of IHL to non-international conflicts could, therefore, be invoked as a justification for significantly curtailing the protections otherwise afforded by the applicable rules of IHRL. As will become clear in later chapters, this more permissive approach of IHL compared with IHRL can similarly be seen with regard to the procedural regulation of internment. Consequently, the long-held view that eliminating the distinction in IHL would improve the protections afforded to victims of non-international conflicts now faces a powerful

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[104] N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva 2009) Section IX. For similar views, see, e.g., JS Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff, Dordrecht 1985) 75; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, Oxford 2004) 21–2; Greenwood (n 79) 38; N Melzer, *Targeted Killing in International Law* (OUP, Oxford 2008) 288–96; R Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819.

[105] See, e.g., WJ Fenrick, 'ICRC Guidance on Direct Participation in Hostilities' (2009) 12 YIHL 287, 298–9; D Akande, 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities' (2010) 59 ICLQ 180, 191–2; WH Parks, 'Part IX of the ICRC's "Direct Participation in Hostilities": No Mandate, No Expertise and Legally Incorrect' (2010) 42 NYU J of Intl L & Pol 769, 828; MN Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harv Nat Sec J 5, 39–43; JK Kleffner, 'Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?' (2012) 45 Isr L Rev 35.

[106] See, e.g., HRC, *Suarez de Guerrero v Colombia*, UN Doc Supp No 40 (A/37/40), 9 April 1981, [13.2]–[13.3]; European Court of Human Rights (ECtHR), *McCann and others v UK*, App No 18984/91, 27 September 1995, [145]–[214].

counterargument.[107] This will prove an important consideration when discussing how the law should develop in this area in chapter eight. Of course, depending on the perspective one takes, this argument could be invoked both in favour of and against eliminating the distinction between types of conflict. From an humanitarian perspective, in order better to protect victims of internal conflicts, one should be cautious in proposing the extension of more rules of IHL to such conflicts. However, from the perspective of states wishing to preserve their discretion, eliminating the distinction could offer various advantages that they would not enjoy were IHRL the sole governing regime. Clauss Kress has pointed to this advantage for states, noting that 'the resort to the armed conflict model offers the advantage of applying, as the *lex specialis*, a targeting and detention regime that is appreciably more permissive than that under international human rights law'.[108]

2.4 Conclusions

This chapter has served two purposes. First, it has explored the general context within which this thesis falls. As will become clear in subsequent chapters, whilst IHL contains procedural rules applicable to internment in international conflicts, it does not for non-international conflicts; this is another manifestation of this general distinction drawn between categories of conflict. Second, this chapter has considered the reasons for and arguments against preserving the general distinction in IHL, enabling an informed discussion of whether the distinction should be preserved with regard to the procedural regulation of internment in later chapters. Importantly for our purposes, it was shown that the traditional view that eliminating the distinction between types of conflict was the most appropriate means of humanising non-international conflicts is no longer necessarily valid,

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[107] Kretzmer (n 98) 39.

[108] C Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 JCSL 245, 260–1.

given the development of IHRL. Such considerations could have important consequences for the current enquiry and will be returned to in chapter eight when considering the desirability of eliminating the distinction in this area. Before that, however, a full examination of the current *lex lata* is needed. This will begin in the next chapter with a consideration of the procedural regulation of internment in international armed conflicts under IHL, so as to develop a frame of reference for judging the rules applicable in non-international conflicts in the subsequent chapters.

3. The Procedural Regulation of Internment in International Armed Conflicts under IHL

This chapter will explore the procedural regulation of internment in international armed conflicts under IHL. As noted in the introduction, 'procedural' in this sense is used in contradistinction to treatment standards and conditions of detention; the focus instead is on the deprivation of liberty itself. In particular, three categories of rules are explored, relating to the standard for internment (i.e. the grounds justifying internment), the availability of review procedures, and the point at which internment must cease. Given the view that, 'with regard to the law of war, states are bound by a reasonably robust set of procedural rules when they administratively detain protected persons during international armed conflict,'[1] it is important to examine what these rules are, in order to proceed to a comparison with the degree of regulation in non-international conflicts. As such, this chapter will create a frame of reference for subsequent chapters by elaborating on the categories of procedural rules which will be discussed throughout the thesis.

In addition, by examining the rules applicable to internment in international conflicts, any deficiencies therein can be highlighted. This is especially important for the discussion in chapter eight regarding how the law of non-international armed conflict might appropriately be developed in this area. The previous chapter demonstrated that the traditional means by which the law of non-international armed conflict has developed has been to draw by analogy from the rules in international conflicts. Whether this should also be the case with regard to the procedural regulation of internment requires, first, examining the adequacy of those rules. Indeed, it will be argued that the claim that the procedural rules applicable in international conflicts are 'robust' significantly overstates the case, for whilst IHL does specify certain rules, they remain vague. For this reason, the

[1] AS Deeks, 'Administrative Detention in Armed Conflict' (2009) 40 Case W Res J Intl L 403, 414.

detailed elaboration of these rules in practice will also be discussed, which will then be drawn on in chapter eight.

This chapter will be structured according to the different categories of procedural rules, exploring the standard for internment (section 3.2), the review process for challenging internment (section 3.3), and the point at which internment must cease (section 3.4). In each of these sections a comparison will be made between the different rules that apply to civilian and combatant internees. These different rules regulating civilian and combatant internment are seen by some as entirely disconnected.[2] It will, however, be shown that the same basic rule may be seen to underlie each internment regime,[3] such that internment is permitted only where necessary for security reasons.

The chapter will begin with an examination of the statuses of combatant and civilian in section 3.1. This is not only a necessary precursor to comparing the rules applicable to each, but it will also provide further information for the discussion in the following chapters regarding the rules applicable in non-international conflicts and the degree to which the distinction between types of conflict should be eliminated in this area.

3.1 Status

The law of international armed conflict differentiates between two key categories of protected persons, those of 'combatant' and 'civilian'.[4] For each, a separate set of rules exists, including those regulating internment. Each status will be examined in turn to consider who qualifies and, thus, which set of procedural rules on internment applies.

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[2] LM Olson, 'Guantánamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards' (2009) 42 Case W Res J Intl L 197, 202.

[3] The expression 'internment regime' is used throughout the thesis to describe the collection of procedural rules regulating the grounds, procedural safeguards and end-points of internment.

[4] See, e.g., Part III of API relating to combatants/POWs and Part IV of API relating to the civilian population. See also K Ipsen, 'Combatants and Non-Combatants' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn OUP, Oxford 2008) 79.

3.1.1 Combatants/POWs

The rules regulating the treatment of combatants are found in the Third Geneva Convention (GCIII) and Additional Protocol I (API).[5] As Knut Ipsen explains, the primary status of combatant gives rise to the secondary status of prisoner of war (POW) when the combatant falls into the power of the enemy.[6] Article 4 GCIII specifies upon whom POW status, and thus the protections of GCIII, is conferred. According to this provision, POWs are persons that have fallen into the power of the enemy and belong to one of the following:

i. the armed forces and the militias and volunteer corps forming part of the forces of a party to the conflict (Article 4A(1));
ii. other militias or volunteer corps belonging to a party to the conflict, where commanded by a person responsible for subordinates, wear a fixed, distinctive emblem, carry arms openly, and adhere to IHL (Article 4A(2));
iii. regular forces professing allegiance to an authority not recognised by the detaining power (Article 4A(3));
iv. non-members authorised to accompany the armed forces (Article 4A(4));
v. members of crews of merchant marine and civil aircraft of the parties to the conflict where no greater protection is offered under international law (Article 4A(5));
vi. members of a *levée en masse* (Article 4A(6)).

Article 4B GCIII specifies two further categories of persons to be *treated as* POWs:

vii. demobilised members of the armed forces of occupied territory, if the occupier considers it necessary to intern them, e.g. where they have attempted to rejoin the enemy forces, or where they do not comply with a summons for internment, so long as hostilities continue outside the occupied territory (Article 4B(1)); and

[5] The full titles of these treaties can be found in the table of abbreviations.

[6] Ipsen (n 4) 79.

viii. those falling in one of the above categories who are in neutral or non-belligerent states and whom such states are obligated under international law to intern (Article 4B(2)).

API altered the rules on combatant/POW status.[7] Article 43(1) API defines 'armed forces' as:

> … all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

API thus brings regular armed forces, as well as organised groups and units, previously dealt with separately under Articles 4A(1) & (2) GCIII, under this single paragraph. The requirements for *all* such forces are now simply that they be organised, operate under a command responsible to a party to the conflict, and have an internal disciplinary system to enforce IHL.[8] Article 43(2) then confirms that members of the armed forces are combatants, and thus have a right to participate directly in hostilities; they cannot, therefore, be prosecuted for their mere participation in hostilities when acting in compliance with IHL ('combatant immunity').[9] These rules, together with those in GCIII, confirm that only those *lawfully* participating in hostilities (as opposed to civilians taking up arms) may be considered combatants and subject to internment as a POW.[10]

Finally, Article 44(3) API, after confirming that 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack', states that a combatant shall, nevertheless,

7 Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn CUP, Cambridge 2010) 51.

8 Ipsen (n 4) 85.

9 E Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP, Oxford 2010) 52–3. See the discussion on this in section 2.1.

10 The issue of whether those participating in hostilities but not subject to POW status are protected elsewhere is discussed below under section 3.1.3.

retain his combatant status if he cannot so distinguish himself, as long as he carries his arms openly during each military engagement and when visible to the enemy whilst deploying for an attack. Article 44(4) then states that failure to honour these requirements shall lead to a forfeiture of POW status, although such persons 'shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war'. The requirement of a fixed, distinctive emblem for combatant/POW status, originally in Article 4A(2)(b) GCIII, has thus been relaxed by Article 44(3).[11] Yoram Dinstein argues that this change is to the detriment of the civilian population, for whom the principle of distinction is so essential.[12] That said, Article 44(3)'s purpose was to bring the increasingly common phenomenon of guerilla warfare within the POW framework,[13] rather than to change the tradition of the wearing of uniforms by regular state forces.[14]

It was this controversy regarding Article 44 API which was invoked by certain states, including the US, as a reason for not ratifying API.[15] Indeed, the ICRC noted how controversial this provision continues to be, undermining its ability to crystallise as custom.[16] This controversy is confirmed in doctrine, with a number of commentators considering Article 44 API as binding only on states parties.[17] Given that, unlike the 1949 Geneva Conventions, the Additional Protocols do not enjoy universal ratification, this has

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[11] LC Green, *The Contemporary Law of Armed Conflict* (3rd edn Manchester University Press, Manchester 2008) 135.

[12] Dinstein (n 7) 53–4. Similarly, see GB Roberts, 'The New Rules for Waging War: The Case Against Ratification of Additional Protocol I' (1985–6) 26 VJIL 109, 129; AD Sofaer, 'The Rationale for the United States Decision' (1988) 82 AJIL 784, 786.

[13] Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva 1987) 520–1.

[14] Art 44(7) API.

[15] Sofaer (n 12) 786.

[16] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (CUP, Cambridge 2005) 387–9.

[17] Dinstein (n 7) 54–5. Similarly, see C Greenwood, 'The Law of War (International Humanitarian Law)' in MD Evans (ed), *International Law* (2nd edn OUP, Oxford 2006) 790.

important consequences on the applicable law in particular conflicts.[18]

3.1.2 Civilians

Whilst combatants are protected by GCIII, civilians are protected by the Fourth Geneva Convention (GCIV), together with API. Article 4 GCIV defines those protected by GCIV negatively,[19] i.e. those in the hands of the enemy and not protected by the first three Conventions. Further limitations, however, are placed on GCIV's application: first, it apparently only applies where the individual is in the hands of a party to the conflict of which they are not a national;[20] second, it only applies where the individual's national state is bound by the Convention;[21] third, it does not apply to nationals of neutral states in the territory of a belligerent state, and nationals of co-belligerent states, as long as their states maintain normal diplomatic relations with the state in whose hands they are.[22] GCIV consequently protects only a subset of what might normally be referred to as 'civilians'.[23]

Finally, even if an individual satisfies the conditions in Article 4 GCIV, they may be stripped of some of their rights under the Convention by virtue of the derogation provision in Article 5 GCIV. So as to examine this provision's relevance for the procedural rules applicable to civilian internment that are to be examined in the following sections, Article 5 GCIV is discussed in section 3.5, at the end of this chapter.

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[18] As of 19 November 2013, 195 states are party to the 1949 Geneva Conventions, 173 are party to API, and 167 are party to APII: <http://www.icrc.org/ihl/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf> accessed 15 December 2013.

[19] It should be noted that GCIV does not define 'civilian' as such, but instead those persons protected by the Convention.

[20] Art 4(1) GCIV. The ICTY Appeals Chamber in *Prosecutor v Duško Tadić* (Appeals Judgment) ICTY-94-1-A (15 July 1999) at [166]–[169], however, stated that the drafting history and object and purpose of GCIV, together with the development in the conduct of wars that now sees conflict as being inter-*ethnic* rather than primarily inter-*state*, reveals that the true test for the applicability of GCIV is not nationality but allegiance, which could be proven by ethnicity rather than nationality.

[21] Art 4(2) GCIV.

[22] Art 4(2) GCIV.

[23] Unless stated otherwise, reference to 'civilians' in this thesis will mean persons protected by GCIV.

3.1.3 A Third Category? – 'Unlawful Combatants'

There is a debate regarding a possible third category of persons under IHL—so-called 'unlawful combatants' or 'unprivileged belligerents'—who directly participate in hostilities without being entitled to POW status. This is important to the present discussion, for it raises the question of whether the legality of internment of such individuals is to be assessed under the regime for POWs in GCIII, civilians in GCIV, or neither. This debate was revived in light of the so-called 'war on terror' and resulting detentions at Guantánamo Bay, Cuba, by the US Department of Defence of those it considered 'unlawful enemy combatants' (including members of the Taliban and al-Qaeda).[24] In examining the status of the Taliban and al-Qaeda, Christopher Greenwood implied that they fall outside both GCIII and GCIV.[25] Dinstein, similarly, argues that, '[a] person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant'.[26]

Such arguments, however, are difficult to reconcile with the text of the Geneva Conventions. As Knut Dörmann argues, the text makes it clear that no third category of person exists, since the scope of GCIV is defined negatively, as protecting those not protected by the other Conventions.[27] Moreover, given that Article 5 GCIV, examined below, was designed as a derogation provision for those individuals who may be characterised as unlawful combatants, it is clear that GCIV was intended to cover such persons.[28] Indeed, state practice, much of which has been in response to recent US

[24] Crawford (n 9) 56–61; Ipsen (n 4) 83. On this, see section 6.2.3.1.

[25] CJ Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 Intl Affairs 301, 316.

[26] Dinstein (n 7) 36. For a slightly different approach, see J Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 VJIL 1025 (arguing that GCIV applies to spies/saboteurs in enemy territory but not to 'unlawful combatants' on the battlefield, invoking the distinction drawn in RR Baxter, 'So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs' (1951) 28 BYIL 323).

[27] K Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 IRRC 45, 49.

[28] Ibid, 50.

detention practices, similarly confirms the non-existence of this alleged third category.[29] Thus, Emily Crawford notes that, '[g]iven the almost uniform resistance to US attempts to proclaim a "Geneva" status of "unlawful enemy combatant", it is doubtful such a legal category exists.'[30] Consequently, where not entitled to POW status, if its Article 4 conditions are met, an individual is protected by GCIV, albeit subject to Article 5 GCIV.[31]

3.2 Standard for Internment

Having discussed the different statuses under IHL, the procedural rules applicable to internment in international conflicts can now be examined. It is noteworthy that these rules give content to the international crime of unlawful confinement, which constitutes a grave breach of GCIV.[32] As such, failure to observe them can entail the individual criminal responsibility of the perpetrator (in addition to the responsibility of the state, where the conditions for its invocation are met).[33]

The first set of rules to consider are those that specify in what circumstances a person may be interned. In exploring these, this section will look in turn at the grounds justifying civilian and combatant internment.

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[29] See, e.g., UK Ministry of Defence, *Joint Doctrine Publication 1-10: Captured Persons (CPERS)* (2nd edn, Ministry of Defence, Shrivenham 2011) 1-12 [141]; PC Tange, 'Netherlands State Practice' (2007) 38 NYIL 263, 290; HCJ 769/02, *Public Committee Against Torture in Israel* et al *v The Government of Israel* et al, 57(6) PD 285 (Israel Supreme Court) [26]–[28]; *A v State of Israel*, CrimA 3261/08 (11 June 2008) (Israel Supreme Court) [12].

[30] Crawford (n 9) 60.

[31] Similarly, see JS Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva 1958) 51; Dörmann (n 27) 49; D Jinks, 'The Declining Significance of POW Status' (2004) 45 Harvard Intl LJ 367, 381–6; M Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) 2 JICJ 96, 100–102; Crawford (n 9) 60–1.

[32] Art 147 GCIV.

[33] *Prosecutor v Dario Kordić and Mario Čerkez* (Appeals Judgment) ICTY-95-14/2 (17 December 2004) [69]–[70].

3.2.1 Civilians

GCIV represented the first IHL treaty applicable to civilians. Before 1949, the rules regarding when 'enemy' civilians could be interned were unclear. Writers during the early twentieth century considered pre-1914 customary law to prohibit blanket internment of enemy nationals.[34] However, by virtue of compulsory military service during the First World War, together with the intricate networks of espionage and widespread public opinion in favour of detention (particularly in Britain), a change occurred to the effect that general internment of resident enemy aliens was considered acceptable.[35] Indeed, practice during the Second World War suggested that no custom restricted states in this area.[36] In the UK the authority to detain enemy aliens was seen as an element of the royal prerogative and, as in the United States, was considered unfettered by both international law and domestic judicial control.[37] The drafting of GCIV and its rules regulating civilian internment were therefore a progressive development.

GCIV deals separately with the protection of civilians in the territory of a party to the conflict (Part III, Section II of GCIV) and those in occupied territory (Part III, Section III of GCIV), establishing for each slightly different rules on internment (Articles 41–3 and 78, respectively). The basic norm governing all civilian internments, however, is found in Article 27(4) GCIV, which states that 'the Parties to the conflict may take such

[34] L Oppenheim, *International Law, A Treatise: Volume II, War and Neutrality* (Longmans, Green & Co, London 1906) 60–1; J Westlake, *International Law Part II: War* (CUP, Cambridge 1907) 42; N Bentwich, 'International Law as Applied by England in the War: The Treatment of Alien Enemies' (1915) 9 AJIL 642, 646; JW Garner, 'Treatment of Enemy Aliens: Measures in Respect to Personal Liberty' (1918) 12 AJIL 27.

[35] Garner, ibid, 28–9; AS Hershey, 'Treatment of Enemy Aliens' (1918) 12 AJIL 156; H Lauterpacht, *Oppenheim's International Law, A Treatise: Volume II, Disputes, War and Neutrality* (5th edn Longman's, Green & Co, London 1935) 257–8.

[36] EJ Cohn, 'Legal Aspects of Internment' (1941) 4 MLR 200, 202.

[37] *Netz v Chuter Ede* [1946] 1 All ER 628 (UK); *Minotto v Bradley* (1918) 252 Fed 600 (US); M Brandon, 'Legal Control over Resident Enemy Aliens in Time of War in the United States and in the United Kingdom' (1950) 44 AJIL 382.

measures of control and security in regard to protected persons as may be necessary as a result of the war.' Article 41 GCIV notes that internment is the most severe measure of control permissible, which can only be resorted to where the grounds and procedures in Articles 42–3 or 78 GCIV are adhered to. Thus, Article 27(4) may be seen as establishing the authority to intern civilians, with Articles 41–3 and 78 giving content to this authorisation and detailing the limits thereof.[38] In the Israeli Supreme Court's words, '[t]hese parameters create a 'zone' of situations—a kind of 'zone of reasonableness'—within which the military commander may act.'[39]

Regarding when internment may occur, Article 42(1) stipulates that civilian internment in the territory of a party to the conflict is permitted, 'only if the security of the Detaining Power makes it absolutely necessary', whilst Article 78(1) permits internment in occupied territory only where the 'Occupying Power considers it necessary, for imperative reasons of security.' The ICRC Commentary argues that the phrase 'imperative reasons of security' indicates that internment in occupied territory 'should be even more exceptional than it is inside the territory of the Parties to the conflict'.[40] It is not, however, clear why this should be the case; indeed, the reference to 'absolute' necessity in Article 42(1) could equally suggest a more stringent test. Moreover, Article 78(1) permits internment where the detaining power *considers* it necessary, whereas Article 42(1) does so only where it *is* necessary. The ordinary meaning of this additional word in Article 78(1) would suggest that, whilst in occupied territory the necessity of internment is self-

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[38] Pictet, *GCIV* (n 31) 207; H-P Gasser, 'Protection of the Civilian Population' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn OUP, Oxford 2008) 286; *Prosecutor v Zejnil Delalić* et al (Trial Judgment) ICTY-96-21 (16 November 1998) [574]; *Prosecutor v Dario Kordić and Mario Čerkez* (Trial Judgment) ICTY-95-14/2-T (26 February 2001) [281]–[283]; *A v Israel* (n 29) [17].

[39] 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, [29].

[40] Pictet, *GCIV* (n 31) 367.

judging,[41] in the territory of a party to the conflict it is objective, i.e. internment must *actually* be necessary.[42]

Notwithstanding the difference in language between Articles 42 & 78 GCIV, it is clear that these standards share two key elements: first, the individual in question must pose a threat to the detaining power's security; second, that threat must have reached the point of rendering internment of that particular individual necessary,[43] such that the threat cannot be avoided by a less restrictive measure:

> … the relevant norms of international humanitarian law have been developed such that only absolute necessity, based on the requirements of State security, can justify recourse to these measures [i.e. internment], and only then if security cannot be safeguarded by other, less severe means.[44]

It will be noticed that the above two elements are expressed in terms of the particular individual. This confirms that civilian internment should never be a collective measure. Thus, the ICTY has held that internment is 'to be taken only after careful consideration of each individual case. Such measures are never to be taken on a collective basis.'[45] This issue, however, is not without controversy. The ICRC Commentary to Article 42 GCIV, for example, states that 'a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of

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[41] Similar reasoning has been adopted in other areas of international law: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, [222]; D Akande and S Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' (2003) 43 VJIL 365, 388. Although cf HL Schloemann and S Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 AJIL 424, 443.

[42] Similarly, see *Prosecutor v Zejnil Delalić* et al (Appeals Judgment) ICTY-96-21-A (20 February 2001) [320].

[43] As noted above, whether this test of necessity is objective or subjective would seem to depend on whether one is dealing with art 42 or 78 GCIV.

[44] *Delalić* (n 38) [571].

[45] *Delalić* (n 38) [578]; *Kordić and Čerkez* (n 38) [285]; *Prosecutor v Milorad Krnojelac* (Trial Judgment) ICTY-97-25 (15 March 2002) [123]; HCJ 3239/02, *Mar'ab et al v IDF Commander of Judea and Samaria et al*, 57(2) PD 349, [23] (Israel Supreme Court); *A v Israel* (n 29) [18]–[19]; Pictet, *GCIV* (n 31) 258; J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 381.

organizations whose object is to cause disturbances'.[46] This suggests that civilian internment may be based solely on membership of certain organisations, without the need for an *individual* threat determination. The text of Articles 42 & 78 GCIV sheds no light on this question, for nothing in either provision reveals whether the drafters intended collective decisions to be permissible. The *travaux* also offers little help here, with different delegations taking different views. On the one hand, the US argued strongly in favour of the permissibility of collective internment, with the initial review procedure (to be examined below) providing the opportunity to correct mistakes.[47] Other delegations, on the other hand, were concerned that this risked mass, arbitrary internment.[48] It is submitted that this latter view is the more accurate (reflected in the ICTY's interpretation of these provisions), as more in keeping with the object and purpose of these rules, which seek to give content to the basic principle in Article 27(4) GCIV, permitting internment only where *necessary* as a result of the war.[49]

It may reasonably be argued that internment on the basis of status and internment on the basis of security threat are not necessarily incompatible (for being a member of an armed organisation could render one a security threat).[50] However, permitting pure status-based internment under GCIV would leave the detaining state free to define the parameters of internment, for it would likely be that state which determines what constitutes 'membership' of the particular organisation (and, indeed, what constitutes the organisation itself).[51] These precise issues have arisen with regard to the US' recent

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[46] Pictet, *GCIV* (n 31) 258.

[47] *Final Record of the Diplomatic Conference of Geneva of 1949: Vol III* (ICRC, 1963) 126.

[48] *Final Record of the Diplomatic Conference of Geneva of 1949: Vol II, Section A* (ICRC, 1963) 825–6.

[49] See above, text to n 38.

[50] Indeed, it is shown below that this is the case for combatant internment: see section 3.2.2.

[51] The difficulties with applying status-based internment to non-state armed groups are explored in detail in section 8.2.

military operations against al-Qaeda.[52]

It is submitted that a reasonable compromise is that adopted by the Israeli Supreme Court in *A v Israel*.[53] Here, the Court stated that a domestic law permitting administrative security detention should be interpreted 'with reference to the security purpose of the law and in accordance with the constitutional principles and international humanitarian law … *which require the proof of an individual threat as a ground for administrative detention*.'[54] Where an individual is a member of a terrorist organisation, the Court stated that 'we should consider the detainee's connection and the nature of his contribution to the cycle of hostilities of the organization in the broad sense of this concept'.[55] Whilst recognising the importance of status/membership, the Court therefore made clear that the state is not free to define membership and then detain accordingly, but must consider the individual's role within the organisation and whether that role renders them a security threat.[56]

The discussion above demonstrates that the parameters of internment authority under IHL are controversial. This arises in large part from the indeterminacy of the GCIV internment standards and their broad nature. As noted above, Articles 42(1) and 78(1) contain two common elements: first, the individual must pose a threat to the detaining power's security; second, internment must be the only means of protecting against that threat. Regarding the first element, the ICTY has conceded that '"[s]ecurity" … does not appear susceptible to more concrete definition. The measure of activity deemed prejudicial to the … security of the State … is left largely to the authorities of that State itself.'[57] The

[52] N Lubell, 'The War (?) Against Al-Qaeda' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 424–8.

[53] *A v Israel* (n 29).

[54] Ibid, [21] (emphasis added).

[55] Ibid.

[56] Others have read the judgment more critically: see, e.g., E Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Editions A Pedone/Hart, Paris/Oxford 2013) 358.

[57] *Delalić* (n 38) [574]; *Kordić and Čerkez* (n 38) [284]; Pictet, *GCIV* (n 31) 257; Olson (n 2) 203–4; Y

Appeals Chamber has gone further and argued that deference to the state is appropriate, leaving a certain degree of discretion in determining what constitutes a threat to its own security.[58] To an extent, this is true. The state and its military commanders are well-informed regarding security threats and are, thus, arguably best placed to make decisions on the necessity of an internment. Moreover, attempting to develop a definition of 'security' *in abstracto* would be doomed to failure, as any such definition would be either under- or over-inclusive, omitting certain characteristics that may reasonably be considered a security threat, or avoiding such omissions by casting a net so wide as to capture those not reasonably considered a threat.

Nevertheless, the ICTY has offered some general interpretations of these provisions, suggesting that 'the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.'[59] More specifically:

> Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.[60] (emphasis in original)

Little more, however, can be said about the GCIV standards *in abstracto*. Rather, preference in jurisprudence appears to be for a case-by-case assessment.[61] The Israeli Supreme Court, for example, has stated that, 'it is not possible to define the nature of such a [threat] precisely and exhaustively, and the matter will be examined on a case by case

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Dinstein, *The International Law of Belligerent Occupation* (CUP, Cambridge 2009) 172.

58 *Delalić* (n 42) [323].

59 *Delalić* (n 38) [577]. This standard was originally included in Pictet, *GCIV* (n 31) at 257–8 and has been adopted in the UK's Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, Oxford 2004) at 230.

60 *Delalić* (n 38) [576].

61 Ibid, [1133].

basis according to the circumstances.'[62] Indeed, states have similarly not elaborated a clear list of circumstances justifying internment.[63] Instead, the tendency is to quote verbatim the open standards from Articles 42(1) and 78(1) GCIV in military manuals, listing examples of situations in which internment would be justified only in particular operations, with such lists remaining outside the public domain.[64]

It is important to note that this difficulty with defining 'security' *in abstracto* is not limited to IHL, but exists in many areas of international law by virtue of the transcendental nature of the notion of state security, itself a consequence of the fact that it is intimately connected with the concept of the sovereign state.[65] We may, therefore, make reference to these other areas when addressing the issue at hand. Dapo Akande and Sope Williams, for example, when discussing national security exemptions under the General Agreement on Tariffs and Trade, refer to jurisprudence of the ICJ, European Court of Human Rights (ECtHR) and European Court of Justice (ECJ) when addressing similar national security exceptions. The authors emphasise that these tribunals address separately the questions of whether security interests are engaged and the necessity of the measures adopted, with the result that, whilst deference is given to the state in defining what constitutes a threat to its security, the necessity element is an objective standard susceptible to judicial review.[66] The same approach might be adopted here, with the necessity element of the GCIV internment standards acting as a counter to the subjective security element. This approach

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[62] *A v Israel* (n 29) [21].

[63] Debuf (n 56) 370–7.

[64] For examples where military doctrine merely quotes the GCIV standards, see US Army Field Manual, *FM 27-10: The Law of Land Warfare* (Department of the Army, Washington, DC 1956) 110 [281]; US Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Departments of the Army, Navy, Air Force and Marine Corps, Washington, DC 1997) s 5-1(b); Canada, *Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Levels* (Office of the Judge Advocate General, Ottawa, 2001) 11-7 [1125]; UK Ministry of Defence, *Joint Doctrine Publication 1-10* (n 29) 1-12 [142].

[65] Schloemann and Ohlhoff (n 41) 443–4.

[66] Akande and Williams (n 41) 382–3, citing, inter alia, ECJ, *Commission v Spain* [1999] ECR I-5585; ECtHR, *Smith & Grady v United Kingdom* (2000) 29 EHHR 493.

is useful even regarding the necessity test in Article 78 GCIV, which, as was noted above, appears to be self-judging, for as Akande and Williams argue, under such provisions the state must nonetheless *actually* consider such a measure necessary for its security.[67]

Notwithstanding the difficulty in defining the GCIV internment standards *in abstracto*, practice and doctrine have confirmed certain *limits* on states' internment authority. First, as the text of these provisions makes clear, internment must never be used as a punishment for past acts, but only where necessary to prevent a present or future security threat arising.[68] Second, as noted, the ICTY has confirmed that internment must be based on an *individual* threat determination.[69] This requirement not only limits in itself the internment powers conferred by GCIV, but it also helps to explain a number of further, more specific limits that have been recognised. In this regard, the ICTY has confirmed a third limit, that simply being 'a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party … and is not, therefore, a valid reason for interning him'.[70] This is now adopted in the practice of the UK, for example.[71] For the same reason, the ICTY has also confirmed a fourth limit, that merely being of military age cannot alone justify internment.[72] Fifth, there is both academic and judicial support for the view that intelligence value alone is insufficient to warrant

[67] Akande and Williams (n 41) 389–90.

[68] *A v Israel* (n 29) [22]; Pejic (n 45) 381; Debuf (n 56) 322–6.

[69] See above, text to n 45.

[70] *Delalić* (n 38) [577]; *Delalić* (n 42) [327]; *Kordić and Čerkez* (n 38) [284]. Similarly, see Pictet, *GCIV* (n 31) 258; Eritrea Ethiopia Claims Commission (EECC), *Civilians Claims, Ethiopia's Claim 5 (Ethiopia/Eritrea)*, Partial Award, 17 December 2004, 135 ILR 427, [102]–[104].

[71] UK Ministry of Defence (n 59) 230. Similarly, see US, *Act on Restitution for World War II Internment of Japanese-Americans and Aleuts* (1988), s 1989a. There do, however, remain apparent instances of internment solely on the basis of nationality: see, e.g., F Hampson, 'The Geneva Conventions and the Detention of Civilians and Alleged Prisoners of War' [1991] PL 507; G Risius, 'Prisoners of War in the United Kingdom' and B Walsh, 'Detention and Deportation of Foreign Nationals in the United Kingdom during the Gulf Conflict' in P Rowe (ed), *The Gulf War 1990–91 in International and English Law* (Routledge, Oxford 1993).

[72] *Delalić* (n 38) [577]; *Kordić and Čerkez* (n 38) [284]; Pictet, *GCIV* (n 31) 258. Although cf EECC, *Civilians Claims, Eritrea's Claims 15, 16, 23 and 27–32 (Eritrea/Ethiopia)*, Partial Award, 17 December 2004, 135 ILR 374, [115]–[117].

internment; simply because an individual has knowledge of an act to be committed by another person that *would* constitute a security threat, does not render that *knowledge itself* a threat.[73] Sixth, political or religious opinions and practices should not be considered sufficient to constitute a security threat permitting internment; only where translated into action that does constitute such a threat would internment be justified.[74] Seventh, practice has also confirmed that the internment of persons solely as 'bargaining chips' for negotiating the release of prisoners held by the opposing side is impermissible and constitutes the proscribed act of hostage taking.[75]

Finally, it is clear that the security basis for internment must have a nexus to the armed conflict. The basic principle underpinning Articles 42 & 78 GCIV confirms this. As noted, this principle, found in Article 27(4) GCIV, permits states to take such measures of control 'as may be necessary as a result of the war'; acts of individuals which have no link to the conflict cannot, therefore, justify internment for it would not be 'necessary *as a result of the war*'.[76] Indeed, the ICRC has similarly emphasised the need for a 'belligerent nexus' when considering what constitutes 'direct participation in hostilities' by civilians, at which point they become lawful targets:[77]

> … armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to

[73] *Hamdi* et al *v Rumsfeld* et al, 542 US 507 (2004), 521 (US Supreme Court); Pejic (n 45) 380; T Davidson and K Gibson, 'Experts Meeting on Security Detention Report' (2009) 40 Case W Res J Intl L 323, 343–4.

[74] Similarly, see Israel, Ministry of Justice, Fact Sheet on Administrative Detention (2003) 3, cited in Debuf (n 56) 406; Sandoz *et al* (n 13) 871.

[75] See, e.g., the development in the Israeli Supreme Court's case law from ADA 10/94, *Anonymous v Minister of Defence,* 53(1) PD 97 (holding that Lebanese nationals could be interned as bargaining chips in negotiations with Hezbollah) to CFH 7048/97, *Anonymous v Minister of Defence*, 54(1) PD 721, 742 (holding that such internment is unlawful and amounts to hostage-taking), both cited in Dinstein (n 57) 153. On the illegality of hostage-taking under IHL, see common art 3 GCI–IV; art 34 GCIV; Pejic (n 45) 380.

[76] Similarly, see Debuf (n 56) 314.

[77] Art 51(3) API and art 13(3) APII.

> any form of "participation" in hostilities taking place between these parties … such violence … must be addressed through law enforcement measures.[78]

The same principle of belligerent nexus can be applied here, *mutatis mutandis,* to limit the situations that will be considered a security threat necessitating internment.[79]

To conclude this section, it is therefore clear that, whilst GCIV specifies in Articles 42 & 78 the grounds on which civilians protected by GCIV may be interned, these provisions leave considerable discretion to the detaining state. Certain limits on states' detention authority, however, can be discerned from practice. Whilst the remaining indeterminacy of the detention standards leaves room for arbitrary decisions by the detaining power, two points must be borne in mind. First, as noted, having a pre-determined, exhaustive list of circumstances in which internment is justified would risk being either over- or under-inclusive. Second, it will be shown below that GCIV recognises this initial discretion left to states and provides a safeguard in the form of review to help remedy mistakes. Whether this *post hoc* remedy is sufficient to counter the risks to the civilian population arising from the discretion left to states will be discussed below.

3.2.2 Combatants

Combatants/POWs have always been in a precarious position. It was not until the mid-nineteenth century that the codification of the rules regulating their treatment began, and even since then they have been 'continually subjected to poor treatment, abuse and were

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[78] N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva 2009) 59.

[79] A similar concept of belligerent nexus was also adopted by the ICTY in *Prosecutor v Kunarac* et al (Appeals Judgment) IT-96-23&23/1 (12 June 2002) at [55]–[60] in its treatment of the geographical scope of application of IHL, such that the question is whether an armed conflict exists and whether the particular act to be regulated occurs in relation to that armed conflict. Similarly, see N Lubell and N Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 JICJ 65.

genuinely used as political tools in a global ideological struggle.'[80] It has been argued that, whilst historically it was advantageous not to be considered a POW, so as to avoid lengthy internment, the First World War saw a shift in this regard as a result of the abuses committed against civilians together with the development of protections for POWs.[81] In light of the adoption of GCIV, the first IHL treaty on the protection of civilians, this preference for POW status is arguably less clear now, the exception being with those participating in hostilities who wish to claim combatant immunity.[82]

The differences between the GCIII and GCIV internment regimes illustrate this point well. As shown above, GCIV permits the internment of civilians only if the particular civilian poses a security threat rendering internment necessary, requiring an *individual* threat determination (typically shown by conduct).[83] GCIII, on the other hand, permits internment of enemy forces by virtue of their *status* as combatants ('status-based internment'), with no requirement of an individual threat determination. This is seen in Article 21(1) GCIII, which confers the power to intern combatants on parties to international conflicts, stating that, '[t]he Detaining Power may subject prisoners of war to internment'; it was shown in section 3.1.1 that enemy combatants become POWs (and thus subject to internment) when they fall into the hands of the opposing forces, without any further requirement of an individual threat determination.[84]

Notwithstanding this difference between the civilian and combatant internment regimes, it is submitted that both are premised on the same rule that permits internment only where necessary as a result of the war (i.e. for security reasons). Section 3.2.1

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[80] S Carvin, 'Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War' (2006) 11 JCSL 67, 67.

[81] R Stone, 'American-German Conference on Prisoners of War' (1919) 13 AJIL 406, 436.

[82] Jinks (n 31) (demonstrating that the traditional preference for POW status is declining).

[83] Section 3.2.1.

[84] Arts 4 GCIII and 43 API.

explained that the basis for civilian internment is found in Article 27(4) GCIV, permitting measures of control and security that are necessary as a result of the war. It was shown that the internment standards in Articles 42 and 78 build upon this provision, permitting internment only where necessary to prevent a present or future security threat arising. Similarly, with combatants (i.e. those listed in Articles 4A(1), (2), (3) and (6) GCIII and Article 43 API), '[t]he purpose of captivity is to exclude enemy soldiers from further military operations … [P]risoners of war shall only be considered as captives detained for reasons of security'.[85] Hence, combatants are interned on the same basis as civilians, that is, where necessary to prevent a security threat arising. With civilians, the existence of such a threat must be established on a case-by-case basis; with combatants, that risk is assumed to exist by virtue of their status, given that they may rejoin hostilities if released. Indeed, as explained in chapter two, this same assumption of threat posed by the *group* similarly underpins the status-based approach to combatant *targeting*.[86]

It must be noted, however, that GCIII permits internment of persons as POWs that are not combatants and thus for whom the above argument would not seem to apply. Section 3.1.1 explored those categories of persons that qualify for POW status and are thus subject to internment under Article 21(1) GCIII. These should be compared with the following definition of 'civilian' for the purposes of targeting in Article 50(1) API:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third [Geneva] Convention and in Article 43 of this Protocol.

Read alongside GCIII, Article 50(1) API demonstrates that there is a point at which the

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[85] H Fischer, 'Protection of Prisoners of War' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn OUP, Oxford 2008) 372. Similarly, see Oppenheim (n 34) 131; Stone (n 81) 414; L Doswald-Beck, 'Introduction: Background Paper' in The University Centre for International Humanitarian Law, 'Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict' (Geneva, 24–5 July 2004) 2 <http://www.adh-geneve.ch/pdfs/4rapport_detention.pdf> accessed 10 September 2013; Dinstein (n 7) 34–5.

[86] See section 2.3.2.

statuses of combatant and POW diverge, with those persons falling within Articles 4A(4) and 4A(5) qualifying as POWs, subject to internment *ipso facto*, but not as combatants. It is worth quoting these provisions in full. Article 4A(4) confers POW status on:

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

Article 4A(5) further confers POW status on:

> Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

Those falling into the above two categories are not members of opposing forces and thus do not pose the risk of rejoining hostilities if released. The question therefore arises as to why GCIII permits internment of such individuals. Regarding Article 4A(4), it appears that those falling within this provision were included in the POW category not so as to permit states to intern them for security reasons, but rather to ensure that such persons benefit from the protections in GCIII applicable to POWs. Indeed, given that such persons accompany the armed forces, there is an increased risk of their internment along with those forces; Article 4A(4) merely recognised this fact and brought them within the protective POW regime.[87] This interpretation is supported by the *travaux* of this provision, with the ICRC delegate at the 1949 diplomatic conference explaining that draft Article 4A(4) 'was designed to extend the *protection* of the Convention to the new units to which modern warfare had given rise, such as welfare units.'[88] Indeed, this interpretation would

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[87] Indeed, this would seem to be the interpretation in *Oppenheim* of art 13 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 2010) 205 CTS (1907) 277–98, on which art 4A(4) GCIII was partly based: Oppenheim (n 34) 133.

[88] *Final Record: Vol II-A* (n 48) 238.

also seem to apply to Articles 4B(1) and (2), which, as noted, list certain categories of persons who are to be treated as POWs, reflecting the idea that such persons were listed so as to ensure that the protections of GCIII were applicable thereto.[89]

Regarding Article 4A(5), whilst this also labels as POWs, and thus subject to internment *ipso facto*, persons not entitled to combatant status, it can in fact be reconciled with the argument that internment is permitted only where necessary for security reasons. This is because merchant seamen had been known in the past to participate in military operations, posing a security threat to the opposing power.[90] The assumption underlying Article 4A(5) is still, therefore, that the persons subject thereto pose a security threat necessitating internment.

3.3 Review of Internment

Having considered the rules relating to when internment may occur, this section will now consider the rules governing review of internment. Once again, it will look in turn at the relevant rules applicable to civilians and combatants.

3.3.1 Civilians

Once a protected civilian has been interned, GCIV specifies that they must enjoy both an initial review of the internment decision as well as periodic reviews thereafter, should internment continue. Each type of review will be examined in turn.

3.3.1.1 Initial review

For internees in the territory of a party to the conflict, Article 43(1) GCIV requires that the

[89] Demonstrating that such provisions were adopted with a view to extending the protections of GCIII, see JS Pictet (ed), *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* (ICRC, Geneva 1960) at 68 (art 4B(1)) and 70 (art 4B(2)).

[90] Ibid, 65.

internment decision must be 'reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.' For those in occupied territory, Article 78(2) states:

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

Failure to honour these provisions will render unlawful any internment.[91]

The text of Article 78(2) is less prescriptive than that of Article 43(1), stipulating simply a 'regular procedure' and 'right of appeal' as opposed to 'an appropriate court or administrative board'. The ICRC Commentary argues that Article 78 requires the same procedures as Article 43.[92] However, given that Article 43(1) is relevant context when interpreting Article 78(1),[93] and given their difference in language, it is reasonable to infer that the drafters intended there to be a difference between these two provisions. This is confirmed by the *travaux*, which indicates a clear rejection of proposals to equate the two provisions 'owing to the difference which existed between the situation in an occupied territory and that in national territory.'[94]

The purpose of initial review is to ensure that the standards for internment specified in GCIV are met in a particular case, i.e. to ensure that internment is necessary for the security of the detaining power: 'if these measures were inspired by other considerations, the reviewing body would be bound to vacate them'.[95] These procedures are, therefore, the

91 *Delalić* (n 38) [583].

92 Pictet, *GCIV* (n 31) 368.

93 Art 31(2) VCLT, *chapeau*, makes clear that the text of a treaty is relevant context in interpreting its provisions.

94 *Final Record: Vol II-A* (n 48) 772. The relevant drafting history can be found at ibid, 772–3 and 790. For an example of a state in favour of bringing the two provisions closer together, see *Final Record of the Diplomatic Conference of Geneva of 1949: Vol II, Section B* (ICRC, 1963) 441 (Belgium).

95 *Delalic* (n 38) [581]; *Kordić and Čerkez* (n 38) [287]; Pictet, *GCIV* (n 31) 261.

key safeguards against the arbitrary exercise of the internment authority under IHL. It was shown in section 3.2.1 that the detaining power has significant discretion when deciding whether to intern a civilian; these review mechanisms are designed to provide a check on this discretion.[96] Consequently, it may be argued that the concerns raised in the previous section regarding the indeterminacy of the initial internment standard, and the resulting risk of arbitrariness, are addressed by these review mechanisms.

However, Articles 43(1) & 78(2) GCIV themselves also leave some discretion to the detaining power. First, neither specifies a maximum length of time before which an internee's request for review must be honoured; rather, they simply state that this must be 'as soon as possible' and 'with the least possible delay', respectively. The Israeli Supreme Court considered that a period of twelve days before which a person is given access to review proceedings would be too long.[97] The ICTY Appeals Chamber has highlighted the context-dependent nature of this requirement:

> … the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the *minimum* time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a "definite suspicion" of the nature referred to in Article 5 of Geneva Convention IV.[98] (emphasis in original)

Second, no rules regarding the composition or independence of the review bodies are specified. Whilst the reference in Article 43(1) to 'administrative *board*' implies that the decision cannot rest with a single person,[99] no similar inference can be drawn from Article 78(2). More generally, it is clear that, under both Articles 43(1) and 78(2), review can be by an administrative, rather than judicial, authority, and there is no requirement that, in

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[96] *Delalić* (n 38) [580].

[97] *Mar'ab* (n 45) [32]–[34]. Although the Court was specifically referring to judicial intervention under domestic administrative detention laws, it referred to the GCIV internment regimes by analogy at ibid, [28].

[98] *Delalić* (n 42) [328].

[99] Pictet, *GCIV* (n 31) 260; Pejic (n 45) 387.

addition to military officers, civilian members of the judiciary be present. Consequently, military interests may appear over-represented, potentially undermining the impartiality (real or perceived) of the review process.

Third, the procedures of the review bodies are not prescribed.[100] For example, rules relating to evidentiary standards and on whom the burden of proof falls are not elaborated, which, arguably, undermines the effectiveness of such review procedures in containing the detaining power's discretion.[101] Moreover, there is no guarantee in Articles 43(1) or 78(2) GCIV of legal representation for internees, the right to appear, and the right to call and challenge witnesses.

Finally, there is no guidance on the standard of review, i.e. whether the reviewing authority will adopt a *de novo* or deferential approach to the detaining authorities. It is useful at this point to remember that the GCIV standards for internment comprise the two elements of security threat and necessity. As noted above, whilst deference may be given to the state in defining what constitutes a threat to its security, the reviewing authority could ensure a full, objective review of the necessity of internment, judging whether there genuinely was no other, less rights-restrictive means of countering that threat.[102] As noted, even for review under Article 78, which requires only that the detaining authority 'consider' internment necessary, a good faith review is still required.[103]

The provisions on initial review, therefore, remain vague. Indeed, this was very much intended by the drafters, demonstrated by the rejection of the Canadian proposal at the 1949 diplomatic conference to include more detailed rules in these provisions.[104] However, these vague provisions have been elaborated in practice, with certain states

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[100] Gasser (n 38) 316; Deeks (n 1) 409–10.

[101] See references below to case law in which rules on the burden of proof have been elaborated: n 112.

[102] See the discussion above at text to nn 65–7.

[103] Ibid.

[104] *Final Record: Vol III* (n 47) 127.

developing more detailed policy guidance that help to address some of the shortcomings noted above. The UK's recent *Joint Doctrine Publication on Captured Persons*, for example, requires that the review tribunal be independent of the chain of command involved in the initial decision to intern and that it include the head of detention operations, the chief of staff, a policy adviser and the Commander Legal.[105] Moreover, the review tribunal is to make an initial determination no later than 48 hours after capture, with periodic reviews no later than every 28 days; these reviews include a consideration of whether it is possible to transfer the internee to criminal jurisdiction.[106] The US has similarly elaborated the GCIV procedures, albeit in less detail. For example, under US military doctrine, decisions on internment are to be made by 'a responsible commissioned officer',[107] with reviews carried out 'by a board of officers.'[108]

These elaborations in UK and US military doctrine are policy-based rather than indications of *opinio iuris*.[109] However, the content of Articles 43(1) and 78(2) GCIV has, to some extent, also been elaborated *de lege lata.* First, the ICTY Appeals Chamber in *Delalić* held that the Military Investigative Commission, established by the defendants to review civilian detentions, failed to satisfy the requirements of Article 43(1), 'as it did not have the power to decide *finally* on the release of prisoners whose detention could not be considered as justified for any serious reason.'[110] Thus, the bodies reviewing the decision to intern must have the final say on whether internment should continue. This seems in keeping with the object and purpose of these provisions, for only then can the review body

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[105] UK Ministry of Defence, *Joint Doctrine Publication 1-10* (n 29) Annex 1B [1B3].

[106] Ibid, [1B5].

[107] US Army Regulation 190-8 (n 64) s 5.1(c)(1)(a).

[108] Ibid, s 5.1(g)(1).

[109] RM Chesney, 'Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010' (2011) 51 VJIL 549, 561.

[110] *Delalić* (n 42) [329] (emphasis added).

effectively protect persons against unnecessary internment.[111] In the same case, the ICTY also held that the burden of proof for establishing that internment is necessary for security reasons must lie with the detaining authority, thus ensuring that the review process is not rendered ineffective by placing the burden on the internee to prove that internment is unnecessary.[112] Third, the ICRC Commentary states that, if these review procedures are to serve their roles as checks on the exercise of detention power, they must operate impartially and independently from the authority that ordered detention.[113]

An additional right that is noted here due to its relationship with the review process is the right of civilian internees to know the reasons for their internment. The requirement to give reasons forms an essential aspect of the right to have the internment decision reviewed, for without knowing the reason for internment, one cannot effectively challenge it.[114] Article 75 API, which reflects customary international law and thus applies even to those not party to API,[115] stipulates in paragraph 3 that internees 'shall be informed promptly … of the reasons' for their internment. Although Article 75(1) limits the article's applicability to those 'who do not benefit from more favourable treatment' under the Geneva Conventions or API, given that it is designed to embody 'minimum rules of protection',[116] the rules contained therein must *a fortiori* apply where persons are

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[111] See above, text to nn 95–6 (confirming that the purpose of these review procedures is to ensure persons are interned only where so permitted by IHL).

[112] *Delalić* (n 42) [329]. Similarly, see EECC, *Civilians Claims, Ethiopia's Claim 5* (n 70) [104]; HCJ 466/86, *Abu Bakr v Judge of the Military Court in Schechem*, 40(3) PD 649, 650–1, cited in Dinstein (n 57) 176.

[113] Pictet, *GCIV* (n 31) 260. Similarly, see Chatham House and ICRC, 'Meeting Summary: Procedural Safeguards for Security Detention in Non-International Armed Conflict', London, 22–3 September 2008, 15 <http://www.chathamhouse.org.uk/files/15558_il220908summary.pdf> accessed 10 December 2013; Pejic (n 45) 386.

[114] Chatham House and ICRC, ibid, 10–11; Deeks (n 1) 412.

[115] EECC, *Civilians Claims, Ethiopia's Claim 5* (n 70) [29]; Dörmann (n 27) 70; Pejic (n 45) 377; Fischer (n 85) 375. The US, for example, has recognised the customary status of art 75 API: The White House (Office of the Press Secretary), 'Fact Sheet: New Actions on Guantanamo and Detainee Policy' (7 March 2011); *Hamdan v Rumsfeld* et al, 548 US 557 (2006) 633–5 (US Supreme Court); WH Taft, IV, 'The Law of Armed Conflict After 9/11: Some Salient Features' (2003) 28 Yale J Intl L 319, 321–2.

[116] Sandoz *et al* (n 13) 865.

protected by the more comprehensive IHL regimes.[117] Indeed, military doctrine confirms that civilian internees must be given the reasons for their internment.[118]

3.3.1.2 Periodic review

Where the decision to intern is upheld, Article 43(1) specifies that:

> … the court or administrative board [that provided the initial review] shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Similarly, Article 78(2) requires periodic review 'if possible every six months, by a competent body set up by the [Occupying] Power.' Once again, the language of Article 78 seems more liberal than that of Article 43, and it makes no reference to a bias in favour of release, as does Article 43(1). In practice, certain occupying states have offered periodic reviews much more frequently than Article 78 requires. Thus, during its occupation of Iraq following the 2003 invasion, the UK gave periodic reviews of civilian internment at 10, 28 and 90 day intervals, and every 90 days thereafter.[119]

The purpose of periodic review is to re-examine the original basis for internment in light of changing circumstances, so as to ensure that no person is interned 'for a longer time than the security of the Detaining State demands'.[120] It also acts, therefore, as an enforcement mechanism for Article 132 GCIV, discussed below, requiring the release of

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[117] Similarly, see Dörmann (n 27) 73. This reasoning is similar to the ICJ's conclusion in *Nicaragua* (n 41) at [218], that common Article 3, as it is the minimum applicable in non-international armed conflicts, must necessarily also apply in international conflicts, the rules for the latter being much more comprehensive than those for the former. This logical approach to the structure of IHL is similarly adopted in R Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL 48, 50 (fn 10).

[118] US Army Regulation 190-8 (n 64) s 5.1(c)(2)(b); UK Ministry of Defence (n 59) 216; Canada, *Joint Doctrine Manual* (n 64) 11-10 [1135(3)].

[119] UK, House of Commons, Written Answer by the Minister of State for the Armed Forces, Ministry of Defence, *Hansard*, 8 December 2003, Vol 415, Written Answers, Col 269W, cited in ICRC, Customary IHL Database: Practice Relating to Rule 99 Deprivation of Liberty (British Red Cross/ICRC) <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99> accessed 10 December 2013.

[120] Pictet, *GCIV* (n 31) 261.

internees as soon as the reasons justifying internment cease.[121] It has been suggested that, as the period of internment increases, so the burden required to prove the continued necessity for internment similarly increases.[122]

However, these provisions on periodic review suffer from the same shortcomings as those on initial review noted above, e.g. no guidance is given on the composition or procedures of the review bodies. The only rule of procedure specified in Article 43(1) is that there is a bias in favour of release 'if circumstances permit', suggesting that the burden of proof falls on the detaining power to demonstrate the continued necessity of internment. Beyond this, however, discretion once again appears left with the detaining authority.

3.3.2 Combatants

At first sight, GCIII appears to provide an initial review procedure similar to that in GCIV. Article 5(2) GCIII stipulates that:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[123]

However, Article 5(2) was not designed for the purpose of providing a review mechanism for those *contesting their internment*.[124] Instead, it was meant for those that have committed a belligerent act who *assert their right* to POW status in order to claim

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[121] Pictet, *GCIV* (n 31) 261; *Delalić* (n 38) [581].

[122] Pejic (n 45) 382; CFH 7048/97, *Anonymous v Minister of Defence* (n 75) [25].

[123] States have elaborated procedures here: see, e.g., US Army Regulation 190-8 (n 64) s 1.6 (requiring a panel of 3 commissioned officers, before which the detainee has a right to testify and call witnesses).

[124] K Dörmann, 'To What Extent Does International Humanitarian Law provide for the Supervision of the Lawfulness of Detention?: Presentation' in The University Centre for International Humanitarian Law, 'Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict' (Geneva, 24–5 July 2004) 13 <http://www.adh-geneve.ch/pdfs/4rapport_detention.pdf> accessed 10 December 2013.

combatant immunity and the protections under GCIII.[125] This is clear from Article 5(2)'s requirement that such persons 'shall enjoy' POW status; Geoffrey Corn argues that this demonstrates that the 'operative presumption' underlying that provision is that the individual has been captured on suspicion of participation in hostilities and, therefore, desires combatant/POW status in order to enjoy immunity from domestic prosecution.[126] Indeed, the provision was proposed by the ICRC to address the practice during the Second World War, whereby adversaries would refuse to recognise certain national forces as POWs, instead treating them as *francs-tireurs*.[127] The article thus seeks to ensure that POW status is granted to such persons, notwithstanding the negative consequence of that status, i.e. internment for the duration of hostilities.[128]

Similarly, Article 45(1) API, which 'updates' Article 5 GCIII to include the new definitions of combatant in API, requires that a 'person who takes part in hostilities and falls into the power of an adverse party shall be presumed to be a prisoner of war' until a competent tribunal has determined otherwise. As with Article 5 GCIII, the presumption underlying this article is that the individual claims that they qualify for POW status (and are thus subject to internment). Indeed, Article 45(1) sought to bring a greater number of persons within the POW regime, by stipulating that POW status shall be presumed whenever the individual, or his national state, claims such status or where they appear to be entitled thereto. As the ICRC Commentary explains, this paragraph is 'intended to reduce to a minimum those cases in which a captor could *arbitrarily deny* the status of prisoner of war'.[129] This is indicative of the traditional presumption, noted above, that

[125] Ibid.

[126] GS Corn, 'Enemy Combatants and Access to *Habeas Corpus*: Questioning the Validity of the Prisoner of War Analogy' (2007) 5 Santa Clara J Intl L 236, 258–9.

[127] Sandoz *et al* (n 13) 544; Corn (n 126) 258.

[128] Similarly, see *Final Record: Vol II-A* (n 48) 563.

[129] Sandoz *et al* (n 13) 553 (emphasis added).

POW status is beneficial; however, as also noted there, and as shown throughout this chapter regarding the procedural regulation of internment, POW status is not necessarily advantageous compared with civilian status.[130]

Consequently, the tribunals required by Articles 5 GCIII and 45 API are not comparable to those required by Articles 43 and 78 GCIV; the former are reviews of the *status* of internees, for those wishing to claim POW status and combatant immunity, whereas the latter are reviews of the *internment* itself, for those challenging their deprivation of liberty. In reality, GCIII does not provide initial or periodic review comparable to that in GCIV. This may be explained by the different assumptions underpinning these two internment regimes. As explained above, the basic norm regulating civilian internment—that it must be necessary for security—may be seen equally to underlie combatant internment.[131] For civilians, it was shown that significant discretion is left to the detaining power when deciding to intern, requiring an initial review as a check against the exercise of this discretion (although, as noted, the review procedures also leave discretion to the state). Moreover, the need for periodic review of civilian internment demonstrates that an individual may cease to pose a security threat during their internment, rendering it unnecessary. For combatants, on the other hand, Article 4 GCIII and Articles 43 & 44 API,[132] in defining the categories of person subject to POW status, already list those for whom internment is presumed necessary. It is thus assumed that limited discretion will be exercised under GCIII, rendering any initial review procedure without purpose. Moreover, as explained in section 3.4.2 below, it is also assumed that POWs will remain a security threat for the duration of hostilities by virtue of the

[130] See above, text to nn 81–2.

[131] See section 3.2.2.

[132] See section 3.1.1.

possibility of them rejoining hostilities if released.[133] Consequently, no periodic review is provided.

Whilst these assumptions help to explain the absence of review under GCIII, they may, at times, be ill-founded. To illustrate this, a distinction must be drawn between defining those categories of person subject to internment and determining whether a particular individual falls within one of those categories. Thus, although GCIII, unlike GCIV, clearly defines those categories of person for whom internment is considered necessary, discretion may still be exercised at the second stage, when determining whether a particular individual falls into one of those categories. This may be the case, for example, where the individual in question is not in uniform, yet alleged to be a member of the armed forces. Indeed, as noted in section 3.1.1, Article 44 API brought irregular guerilla forces within the combatant/POW framework.[134] As such forces may lack a distinctive emblem, the detaining power will likely need to exercise some discretion in determining whether the particular individual is a combatant and thus subject to internment. Such cases could result in mistakes being made, with an individual being incorrectly labelled a combatant.

It is submitted that this reflects a flaw in GCIII and API, for they allow a detaining state to exercise discretion when interning certain persons, without requiring a review for those challenging their internment. The presumption is that POW status will be desired; however, that presumption is arguably no longer well-founded, in light of the lengthy internment that follows and the more protective internment regimes in GCIV.[135] Indeed, the ICTY was faced with such a case in *Prosecutor v Krnojelac*, which involved the detention of Muslim men as POWs, based on the fact that some of them were carrying

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[133] Dörmann (n 124) 10; Doswald-Beck (n 85) 2 (fn 2).

[134] See above, text to n 11–14.

[135] See above, text to nn 81–2.

weapons.[136] The Trial Chamber held such evidence to be insufficient to raise a reasonable doubt as to civilian status, and thus, for the detentions to be lawful, compliance with the procedural rules in GCIV was necessary.[137]

Certain states have addressed these problems by applying Article 5(2) GCIII tribunals as a mechanism for individuals to challenge their internment as POWs; this was the practice of the US in both the 1990–1 Gulf War and the initial international armed conflict in Iraq following the 2003 invasion.[138] This, however, remains a matter of policy rather than legal obligation.

3.4 Release

The final set of procedural rules relates to the point at which internees must be released. This section will demonstrate the similarity between the rules on release from civilian and combatant internment.

3.4.1 Civilians

For civilian internees, whether in 'enemy' territory or occupied territory, Article 132(1) GCIV requires release 'as soon as the reasons which necessitated his internment no longer exist.' Thus, the UK, following the 2003 invasion of Iraq, stated that persons interned 'will be held until it is assessed that their internment is no longer necessary for reasons of

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[136] *Krnojelac* (n 45).

[137] *Krnojelac* (n 45) [117]. Similarly, see also *Prosecutor v Blagoje Simić, Miroslav Tadić and Simo Zarić* (Trial Judgment) ICTY-95-9-T (17 October 2003) [659]; Hampson (n 71) 514–17 (noting a similar assumption by the UK regarding resident Iraqis in the UK).

[138] MC Waxman, 'The Law of Armed Conflict and Detention Operations in Afghanistan' in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (2009) (Vol 85, US Naval War College International Law Studies) 348 (fn 27) (on US practice in the Gulf War); M Schmitt, 'Iraq (2003 onwards)' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 376 (on US practice following the 2003 invasion of Iraq).

security'.[139] The ICRC Commentary notes that Article 132(1) GCIV forms the 'counterpart to the principle stated in Article 42', permitting internment only where necessary for security.[140] In other words, internment is permitted only if, *and for so long as*, it is necessary for security. Article 132(2) additionally requires, for humanitarian reasons, that the parties to a conflict endeavour to conclude agreements for the early release of particular internees, such as those that have been detained for a long period.

Article 133(1) then establishes an absolute end-point for internment, requiring that it cease, if not before, 'as soon as possible after the close of hostilities.' Article 133(1) is closely related to Article 132(1): '[s]ince hostilities are the main cause for internment, internment should cease when hostilities cease.'[141] It should be noted that this refers to 'a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities'; a peace treaty is therefore not necessary.[142] The purpose of this factual test for the end-point of internment is to ensure release at the earliest possible moment, preventing political difficulties in reaching a formal settlement from unnecessarily prolonging internment.

3.4.2 Combatants

For POWs, absent special circumstances,[143] Article 118(1) GCIII states the basic rule that '[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.' Like Article 133 GCIV, the reference to 'active hostilities' demonstrates

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[139] United Kingdom, House of Lords, Written Answer by the Parliamentary Under-Secretary of State for Defence, *Hansard*, 8 September 2003, Vol 652, Written Answers, Col WA45, cited in ICRC, Customary IHL Database: Practice Relating to Rule 99 Deprivation of Liberty (British Red Cross/ICRC) <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99> accessed 10 December 2013.

[140] Pictet, *GCIV* (n 31) 510–11; *Kordić and Čerkez* (n 38) [288].

[141] Pictet, *GCIV* (n 31) 515.

[142] Ibid, 514.

[143] See, e.g., art 109 GCIII (early release of wounded or sick POWs).

that this is a factual, rather than legal standard, without the need for an armistice or peace treaty.[144] Indeed, this factual test sought to address problems arising from previous treaty provisions which conditioned POW repatriation on the conclusion of peace.[145] However, this turn from the legal to the factual in the point of POW release has not prevented claims in conflicts since 1949 that attempt to undercut this factual basis with political motives.[146]

At first sight, GCIII appears to regulate the point of release to a lesser degree than GCIV regarding civilians. Thus, it was shown above that GCIV requires release of civilian internees as soon as the reasons for internment cease and, if not before, at the close of hostilities. GCIII, on the other hand, seems to stipulate only the second (generally later) of these two end-points. However, once again, the difference between the GCIII and GCIV internment regimes is not as stark as appears. Thus, although GCIII does not explicitly require release as soon as the reasons justifying internment cease, this reflects the assumption that the reasons necessitating combatant internment, i.e. the threat posed by their possible return to the battlefield, co-exist with the hostilities, and thus cease only when hostilities do. As such, '[t]he *length of detention* is limited to what is necessary (until the end of active hostilities …).'[147] This interpretation is confirmed by the provisions on early release. Article 109(1), for example, requires early repatriation of seriously wounded and sick POWs. In addition to promoting humanitarian ends, this reflects the fact that such persons, by virtue of being wounded, are not likely to rejoin the hostilities; hence, their internment is no longer necessary. As the ICRC Commentary to this article makes clear, '[t]he main objection raised by the Detaining Power against early

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144 Pictet, *GCIV* (n 31) 514–15.

145 See, e.g., art 20 of the 1899 Hague Regulations. On this development, see Pictet, *GCIII* (n 89) 541.

146 See, e.g., HS Levie, 'Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India' (1973) 67 AJIL 512.

147 Dörmann (n 124) 10; Dowald-Beck (n 85) 2, fn 2; Pictet, *GCIII* (n 89) 515.

repatriation is that repatriated prisoners of war might return to active service. This danger does not exist in the case of wounded and sick.'[148]

Finally, Article 118 GCIII raises the question of what happens where the POW does not wish to be repatriated. The text of the provision suggests repatriation should take place regardless of the POW's wishes. This issue arose at the end of the Korean War, where North Korea asserted its right under Article 118 to have its forces returned to it, contrary to the wishes of many POWs.[149] The West disagreed with North Korea's interpretation of the law, and in December 1952 the UN General Assembly adopted a resolution confirming that force shall not be used to repatriate POWs.[150] The ICRC Commentary to Article 118 consequently states that '[p]risoners of war have an inalienable right to be repatriated once active hostilities have ceased'.[151] This demonstrates that Article 118 is now seen not as giving *states* a right to have their nationals repatriated, but rather as giving *POWs* a right to repatriation, which they are free not to exercise. This development should be seen in the context of the evolution of IHL generally, which in the post-Second World War era has been seen less as comprising *state* rights and more as protecting *individual* rights, a process Theodor Meron has termed 'the humanization of humanitarian law'.[152] The ICRC now considers it a norm of customary international law that states involve them in any intended repatriations, to ensure POWs are not repatriated against their will.[153]

3.5 Article 5 GCIV

[148] Pictet, *GCIII* (n 89) 515.

[149] Ibid, 543.

[150] UNGA Res 610 (VII) (1952), preambular [2].

[151] Pictet, *GCIII* (n 89) 546–7. Similarly, see Fischer (n 85) 372 (noting that, following the second Gulf War, the United States passed the names of POWs that did not wish to be repatriated onto the ICRC).

[152] T Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 251–6 (also referring to this example of POW repatriation).

[153] Henckaerts, *Vol I* (n 16) 455.

The final issue to be discussed concerns derogation from GCIV, under Article 5. Article 5(1) states that a protected person in enemy territory 'definitely suspected of or engaged in activities hostile to the security of the State' shall not be entitled to such rights and privileges under GCIV as would, if granted, be 'prejudicial to the security' of the state. Article 5(2), referring to occupied territory, states that a protected person shall, 'where absolute military security so requires, be regarded as having forfeited rights of communication' under GCIV where they are 'detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power.' Article 5(3) then confirms that the principle of humane treatment and the rights to fair and regular trial in GCIV are non-derogable. Moreover, paragraph 3 requires that such persons, 'shall also be granted the full rights and privileges of a protected person … at the earliest date consistent with the security of the State or Occupying Power'.

Geoffrey Best notes that Article 5, forming part of what he calls the 'security- and order-maintaining parts' of GCIV, constituted a counterpart to the 'civilian-protecting parts, which otherwise and on their own must be considered pure fantasy.'[154] Indeed, the Australian delegate to the 1949 diplomatic conference introduced draft Article 5 GCIV as, '[i]n his opinion, the rights of the State in relation to certain persons such as spies, saboteurs, fifth columnists and traitors, had been insufficiently defined.'[155]

The existence of Article 5 GCIV begs the question of whether that provision might limit the applicability of the procedural rules regulating internment explored above. Indeed, those subject to internment under GCIV and those falling within Article 5 would seem to overlap considerably. It might be argued, therefore, that such persons may not enjoy the procedural safeguards in Articles 42, 43 and 78 GCIV where the state considers it necessary to derogate. Indeed, during the drafting of Article 5 GCIV, certain states

[154] G Best, *War and Law since 1945* (OUP, Oxford 1994) 124.

[155] *Final Record: Vol II-A* (n 48) 622.

expressed the concern that it was too broad and could undermine the protections that had been agreed, including the procedural rules on internment.[156]

However, limits are clearly placed on a state's authority to derogate under Article 5. First, the subset of persons to which Article 5 applies arguably is not broad. Thus, as Hans-Peter Gasser notes, 'it can be assumed that this rule refers primarily to acts of espionage or sabotage.'[157] The ICTY similarly adopts a limited view of the persons subject to Article 5 GCIV:

> Although the language of this provision may suggest a broad application of Article 5 … the Chamber observes nevertheless that "activities hostile to the security of the State", are above all espionage, sabotage and intelligence with the enemy Government or enemy nationals and exclude, for example, a civilian's political attitude towards the State.[158]

Moreover, as Derek Jinks notes, in determining whether individuals fall within Article 5, the article requires individualised assessments both of the activities of the individual and whether derogation is necessary.[159] It cannot, therefore, operate as the basis for collective actions.[160] This is consistent with the *travaux* of Article 5, seen in the statement by the Australian delegation, which had proposed the provision, that it 'had been carefully worded so as to ensure that only *individual* measures should be taken against *individual* persons.'[161]

Second, both in the territory of a party to the conflict and in occupied territory, Article 5 requires a necessity test, limiting derogation in the former to situations where non-derogation would be prejudicial to state security and in the latter to situations where

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[156] *Final Record: Vol II-A*, ibid, 797 (Bulgaria); *Final Record: Vol II-B* (n 94) 378 (Soviet Union). Similarly, see GIAD Draper, 'The Geneva Conventions of 1949' (1965) 114 *Recueil des Cours* 59, 131.

[157] Gasser (n 38) 260.

[158] *Kordić and Čerkez* (n 38) [280].

[159] Jinks (n 31) 390.

[160] Similarly, see RW Gehring, 'Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I' (1980) 19 MLLWR 11, 81; Pejic (n 45) 381–2.

[161] *Final Record: Vol II-A* (n 48) 796. Similarly, see ibid, 798 (France). No delegation at the conference disagreed with this interpretation of art 5.

‘absolute military security so requires’. Jinks argues that ‘[t]his requirement [of necessity] limits sharply the range of permissible derogations.’[162] Indeed, the ICRC considers that, given this necessity test, the rights which may be derogated from are very limited, even in the territory of a party to the conflict (where the right to derogate seems broadest), comprising:

> … the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith and the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross. *The security of the State could not conceivably be put forward as a reason for depriving such persons of the benefit of other provisions*.[163] (my emphasis)

In light of this necessity requirement, it is submitted that the procedural rules explored in this chapter could not be the subject of derogation, for the granting of those safeguards could never be prejudicial to state security (particularly given how minimalist their requirements are), and thus derogation therefrom would be unnecessary. In occupied territory in particular, derogation is permitted only with regard to rights of communication (i.e. with the outside world), a category into which the procedural rules regulating internment do not fall.[164] This interpretation of Article 5 is consistent with the object and purpose of the Conventions as a whole, for were a significant subset of those subject to internment to lose the procedural safeguards under GCIV, the protective purpose of those safeguards would be lost.[165] Indeed, this interpretation has been confirmed by the ICTY, which has held that even those subject to Article 5 GCIV must still enjoy the safeguards in Article 43 GCIV.[166] The same approach regarding the non-derogability of Article 78 GCIV

[162] Jinks (n 31) 390.

[163] Pictet, *GCIV* (n 31) 56, cited in Jinks (n 31) 390–1.

[164] Jinks (n 31) 391–2.

[165] As noted above at n 156, this concern was raised during the drafting of art 5.

[166] *Delalić* (n 38) [579]; *Kordić and Čerkez* (n 38) [286].

is supported in the literature.[167]

It must finally be noted, however, that these restrictive interpretations of Article 5 GCIV are not universally held. Dinstein, for example, has argued that so-called 'unlawful combatants', discussed under section 3.1.3, do not 'enjoy the benefits of civilian status: Article 5 … specifically permits derogations from the rights of such a person'.[168] In arguing that Article 5 strips civilians of the benefits of civilian status, Dinstein implies that the provision's scope is limitless, preventing them from enjoying *any* rights under GCIV. The present author cannot accept this view. Not only is this inconsistent with the jurisprudence examined above, it is also contrary to the ordinary meaning even of the wider authorisation in Article 5(1), which still permits derogation only 'from such rights and privileges … as would … be prejudicial to the security of the State.' Dinstein's view of the scope of Article 5 must, therefore, be rejected.

3.6 Conclusions

This chapter has examined the procedural regulation by IHL of internment in international armed conflicts. In so doing, it has explored the three key sets of procedural rules found in IHL: the grounds on which internment may be based; the review mechanisms that must be provided to internees; and the point at which an internee must be released. In addition, it was shown that internees are entitled to know the reasons for their internment, so as to enable them to challenge it. Having shown this, we are now better prepared to move onto an examination of the degree to which international law stipulates such rules in non-international armed conflicts. This chapter thus provides a frame of reference for the subsequent chapters. It will also prove essential to the discussion in chapter eight

[167] Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff, Leiden 2009) 275–7.

[168] Dinstein (n 7) 29–30.

regarding how the law should develop in this area and, in particular, whether the rules explored in this chapter, and the detailed elaboration of them, should be extended to non-international conflicts.

Two themes have been explored in this chapter. First, notwithstanding the distinct regimes for combatant and civilian internment, certain common principles underlie each. For example, it was shown that the same basic premise underpins both internment regimes, namely, that internment is permitted only where necessary for security. The key difference between the civilian and combatant internment regimes is that, whilst the former provides for review of internment, the latter does not. This was explained on the basis of the different assumptions that underpin each regime.

The second theme explored relates to the inadequacies of these internment regimes as they appear in the treaties. Importantly, it was shown that considerable discretion is left to states under each regime. Whilst a certain amount of discretion is necessary, it was argued that this could undermine the extent to which these regimes effectively protect against arbitrary internment. To repeat a quote referenced at the start of this chapter, 'with regard to the law of war, states are bound by a reasonably robust set of procedural rules when they administratively detain … during international armed conflict'.[169] This chapter has demonstrated that, whilst it is true that IHL establishes certain procedural rules, one should be cautious in viewing them as a benchmark towards which the law of non-international armed conflict should aim. This will become particularly clear in chapter five, when comparing these rules to the equivalent provisions in international human rights law.

[169] Deeks (n 1) 414.

4. The Procedural Regulation of Internment in Non-International Armed Conflicts under IHL

The previous chapter examined the procedural rules applicable to internment in international conflicts, regulating the grounds for internment, the availability of review procedures, and the point at which internees must be released. Those rules will now be used as a frame of reference for examining the extent to which equivalent rules exist for non-international conflicts under IHL.

This chapter is divided into four parts. Section 4.1 will begin by considering whether IHL provides a legal basis for internment in non-international armed conflicts. It will be argued that no such legal basis exists, but must instead be sought elsewhere, e.g. in domestic law or a Security Council resolution. Sections 4.2 and 4.3 will then examine the degree to which treaty and customary IHL, respectively, provide for the procedural regulation of internment in non-international conflicts. It will be shown that, contrary to the views of certain commentators,[1] IHL is not silent here, but instead contains a basic prohibition of internment that is not necessary as a result of the war. Section 4.4 will then examine the binding nature of IHL *vis-à-vis* non-state armed groups. This is necessary in order to confirm that the rules examined in this chapter regulate detentions by both states and armed groups.

4.1 The Legal Basis to Intern in Non-International Armed Conflicts

It is important at the outset to consider whether IHL provides a legal basis to intern in non-international armed conflicts. This question arises because international human rights law (IHRL) requires that any deprivation of liberty be based on grounds established in law.[2] It

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[1] See, e.g., L Lopez, 'Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts' (1994) 69 NYU L Rev 916, 935.

[2] See, e.g., International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 9(1); Convention for the Protection of Human Rights

will be shown in chapter six that this rule of IHRL continues to apply in non-international armed conflicts. Without a legal basis, internment would therefore violate IHRL.[3] It is important to consider whether IHL provides such a legal basis in non-international conflicts given that it does in international conflicts.[4] Thus, Susan Marks and Andrew Clapham note that one instance in which the deprivation of liberty is permissible under IHRL is where it is authorised by GCIII or GCIV.[5] Hence, before considering whether IHL limits the detention authority of states and non-state groups in non-international conflicts, it must first be examined whether it confers that detention authority.

It is clear that conventional IHL applicable in non-international conflicts, comprising common Article 3 and Additional Protocol II (APII), does not contain an explicit legal basis for internment.[6] Nonetheless, applicable treaty rules recognise that parties to non-international conflicts will intern, regulating various aspects thereof,

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and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 5(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR), art 6.

[3] Similarly, see J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 383 (noting the need for internment to adhere to the principle of legality). See, more generally, F Berman, 'Jurisdiction: The State' in P Capps *et al* (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart, Portland, Oregon 2003) 3 (stating with regard to the notion of jurisdiction and the various powers that flow therefrom, that '[t]hey are powers over *people*, so powers over individuals themselves (including their liberty), over their property, and over their activities. Even if this were not the age of human rights, it surely needs no further demonstration that powers of that kind need a justification').

[4] See art 21 GCIII (legal basis for combatant/POW internment) and art 27(4) GCIV (legal basis for civilian internment).

[5] S Marks and A Clapham, *International Human Rights Lexicon* (OUP, Oxford 2005) 75. Similarly, see N Rodley and M Pollard, *The Treatment of Prisoners under International Law* (3rd edn OUP, Oxford 2009) 490; J Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 87; W Kalin, 'Human Rights Law Relating to Arbitrary Detention During Armed Conflict: The Covenant on Civil and Political Rights and its Relationship with International Humanitarian Law' in The University Centre for International Humanitarian Law, 'Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict' (Geneva, 24–25 July 2004) 31–2 <http://www.adh-geneve.ch/pdfs/4rapport_detention.pdf> accessed 10 December 2013. The relationship between these rules under IHL and IHRL is considered in more detail in section 6.1.2.

[6] LM Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40 Case W Res J Intl L 437, 452.

including treatment standards for detainees.[7] Given this absence from conventional IHL of a legal basis to intern, it has been argued by certain commentators that customary IHL may be considered to provide an implicit legal basis in similar circumstances to those permitted in international conflicts.[8] Robert Barnsby, for example, argues that there is overwhelming practice of states interning in non-international conflicts, thus suggesting a legal basis exists in custom.[9] However, by itself, this practice demonstrates no more than the fact that IHL *does not prohibit* internment. Importantly, states generally rely on sources other than IHL, primarily domestic law, for providing the legal basis to intern in non-international conflicts.[10] As a result, the *opinio iuris* of states does not support the view that IHL provides a legal basis for detention in non-international conflicts.[11]

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[7] See, e.g., references to 'interned' persons in art 5(1) APII.

[8] Pejic (n 5) 94; G Corn and ET Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations' (2009) 42 Isr L Rev 42, 57; 'Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict' (2009) 91 IRRC 859, 863.

[9] RE Barnsby, 'Yes We Can: The Authority to Detain as Customary International Law' (2009) 202 Mil L Rev 53.

[10] See, e.g., UN Commission on Human Rights, 'Report of the Working Group on Involuntary or Enforced Disappearances: Mission to Nepal', E/CN.4/2005/65/Add.1 (28 January 2005) [45] (on the Nepalese government's reliance on the 2002 Terrorist and Disruptive Activities (Control and Punishment) Act as the basis for internment); 'Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay', *In Re: Guantanamo Bay Detainee Litigation*, Misc No 08-442 (TFH) (DDC 13 March 2009) 1 (demonstrating that the Obama Administration relies on domestic law as providing the authority to detain in its conflict with al-Qaeda); *Gherebi v Obama*, 609 F Supp 2d 43 (DDC 2009) 61–2 and *Hamlily v Obama*, 616 F Supp 2d 63 (DDC 2009) 71–2 (also relying on domestic law as providing a legal basis for detentions in the US' conflict with al-Qaeda); AS Deeks, 'Administrative Detention in Armed Conflict' (2009) 40 Case W Res J Intl L 403, 425 (on the Sri Lankan government's reliance on the 1979 Prevention of Terrorism Act as the basis for internment). See also *Ali Saleh Kahlah Al-Marri and Mark A Berman v Commander John Pucciarelli,* 534 F.3d 213 (2008), 234 ('[b]ecause the legal status of enemy combatant does not exist in non-international conflicts, the law of war leaves the detention of persons in such conflicts to the applicable law of the detaining country'). Although cf *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), [17] (implying there is a 'right' under international law to intern in non-international conflicts).

[11] Similarly taking the view that IHL does not contain a legal basis for detention in non-interational conflicts, see G Rona, 'An Appraisal of US Practice Relating to "Enemy Combatants"' (2007) 10 YIHL 232, 241; UN Commission on Human Rights, 'Report of the Working Group on Arbitrary Detention', E/CN.4/2006/7, 12 December 2005, [72]; L Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP, Cambridge 2002) 65–6; Deeks (n 10) 404–5; M Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide' (2009) 40 Case W Res J Intl L 593, 607; Olson (n 6) 452; Rodley and Pollard (n 5) 491; P Rowe, 'Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict' (2011) 61 ICLQ 697.

Thus, whilst IHL recognises that the parties to a non-international conflict will intern, it does not provide a legal basis for such actions; rather, it merely accepts that they occur and regulates them. Indeed, this appears to be the general approach taken under the law of non-international armed conflict.[12] This difference between *regulating* and *authorising* certain action is, of course, at the heart of IHL as a legal regime, which, whilst regulating conflict, does not in any way affect its legality under the *ius ad bellum*.[13] That this is the case is to be expected: given that IHL applies without distinction to all parties to an armed conflict,[14] in extending rules to non-international conflicts, states have been keen to ensure that nothing in those rules could be read as authorising the non-state party to engage in acts of rebellion.[15] Consequently, the legal basis for internment during a non-international armed conflict lies elsewhere, primarily in domestic law, allowing states to adopt legislation permitting *state agents* to intern, whilst leaving non-state groups open to prosecution under domestic law.[16] Finally, the requirement under IHRL that detentions have a legal basis, and the absence of any such basis for non-state groups, raises the

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[12] Rowe (n 11) 702 (in non-international armed conflicts, 'IHL is generally stated in negative, rather than in positive, terms. It prohibits acts, such as attacking those who do not take a direct part in hostilities or who have ceased to do so. It does not, of itself, give a legal power to attack those who do take a direct part in hostilities'); S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 71.

[13] L Oppenheim, *International Law, A Treatise: Volume II, War and Neutrality* (Longmans, Green & Co, London 1906) 56 ('[w]ar is a fact recognised, and with regard to many points regulated, but not established, by International Law'); Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP, Cambridge 2010) 3–4.

[14] C Greenwood, 'Scope of Application of Humanitarian Law' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP, Oxford 2008) 56. The basis on which IHL binds non-state armed groups is explored below under section 4.4.

[15] See, e.g., *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977): Volume VII* (Federal Political Department, Bern 1978) 132 (the US delegate objecting that draft art 24 APII, on the protection of civilians from attack, 'even in its revised form, implied that rebels were allowed to choose their objectives. He was therefore against the article').

[16] Rowe (n 11) 702–3. See the discussion in section 2.3.1 on the challenges posed by this lack of combatant immunity in non-international conflicts.

question of whether such groups violate IHRL when detaining. This will be explored in chapter seven.[17]

To conclude this section, states can rely on neither customary nor conventional IHL for a legal basis to intern in non-international armed conflicts. Any such internment, to be consistent with IHRL, would need to be based on legal grounds established elsewhere, e.g. domestic law or a Security Council resolution.[18] Thus, unlike in international conflicts, where IHL confers detention authority on states, in non-international conflicts, IHL presumes such powers already exist in domestic law and regulates them. The degree to which it so regulates internment is the subject of the remainder of this chapter.

4.2 Procedural Rules under Conventional Humanitarian Law

Chapter two demonstrated that treaty-based IHL establishes a framework of rules regarding the grounds, procedures and end-point of internment in international armed conflicts. This section will now examine whether any equivalent treaty rules exist under IHL applicable in non-international conflicts. Common Article 3 and APII will be examined in turn.

4.2.1 Common Article 3

Chapter two introduced common Article 3, which establishes the 'minimum yardstick' below which no conduct may fall in any armed conflict.[19] Due to its basic character, the

[17] Section 7.3.

[18] The UK government, e.g., relied on UNSC Res 1546 (2004) for the legal basis to intern in Iraq: ECtHR, *Al-Jedda v United Kingdom*, App No 27021/08, Judgment (Grand Chamber), 7 July 2011, [16].

[19] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, [218].

rules therein are very general. However, one of the key features of common Article 3 is the principle of humane treatment in the *chapeau* of paragraph one.[20] The *chapeau* reads:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. (emphasis added)

The general principle of humane treatment is then followed by four examples of treatment inconsistent therewith: violence to life and person, in particular murder, cruel treatment, mutilation and torture; the taking of hostages; outrages upon personal dignity; and the passing of sentences or carrying out of executions without due process.[21]

Two points must be noted at the outset. First, the reference in paragraph one to 'detention' (which can be assumed to include preventive, security detention or 'internment') is a clear acknowledgement that it may occur in non-international conflicts.[22] Indeed, as noted, APII explicitly refers to 'internment'.[23] Second, this recognition notwithstanding, common Article 3 contains no explicit rules specifying the grounds on which internment must be based, the procedures that must be followed, nor the point at which internment must end. Consequently, in what appears to be an application of the *Lotus* principle,[24] Laura Lopez has concluded that, in non-international conflicts, 'innocent civilians may be detained arbitrarily'.[25] Whilst some acknowledge the relevance of other areas of international law (primarily IHRL), many continue to view conventional

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[20] H Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 BYIL 360, 361.

[21] Common art 3(1)(a)–(d).

[22] Deeks (n 10) 413.

[23] Art 5 APII; Pejic (n 3) 377.

[24] *'Lotus' Judgment No 9*, 1927, PCIJ, Ser A, No 10, 18 ('[t]he rules of law binding upon States therefore emanate from their own free will … Restrictions upon the independence of States cannot therefore be presumed').

[25] Lopez (n 1) 935.

IHL as silent in this area, arguing that it merely 'indicates that internment occurs in non-international conflicts but contains no indication of how it is to be regulated.'[26]

Conversely, whilst acknowledging that common Article 3 contains no explicit procedural rules applicable to internment, certain commentators are of the view that it is not silent here. Joanna Dingwall, for example, has argued that it prohibits 'unlawful confinement', seeing it as simply 'self-evident' that such acts would be inconsistent with the principle of humane treatment.[27] Others take a similar view, considering common Article 3 to prohibit either 'unlawful confinement' or 'arbitrary deprivation of liberty'.[28] Moreover, as Dingwall noted,[29] the Prosecutor of the ICTY has stated that 'arbitrary deprivation of liberty, without due process of law, inherently constitutes a serious attack on human dignity within the meaning of Cruel Treatment' in common Article 3.[30] Similarly, the ICRC has stated that 'common Article 3 … require[s] that all civilians and

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[26] LM Olson, 'Guantánamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards' (2009) 42 Case W Res J Intl L 197, 208. Similarly, see K Dörmann, 'To What Extent Does International Humanitarian Law provide for the Supervision of the Lawfulness of Detention?: Presentation' in The University Centre for International Humanitarian Law (n 5) 15; L Doswald-Beck, 'Introduction: Background Paper' in The University Centre for International Humanitarian Law (n 5) 3; Pejic (n 3) 377; A Jachec-Neale, 'Status and Treatment of Prisoners of War and Other Persons Deprived of Their Liberty' in E Wilmshurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP, Cambridge 2007) 313; M Sassòli and LM Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 IRRC 599, 618; T Davidson and K Gibson, 'Experts Meeting on Security Detention Report' (2009) 40 Case W Res J Intl L 323, 337; Deeks (n 10) 413; Hakimi (n 11) 607.

[27] J Dingwall, 'Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts' (2004) 9 JCSL 133, 150.

[28] See, e.g., R Goodman, 'Rationales for Detention: Security Threats and Intelligence Value' in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (2009) (Vol 85, US Naval War College International Law Studies) 373–4; GS Corn, 'Enemy Combatants and Access to *Habeas Corpus*: Questioning the Validity of the Prisoner of War Analogy' (2007) 5 Santa Clara J Intl L 236, 260–1; C Droege, '"In truth the leitmotiv": The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law' (2007) 89 IRRC 515, 537.

[29] Dingwall (n 27) 142–3.

[30] *Prosecutor v Fatmir Limaj* et al (Prosecution's Final Brief (Redacted Public Version)) ICTY-03-66 (26 July 2005) [391]–[392]. It should be noted, however, that, since Dingwall's article, the ICTY Trial Chamber in *Prosecutor v Fatmir Limaj* et al (Trial Judgment) ICTY-03-66 (30 November 2005) acquitted the defendants of the charge of unlawful detention as a war crime, which the Prosecutor argued violated the common Article 3 prohibition of cruel treatment, concluding at [232] that 'in the circumstances of this case, these acts in and of themselves do not amount to a serious attack on human dignity within the meaning of cruel treatment'.

persons *hors de combat* be treated humanely ... whereas arbitrary deprivation of liberty is not compatible with this requirement.'[31]

These views are not unreasonable interpretations of the humane treatment requirement in common Article 3, as the ordinary meaning of that provision certainly allows for arbitrary deprivations of liberty to be covered. Indeed, the broad scope of the principle has been highlighted by the ICTY:

> ... while there are four sub-paragraphs [in common Article 3(1)] which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation, the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual *qua* human being and, therefore, it must safeguard the entitlements which flow therefrom.[32]

International law has long recognised that liberty, and freedom from the arbitrary deprivation thereof, constitutes one of the 'entitlements which flow' from being a human being.[33] As such, arbitrary deprivation of this right could qualify as inhumane treatment.

It might be questioned whether the humane treatment requirement is too vague to yield such a norm. Indeed, overly broad treaty terms have been found by the ICJ to undermine the extent to which they are capable of yielding specific rights and obligations.[34] This is particularly the case where the object and purpose of the treaty does not support the specific obligation which is argued to arise from the vague provision.[35] However, common Article 3 is clearly intended as the source of specific obligations for belligerents, evidenced by the explicit enumeration of certain acts prohibited by the

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[31] J-M Henckaerts & L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP, Cambridge 2005) 344 (Rule 99).

[32] *Prosecutor v Zlatko Aleksovski* (Trial Judgment) ICTY-95-14/1 (25 June 1999) [49] (footnotes omitted). Similarly, see JS Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva 1958) 204.

[33] Art 9(1) ICCPR; art 5(1) ECHR; art 6 ACHPR; Universal Declaration of Human Rights, UNGA Res 217 A(III) (1948), art 9.

[34] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objections) [1996] ICJ Rep 803, [24]–[31]; Sir F Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) Yale J Intl L 315, 317.

[35] *Oil Platforms* (Preliminary Objections), ibid, [28].

humane treatment requirement.[36] Moreover, interpreting the humane treatment requirement in common Article 3 as prohibiting arbitrary or unlawful detention would seem perfectly consistent with the object and purpose of the Geneva Conventions. Thus, it is generally argued that IHL, including the Geneva Conventions, serves two purposes, those of humanity and military necessity;[37] although the balance has, arguably, shifted towards the former since the Second World War.[38] Whilst interpreting common Article 3 as prohibiting *all* deprivations of liberty would no doubt be inconsistent with the military necessity prong of IHL, viewing it as excluding *arbitrary* deprivations of liberty, for example, would not. Not only would such a rule advance the humanitarian goals of the Conventions, but to prohibit arbitrary detention would, it is submitted, also be consistent with the principle of military necessity, for detaining a person arbitrarily (i.e. without reason) could never be militarily necessary.

One could, therefore, reasonably reach the conclusion that common Article 3, by virtue of its humane treatment requirement, prohibits arbitrary detention. The difficulty with the approach taken above, however, is that it is unclear what the content of such a rule would be; indeed, as noted, certain commentators refer to the prohibition in terms of 'unlawful' rather than 'arbitrary' detention.[39] It is submitted, however, that an examination of the context of common Article 3 not only supports the view that arbitrary detention is itself prohibited, but also makes clear what the content of that rule is. To demonstrate this,

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[36] Ibid, [27] (noting the importance of such explicit enumerations as evidence that a broadly-phrased provision is capable of yielding specific rights and obligations).

[37] Dinstein (n 13) 4–6; C Greenwood, 'Historical Development and Legal Basis' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008) 37–38; MN Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 VJIL 795, 798; GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP, Cambridge 2010) 258.

[38] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [95]; T Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239; Schmitt (n 37) 807–11. Indeed, writing in 1952, Sir Hersch Lauterpacht was already of the view that the Geneva Conventions, and IHL in general, serve mainly the humanitarian goal, and that '[t]his, and not the regulation and direction of hostilities, is its essential purpose': Lauterpacht (n 20) 364.

[39] See, e.g. Dingwall (n 27) 150.

a brief detour into the *travaux* of the provision is necessary. Whilst common Article 3 is often labelled a 'Convention in miniature',[40] its drafting history reveals an intimate relationship between that provision and the rest in the Geneva Conventions.[41] Thus, the content of common Article 3 is based on the various proposals that were made for preambles to the Conventions (which, incidentally, were never adopted).[42] Common Article 3 may, therefore, be considered to embody the principles, including that of humane treatment, from which the specific norms of the Conventions are derived.[43]

Based on this drafting history, the ICRC Commentary views the principle of humane treatment in common Article 3 as the 'leitmotiv' of the Geneva Conventions.[44] Indeed, it can be seen not only in common Article 3 itself, but also as an explicit principle in each Convention applicable in international armed conflicts,[45] which, the ICRC argues, reflects the fact that the principle constitutes the 'basic theme' of the Conventions.[46] For example, Article 27(1) GCIV contains the humane treatment principle for the purposes of GCIV, and the Commentary notes that that article is 'the central point in relation to which all

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[40] *Final Record of the Diplomatic Conference of Geneva of 1949: Vol II, Section B* (ICRC, 1963) 35; JS Pictet (ed), *Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva 1952) 48.

[41] Similarly, see Dingwall (n 27) 148–52.

[42] Pictet, *GCI* (n 40) 23. See, e.g., the various proposals for preambles, clearly mirroring what became common Article 3: *Final Record of the Diplomatic Conference of Geneva of 1949: Vol II, Section A* (ICRC, 1963) 366 (Soviet proposal); ibid, 366–7 (Swiss proposal); *Remarks and Proposals Submitted by the International Committee of the Red Cross: Documents for the Consideration of Governments Invited by the Swiss Federal Council to Attend the Diplomatic Conference at Geneva (April 21, 1949)* (ICRC, Geneva 1949) 8 (ICRC proposal); *Final Record of the Diplomatic Conference of Geneva of 1949: Vol III* (ICRC, 1963) 97 (French proposal).

[43] *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims: Geneva, April 14–26, 1947* (ICRC, Geneva 1947) 8, 103, 272 (calling for the application in non-international armed conflicts of the 'principles' underlying, respectively, what would become GCI, GCII and GCIII); *Final Record: Vol II-B* (n 40) 123 (French proposal calling for the application of the 'provisions of the preamble to the [Civilians] Convention' to non-international armed conflicts).

[44] Pictet, *GCIV* (n 32) 204.

[45] Art 12(2) GCI; art 12(2) GCII; art 13(1) GCIII; art 27(1) GCIV.

[46] JS Pictet (ed), *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* (ICRC, Geneva 1960) 140.

other provisions [of the Conventions] must be considered'.[47] Importantly, the principle is 'identical' in each provision in which it appears throughout the Conventions.[48] In interpreting the principle in common Article 3, we may, therefore, make reference to understandings of it elsewhere, for these references may be seen as part of the context of common Article 3.[49] In this regard, it is important to note that Article 27 GCIV draws a clear relationship between humane treatment on the one hand and internment on the other. Thus, whereas Articles 27(1)–(3) GCIV lay down the basic humanitarian principles of GCIV (including humane treatment), paragraph four then reads '[h]owever, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.' It was shown in chapter three that such 'measures of control and security' include internment and that Article 27(4) GCIV underpins the more detailed GCIV internment regimes.[50] Article 27 GCIV, therefore, makes clear that operating alongside the principle of humane treatment (as well as the other basic guarantees in Articles 27(1)–(3)) is the notion that parties may intern where necessary as a result of the war. The precise relationship between humane treatment and internment is alluded to in the ICRC Commentary to Article 27, which states that the requirement of humane treatment is,

> … valid "in all circumstances" and "at all times", and appl[ies], for example, to cases where a protected person is the *legitimate* object of strict measures, since the dictates of humanity and measures of security or repression, even when they are severe, are not necessarily incompatible.[51] (emphasis added)

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[47] Pictet, *GCIV* (n 32) 201.

[48] Ibid, 38.

[49] Art 31(1) VCLT; J-M Sorel and V Boré Eveno, '1969 Vienna Convention, Article 31: General Rule of Intepretation' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary, Volume I* (OUP, Oxford 2011) 824 (noting that 'context' includes the treaty text itself).

[50] See section 3.2.1.

[51] Pictet, *GCIV* (n 32) 205. Similarly, see *Final Record: Vol II-A* (n 42) 712 (the Swiss delegate commenting that the fourth paragraph 'did not, however, restore to Governments the right to take arbitrary action, nor did it affect the general prohibitions resulting from the humanitarian principles of the Convention'); *Final Record: Vol II- A* (n 42) 821 (Committee III noting that draft art 27(4) 'does not re-establish arbitrary governmental power … it leaves in tact the general prohibitions imposed by the

From this, it is clear that the humane treatment axiom is intransgressible. It is also clear that measures of control, such as internment, when *legitimate*, are compatible with the humane treatment requirement. It is therefore submitted that the notion of necessity in Article 27(4) can be considered to inform the content of the principle of humane treatment in Article 27(1), such that a measure of control or security (internment) is consistent with humane treatment only where it is 'necessary as a result of the war'; where not necessary, internment in itself will be inhumane.

Whilst Article 27 GCIV does not apply in non-international armed conflicts, it does offer an understanding of what the humane treatment principle requires. Given its identical meanings in common Article 3 and Article 27, that understanding may be applied when interpreting the former. We may therefore conclude that common Article 3 prohibits internment that is not necessary as a result of the war. In so doing, it is possible to move beyond stating that it is simply 'self-evident' that the principle of human treatment in common Article 3 prohibits arbitrary detention; the Conventions themselves make clear that this is the case and confirm that what is 'arbitrary' is any deprivation of liberty that is not 'necessary as a result of the war'. Importantly, as section 4.3.1 will demonstrate, this interpretation finds support in the practice of states and international bodies.[52] Whilst it is true, therefore, that common Article 3 does not contain explicit procedural rules on internment, it is not the case that it is entirely silent in this area.

It is clear, nevertheless, that the degree to which common Article 3 regulates internment is very limited. In particular, whereas chapter three demonstrated that, in

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humanitarian principles of the Convention'); *Prosecutor v Dario Kordić and Mario Ćerkez* (Trial Judgment) ICTY-95-14/2-T (26 February 2001) [281] (noting that even where security measures are resorted to pursuant to Article 27(4), 'the treatment of protected persons must in all circumstances meet the standards set forth in paragraphs 1, 2 and 3 of Article 27').

52 Subsequent practice is, of course, an important reference when interpreting treaties: art 31(3)(b) VCLT; A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge 2007) 241.

international conflicts, IHL builds upon this basic prohibition of internment that is not necessary as a result of the war, by, for example, requiring initial and periodic review, this is not the case in non-international conflicts. Here, the basic prohibition is all that common Article 3 may be considered to stipulate. The argument above is premised on the structure of Article 27 GCIV and its relationship to common Article 3; to go further, it is submitted, would no longer reflect a good faith interpretation.

Finally, as noted in section 3.2.1, whereas the test for determining the necessity of internment under Article 42 GCIV is objective, the test under Article 78 GCIV appears subjective, referring to the requirement that the state 'consider' internment necessary for security. The reference in Article 27(4) to 'measures of control … as may be necessary', rather than 'as may be *considered* necessary', demonstrates that this test, like that in Article 42 GCIV, is objective, and, since we are drawing on Article 27(4), the test in non-international conflicts may also be considered objective. Indeed, Nils Melzer views Article 27(4) as an expression of the principle of military necessity,[53] and he argues that, '[i]t would contradict the nature of military necessity as an abstract principle of law, and as a decisive restraint on military action, to leave its assessment entirely to the operating party to the conflict'.[54] More generally, it is clear from other areas of international law in which necessity tests feature, that such tests, absent clear indication to the contrary, set objective standards.[55] Without the need for some degree of reasonableness in the claim of necessity,

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[53] N Melzer, *Targeted Killing in International Law* (Oxford Monographs in International Law, OUP, Oxford 2008) 291 (fn 263).

[54] Ibid, 291–2.

[55] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment [2003] ICJ Rep 161, [73] ('the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"'); *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)* Judgment [1997] ICJ Rep 7, [51] (with regard to the invocation of necessity as a circumstance precluding wrongfulness under the law of state responsibility, the ICJ noted that 'the State concerned is not the sole judge of whether those conditions [that must be met for a valid necessity plea] have been met'); *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/08, Award, 12 May 2005, [370] (regarding necessity as a basis for non-precluded measures under a bilateral investment treaty, the

the prohibition of internment not necessary as a result of the war could be rendered meaningless, for what is necessary would be left entirely to the whim of each commander.

4.2.2 Additional Protocol II

The relevance of APII for the procedural regulation of internment can be addressed swiftly. As noted in chapter two, the field of application of APII is more narrowly defined than that of common Article 3.[56] Thus, Christopher Greenwood notes that APII is applicable only to those non-international conflicts that we might label a civil war.[57]

As with common article 3, APII recognises that internment will occur in non-international conflicts, by specifying minimum treatment standards for detainees.[58] Once again, however, APII lacks any explicit reference to procedural rules on internment. Part II, comprising Articles 4–6, elaborates the principle of humane treatment in common Article 3, but focuses on treatment and the conditions of internment rather than on grounds or procedural safeguards.[59] First, Article 4 contains 'fundamental guarantees' applicable to those who are not, or no longer, taking a direct part in hostilities, including internees. As with common Article 3, it sets out the humane treatment principle in paragraph one and then gives examples of treatment that would be inconsistent therewith.[60] However, rather than addressing the act of internment itself, this article prescribes certain substantive standards of treatment, such as a prohibition on acts of terrorism.[61] That said, Article

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tribunal held that, 'when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly').

56 Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva 1987) 1349–50.

57 Greenwood (n 14) 55.

58 Art 5 APII.

59 Deeks (n 10) 414.

60 Arts 4(2)(a)–(h) APII.

61 Art 4(2)(d) APII.

4(2)(b) prohibits collective punishments, which 'concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction'.[62] Certain commentators have argued on this basis that internment of one person cannot be justified solely by another's acts; the justification necessitating internment, so the argument goes, must apply to each internee.[63] However, the language of Article 4(2)(b) APII demonstrates that it applies to sanctions or punishments; internment, on the other hand, is a preventive measure, based on future security threat.[64] It is submitted that the same end can be reached via the prohibition of unnecessary internment, shown in the previous section to apply under common Article 3. Thus, internment could not reasonably be necessary if based solely on the actions of another individual.[65]

The remainder of Part II of APII is similarly without relevance to the procedural regulation of internment. Thus, Article 5 APII, entitled '[p]ersons whose liberty has been restricted', is concerned not with procedural rules but rather with the conditions of and treatment during internment.[66] Finally, Article 6 elaborates the requirement in common Article 3(1)(d) that sentences and executions be passed only after judgment by a 'regularly constituted court' offering essential standards of due process. As with that provision, Article 6, being concerned with 'prosecution and punishment of criminal offences,'[67] is not relevant to the non-penal measure of internment.

Notwithstanding its fleshing out of common Article 3, APII therefore adds nothing to the procedural regulation of internment. Given that APII was designed to 'develop and

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[62] Sandoz *et al* (n 56) 1374.

[63] Pejic (n 3) 381–2; Davidson and Gibson (n 26) 340.

[64] Pejic (n 3) 375–6.

[65] Similarly, see the discussion in section 3.2.1 on the need for individual determinations of security threat under the GCIV internment regimes.

[66] Sandoz *et al* (n 56) 1384.

[67] Art 6(1) APII.

supplement' common Article 3, this is disappointing.[68] Indeed, there was recognition before 1977 that common Article 3 provided insufficient procedural safeguards for internees. Richard Baxter, for example, commenting in 1974 on the future development of the law of non-international armed conflict, stated:

> The internment of individuals who have not engaged in hostilities but are thought to represent a threat to the security of the state should … be subject to procedural and substantive safeguards.[69]

No further developments in this area have since occurred under treaty law. As a result, the only relevant norm that may be distilled from the treaty rules applicable in non-international conflicts is a prohibition of internment that is not necessary as a result of the war, e.g. for security reasons. This is in contrast to the relatively detailed procedural rules applicable in international conflicts that define who may be interned, what review mechanisms must be provided, and the point at which they must be released.[70] In light of this clear gap in conventional IHL, the next section will examine the extent to which customary IHL might be of relevance here.

4.3 Procedural Rules under Customary Humanitarian Law

At the time of the adoption of the Additional Protocols in 1977, it was thought that the international regulation of non-international conflicts was too novel for customary rules to have crystallised, hence the Martens Clause in APII making no reference to custom.[71] Chapter two noted, however, that customary rules have subsequently emerged that extend the norms traditionally applicable only in international armed conflicts to non-international conflicts, contributing to the partial erosion of the distinction between the

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[68] Art 1(1) APII; Sandoz *et al* (n 56) 1324.

[69] RR Baxter, 'Ius in Bello Interno: The Present and Future Law' in JN Moore (ed), *Law and Civil War in the Modern World* (The Johns Hopkins University Press, Baltimore 1974) 535.

[70] See, generally, chapter 3.

[71] Compare APII, preambular [4], and art 1(2) API; Sandoz *et al* (n 56) 1341.

categories of conflict.[72] This section examines whether this is true regarding the procedural regulation of internment. In so doing, it is important to note that we are concerned here with customary *IHL*. By using this term, it is not suggested that customary international law is naturally divided into categories according to its subject matter; rather, as is the case also with treaty law, the various categories referred to (such as 'IHL') are merely useful descriptors of those rules that share common features.[73] This is important to remember because, as will become clear, much of the practice in this area is very general, particularly regarding the situations to which it refers. Ashley Deeks, for example, notes that, notwithstanding states introducing administrative detention laws, it is often unclear whether they are intended for, or apply in, armed conflict situations.[74] The focus in this section, however, is on custom arising from practice specifically addressing internment in non-international armed conflict, and it is in this sense that the term 'customary IHL' is used. More general practice, not specific to non-international conflicts, will be examined in chapter five.[75] It will be shown there that other, generally applicable rules of customary international law regulate detention in all situations, including non-international conflicts.

The reason for examining customary IHL separately is three-fold. First, the goal here is, in part, to consider whether the distinction between international and non-international conflicts has been eroded in this area by custom, in common with other areas. Second, whilst such views are shown in section 5.1 to be inaccurate, a number of states consider operations conducted during armed conflict to be regulated by IHL alone, to the exclusion of other areas of international law (specifically IHRL). Considering what customary IHL

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[72] See section 2.1.

[73] Similarly, see F Hampson, 'Other Areas of Customary Law in Relation to the Study' in E Wilmshurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP, Cambridge 2007) 54–8; Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Finalised by Martti Koskenniemi, 13 April 2006, A/CN.4/L.682, [129]–[133].

[74] Deeks (n 10) 422.

[75] Section 5.3.

in particular has to say on this topic is, therefore, useful. Third, whereas the binding nature of IHRL *vis-à-vis* non-state actors is controversial,[76] it is reasonable to presume, in common with IHL generally, that customary rules that emerge from state practice specifically in non-international conflicts bind both states and non-state groups equally. That said, such a presumption remains rebuttable by state practice and *opinio iuris* to the contrary.[77] There is, therefore, value in examining customary IHL, before an examination of customary international law generally is carried out in chapter five.

It should be noted at the outset that certain states have developed specific internment regimes in non-international armed conflicts. This is the case, for example, in traditional non-international conflicts (e.g. Sri Lanka), so-called internationalised non-international conflicts (e.g. Iraq post-2003 and Afghanistan post-2001), and transnational conflicts between states and non-state groups that some consider to constitute non-international armed conflicts (e.g. the US conflict with al-Qaeda).[78] To different degrees, these internment regimes mirror those applicable in international armed conflicts, raising the question of whether such practice has eliminated the distinction between the two categories of conflict in this area.[79] However, it is submitted that no such conclusion may validly be made. First, this practice, as will be shown in chapter six, varies considerably in detail, making it difficult to extrapolate general customary rules.[80] Second, even if this practice were relatively uniform, it would not alone appear sufficiently dense to trigger the crystallisation of customary norms. Finally, and most importantly, as will be demonstrated

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[76] This is discussed in section 7.3.

[77] The binding nature of customary IHL for non-state groups is discussed below under section 4.4.3.

[78] State practice in each of these conflicts is discussed in detail in section 6.2, and, to avoid repetition, the reader is directed to that section for more information.

[79] See, e.g., section 6.2.1.2 (Sri Lanka) and section 6.2.2.1 (Iraq), demonstrating that, in each, the states involved adopt internment regimes with both grounds and review procedures similar to those applicable under GCIII and GCIV.

[80] Compare, e.g., the approaches taken in Colombia (section 6.2.1.1) and Afghanistan (section 6.2.2.2).

in chapter six, those states that have adopted such regimes generally did so on the assumption that the governing legal regime was IHRL, as opposed to IHL.[81] Indeed, as will also be made clear in chapter six, those internment regimes were generally grounded in domestic law, and no claim was made that they were based on customary IHL.[82] Similarly, in Iraq, the internment regime in GCIV was extended to the non-international conflict phase of the hostilities not by customary IHL, but rather a Security Council Resolution.[83] There is no *opinio iuris*, therefore, suggesting that the GCIII and/or GCIV internment regimes apply as a matter of customary IHL in non-international armed conflicts.[84]

Whilst it is not possible to conclude, therefore, that customary IHL has eliminated the distinction between international and non-international conflicts in this area, it is at the same time not silent. To demonstrate this, the remainder of this section will evaluate the conclusions relevant to this area in the ICRC's 2005 *Study on Customary International Humanitarian Law*.[85] The importance of the Study for our purposes is demonstrated by Theodor Meron's comment that 'the principal driving force behind the project … was the desire to remedy the scarcity of rules applicable to noninternational armed conflicts'.[86] As such, reference will be made below to the Study, particularly Volume II thereof, comprising the collection of state practice.[87] Additionally, more recent practice will also be

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[81] See, e.g., section 6.2.1.2 (demontrating that Sri Lanka derogated from certain provisions of art 9 ICCPR, indicating its acknowledgment that that provision governed its detention operations).

[82] See, e.g., section 6.2.1.3 (demonstrating that Nepal's internment regimes were based on its domestic Public Security (2nd Amendment) Act 1991 and Terrorist and Disruptive Activities (Control and Punishment) Ordinance 2004).

[83] UNSC Res 1546 (2004). Similarly, see RM Chesney, 'Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010' (2011) 51 VJIL 549, 575.

[84] Similarly, see Henckaerts, *Vol I* (n 31) 347–52.

[85] Henckaerts, *Vol I* (n 31); J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume II: Practice* (CUP, Cambridge 2005).

[86] T Meron, 'Revival of Customary Humanitarian Law' (2005) 99 AJIL 817, 833.

[87] Henckaerts, *Vol II* (n 85).

included.[88]

Whilst a general examination of the ICRC Study is beyond the scope of this thesis, it is important to note that it was not uncontroversial. First, its methodology was criticised on a number of grounds, including its use of military manuals and its general approach to applying the traditional test of customary international law, comprising state practice and *opinio iuris*.[89] Second, the Study has been criticised for particular rules that it determined to be customary (although none of those with which this section deals).[90] The ICRC has, however, responded to many of these criticisms.[91]

The ICRC Study confirms that two customary rules of IHL applicable to internment in non-international conflicts may be distilled from practice: first, a prohibition of arbitrary deprivation of liberty; second, a requirement of release where the reasons justifying internment cease. Beyond this, however, customary IHL appears not (at present) to fill the gaps left by treaty law in this area. Chapters 5–7 will examine the role of international human rights law in addressing these gaps in IHL. First, however, the remainder of this section will look in more detail at these two customary norms of IHL.

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[88] The task of updating the Study's collection of state practice has been taken up by the British Red Cross in conjunction with the Lauterpacht Centre for International Law, University of Cambridge, and its findings are uploaded onto the website: <http://www.lcil.cam.ac.uk/projects/cihl_project.php> accessed 30 January 2014. Where practice is taken from the ICRC Study or the online database, it is cited as such.

[89] See, e.g., JB Bellinger, III and WJ Haynes, II, 'A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*' (2007) 89 IRRC 443, 444–8; D Bethlehem, 'The Methodological Framework of the Study' in E Wilmshurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP, Cambridge 2007); I Scobbie, 'The Approach to Customary International Law in the Study' in E Wilmhurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP, Cambridge 2007). The use of military manuals as state practice and *opinio iuris* is discussed below at text to nn 99–100.

[90] Bellinger and Haynes, ibid, 448–71; G Aldrich, 'Customary International Humanitarian Law—An Interpretation on Behalf of the International Committee of the Red Cross' (2005) 76 BYIL 503, 508–22.

[91] See, e.g., J-M Henckaerts, '*Customary International Humanitarian Law*: A Response to US Comments' (2007) 89 IRRC 473.

4.3.1 Prohibition of arbitrary deprivation of liberty

It should first be noted that, in addition to common Article 3 *qua* treaty law, common Article 3 is also widely considered to reflect customary law.[92] As such, based on the interpretation in section 4.2.1, both conventional and customary humanitarian law, through the principle of humane treatment, may be considered to prohibit internment that is not necessary as a result of the conflict.

The ICRC Study refers to the practice of states and other actors in order to demonstrate that customary IHL prohibits the 'arbitrary deprivation of liberty' in non-international conflicts.[93] First, the Study notes that all states have legislation specifying the grounds on which individuals may be detained.[94] Moreover, of the more than 70 states that criminalise the unlawful deprivation of liberty during armed conflicts, most do so equally in international and non-international conflicts.[95] Importantly, there are also examples of military manuals that either apply in, or have been applied in, non-international conflicts, stating that unlawful confinement is a *violation of IHL*.[96] In addition, much of the national legislation prohibiting arbitrary detention in non-international conflicts to which the ICRC

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[92] *Nicaragua* (n 19) [218]; *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) [98]; *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4 (2 September 1998) [608]; *Prosecutor v Morris Kallon and Brima Bazzy Kamara* (Decision on Challenge to Jurisdiction, Lomé Accord Amnesty) SCSL-2004-15-AR72(E) (13 March 2004) [47]. Indeed, the International Law Commission (ILC) suggests that the 'basic rules' of IHL, which might reasonably be considered to include common art 3, are of *ius cogens* character: Report of the ILC (2001), 53rd Meeting, UNGA, Official Records, 56th Meeting, Supplement No 10 (A/56/10) 284.

[93] Henckaerts, *Vol I* (n 31) 344 (Rule 99).

[94] Ibid, 347.

[95] Ibid, 347. See, e.g., Armenia, *Penal Code* (2003), art 390.2(4), cited in Henckaerts, *Vol II* (n 85) 2331, [2555]; Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), arts 1(1)(6) and 1(2)(5), cited in ibid, 2331, [2562]; Georgia, *Criminal Code* (1999), art 411(2)(f), cited in ibid, 2333 [2580]; Moldova, *Penal Code* (2002), art 391, cited in ibid, 2334 [2593]; Nicaragua, *Draft Penal Code* (1999), art 461, cited in ibid, 2335 [2599]; Portugal, *Penal Code* (1996), art 241(1)(g), cited in ibid, 2336 [2607]. References to other national legislation criminalising unlawful deprivation of liberty in non-international conflicts are made in Henckaerts, *Vol I* (n 31) at 347 (fn 290).

[96] Henckaerts, *Vol I* (n 31) 347. See, e.g., Australia, *Commanders' Guide* (1994), s 1305(d), cited in Henckaerts, *Vol II* (n 85) 2329 [2536]; Croatia, *LOAC Compendium* (1991) Annex 9, p 56, cited in ibid, 2329 [2539]; Germany, *Military Manual* (1992), s 1209, cited in ibid, 2330 [2543]; South Africa, *LOAC Manual* (1996), s 40, cited in ibid, 2330 [2549].

Study refers, explicitly states that such detention is a 'war crime' and thus a violation of IHL.[97] The ICRC Study concludes that this practice endorses at least a general prohibition of 'arbitrary' detention.[98]

In order for the above practice to establish a customary rule, rather than merely reflect policy (or simply rules of domestic law), it must be accompanied by *opinio iuris*. In this regard it must be noted that the use of military manuals in the ICRC Study has been criticised by the US on the ground that these reflect policy rather than legal considerations.[99] The present author does not accept such criticisms, however. Indeed, military manuals are among the most illustrative sources of state practice in this area, for they reflect the considered general policy of the state, whereas actual operational practice, for example, might often reflect a particular commander's approach or the policy adopted for a specific situation.[100] Whilst it is certainly true that military manuals may not reflect the *opinio iuris* of the state, the ICRC Study confirms the existence of *opinio iuris* in this area, by noting that '[n]o official contrary practice was found with respect to either international or non-international armed conflicts. Alleged cases of unlawful deprivation of liberty have been condemned.'[101] The value of this is significant. The lack of *official* contrary practice demonstrates that, where arbitrary detentions occur, those accused will

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[97] See, e.g., *Azerbaijan's Criminal Code* (1999), arts 112 and 116.0.18, cited in Henckaerts, *Vol II* (n 85) 2331 [2559]; *Bosnia and Herzegovina's Criminal Code* (1998), art 154(1), cited in ibid, 2332 [2563]; *Ethiopia's Penal Code* (1957), art 282(c), cited in ibid, 2333 [2579]; *Portugal's Penal Code* (1996), art 241(1)(g), cited in ibid, 2336 [2607]; *Slovenia's Penal Code* (1994), art 374(1), cited in ibid, 2336 [2611]; *Socialist Federal Republic of Yugoslavia's Penal Code* (1976), art 142(1), cited in ibid, 2337 [2624]; *Uruguay, Law on Cooperation with the ICC,* 2006, arts 26.2 and 26.3.7, cited in ICRC, Customary IHL Database: Practice Relating to Rule 99 Deprivation of Liberty (British Red Cross/ICRC) <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99> accessed 10 December 2013.

[98] Henckaerts, *Vol I* (n 31) 344 (Rule 99).

[99] Bellinger and Haynes (n 89) 446–7. Similarly see C Garraway, 'The Use and Abuse of Military Manuals' (2004) 7 YIHL 425, 440 (arguing that the law-making function of military manuals should not be overstated).

[100] See also the discussion in chapter one regarding the more general debate over the use of statements, in addition to actions, in finding customary international law: section 1.2.

[101] Henckaerts, *Vol I* (n 31) 347.

seek to rely not on extra-legal arguments (e.g. that there is no rule prohibiting arbitrary detentions) but, rather, will proffer a response within the legal framework (e.g. that a particular detention was not arbitrary).[102]

The existence of *opinio iuris* in this area is also confirmed by a number of other sources. First, as noted above, the practice in this area includes national legislation referring to arbitrary detention in non-international conflicts *as a violation of IHL*, confirming that such practice is not merely reflective of policy.[103] Second, national case law similarly confirms the existence of *opinio iuris* here. In a 2007 case, for example, the Colombian Constitutional Court stated:

> Taking into account … the development of customary international humanitarian law applicable in internal armed conflicts, the Constitutional Court notes that the fundamental guarantees stemming from the principle of humanity, some of which have attained *ius cogens* status, … [include] the prohibition of arbitrary deprivation of liberty.[104]

Similarly, in the 2002 case of *Mehinovic v Vuckovic*, a US District Court held that:

> Acts of torture, inhuman treatment, and arbitrary detention of civilians committed in the course of hostilities violate the international law of war as codified in the Geneva Conventions … Such acts, whether committed in an international or a non-international armed conflict, violate customary international law.[105]

That customary IHL prohibits arbitrary detention in non-international conflicts is also

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[102] The ICJ has accepted that such practice confirms, rather than negates, the existence of a customary rule: *Nicaragua* (n 19) [186].

[103] See above, text to nn 96–7.

[104] *Constitutional Case No C-291/07*, Judgment, 25 April 2007, 112, cited in ICRC, Customary IHL Database: Practice Relating to Rule 99 Deprivation of Liberty (British Red Cross/ICRC) <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99> accessed 10 December 2013.

[105] *Kemal Mehinovic et al v Nikola Vuckovic* (2002) 198 F Supp 2d 1322 (US District Ct for the Northern District of Georgia) 1350. Similarly, see Extraordinary Chambers in the Courts of Cambodia (ECCC), Case File 001/18-07-2007/ECCC/TC, *KAING Guek Eav alias Duch*, Trial Judgment, 26 July 2010, [347] ('[t]he customary status of the prohibition of arbitrary imprisonment under international law initially developed from the laws of war and is supported by human rights instruments'); HCJ 3239/02, *Mar'ab et al v IDF Commander of Judea and Samaria et al*, 57(2) PD 349, [20] (stating that in both peace and war, '[t]here is no authority to detain arbitrarily'); *Contreras Sepúlveda case*, Case No 2182-98, Judgment, 17 November 2004 (Chilean Supreme Court) [26] ('the irregular detention of civilians may not be considered to fall within the competence of the military'), cited in ICRC, Customary IHL Database: Practice Relating to Rule 99 Deprivation of Liberty (British Red Cross/ICRC) <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99> accessed 10 December 2013.

supported by the practice of certain intergovernmental institutions and international tribunals. For example, a 2002 conference of the African Parliamentary Union, comprising 21 African states, declared that arbitrary detention, *inter alia*, in any armed conflict 'seriously violate[s] the rules of International Humanitarian Law'.[106] Similarly, the Inter-American Commission on Human Rights has held that, during the non-international conflict in Colombia, certain detentions by paramilitary groups constituted 'arbitrary deprivations of liberty, in violation of international humanitarian law.'[107] Moreover, in response to the ICTY Prosecutor's claim, noted above, that the defendant had violated common Article 3 through unlawful detention, the Trial Chamber held that, 'in the circumstances of this case, these acts in and of themselves do not amount to a serious attack on human dignity within the meaning of cruel treatment'.[108] Whilst rejecting the claim in the specific case, therefore, the Trial Chamber did not reject the claim on principle. Although this practice from international bodies does not specifically refer to *customary* IHL, and may instead relate to common Article 3, the latter, as noted, has been universally recognised as embodying customary law.[109]

The above practice, including domestic laws, whilst clearly rejecting the notion of unfettered detention power in non-international armed conflict, varies considerably in the terminology used (e.g. 'unlawful'/'arbitrary' detention) and the permissible grounds for detention. This notwithstanding, the ICRC Study concludes that one can nonetheless discern a general prohibition of 'arbitrary deprivation of liberty'.[110] However, the Study

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[106] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble, <http://www.ipu.org/splz-e/niamey02.htm> accessed 16 December 2013.

[107] Inter-American Commission on Human Rights, 'Third Report on the Human Rights Situation in Colombia' (26 February 1999) OEA/Ser.L/V/II.102 Doc 9 rev 1, ch IV [300] <http://www.cidh.org/countryrep/Colom99en/table of contents.htm> accessed 16 December 2013.

[108] See above at n 30.

[109] See above at n 92.

[110] Henckaerts, *Vol I* (n 31) 344 (Rule 99).

then seeks to elaborate this norm in customary IHL by drawing on the equivalent norm in IHRL.[111] For the reasons explained at the outset of this section, the approach adopted here is to address IHL and IHRL separately. Relevant rules of IHRL will be discussed in chapters 5–7.[112] It is instead submitted here that the customary IHL norm should be interpreted in the same way as was argued above regarding common Article 3, i.e. that internment is 'arbitrary', and thus prohibited, when it is not actually necessary as a result of the conflict, e.g. for security reasons. This approach is supported by the fact that common Article 3 exists in both treaty and customary law, as explained above. Indeed, the ICRC Study states that, at its most basic, the arbitrary deprivation of liberty prohibition in customary IHL requires '[t]he need for a valid reason for the deprivation of liberty',[113] and such a reason must be connected to the conflict if it is to be the subject of regulation by IHL.[114] In non-international conflicts, both conventional and customary IHL should, therefore, be considered to prohibit internment that is not necessary as a result of the conflict.

4.3.2 The end-point of internment

The ICRC Study argues that one further relevant norm has crystallised as custom. Rule 128, comprising three parts, A to C, relates to the release of internees. Rule 128C applies to non-international conflicts, stating that, unless detained on penal grounds, '[p]ersons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease.'[115] Interestingly, the

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[111] Ibid, 349–52. On the IHRL norm, see section 5.2.1.

[112] See also Olson (n 6) (discussing a number of problems with the ICRC's use of IHRL to elaborate the customary IHL rule).

[113] Henckaerts, *Vol I* (n 31) 348.

[114] Similarly, it was argued in section 3.2.1 that, for conduct to constitute a security threat necessitating internment within the sense of GCIV, it must have a nexus to the armed conflict.

[115] Henckaerts, *Vol I* (n 31) 451. Similarly, see Pejic (n 3) 382–3.

practice referred to in the ICRC Study as evidence for this rule on the whole relates to release of internees at the cessation of hostilities, rather than specifically when the reasons justifying internment cease. Indeed, much of the practice comprises ceasefire agreements requiring the release of internees, such as that between the government of Angola and the National Union for the Total Independence of Angola (UNITA):

> The ceasefire entails the release of all civilian and military prisoners who were detained as a consequence of the conflict between the Government of the People's Republic of Angola and UNITA.[116]

More recently, the Darfur Peace Agreement similarly required the parties to the conflict to 'unconditionally release all persons detained in relation to the armed conflict in Darfur'.[117] It should be noted that it is the state's practice in forming such agreements which is relevant. Although they also represent the practice of non-state groups, due to the uncertainty of its relevance, this was not taken into account by the ICRC.[118]

The ICRC Study also refers to actual operational practice in which military detainees have been released during non-international conflicts, such as in Rwanda, although this practice does not specifically stipulate that the end-point of internment must be when the reasons for it cease.[119] Finally, certain states have publicly called for the

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[116] Peace Accords between the Government of Angola and UNITA (Bicesse Accords), annexed to Letter dated 17 May 1991 from the Chargé d'affaires a.i. of the Permanent Mission of Angola to the UN addressed to the UN Secretary General, UN Doc S/22609 (17 May 1991) [II.3], cited in Henckaerts, *Vol II* (n 85) 2863 [627]. The ICRC Study cited many other such ceasefire agreements with similar provisions requiring release of all military detainees: Henckaerts, *Vol I* (n 31) 454 (fn 161).

[117] Darfur Peace Agreement between the Government of the Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement (done at Abuja, Nigeria, 5 May 2006) [364] <http://www.sudantribune.com/IMG/pdf/Darfur_Peac_Agreement-2.pdf> accessed 16 December 2013.

[118] Henckaerts, *Vol I* (n 31) xxxvi. The ICTY has been more open to taking into account the practice of non-state armed groups in examining customary IHL: *Tadić* (n 92) [108]. Arguing in favour of a law-making role for non-state armed groups, see A Roberts and S Sivakumaran, 'Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 YJIL 107. This issue is discussed in more detail below under section 4.4.

[119] Association Rwandaise pour la défense des droits de la personne et des libertés puliques, *Rapport sur les droits de l'homme au Rwanda* (Kigali, 1993) 45 and 51, cited in Henckaerts, *Vol II* (n 85) 2873 [712]. Similarly, see ICRC, *Report on the Practice of Colombia* (1998) ch 1.8, cited ibid, 2872 [702]; ICRC, *Report on the Practice of Nigeria* (1997) ch 5.4, cited in ibid, 2873 [710].

release of detainees during particular non-international conflicts, including Bangladesh,[120] France,[121] Philippines,[122] India,[123] and the United States,[124] although, again, these calls do not refer specifically to release where the reasons for detention cease.

The practice referred to, therefore, cannot by itself lead to the conclusion that custom requires the release of internees in non-international conflicts as soon as the reasons justifying their internment cease. Indeed, Agnieszka Jachec-Neale questions whether Rule 128C reflects custom, by virtue of the limited supporting practice; she does, however, concede that, whilst 'perhaps not yet fully matured, this customary norm may well be developing.'[125] Moreover, there is no sign that the practice referenced is accompanied by *opinio iuris*, and states may well argue that it is merely policy-based. However, it is submitted that the requirement of release when the reasons for internment cease may simply be seen as a component of the prohibition of internment that is not necessary as a result of the conflict.[126] The latter will be infringed whenever a person is interned unnecessarily, be it initially or at some subsequent point by virtue of the original justification ceasing to apply.[127]

There appears to remain, however, a significant gap in the regulation of the end-point of internment in non-international conflicts. Chapter three explained that in international conflicts the release of civilian internees must take place as soon as the

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[120] UNSC Verbatim Record, Statement by Bangladesh (16 November 1992) UN Doc S/PV.3137, 111, cited in Henckaerts, *Vol II* (n 85) 2872 [700].

[121] ICRC, *Report on the Practice of France* (1999) ch 5.4, cited in ibid, 2872 [704].

[122] Philippines 10th Congress, House of Representatives Res No 27 (28 November 1995), cited in ibid, 2873 [711].

[123] ICRC, *Report on the Practice of India* (1997) ch 5.4, cited in ibid, 2873 [707].

[124] ICRC, *Report on US Practice* (1997), chs 5.3 and 5.4, cited in ibid, 2873–4 [713].

[125] Jachec-Neale (n 26) 334.

[126] This same point was made with regard to the same rule on release of civilian internees in international conflicts: section 3.4.1.

[127] Similarly, see Henckaerts, *Vol I* (n 31) 452; Pejic (n 3) 382–3.

reasons for internment cease or, if not before, *as soon as possible after the close of hostilities*.[128] Similarly, POWs must be released 'without delay after the cessation of active hostilities.'[129] IHL therefore establishes the point at which hostilities cease as the definite end-point for internment in international conflicts. In contrast, Rule 128C in the ICRC Study suggests that custom requires release only once the reasons for internment cease, with no absolute end-point corresponding to the cessation of hostilities. As noted, most of the practice referred to does in fact relate to the end of hostilities; however, this does not appear to be sufficiently dense or supported by *opinio iuris* for a customary norm to have formed. The ICRC may simply have viewed the cessation of hostilities as the latest point at which the reasons justifying internment cease, extrapolating a general rule from the practice. However, these two points in time arguably may not converge, and thus the consequence of the ICRC's conclusion seems to be that internment may continue beyond the cessation of hostilities, for a seemingly indefinite period, if the initial reason for internment continues. Indeed, after the cessation of hostilities, certain individuals are more likely to pose a security threat in non-international conflicts than in international conflicts, at the end of which POWs, for example, are generally repatriated and thus pose no immediate security risk to the detaining state.

These concerns were raised with regard to Article 2(2) APII, which, in requiring that the treatment and trial standards in Articles 5 and 6 APII be applied to detentions that continue beyond the cessation of hostilities, recognised that internment may continue thereafter. The ICRC Commentary sought to address this by stating that, '[i]n principle, measures restricting a person's liberty, taken for reasons related to the conflict, should cease at the end of active hostilities'.[130] However, this problem is exacerbated by the

[128] Arts 132(1) and 133 GCIV.

[129] Art 118(1) GCIII.

[130] Sandoz *et al* (n 56) 1360.

uncertain end of hostilities in non-international conflicts, highlighted by the US Supreme Court in *Hamdi v Rumsfeld*:

> If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.[131]

Of course, if interned beyond the cessation of hostilities, an individual will remain protected by IHRL, which more broadly protects the right not to be deprived arbitrarily of one's liberty.[132]

Having demonstrated that customary IHL prohibits internment that is not necessary as a result of the conflict and requires release where the justifications for internment cease, it is worth mentioning a possible corollary to these rules. Arguably, they cannot effectively be honoured if there is no mechanism for initially and periodically reviewing the existence of a justification for internment. Indeed, in order to adhere to the requirement of release where the reasons cease, in practice there must be a system for ensuring that release is not delayed, and it would seem that the only suitable mechanism is periodic review. As noted by the ICTY, this is the role played by periodic review in international armed conflict.[133] Of course, this would still result in periodic review being only a corollary right in non-international conflicts, rather than a free-standing right on its own. As such, although failure periodically to review internment in international conflicts is itself a violation of IHL,[134] in non-international conflicts this would not be the case; the violation would only occur if the internee is held beyond the point at which the reasons for their internment

[131] *Hamdi v Rumsfeld* (2004) 542 US 507, 520 (US Supreme Court). This issue is discussed *de lege ferenda* in chapter eight.

[132] See section 5.2.1.

[133] *Prosecutor v Zejnil Delalić et al* (Trial Judgment) ICTY-96-21 (16 November 1998) [581]; Pictet, *GCIV* (n 32) 261; Deeks (n 10) 410. See section 3.3.1.2.

[134] *Prosecutor v Zejnil Delalić* et al (Appeals Judgment) ICTY-96-21 (20 February 2001) [322].

cease to exist.

4.4 The Binding Nature of IHL for Non-State Armed Groups

This chapter has shown that IHL does regulate internment in non-international armed conflict, albeit in a minimal way. Most importantly, it was argued that both treaty and customary IHL can be interpreted as prohibiting internment that is not necessary as a result of the conflict. This brings us to the question of upon whom this obligation falls. In international conflicts, since the parties are states, each state is bound to apply the IHL treaties which they have ratified by virtue of the principle of *pacta sunt servanda*.[135] However, in a non-international conflict, where (at least) one party is a non-state armed group, the question arises as to whether and, if so, how the applicable rules of IHL bind such groups. This has proved a particularly controversial question in the literature.[136]

The importance of this issue for the present thesis is reflected in the fact that detentions by non-state groups are a common feature of non-international conflicts. In the Colombian conflict, for example, the *Feurzas Armadas Revolucionarias de Colombia* (FARC) has routinely detained individuals, including members of the Colombian armed forces.[137] Such a detention took place in January 2013, when FARC detained two police officers, stating that they were held as 'prisoners of war', in order to make clear that they had ended their previous policy of kidnappings for ransom.[138] Similarly, members of the *Rassemblement Congolais pour la Democratie* (RCD) group that was party to a non-

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[135] Art 26 VCLT.

[136] Compare, e.g., A Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-international Armed Conflicts' (1981) 30 ICLQ 416 and S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369.

[137] F Szesnat and A Bird, 'Colombia' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 231–2.

[138] 'Captive Policemen are "POWs": FARC', *IOL News* (South Africa), 30 January 2013, <http://www.iol.co.za/news/world/captive-policemen-are-pows-farc-1.1461429#.UgDMRJLVCSo> accessed 6 August 2013.

international conflict in the Democratic Republic of Congo detained, *inter alia*, 'persons suspected of not supporting the RCD authorities … because of acts they might commit'.[139] In the 2008 South Ossetia conflict, South Ossetian forces, likewise, detained a number of individuals, including civilians and members of the Georgian armed forces, as hostages.[140] In order comprehensively to examine the extent to which IHL regulates internment in non-international conflicts, the relevance of the procedural rules discussed in this chapter for these detentions must be considered. Furthermore, it has been shown that the legitimacy of international legal rules will often influence compliance therewith, such that explaining how, if at all, IHL binds non-state armed groups might improve the protections afforded to victims of non-international conflicts.[141]

In examining this issue, this section will begin by demonstrating that common Article 3 and APII are clearly considered by states and commentators as binding on non-state armed groups. It will then consider on what basis these treaty provisions bind non-state groups, concluding that the general authority of states to create rights and obligations directly for individuals at the international level offers the best explanation. The final part will then argue that non-state groups may also be bound by customary IHL, by virtue of their limited legal personality in this area.

4.4.1 Do common Article 3 and APII bind non-state groups?

The text of these instruments reflects the intention of the states parties that they bind

[139] UN Commission on Human Rights, 'Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr Roberto Garretón, in accordance with Commission on Human Rights resolution 2000/15', E/CN.4/2001/40, 1 February 2001, [114].

[140] 'Report of the Independent International Fact-Finding Mission on the Conflict in Georgia: Volume II', September 2009, 360–2; Human Rights Watch, 'Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict Over South Ossetia', 1-56432-427-3, January 2009, 170–3.

[141] Sivakumaran (n 136) 374–5 and 394. The notion of legitimacy is contested, with many viewing process as an essential component of it, such that a norm cannot be legitimate unless 'those addressed believe that the rule or institution has come into being and operated in accordance with generally accepted principles of right process': TM Franck, *The Power of Legitimacy Among Nations* (OUP, Oxford 1990) 24.

equally states and non-state groups in non-international conflicts. Regarding common Article 3, the reference to 'each Party to the conflict', when defining to whom that provision applies, makes clear that it binds insurgents, along with government armed forces.[142] Unlike common Article 3, APII does not refer to its provisions as binding 'each Party to the conflict.' Indeed, this has been suggested as evidence that APII does not bind non-state armed groups.[143] This was not, however, intended to demonstrate that APII does not bind armed groups. Rather, the reluctance of many delegates at the 1974–7 diplomatic conference to legislate for non-international conflicts led to the Pakistani delegation introducing a shorter draft Protocol, as it became clear that a more detailed version could not be adopted by consensus.[144] It was at this stage that all references to 'parties to the conflict' were deleted so as to address the concern that such terms suggested recognition of non-state groups; there was no suggestion, however, that they would not be bound thereby.[145]

Liesbeth Zegveld has demonstrated that '[w]ide international practice' confirms the binding nature of common Article 3 and APII for non-state armed groups, referring *inter alia* to the practice of the ICJ, UN Security Council and international criminal tribunals.[146] The large majority of commentators, too, support this conclusion.[147] As Christopher

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[142] Common art 3, *chapeau*.

[143] See, e.g., GIAD Draper, 'Humanitarian Law and Human Rights' in MA Meyer and H McCoubrey (eds), *Reflections on Law and Armed Conflicts* (Kluwer, The Hague 1998) 146 (suggesting this to be a significant difference between APII and common art 3).

[144] Sandoz *et al* (n 56) 1335 and 1338–9.

[145] Ibid; *Official Records: Vol VII* (n 15) 61. See the discussion in section 2.3.1 on this concern with IHL more generally.

[146] Zegveld (n 11) 10–11, citing, *inter alia*, *Nicaragua* (n 19) [219]; UNSC Res 1193 (1998) [12] (Afghanistan); UNSC Res 794 (1992) [4] (Somalia); *Akayesu* (n 92) [611].

[147] GIAD Draper, *The Red Cross Conventions* (Stevens & Sons, London 1958) 102–3 (regarding common art 3); M Bothe, 'Article 3 and Protocol II: Case Studies of Nigeria and El Salvador' (1982) 31 Am U L Rev 899, 907; L Moir, *The Law of Internal Armed Conflict* (CUP, Cambridge 2002) 52; Zegveld (n 11) 10–11; Sivakumaran (n 136); Greenwood (n 14) 56; D Fleck, 'The Law of Non-International Armed Conflicts' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP, Oxford 2008) 631.

Greenwood has stated, 'common article 3 and the Protocol [II] apply with equal force to all parties to an armed conflict, government and rebels alike.'[148]

4.4.2 On what basis do common Article 3 and APII bind non-state groups?

Having thus shown that both common Article 3 and APII are considered binding on non-state groups, it must now be explained how a non-signatory, non-state group can be bound by these treaty provisions. During the drafting of the Geneva Conventions, doubt was expressed as to how a non-state group could be bound by common Article 3.[149] The ICRC Commentary suggests that if the group exercises effective control over part of the territory, it is bound by the fact that it claims to represent a part of the state.[150] This, however, fails to explain how groups without territorial control are bound by common Article 3, which does not condition its applicability on such control.[151] Moreover, whilst the application of APII *is* conditioned on territorial control, this explanation assumes that the non-state group claims to represent the state, which is not the case with many such groups.[152]

The ICRC Commentary to GCII offers another explanation as to how common Article 3 binds non-state groups: 'by the fact of ratification, an international Convention becomes part of law and is therefore binding upon all the individuals of that country.'[153] However, as the Commentary acknowledges, this concept of the self-executing treaty, which then binds those within the jurisdiction of the state party *qua* domestic law, is not universal, and thus it cannot explain the generally binding nature of common Article 3 and

[148] Greenwood (n 14) 56.

[149] Pictet, *GCI* (n 40) 51.

[150] Ibid.

[151] Sivakumaran (n 136) 380.

[152] Moir (n 147) 55–6; Sivakumaran, ibid, 380; M Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 JICJ 25, 41 (giving as examples the KLA and LTTE as non-state groups that did not wish to represent the state).

[153] JS Pictet (ed), *Commentary to Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (ICRC, Geneva 1960) 34.

APII for non-state groups.[154]

Antonio Cassese offered an alternative explanation for the binding nature of IHL, employing the framework in the Vienna Convention on the Law of Treaties (VCLT) governing the effect of treaties on third states (although Cassese's article dealt specifically with APII, his arguments apply equally to common Article 3).[155] This framework comprises Articles 34–5 VCLT, with Article 34 containing the general rule that non-parties remain unaffected by treaties and Article 35 VCLT containing an exception where, first, the parties to the treaty so intend and, second, the third state consents in writing. That the *pacta tertiis* rule can be extended as a matter of law from states to non-state armed groups is far from clear.[156] However, even assuming it can, the rule cannot explain the binding nature of IHL treaties for individuals. Whilst the preceding section demonstrated that common Article 3 and APII certainly show an intention on the part of the drafters to bind non-state armed groups, it is submitted that Cassese's argument fails due to the second condition in Article 35 VCLT (that the non-state group consents). This cannot be a condition for the application of APII (or common Article 3). First, neither common Article 3 nor APII suggests that this is the case. It is true that Article 1(1) APII limits its application to cases where the non-state group controls such territory 'as to enable [it] … to implement [the] Protocol', but this confirms that the Protocol applies not where the group is *committed* to implement it, rather where it is *able* to implement it.[157] Second, the result of Cassese's argument is that 'it would be necessary to determine in each civil war

[154] Ibid.

[155] Cassese (n 136). Similarly, see Moir (n 147) 96–9.

[156] Sivakumaran (n 136) 377; Milanović (n 152) 39 ('[a]lthough the *pacta tertiis* rule has been extended to international organizations, at least those classically defined as inter-state entities and thus thought to be sufficiently analogous to states to benefit from the rule, its application to individuals and non-state actors is not straightforward' (footnotes omitted)).

[157] Moir (n 147) 107–9.

whether rebels are ready and willing to accept the Protocol.'[158] Aside from practical problems in obtaining consent, this would leave non-state groups free to determine what rules apply to their actions, a conclusion that is inconsistent with a key tenet of humanitarian law, i.e. that IHL regulates all conduct in situations objectively reaching the level of an armed conflict.[159]

It is submitted that the best explanation for the binding nature of common Article 3 and APII for non-state groups is that which recognises that when a state ratifies a treaty, it does so on behalf of its population. The result is that, where intended by the states parties, individuals within their territory are bound by its provisions under international law. Indeed, this is the view that was put forward in the ICRC Commentary to APII:

> … the commitment made by a state not only applies to the government but also to any established authorities and private individuals within the national territory of that state and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the state.[160]

Two points must be elaborated here. First, only those provisions of a treaty that are intended to bind individuals directly (as well as the states parties) are capable of doing so.[161] The Permanent Court of International Justice (PCIJ) made clear in *Jurisdiction of the Courts of Danzig* that, whilst the presumption is that treaties cannot directly create rights and obligations for individuals, where the states parties intend for that treaty to bind individuals, this presumption is rebutted.[162] As shown above in section 4.4.1, it is clear that both common Article 3 and APII were intended to bind non-state armed groups, and

[158] Cassese (n 136) 428. Others too have taken the view that the treaties bind only where the group consents: RT Yingling and RW Ginnane, 'The Geneva Conventions of 1949' (1952) 46 AJIL 393, 395–6.

[159] C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 ICLQ 283, 304.

[160] Sandoz *et al* (n 56) 1345. Similarly, see Sivakumaran (n 136) 381–93; Fleck (n 147) 608; Milanović (n 152) 47.

[161] Milanović, ibid, 45.

[162] *Jurisdiction of the Courts of Danzig* (1928) PCIJ Series B, No 15, 17–18. That treaties can directly bind individuals has also been upheld by the ICTY: see, e.g., *Prosecutor v Dario Kordić and Mario Čerkez* (Appeals Judgment) ICTY-95-14/2 (17 December 2004) [40]–[46]; *Prosecutor v Galić* (Appeals Judgment) IT-98-29-A (30 November 2006) [85].

hence this threshold is met for both.

The second point relates to which states may bind which individuals. This should be seen as a matter of prescriptive jurisdiction, i.e. the right of a state to legislate, whether via national or international law, for individuals. It is well established that states can exercise prescriptive jurisdiction on the basis of territoriality and nationality.[163] The territoriality principle permits states to adopt laws that bind those present in their territory, whilst the nationality principle allows states to legislate for their nationals, whether present in their territory or abroad.[164] It is submitted that states may legislate for individuals directly via treaties on both these bases of jurisdiction. Together, they ensure that, in the event of a non-international armed conflict, the non-state group would be bound by common Article 3 and APII if *either* the state on whose territory they operate *or*, if different, their state of nationality has ratified them. Indeed, it is on these two bases that the International Criminal Court may (in cases other than Security Council referral) exercise jurisdiction over individuals suspected of committing crimes within the Court's jurisdiction.[165] Given that the territoriality and nationality principles have been incorporated into international criminal law as the two key bases of jurisdiction, it would seem appropriate for them also to operate as the bases on which common Article 3 and APII bind non-state groups.

4.4.3 On what basis does customary IHL bind non-state groups?

It was argued above that the prohibition of internment that is not necessary as a result of the conflict is part of customary IHL. It has been accepted that customary IHL binds non-

[163] AV Lowe, 'Jurisdiction' in MD Evans (ed), *International Law* (2nd edn, OUP, Oxford 2006) 342.

[164] Ibid.

[165] Art 12(2) of the Rome Statute; Milanović (n 152) 48; D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 JICJ 618 (demonstrating that the jurisdiction of states over international crimes committed on their territory is not subject to the consent of the state of nationality of the perpetrator).

state armed groups,[166] and thus this norm can be considered binding on such groups under both treaty law and custom.[167] However, it must now be asked *how* customary IHL can bind non-state groups.

The best explanation lies in the legal personality of non-state armed groups in this area. In the *Reparations* advisory opinion, the ICJ made clear that, like all legal systems, in the international legal system what constitutes an actor with legal personality, and the rights and duties derived therefrom, varies depending on the needs of the community, and that 'the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.'[168] Sandesh Sivakumaran has shown that the needs of the international community demand that non-state armed groups, by organising themselves to such a degree that they become party to a non-international conflict, are capable of having sufficient legal personality as to have vested in them certain rights and obligations under custom.[169] The nature of this legal personality, however, is not identical to that of states, nor are the rights and duties emanating therefrom the same as those of states.[170] For example, it seems at present that non-state groups are incapable of contributing to the practice that helps a norm to

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[166] Sivakumaran (n 136) 371–2 (referring to the Special Court for Sierra Leone and the International Commission of Inquiry on Darfur as relying on the customary status of rules for their binding quality vis-à-vis non-state groups); E Castren, *Civil War* (Suomalainen Tiedeakatemia, Helsinki 1966) 86–8; *Nicaragua* (n 19) [217]–[219] (noting the binding nature of common art 3 for the *contras* after relying on its customary status); Moir (n 147) 56–8; Henckaerts¸ *Vol I* (n 31) 495 (Rule 139).

[167] The binding nature of this specific customary norm for non-state groups has received very little attention, although there is some support for the conclusions reached here: UN Commission on Human Rights, Situation of Human Rights in Sudan, E/CN.4/1994/48, 1 February 1994, [3] (calling upon 'all parties to the hostilities to respect fully the applicable provisions of international humanitarian law, to halt the use of weapons against the civilian population and to protect all civilians from violations, including … arbitrary detention'); D Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 IRRC 743, 748–9 ('it is clear that the customary prohibition on arbitrary deprivation of liberty is applicable to armed opposition groups').

[168] *Advisory Opinion Concerning Reparation for Injuries Suffered in the Service of the United Nations* (*Reparations)* ICJ Reports 1949, 178.

[169] Sivakumaran (n 136) 373–4. Similarly, see Draper (n 147) 102–3.

[170] *Reparations* (n 168) 179.

crystallise under custom; this practice remains the practice of states alone.[171] For the same reason, armed groups cannot avail themselves of the persistent objector principle as a means of preventing a customary norm from binding them.[172]

Finally, it should be noted that, just as treaties must indicate an intention that they bind non-state armed groups, so the state practice and *opinio iuris* contributing to the formation of a customary rule must point to such an effect. As argued in section 4.3, for practice specific to non-international armed conflicts, it might reasonably be presumed that the customary rule is intended to bind both states and non-state parties alike, in keeping with the general rule that IHL binds all parties to an armed conflict.[173] However, this presumption must be rebuttable by state practice and *opinio iuris* to the contrary.

4.4.4 Conclusion on the binding nature of IHL

To conclude this discussion, it has been argued that both common Article 3 and APII bind non-state groups party to non-international conflicts. Both can do so by virtue of a state's right to exercise prescriptive jurisdiction, via national and international law, over its nationals and those within its territory. Moreover, non-state groups are also bound by customary IHL as a result of their limited legal personality in this area. As such, the prohibition on internment that is not actually necessary as a result of the war, shown to be embodied in both treaty and customary IHL, binds states and non-state groups alike.

It should, however, be borne in mind that answering the question of how common

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[171] Henckaerts, *Vol I* (n 31) xxxvi; Sivakumaran (n 136) 374; Fleck (n 147) 608. This is disputed by some commentators: see, e.g., HA Wilson, *International Law and the Use of Force by National Liberation Movements* (OUP, Oxford 1998) 51 (distinguishing between custom for states and custom for non-state actors). As noted, certain tribunals and commentators are open to a law-making role for non-state armed groups: see above at n 118.

[172] Indeed, the existence and content of the persistent objector principle are controversial even for states: see, e.g., TL Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 Harv Intl LJ 457; P Dumberry, 'Incoherent and Ineffective: the Concept of Persistent Objector Revisited' (2010) 59 ICLQ 779.

[173] Greenwood (n 37) 10–11.

Article 3 and APII bind non-state groups is not the end of the matter. It was stated at the outset of this section that the greater the legitimacy of a norm, the more likely there will be compliance therewith. However, legitimacy is not synonymous with legality, and the explanations given above, although legally sound, do not recognise a role of any kind for non-state armed groups in determining their legal obligations. This may well reduce the likelihood of compliance, particularly given that the applicable rules have been agreed by the state whose authority they question.[174] Indeed, Richard Baxter commented that explanations of the kind given above are not likely to induce compliance with IHL by non-state groups, demonstrated by the Viet Cong's refusal to adhere to common Article 3 on the ground that it had not consented to this obligation.[175] For practical reasons, therefore, states and non-governmental organisations such as the ICRC should continue to engage with these groups, for this opens up the discursive space, making it more likely to yield rules that insurgents consider legitimate and are thus willing to follow.[176]

Finally, it should be noted that non-state groups can also become bound by additional rules of IHL through both bilateral agreements with states (envisaged by common Article 3) and unilateral declarations.[177] Indeed, both have been used to incorporate the internment regimes applicable under GCIII and GCIV into specific non-international conflicts.[178] The normative status of commitments by non-state armed

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[174] Sivakumaran (n 136) 386.

[175] Baxter (n 69) 528.

[176] Sivakumaran (n 136) 394; Robert and Sivakumaran (n 118); S Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 IRRC 649. There are organisations that seek to do this: see, e.g., Geneva Call <www.genevacall.org> visited 15 October 2013. Such commitments appear to have effected an increase in rule compliance: P Bongard and J Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call *Deed of Commitment*' (2011) 93 IRRC 673.

[177] S Sivakumaran, 'Lessons from the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War' (2011) 93 IRRC 463.

[178] Unilateral declarations drawing on the GCIII regime were made, e.g., by the armed groups in the conflicts in Biafra, Eritrea, El Salvador, Turkey and Libya: see Sivakumaran, ibid, 478–9. As an example of a bilateral agreement incorporating rules of IHL generally, see, e.g., Abidjan Peace Agreement

groups, and particularly their character under public international law, is, however, disputed.[179] It is submitted that, at least in certain situations, these two types of commitment can create international legal obligations binding on non-state groups.[180] Regarding unilateral commitments, just as unilateral declarations by states under certain circumstances can create binding obligations for the state concerned,[181] so there is no reason why a commitment by a non-state group could not be considered binding on that group under international law, particularly given that their limited legal personality in this area allows them to be bound by customary IHL.[182] Indeed, UN and other bodies have referred to such commitments as binding non-state groups.[183] Regarding bilateral agreements between states and non-state groups, both the Security Council and other international bodies have held these also to bind the groups party thereto.[184] Many argue that there is no reason why an agreement between a state and non-state armed group could not constitute a treaty.[185] As a result, non-state groups are able to commit themselves to

between the Government of Sierra Leone and the Revolutionary United Front, 30 November 1996, art 21, <http://www.sierra-leone.org/abidjanaccord.html> accessed 17 December 2013.

[179] See, e.g., *Prosecutor v Kallon & Kamara* (n 92) [36]–[50] (finding that the Lomé Agreement between the central government and the RUF did not constitute a treaty as one of its parties was a non-state group that lacked treaty-making capacity). The decision has been criticised: C Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 AJIL 373, 387–8; A Cassese, 'The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty' (2004) 2 JICJ 1130.

[180] Similarly, see Roberts and Sivakumaran (n 118) 141–3 (on unilateral declarations) and ibid, 143–6 (on bilateral agreements).

[181] On the binding character of unilateral declarations by states, see *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, [43]; ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations with Commentaries Thereto' [2006] Ybk of the ILC, Volume II, Part II.

[182] See above, section 4.4.3.

[183] See, e.g., Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Sri Lanka, E/CN.4/2006/53/Add.5, 27 March 2006, [30], cited in Sivakumaran (n 12) 109; *Akayesu* (n 92) [627].

[184] See, e.g., UNSC Res 1127 (1997) (UNITA); Report of the International Commission of Inquiry on Darfur to the Secretary-General, S/2005/60, 1 February 2005, [174], both cited in Sivakumaran, ibid, 109.

[185] Bell (n 179) 380 (arguing that art 3 VCLT and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations of between International Organizations (21 March 1986), UN Doc A/CONF.129/15, confirm that agreements between states and non-state entities can constitute treaties under international law). See also 'Report of the ILC to the General Assembly: Document A/529' (1962) Ybk of the ILC, Volume II, 164 (art 3 of the ILC's Draft Articles on the Law of Treaties

additional rules of IHL through unilateral declarations and bilateral agreements with states and international bodies.

4.5 Conclusions

This chapter has explored the current state of IHL regarding the procedural regulation of internment in non-international armed conflict. Section 4.1 demonstrated that, unlike in international conflicts, in non-international conflicts IHL does not provide a legal basis for internment but, rather, assumes such a basis exists elsewhere, e.g. in domestic law. Section 4.2 then explored the regulation of internment by treaty-based IHL, challenging traditional arguments that it is silent in this area. It was argued that common Article 3 prohibits internment that is not necessary as a result of the conflict, e.g. for security reasons, which includes a requirement of release as soon as the reasons cease. Whilst a vague formulation, this is, nonetheless, an important finding, not least of all because IHL is the key body of international law that directly binds non-state groups party to non-international conflicts. Consequently, this chapter has demonstrated that there does exist a universal rule, applicable to both states and non-state groups, that regulates internment in such situations. None of the other procedural rules applicable in international conflicts applies, however. Furthermore, section 4.3 supported the ICRC's view that customary IHL prohibits 'arbitrary deprivations of liberty'. It was argued that this should be read as having the same content as the rule in common Article 3, such that internment will be 'arbitrary' where it cannot be shown to be necessary as a result of the conflict. Importantly, however, custom does not appear to have gone further in eliminating the distinction between international and non-international conflicts in this area. Finally, section 4.4 demonstrated that these rules bind both states and non-state groups.

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provided: '[c]apacity to conclude treaties under international law is possessed by States and by other subjects of international law').

It is worth noting here that there is nothing incompatible between the finding in section 4.1 that IHL does not provide a legal basis to intern in non-international conflicts and that in sections 4.2 and 4.3 that IHL prohibits internment that is not necessary as a result of the war. It might be argued that, once it is accepted that IHL regulates the act of internment itself (as opposed to treatment standards or conditions of detention), it must thereby *authorise* internment in certain situations. Thus, by claiming IHL prohibits unnecessary internment, so the argument goes, it must follow that IHL permits internment that *is* necessary, e.g. for reasons of security. However, as noted in section 4.1, it is important to remember that, whilst IHL *does not prohibit* internment where it is necessary as a result of the war, it does not thereby create a legal basis for internment for the purposes of IHRL. A similar distinction in a different context was acknowledged by the ICJ in *DRC v Uganda*. Here, the ICJ held that the Lusaka Agreement between the two parties, in laying down a timetable for the withdrawal of foreign forces from DRC territory, did not thereby constitute DRC consent to the presence of Ugandan forces on its soil for the remainder of the timetable; rather, the Agreement simply took as its starting point the realities on the ground and established a *modus operandi* for their cessation, but it did not make lawful the continued presence of Ugandan troops.[186] The same approach is taken here, such that the fact of internment is recognised by IHL and regulated, but a legal basis for internment is not thereby created. Importantly, this was confirmed in section 4.1 with reference to state practice: states rely not on IHL but domestic law or Security Council resolutions as providing the legal basis for their detention operations in non-international conflicts.[187]

Whilst this chapter has shown that IHL is not silent in this area, it is clear that it is

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[186] *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep 168, [98]–[105].

[187] See above at text to n 10.

very under-developed. Chapter three demonstrated that, in international conflicts, civilian internment is permitted in the territory of a party to the conflict 'only if the security of the Detaining Power makes it absolutely necessary' or, in occupied territory, where necessary 'for imperative reasons of security'.[188] Moreover, such internment must be subject both to initial and periodic reviews,[189] and release must occur as soon as the reasons justifying internment cease or, at the latest, at the cessation of hostilities.[190] Combatant internment, whilst not subject to the same review procedures, is limited to defined categories of persons who, by virtue of their status, are presumed to pose such a security threat as to render their internment necessary *ipso facto*.[191]

IHL applicable in non-international conflicts is, therefore, significantly less detailed in this area than in international conflicts. The subsequent chapters will now consider the relevance of IHRL and the extent to which that body of law provides further procedural safeguards to internees in non-international conflicts.

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[188] Arts 42 and 78 GCIV.

[189] Arts 43 and 78 GCIV.

[190] Arts 132–3 GCIV.

[191] Section 3.2.2.

5. THE PROCEDURAL REGULATION OF DETENTION UNDER INTERNATIONAL HUMAN RIGHTS LAW

The previous chapters have examined the regulation of internment under conventional and customary IHL. Chapter four demonstrated that IHL applicable in non-international conflicts is very limited here, simply requiring that any internment actually be necessary (and continue to be necessary) as a result of the conflict, e.g. for security reasons. This was shown to lack even more detail than the rules applicable in international conflicts, which themselves were revealed in chapter three to have shortcomings. This is notwithstanding the fact that IHL recognises that internment may occur in non-international conflicts.[1]

A significant gap therefore exists in IHL,[2] with the question arising as to what other rules of international law might apply here. This is the aim of chapters 5–7, which will examine the relevance of the other key body of international law concerned with the protection of individuals, international human rights law (IHRL). The present chapter will offer a general examination of the procedural rules applicable to detention under IHRL, whilst chapters six and seven will explore the application of those rules in non-international armed conflicts.

This chapter is divided into three sections. The first addresses a preliminary issue bearing on the relevance of IHRL for this thesis. Thus, section 5.1 considers the *prima facie* applicability of IHRL in armed conflict, including non-international armed conflict. After confirming that IHRL *prima facie* applies in such situations, section 5.2 then examines the procedural rules applicable to detention under IHRL, drawing comparisons to those under IHL. Section 5.3 then concludes the chapter with an examination of the extent to which these IHRL rules have crystallised as custom.

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1 See, e.g., art 5(1) APII.

2 I am using the word 'gap' in the sense employed by Sir Hersch Lauterpacht, i.e. 'gaps from the point of view of the logical unity and consistency of the law, of its actual effectiveness in meeting emergencies, and of the moral and social ends of the international legal system': Sir H Lauterpacht, *The Function of Law in the International Community* (reissue with foreword and introduction, OUP, Oxford 2011) 109.

5.1 Applicability of IHRL in Armed Conflict

Before examining the IHRL rules on detention, the preliminary issue of the applicability of IHRL in armed conflict must first be addressed. This section will demonstrate that IHRL continues *prima facie* to apply in armed conflict and, more specifically, non-international armed conflict. The purpose of this section is merely to address the general applicability of IHRL to the situations with which this thesis is concerned, in order to justify examining the relevant rules under that body in the following sections. The practical application of the specific IHRL rules on detention in non-international conflicts will then be addressed in chapters 6–7.

Traditionally, IHRL was not considered relevant to the actions of states in the context of armed conflict. Rather, the law of war and the law of peace (of which IHRL was considered part) were viewed as entirely separate.[3] Accordingly, it has been said that '[i]t was probably not assumed, at the time [of the drafting of the Universal Declaration of Human Rights] that human rights would apply to situations of armed conflict, at least not to situations of international armed conflict.'[4] David Kretzmer has suggested a more nuanced reading, stating that

> … the original assumption was that human rights treaties continue to apply in times of war, but only to the relationship which is the concern of those treaties, namely, that between governors and governed. There is no indication that States which drew up the conventions considered that declaration of a state of emergency and derogation from certain of the rights would be required in order to open the path for a State to resort to the laws and customs of war in an armed conflict with another State.[5]

[3] GIAD Draper, 'The Relationship between the Human Rights Regime and the Law of Armed Conflicts' (1971) 1 Isr Ybk Human Rights 191, 191–6; K Suter, 'An Inquiry into the Meaning of the Phrase "Human Rights in Armed Conflicts"' (1976) 15 *Revue de Droit Pénal Militaire et de Droit de la Guerre* 393.

[4] C Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 IRRC 501, 504. Similarly, see R Kolb, 'The Relationship Between International Humanitarian Law and Human Rights Law: a Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions' (1998) 38 IRRC 409.

[5] D Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflict' (2009) 42 Isr L Rev 8, 16. Similarly, see HRC, 'Fourth Periodic Report: United States of America', CCPR/C/USA/4, 22 May 2012, [506]–[507].

Kretzmer goes on to note, however, that, following the adoption of treaty rules on non-international armed conflicts in 1949, this distinction between the relationships to which the two bodies of law applied began to unravel; the relationship regulated by IHL in such situations is precisely the same as that regulated by IHRL.[6]

More generally, practice since the Second World War has confirmed that IHRL, *prima facie*, is applicable to the actions of states in the context of armed conflict, including those relationships which, on Kretzmer's account, were traditionally the exclusive domain of IHL.[7] For example, from the 1950s onwards, the UN, in both the General Assembly and Security Council, has invoked the continued relevance of IHRL during armed conflict.[8] The 1968 Tehran International Conference on Human Rights marked a significant milestone in this development, affirming the applicability of IHRL during armed conflict.[9] The General Assembly thereafter confirmed in a resolution that '[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict'.[10] This trend was continued at the 1974–7 International Conference on the Reaffirmation and Development of International

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6 Kretzmer, ibid, 18.

7 The structure of the following discussion was inspired by Droege (n 4) 504–9.

8 See, e.g., UNGA Res 804 (VIII) (1953) [2] (Korea); UNGA Res 1312 (XIII) (1958) [7] (Hungary); UNSC Res 237 (1967), preambular [2], UNGA Res 2546 (XXIV) (1969) [4], UNGA Res 3525 A (XXX) (1975) [11] (territories occupied by Israel); UNGA Res 46/135 (1991) preamble (Kuwait under Iraqi occupation); UNSC Res 1034 (1995) [1], UNGA Res 50/193 (1995) [3] (the former Yugoslavia); UNGA Res 52/145 (1997) [3] (Afghanistan); UNSC Res 1635 (2005) [7] (DRC); UNSC Res 1653 (2006) [6] (Great Lakes region); UNGA Res 67/262 (2013) [2] (Syria); UNSC Res 2111 (2013), preambular [6] (Somalia); UNSC Res 2095 (2013) [3] (Libya).

9 See, e.g., *Final Act of the International Conference on Human Rights*, UN Doc A/Conf.32/41, 22 April–13 May 1968; confirming this see UNGA Res 2444 (XXIII) (1968).

10 UNGA Res 2675 (XXV) (1970) [1].

Humanitarian Law, with the resulting Additional Protocols of 1977 confirming the applicability of human rights in armed conflict.[11]

In addition, the jurisprudence of international tribunals also confirms the continued applicability of IHRL to the actions of states during armed conflict. Thus, the ICJ held in its *Nuclear Weapons* advisory opinion that:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.[12]

In that case, the Court held that the right not arbitrarily to be deprived of one's life continues to apply even for persons who are lawful targets under IHL.[13] Moreover, the European Court of Human Rights (ECtHR) has applied the European Convention on Human Rights (ECHR) in international armed conflicts, including situations of occupation.[14] Similarly, the Inter-American Commission (IACiHR) and Court of Human Rights (IACtHR) have recognised the applicability of the American Declaration on the Rights and Duties of Man (ADRDM) and the American Convention on Human Rights (ACHR) to situations of armed conflict.[15]

It should be noted that there is some contrary practice in this area, most notably from the United States and Israel, both of which have continued to contest the application of

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[11] Art 72 API; preamble of APII; Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva 1987) [4429].

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

[13] Ibid. Similarly, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [106]; *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 116, [216]–[217]. The Court's approach to the relationship between IHL and IHRL in this area will be explored in section 6.1.1.

[14] See e.g. *Loizidou v Turkey,* App No 15318/89, Judgment (Grand Chamber), 18 December 1996; *Al-Skeini v United Kingdom*, App No 55721/07, Judgment (Grand Chamber), 7 July 2011.

[15] IACiHR, *Coard* et al *v United States*, Report No 109/99, 29 September 1999; IACiHR, *Alejandre v Cuba*, Report No 86/99, 29 September 1999; *Bamaca Velasquez v Guatemala*, Judgment, IACtHR (Ser C) No 70 (2000) [209]; IACiHR, *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba*, Decision of 12 March 2002, all cited in Droege (n 4) 508.

IHRL in armed conflict.[16] Louise Doswald-Beck, however, notes that '[t]hese are minority views which are contradicted by extensive practice to the contrary', and that, '[i]n addition, because of their lack of consistency, neither the United States nor Israel can be seen as persistent objectors to this rule.'[17]

It is clear, therefore, that states' IHRL obligations continue *prima facie* to apply during armed conflict, even with regard to those relationships for which IHL was traditionally designed. This is consistent with the text of the main human rights treaties, which, by including provisions permitting derogation in situations of emergency, imply that they will continue to apply in such situations *absent* derogation.[18] Moreover, in the situations relevant to this research, i.e. non-international conflict, it would seem even more self-evident that IHRL continues to apply absent derogation. First, the controversy that often arises regarding the applicability of IHRL in international armed conflicts, i.e. regarding the extraterritoriality of those obligations, does not arise in traditional internal conflicts involving a state and non-state group on the former's territory.[19] Second, as the quote above by Kretzmer demonstrates, the relationship at the heart of IHRL is at issue in non-international conflicts, i.e. that between a state and its own nationals.[20] Other commentators agree that it is in non-international conflicts, especially, that the continued

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[16] See, e.g., HRC, 'Second Periodic Report: Israel', CCPR/C/ISR/2001/2, 4 December 2001, [8]; HRC, 'Third Periodic Report: United States of America', CCPR/C/USA/3, 28 November 2005, [130]; HRC, Concluding Observations: United States of America, CCPR/C/US/CO/3/Rev.1, 18 December 2006, [10]. Similarly, see MJ Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Isr L Rev 453. Although note the more nuanced view of the Obama Administration: see above at n 5.

[17] L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, Oxford 2012) 8. Similarly, see W Kalin, 'Universal Human Rights Bodies and International Humanitarian Law' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar, Cheltenham 2013) 450 (fn 78) (referring to US practice in the Human Rights Council supporting resolutions calling for respect for human rights in armed conflict).

[18] See, e.g., art 4 ICCPR; art 15 ECHR; art 27 ACHR.

[19] On extra-territoriality, see section 7.2.

[20] See above at text to nn 5–6. Similarly, see H Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 JCSL 265, 275.

applicability of IHRL, alongside IHL, is most clear.[21] Indeed, even those generally sceptical of the applicability of IHRL in armed conflict accept its applicability in internal armed conflicts.[22] That a state remains bound by its obligations under IHRL in non-international conflicts has been confirmed both in international jurisprudence[23] and UN practice.[24]

IHRL continues, therefore, to apply in situations of armed conflict, including non-international conflicts. That default view might, however, be modified in specific cases, for example, through permissible derogation or as a result of the applicability of other relevant rules of international law; these issues will be addressed in chapters six and seven. Before that, however, and having demonstrated this preliminary point, we can now examine the procedural rules that apply to detention under IHRL.

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[21] See, e.g., K Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 AJIL 1, 25; J Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law & The Law of Non-International Armed Conflict in an Extraterritorial Context' (2007) 40 Isr L Rev 396, 401; S Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22 EJIL 219, 234.

[22] See, e.g., Dennis (n 16) 455 ('[t]he majority of states do appear to accept the view that the provisions of the international human rights treaties may continue to apply *domestically* during an internal armed conflict'); NK Modirzadeh, 'The Darks Side of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' in RA Pedrozo (ed), *The War in Iraq: A Legal Analysis* (2010) (Vol 86, US Naval War College International Law Studies) 396–8.

[23] See, e.g., IACiHR, *Juan Carlos Abella v Argentina*, Report No 55/97, 18 November 1997, [160] ('[i]t is … during situations of internal armed conflict that these two branches of international law [IHL and IHRL] most converge and reinforce each other'); IACtHR, *Bamaca Velasquez v Guatemala* (n 15) [208]–[214]; ACiHPR, *Amnesty International and others v Sudan*, Communication Nos 48/90, 50/91, 52/91, and 89/93 (2003); HRC, *Sarma v Sri Lanka*, CCPR/C/78/D/950/2000, 31 July 2003; HRC, Concluding Observations: Democratic Republic of the Congo, CCPR/C/COD/CO/3, 26 April 2006 (generally applying the ICCPR notwithstanding the existence of non-international armed conflicts; see especially ibid, at [16], reminding the state of their positive obligations to investigate abuses by rebel groups); ECtHR, *Al-Jedda v UK*, App No 27021/08, 7 July 2011.

[24] See, e.g., UNSC Res 1574 (2004), preambular [11] (calling for the respect of human rights law in the conflict in Sudan); UNSC Res 2120 (2013), preambular [24] (calling for compliance with IHRL by all parties to the conflict in Afghanistan); UNSC Res 2093 (2013), preambular [15] (condemning violations of IHRL in Somalia, including extrajudicial killings and arbitrary detentions); UNSC, Statement by the President of the Security Council, S/PRST/2013/15, 2 October 2013, [5] (condemning violations of IHL and IHRL by the Syrian authorities); UNGA Res 67/262 (2013), preambular [3] (condemning 'the continuation of grave violations of human rights by the Syrian authorities using heavy weapons, warplanes and Scud missiles to bomb neighbourhoods and populated areas').

5.2 The Procedural Rules Applicable to Detention under Human Rights Treaties

Although there are numerous international and regional human rights instruments, each specifying their own range of rights, certain norms can be discerned that are common to most or all such treaties. This is true of the procedural protections afforded to persons deprived of their liberty, which can be divided into five categories: the standard for detention (i.e. when detention is permissible); the right to know the reasons for one's detention; the right to judicial review of detention (*habeas corpus*); the right to periodic judicial review of detention; and the requirement of release where the reasons justifying detention cease. It is according to these five categories that the following sections are divided, and, as each set of rules is discussed, comparisons will be drawn to the IHL rules applicable in international and non-international conflicts. It is important to note that the goal here is not to provide a general overview of all aspects of these rules, but rather to highlight the key points that are of particular pertinence to the present thesis and will be drawn on in subsequent chapters.

These five sets of rules are best reflected in the International Covenant on Civil and Political Rights (ICCPR), with most other instruments containing similar or identical provisions. Consequently, as these rules are explored below, reference is made in the first instance to the ICCPR, with the equivalent provisions of the other general human rights treaties referenced therewith. Where other instruments differ, this is noted. The instruments on which this chapter draws are the ICCPR, ECHR, ACHR, ADRDM, Universal Declaration of Human Rights (UDHR), Arab Charter of Human Rights (ArCHR) and the African Charter on Human and Peoples' Rights (ACHPR).

It should be noted that the relevant provision of the ACHPR, Article 6, is very general, simply stating:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions

> previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

It does not contain the more specific procedural rules found in the other human rights treaties (such as *habeas corpus*). However, the African Commission on Human and Peoples' Rights (ACiHPR) has elaborated Article 6, most notably in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, which develops the rules laid down, *inter alia*, in Article 6.[25] Reference will therefore be made to these *Principles and Guidelines* in the sections below.

5.2.1 Standard for detention

As shown in chapter three, IHL applicable in international armed conflicts permits internment only where necessary for security reasons.[26] Whereas civilians can only be interned on the basis of an individual threat determination, combatants are assumed to constitute a security threat necessitating internment.[27] Chapter four then argued that, whilst the treaty provisions applicable in non-international conflicts do not contain explicit equivalent rules, they may be interpreted as prohibiting internment that is not necessary as a result of the conflict.[28] However, unlike in international conflicts, IHL provides no legal basis for interning in non-international conflicts.[29]

The two basic procedural rules on detention under IHRL are that everyone has the right to liberty,[30] and that nobody shall be subjected to arbitrary arrest or detention.[31] From

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[25] ACiHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted at 33rd session in Niamey, Niger, 29 May 2003, preamble <http://www.achpr.org/instruments/fair-trial/> accessed 11 December 2013.

[26] See section 3.2.

[27] Compare arts 42 & 78 GCIV with art 21 GCIII.

[28] See section 4.2.1.

[29] See section 4.1.

[30] Art 9(1) ICCPR; art 5(1) ECHR; art 7(1) ACHR; art I ADRDM; art 3 UDHR; art 6 ACHPR; art 14(1) ArCHR.

this, it is clear that the right to liberty is not absolute, but can be curtailed in certain circumstances.[32] Thus, from these two basic rules flows the requirement that '[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.'[33]

The ECHR differs here, as rather than simply prohibiting arbitrary detention, it lays out an exhaustive list of the bases on which a person may be deprived of their liberty.[34] Within this list there is no basis permitting preventive, security detention (i.e. internment), and consequently derogation would be necessary for such measures to be employed by a state party to the ECHR.[35] The ECtHR has, however, confirmed that the list of permissible grounds for detention in Article 5 ECHR is a manifestation of the underlying principle prohibiting arbitrary deprivation of liberty.[36] This may, therefore, be seen as a universal rule of IHRL, underpinning the regimes regulating detention in each of the key treaties. Importantly, this right has not only a negative aspect (i.e. states may not arbitrarily detain) but also a positive aspect (i.e. states must protect persons within their jurisdiction from being arbitrarily deprived of their liberty by others).[37] Positive obligations under human rights treaties are not absolute, but rather require states 'to exercise due diligence, i.e. to

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[31] Art 9(1) ICCPR; art 7(3) ACHR; art 9 UDHR; art 6 ACHPR; art 14(1) ArCHR.

[32] HRC, Draft General Comment No 35: Article 9, CCPR/C/107/R.3, 28 January 2013, [11].

[33] Art 9(1) ICCPR; art 5(1), *chapeau*, ECHR; art 7(2) ACHR; art XXV ADRDM; art 6 ACHPR; art 14(2) ArCHR.

[34] Arts 5(1)(a)–(f) ECHR.

[35] ECtHR, *A and others v UK*, App No 3455/05, Judgment (Grand Chamber), 19 February 2009, [172].

[36] *A and others v UK*, ibid, [164]; ECtHR, *Guide on Article 5: Right to Liberty and Security* (Council of Europe/ECtHR 2012) [1] (the aim of art 5 'is to ensure that no one should be deprived of [their] liberty in an arbitrary fashion').

[37] ECtHR, *Storck v Germany*, App No 62603/00, Judgment, 16 June 2005, [102]; ECtHR, *Guide on Article 5* (n 36) [15]; HRC, Draft General Comment No 35 (n 32) [9].

take all measures reasonably within their power in order to prevent violations of human rights.'[38]

The structure and content of the detention standards in IHL and IHRL therefore differ in important respects. Whilst IHL prohibits (in all armed conflicts) internment that is not necessary as a result of the war, e.g. for security reasons, IHRL prohibits unlawful or arbitrary detention more generally.[39] This difference between IHL and IHRL is explained by the fact that the IHL norm applies only in armed conflict and to deprivations of liberty with a nexus thereto, whereas IHRL applies at all times, governing primarily 'everyday' situations.[40] Consequently, rather than focusing on deprivations of liberty for a specific purpose (e.g. security reasons), IHRL (with the exception of the ECHR) simply sets out the two requirements of lawfulness and non-arbitrariness.[41]

Regarding the requirement of lawfulness under IHRL, the UN Working Group on Arbitrary Detention has suggested a strict interpretation:

> The requirement, which a 'law' has to meet, is that the national legislation must set down all permissible restrictions and conditions thereof. Therefore, the word 'law' has to be understood in the strict sense of a parliamentary statute, or an equivalent unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction …[42]

The broader requirement of non-arbitrariness has been elaborated in jurisprudence. For example, the HRC has stated:

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[38] M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, Oxford 2011) 210.

[39] As noted in section 4.2, whilst certain commentators refer to common art 3 as prohibiting 'arbitrary' detention, it was argued, on the basis of the relationship between common art 3 and the other provisions of the Geneva Conventions, that this should be read as prohibiting internment that is not necessary as a result of the war. Similarly, section 4.3 argued that the equivalent customary norm should be interpreted as having the same content as the conventional IHL norm (as opposed to drawing on IHRL).

[40] Droege (n 4) 521.

[41] See above, text to nn 30–33.

[42] UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004, [54(a)]. Similarly, see *Chaparro Alvarez and Lapo Iniguez v Ecuador*, Judgment, IACtHR (Ser C) No 170 (2007) [56] (adopting a similarly strict interpretation of 'law' for the purposes of art 7(2) ACHR).

> The drafting history of article 9, paragraph 1 [of the ICCPR], confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to a lawful arrest must not only be lawful but reasonable in all the circumstances.[43]

Indeed, the prohibition of arbitrary detention in Article 9 UDHR, on which Article 9 ICCPR was based, was drafted with this in mind, employing the term 'arbitrary' instead of 'unlawful', lest it restrict the protections thereunder.[44] The jurisprudence of the other human rights treaty bodies confirms these requirements of legality and non-arbitrariness in the broader sense.[45] The consequence of this dual requirement of a legal basis *and* non-arbitrariness more broadly is demonstrated in the HRC's Concluding Observations on Trinidad and Tobago, wherein it advised that a domestic statute granting police wide discretion in arresting individuals should be 'confined' so as to bring it into conformity with Article 9 ICCPR.[46] Similarly, the ECtHR in *Medvedyev v France* held:

> … where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty … be clearly defined and that the law itself be foreseeable in its application.[47]

Importantly, as part of this non-arbitrariness standard, jurisprudence has also confirmed the need for a proportionality assessment. The HRC, for example, has held that any

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[43] HRC, *Van Alphen v The Netherlands*, CCPR/C/39/D/305/1988, 15 August 1990, [5.8]. Similarly, see HRC, Draft General Comment No 35 (n 32) [13].

[44] L Marcoux Jr, 'Protection from Arbitrary Arrest and Detention under International Law' (1982) 5 Boston College Intl & Comp L Rev 345, 351–5.

[45] ECtHR, *Steel and others v UK*, App 24838/94, Judgment, 23 September 1998, [54]; ECtHR, *Saadi v UK*, App No 13229/03, Judgment, 29 January 2008, [67]–[74]; *A and others v UK* (n 35) [164]; *Tibi v Ecuador*, Judgment, IACtHR (Ser C) No 114, 7 September 2004, [98]; *Amnesty International and others v Sudan* (n 23) [58]–[59].

[46] HRC, Concluding Observations: Trinidad and Tobago, CCPR/CO/70/TTO, 10 November 2000, [16]. Similarly, see HRC, Draft General Comment No 35 (n 32) [22].

[47] *Medvedyev and others v France*, App No 3394/03, Judgment, Grand Chamber, 29 March 2010, [80]. Similarly, see ECtHR, *Guide on Article 5* (n 36) [22]; IACiHR, *Dayra María Levoyer Jiménez v Ecuador*, Report No 66/01, 14 June 2001, [37]; *Amnesty International and others v Sudan* (n 23) [58]–[59].

deprivation of liberty must be 'necessary in all the circumstances of the case',[48] requiring an examination of the proportionality of detention.[49] The ECtHR, too, has noted this requirement:

> The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained … The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty … The duration of the detention is a relevant factor in striking such a balance …[50]

The IACtHR has similarly emphasised this proportionality requirement and, in so doing, has noted that the purpose for which detention is claimed necessary must itself be legitimate.[51] Related to this, jurisprudence also confirms that detention will be arbitrary if taken for reasons related to the exercise of another right under IHRL, such as freedom of expression.[52]

5.2.1.1 The conformity of internment with the IHRL standard

Having introduced the IHRL standard governing detention, the compatibility with that standard of the type of detention that is the subject of this thesis, i.e. preventive, security

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48 *A v Australia*, CCPR/C/59/D/560/93, 3 April 1997, [9.2].

49 Ibid. Similarly, see S Shah, 'Administration of Justice' in D Moeckli, S Shah and S Sivakumaran (ed), *International Human Rights Law* (OUP, Oxford 2010) 308.

50 *Saadi v UK* (n 45) [70]. Similarly, see 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, [25] (Israeli Supreme Court).

51 *Chaparro Alvarez and Lapo Iniguez v Ecuador* (n 42) [93]. Similarly recognising the need for a legitimate reason for detention, see *Van Alphen v Netherlands* (n 43) [5.8]; UN Working Group on Arbitrary Detention, 'Fact Sheet 26' <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> accessed 19 October 2013. That detention must be based on legitimate grounds is inherent in art 5(1) ECHR's exhaustive list.

52 See, e.g., HRC, *Mukong v Cameroon,* CCPR/C/51/D/458/1991, 21 July 1994; HRC, Draft General Comment No 35 (n 32) [17]; UN Working Group on Arbitrary Detention, 'Fact Sheet 26', ibid; Shah (n 49) 309. Similarly, see UNGA Res 60/166 (2005) [4(f)] (condemning detention on the basis of religion or belief).

detention or ‘internment’, must be considered. It will be shown that, with the exception of the ECHR, internment is not necessarily in violation of IHRL, such that a state may intern in a manner that is consistent with its human rights obligations.

Internment clearly constitutes one form of detention to which the relevant rules of IHRL apply. It will be remembered that internment was defined in chapter one as a deprivation of liberty ordered by the executive, without criminal charge, for the purpose of preventing a security threat from materialising.[53] This may be compared to the language of a 1964 UN Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, in which detention for the purposes of IHRL was defined as

> … the act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities.[54]

Internment, being a deprivation of liberty and involving the confinement of a person to a particular place, would clearly satisfy this definition and would, therefore, be subject to the IHRL rules on detention. Indeed, this is confirmed by jurisprudence. The HRC, for example, has made clear that, ‘if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions [Article 9 ICCPR]’.[55] Similarly, the ECtHR has applied the Article 5 ECHR rules to cases of internment in situations of emergency.[56] Moreover, in their commentary on the jurisprudence of the IACtHR, Laurence Burgogue-Larsen and Amaya Ubeda de Torres state that ‘the text [of

[53] J Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’ (2005) 87 IRRC 375, 375–6.

[54] UN Department of Economics and Social Affairs, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN 4/826 Rev 1 (1964) [21].

[55] HRC, General Comment No 8: Right to Liberty and Security of Persons, 30 June 1982, [4], <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument> accessed 18 December 2013. Similarly, see HRC, *Macado de Cámpora v Uruguay*, CCPR/C/OP/2, 12 October 1982, [18.1].

[56] See, e.g., *Lawless v Ireland (No 3)*, App No 332/57, Judgment (Plenary), 1 July 1961; *Ireland v UK*, App No 5310/71, Judgment, 18 January 1978; *A and others v UK* (n 35) [172]; *Al-Jedda v UK* (n 23).

Art 7 ACHR on detention] includes every type of deprivation of liberty … so as to give as broad a scope as possible to protection under the Convention.'[57]

Given that internment constitutes detention for the purposes of IHRL, its compatibility with the IHRL standard must be examined. As noted above, for states party to the ECHR, internment is not provided for as a permissible ground for detention under Article 5(1) ECHR, and derogation is therefore necessary to adopt an internment regime.[58] Under the other human rights treaties, since they adopt an 'open' standard for detention (legality and non-arbitrariness), as opposed to a closed list of permissible grounds, internment is not necessarily unlawful. First, the requirement of a legal basis will be satisfied if it can be shown that a particular internment is based on 'such grounds and in accordance with such procedures established by law'.[59] Importantly, such a legal basis can be located not only in domestic law but also international law, including treaties or Security Council Resolutions.[60] As noted in chapter four, GCIII and GCIV provide the legal basis for combatant and civilian internment in international conflicts.[61] In non-international conflicts, however, IHL was shown to contain no such legal basis, requiring that one be found elsewhere.[62]

Second, there is nothing in the nature of internment that would necessarily breach the non-arbitrariness requirement under the IHRL standard. For example, as explained above, the HRC has interpreted the non-arbitrariness element as requiring that detention

[57] L Burgorgue-Larsen and AU De Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP, Oxford 2011) [478].

[58] *Ireland v UK* (n 56) [194]–[196]; *A v Others* (n 35) [172].

[59] Art 9(1) ICCPR.

[60] *Coard v US* (n 15) [52]; *Medvedyev v France* (n 47) [79]. The UK relied on a Security Council resolution as the basis for its internment of Al-Jedda: *Al-Jedda* (n 23) [16].

[61] See section 4.1.

[62] Ibid.

be appropriate, just and predictable.[63] Preventive, security detention ordered by the executive is not inherently at odds with these requirements. However, were the law permitting internment to be considered overly broad or vague, this would likely fail to meet the IHRL standard. Indeed, as noted above, international tribunals have held detention to be unlawful where it is based on domestic laws that are framed too broadly.[64] It is therefore important that the legal basis for internment be framed in a clear, predictable way.[65]

It should finally be noted, however, that, under IHRL, preference is often expressed for criminal, rather than administrative detention. Thus, there is an 'assumption [in IHRL] that the criminal justice system is able to deal with persons suspected of representing a danger to State security'.[66] Indeed, certain authorities take the same view regarding internment under IHL.[67]

To conclude this section, internment, whilst incompatible with Article 5 ECHR, is not as such prohibited by IHRL. Rather, in each case it would need to satisfy the elements

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[63] See above at text to n 43.

[64] See above at text to nn 46–7.

[65] Similarly, see *In re Guantanamo Detainee Cases*, 355 F Supp 2d 443 (DDC 2005) 474–8 (cautioning that the definition of 'enemy combatant' developed by the US for the purposes of defining who may be detained might be overly broad). Although note *Steel v UK* (n 45) [54]–[55] (the Court held that the ground for detention of 'breach of the peace' was not overly vague as its content had been elaborated in domestic jurisprudence).

[66] Pejic (n 53) 380. See, e.g., HRC, Concluding Observations: United States, CCPR/C/USA/CO/3, 15 September 2006, [19]; Chatham House and ICRC, 'Meeting Summary: Procedural Safeguards for Security Detention in Non-International Armed Conflict', London, 22–3 September 2008, 5 <http://www.chathamhouse.org.uk/files/15558_il220908summary.pdf> accessed 10 December 2013; HRC, Draft General Comment No 35 (n 32) [15].

[67] Y Dinstein, *The International Law of Belligerent Occupation* (CUP, Cambridge 2009) 173, citing HCJ 5784/03, *L Salame et al v IDF Commander of Judea and Samaria et al*, 57(6) PD 721, [6]. Similarly, see *Ajuri v IDF Commander* (n 50) [26]; Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff, Leiden 2009) 275. Although cf *Jose Padilla v CT Hanft*, 423 F.3d 386 (2005) 394–5 (rejecting the view that the availability of criminal process rendered detention in relation to the US conflict with al-Qaeda unnecessary within the meaning of the domestic law authorisation).

of the IHRL standard, as developed in jurisprudence.[68] Indeed, the HRC takes the same view, permitting internment but requiring its compliance with Article 9 ICCPR in each case.[69]

5.2.2 Reasons for detention

Chapter three explained that, where a person is interned for reasons of security in an international armed conflict, IHL requires the detaining authority to inform them of the reasons for their internment.[70] It was shown that this is a *sine qua non* to the effective exercise of the right to initial (and periodic) review, required by GCIV.[71] Chapter four, however, demonstrated that no equivalent conventional or customary rule of IHL exists applicable in non-international conflicts.

Like IHL applicable in international conflicts, IHRL similarly requires that all persons deprived of their liberty be informed of the reasons justifying their detention: 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.[72] Notwithstanding the reference to 'arrest' and 'charges against him', this provision applies to all forms of detention, criminal or otherwise.[73]

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[68] Similarly, see Doswald-Beck (n 17) 263; N Rodley and M Pollard, *The Treatment of Prisoners under International Law* (OUP, Oxford 2009) 467.

[69] HRC (n 55) [4]; *Mansour Ahani v Canada*, CPR/C/80/D/1051/2002, 15 June 2004, [10.2].

[70] See section 3.3.1.1

[71] Ibid.

[72] Art 9(2) ICCPR; art 5(2) ECHR; art 7(4) ACHR; art 14(3) ArCHR; Principles and Guidelines (n 25) Principle M.2(a).

[73] HRC, Draft General Comment 35 (n 32) [24]; ECtHR, *Van der Leer v Netherlands*, App No 11509/85, Judgment, 21 February 1990, [27]; Doswald-Beck (n 17) 265. The criminal law connotation does not exist in the case of art 7(4) ACHR, which requires simply that '[a]nyone who is *detained* shall be informed of the reasons for his detention' (my emphasis).

The treaties require that reasons be given either at the time of the initial detention or 'promptly' thereafter.[74] The ECtHR has stated the following regarding the 'promptness' standard in Article 5(2):

> While this information must be conveyed 'promptly' … it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.[75]

In one case, the Court held an interval of up to six and a half hours as not 'falling outside the constraints of time imposed by the notion of promptness',[76] whereas in another, involving immigration detention, the Court found a delay of seventy-six hours to breach Article 5(2) ECHR.[77]

Finally, the degree of information that must be imparted to the detainee is not specified. However, importantly for the present enquiry, the HRC has confirmed that it is insufficient to be told that one is arrested 'under prompt security measures without any indication of the substance' of the reasons for detention.[78] Furthermore, the ECtHR has held that simply stating the legal basis of the detention is insufficient, and instead the factual basis must also be conveyed.[79] It is submitted that the purpose served by this particular right sheds light on the extent of information required. Thus, as is the case with the equivalent right under IHL, knowing the reasons for one's detention is a *sine qua non* to challenging effectively the legality of that detention as part of *habeas corpus*

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[74] Specifically, the ICCPR and ArCHR require that the reasons be conveyed at the time of arrest; the ECHR states that the reasons must be conveyed 'promptly'; the ACHR states that '[a]nyone who is detained shall be informed of the reasons for his detention'; Principle M.2(e) of the ACiHPR's Principles and Guidelines (n 25) refers to notification of the reasons 'at the time of arrest'.

[75] *Kerr v UK*, App No 40451/98, Admissibility Decision, 7 December 1999.

[76] *Fox, Campbell and Hartley v UK*, App Nos 12244/86 and 12245/86, Judgment, 30 August 1990, [42].

[77] *Saadi v UK* (n 45) [81]–[85].

[78] HRC, *Adolfo Drescher Caldas v Uruguay*, CCPR/C/OP/2, 21 July 1983, [13.2].

[79] *Kerr v UK* (n 75).

proceedings (discussed immediately below).[80] The degree of detail required must, therefore, be the minimum necessary to challenge the basis of detention.

5.2.3 Habeas corpus

Chapter three demonstrated that civilian internees in international conflicts must receive an initial review by a court or administrative board to ensure that their internment is necessary for security reasons.[81] POW internment, on the other hand, is subject to no such review, given the assumption that their status as enemy combatants *ipso facto* renders their internment necessary for security reasons.[82] Chapter four then showed that, in non-international conflicts, neither treaty nor customary IHL requires an equivalent review procedure for internees.

The third procedural rule applicable to detention under IHRL similarly relates to review and requires that any person detained be given the right of access to *habeas corpus*:

> … [a]nyone 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.[83]

The various aspects of this right as developed in jurisprudence will now be examined.

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[80] Making this point, see HRC, Draft General Comment 35 (n 32) [25]; *Van der Leer v Netherlands* (n 73) [28]; *Fox, Campbell and Hartley* (n 76) [40]; *Juan Humberto Sanchez v Honduras*, Judgment, IACtHR (Ser C) No 99 (2003) [82].

[81] See section 3.3.1.1.

[82] See section 3.3.2.

[83] Art 9(4) ICCPR; art 5(4) ECHR; art 7(6) ACHR; art XXV ADRDM; art 14(6) ArCHR; Principles and Guidelines (n 25) Principle M.4.

5.2.3.1 'Without delay'

As Louise Doswald-Beck notes, there are two aspects to the requirement that a decision be made 'without delay' on the lawfulness of detention, 'the first being when a court is seised of the application and begins the inquiry, and the second being when a decision is reached.'[84] Regarding the first, the HRC has held a delay of seven days before which the detainee could challenge their detention to breach Article 9(4) ICCPR.[85] Applying the equivalent requirement in Article 5(4) ECHR, that a decision be made 'speedily', the ECtHR's jurisprudence confirms that this 'depends on all the circumstances.'[86] The Court has, however, held that six days 'sits ill with the notion of "speedily"'.[87] Similarly, the IACiHR held five days to be a 'very long delay' and incompatible with the requirement in Article 7(6) ACHR that the court decide 'without delay' on the lawfulness of detention.[88]

Regarding the second aspect of this temporal requirement, 'the test is whether the court acted with due diligence to make a decision as speedily as possible.'[89] Once again, the ECtHR has confirmed that the acceptable length of time for a decision to be made depends on the circumstances of each case.[90] In *Khudyakova v Russia*, it held an unjustified delay of 54 days to be impermissible.[91] Similarly, the HRC in *Mansour Ahani v Canada* held that a delay of nine and a half months violated this requirement.[92]

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[84] Doswald-Beck (n 17) 270. Similarly, see *Khudyakova v Russia*, App No 13476/04, Judgment, 8 January 2009, [97].

[85] HRC, *Torres v Finland*, CCPR/C/38/D/291/1988, 5 April 1990, [7.2].

[86] RCA White and C Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP, Oxford 2010) 239.

[87] *Çetinkaya and Çağlayan v Turkey*, App Nos 3921/02, 35003/02 and 17261/03, Judgment, 23 January 2007, [43].

[88] *Nativi & Martinez v Honduras*, Report No 4/87, 28 March 1987.

[89] Doswald-Beck (n 17) 271; *Khudyakova v Russia* (n 84) [97].

[90] *Sanchez-Reisse v Switzerland*, App No 9862/82, Judgment, 21 October 1986, [55].

[91] *Khudyakova v Russia* (n 84) [99]. See also ECtHR, *Kadem v Malta*, App No 55263/00, Judgment, 9 January 2003, [44]–[45] (17 days considered a violation); *Mamedova v Russia*, App No 7064/05, Judgment, 1 June 2006, [96] (26 days considered a violation).

[92] *Mansour Ahani v Canada* (n 69) [10.3].

5.2.3.2 The type of body and the procedures required

It is important that each human rights treaty requires that the detention review be carried out by 'nothing less than a formally constituted court.'[93] The HRC has found violations of Article 9(4) ICCPR where the review procedures do not employ formal courts. Thus, in *Torres v Finland*, the HRC stated that the possibility of applying to the Ministry of the Interior to review the legality of immigration detention,

> … while providing for some measure of protection and review of the legality of detention, does not satisfy the requirements of article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control.[94]

The other treaty bodies too have held that *habeas corpus* proceedings must be before a court that is independent of the executive authority that ordered the detention.[95] The ECtHR, whilst noting that the 'court' for the purposes of Article 5(4) does not have to be a 'court of law of the classic kind integrated within the standard judicial machinery of the country',[96] has confirmed that 'the authority called upon … must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case'.[97] That the body must be judicial, i.e. objective and independent from the executive,

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[93] Rodley and Pollard (n 68) 466.

[94] *Torres v Finland* (n 85) [7.2]. Similarly, see *Vuolanne v Finland*, CCPR/C/35/D/265/1987, 2 May 1989, [9.6] (holding that a superior military officer does not satisfy this requirement of review by a court, in the context of military disciplinary detention). Although note HRC, Draft General Comment No 35 (n 32) [46] (the 'court' in art 9(4) 'need not always be a court within the judiciary. For some forms of detention, a different tribunal of a judicial character may provide the necessary degree of impartiality, independence and procedural adequacy to satisfy the requirement').

[95] *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, IACtHR (Ser A) No 8 (1987), [30]; *Chaparro Alvarez and Lapo Iniguez v Ecuador* (n 42) [128] (noting that the review must be by a 'judge' or 'court'); *Amnesty International and others v Sudan* (n 23) [60]; Principles and Guidelines (n 25) Principles A.4(g) (requiring independence from the executive branch) and A.5 (requiring that the judicial officer has played no role in the particular case).

[96] *Weeks v UK*, App No 9787/82, Judgment, 2 March 1987, [61].

[97] *Neumeister v Austria*, App No 1936/63, Judgment, 27 June 1968, [24] of 'The Law'; *Weeks v UK*, ibid; *Stephens v Malta (No 1)*, App No 11956/07, Judgment, 21 April 2009, [95].

is consistent with the object and purpose of these provisions, which is to provide a check on the executive's detention authority and enforce the prohibition of arbitrary detention.[98]

In addition to the requirement of independence, jurisprudence has also confirmed that the reviewing court must have the power to order release where detention is found to be unlawful.[99] In *Chahal v UK*, for example, the ECtHR held that an advisory panel, which made recommendations to the Home Secretary regarding security detention pending deportation, did not satisfy Article 5(4) ECHR as it could not make binding decisions.[100] This interpretation is consistent with the text of the relevant provisions, which require that the court 'order' release where detention is found to be unlawful.[101]

The procedures required in *habeas corpus* hearings have also been addressed in case law. For example, the ECtHR has held that

> … the requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.[102]

Importantly, in that case, which concerned indefinite administrative detention (i.e. the kind with which we are dealing here), the Court stated that

> ... in view of the dramatic impact of the lengthy—and what appeared at the time to be indefinite—deprivation of liberty on the applicant's fundamental rights, Article 5 paragraph 4 must import substantially the same fair trial guarantees as Article 6 paragraph 1 in its criminal aspect.[103]

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[98] Confirming that this is the object and purpose of these provisions, see *Brannigan and McBride v UK*, App No 14553/89 and 14554/89, Judgment, 25 May 1993, [63]; *Khudyakova v Russia* (n 84) [93]; *Tibi v Ecuador* (n 45) [129]; *Habeas Corpus in Emergency Situations* (n 95) [33]; HRC, Draft General Comment 35 (n 32) [43] and [45]; *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Communication Nos 140/94, 141/94, and 145/95 (1999) [33].

[99] Doswald-Beck (n 17) 272.

[100] *Chahal v UK*, App No 22414/93, Judgment (Grand Chamber), 15 November 1996, [130]–[131]. Similarly, see *Singh v United Kingdom*, App No 23389/94, Judgment, 21 February 1996, [65]; *A v Australia* (n 48) [9.5]; HRC, Draft General Comment No 35 (n 32) [43].

[101] See above at n 83.

[102] *A and others v UK* (n 35) [203].

[103] Ibid, [216]–[217].

More specifically, tribunals have often suggested that, as part of the right to *habeas corpus*, detainees must appear before the court, in adversarial proceedings.[104] In addition, the HRC has also confirmed the importance of providing detainees with legal advice and representation as a *sine qua non* to the effective exercise of the right to *habeas corpus*:[105] '[i]n practice, it is virtually impossible for people to challenge their detention without legal representation.'[106] Indeed, in its Concluding Observations on Australia, the Committee went further and noted that, not only must this right to legal representation not be inhibited, it must also be brought to the attention of the detainee to enable them to avail themselves of it.[107] The other treaty bodies have similarly condemned cases in which detainees did not have access to a lawyer.[108]

5.2.3.3 Scope of review and the meaning of 'lawfulness'

The final issue regarding *habeas corpus* relates to the scope of review and, specifically, the meaning of 'lawfulness' in the *habeas* provisions. The HRC takes the view that, to satisfy Article 9(4) ICCPR, the court must examine not only the lawfulness of detention *vis-à-vis* domestic law, but also its lawfulness *vis-à-vis* international law, and specifically its compliance with Article 9(1) ICCPR (which, it will be remembered, requires both

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104 *Habeas Corpus in Emergency Situations* (n 95) [35]; ECtHR, *Toth v Austria*, App No 11894/85, Judgment, 12 December 1991, [84]; ECtHR, *Włoch v Poland*, App No 27785/95, Judgment, 19 October 2000, [125]–[131]; ECtHR, *Öcalan v Turkey*, App No 46221/99, Judgment, 12 May 2005, [68]; *Sanchez-Reisse v Switzerland* (n 90) [51] ('[t]he possibility for a detainee "to be heard either in person or, where necessary, through some form of representation" … features in certain instances among the "fundamental guarantees of procedure applied in matters of deprivation of liberty"').

105 *Berry v Jamaica*, CCPR/C/50/D/330/1988, 26 April 1994, [11.1].

106 S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (paperback edn, 2nd edn OUP, Oxford 2005) 334.

107 HRC, Concluding Observations: Australia, UN Doc A/55/40 (2000) [526]–[527]; Joseph *et al*, ibid, 335–6.

108 ECtHR, *Aksoy v Turkey*, App No 21987/93, Judgment (Merits), 18 December 1996, [81]–[84]; *Chahal v UK* (n 100) [130]; Principles and Guidelines (n 25) Principles M.2(b) and M.2(f); *Tibi v Ecuador* (n 45) [112].

lawfulness and non-arbitrariness in the broader sense).[109] Thus, in *A v Australia*, which involved administrative immigration detention, the Committee found there to be a violation of Article 9(4) as the court 'was, in fact, limited to a formal assessment of the self-evident fact that [the detainee] was indeed a "designated person" within the meaning of the Migration Amendment Act' [and therefore subject automatically to detention].[110] The other human rights treaty bodies have taken similar approaches regarding the scope of *habeas* review under their treaties.[111]

This interpretation of Article 9(4) ICCPR was criticised by Sir Nigel Rodley in his individual opinions in the HRC.[112] In his view, there is nothing in the text of Article 9(4) nor in the *travaux* that suggests 'legality' includes the requirement of conformity with the non-arbitrariness standard in Article 9(1);[113] indeed, the HRC's previous case law confirming that 'arbitrary' is wider than 'unlawful' suggests that the latter catches a smaller group of cases.[114] Rodley argues instead that those cases in which the review is limited to an examination of conformity with an arbitrary domestic law should be treated as being incompatible with Article 9(1) rather than Article 9(4).[115]

It is clear that the majority's approach in the HRC offers greater protections to detainees than Rodley's, and, for this reason, the majority's approach is supported by

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[109] *A v Australia* (n 48) [9.5]; *C v Australia*, CCPR/C/76/D/900/1999, 28 October 2002, [8.3]; *Baban et al v Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, [7.2]; HRC, Draft General Comment No 35 (n 32) [45].

[110] *A v Australia* (n 48) [9.5].

[111] See, e.g., ECtHR case law: *X v UK*, App No 7215/75, Judgment, 5 November 1981, [57]; *Brogan and others v UK*, App Nos 11209/84, 11234/84, 11266/84 and 11386/85, Judgment, 29 November 1988, [65]; *Chahal v UK* (n 100) [127]; *A and others* (n 35) [202]. Similarly, see inter-American case law: IACiHR, *Ferrer-Mazorra v United States*, Report No 51/01, 4 April 2001, [235].

[112] See, e.g., *C v Australia* (n 109), Individual Opinion of Committee Member Mr Nigel Rodley. Similarly, see HRC, 'Periodic Report of States Parties: Australia', CCPR/C/AUS/5, 19 February 2008, [12].

[113] Ibid.

[114] On that case law, see above at text to n 43.

[115] *C v Australia* (n 109), Individual Opinion of Committee Member Mr Nigel Rodley.

certain commentators.[116] However, requiring domestic courts to judge the compliance of detention under Article 9(1) ICCPR assumes that the Covenant applies directly in domestic law. As such, it fails to account for the diversity in domestic approaches to the incorporation of rules of international law, as only certain states will consider their international obligations as judiciable before domestic courts without further incorporation.[117] Notwithstanding the normative advantages of the majority opinion in the HRC, therefore, it seems that Rodley's criticisms thereof accurately reflect the current law. That said, given that the other treaty bodies follow the same approach, it seems that in practice this approach will be required of states parties.

5.2.3.4 Comparing *habeas corpus* under IHRL with the IHL review procedures

Habeas corpus serves the purpose of protecting against arbitrary deprivation of liberty.[118] It thus plays a very similar role to the initial review procedure required under IHL for civilian internees in international conflicts. As section 3.3.1 explained, GCIV provides for an initial review of the legality of internment by an 'appropriate court or administrative board' (in enemy territory) and a 'regular procedure' and 'right of appeal' (in occupied territory).[119] These review procedures serve to ensure civilian internment falls within the legal authority conferred on states by GCIV (i.e. that internment is necessary for the security of the detaining power), similarly protecting against arbitrariness.[120]

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[116] Joseph *et al* (n 106) 344.

[117] See, e.g., J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP, Oxford 2012) 63–4 (on the dualist approach in the UK to unincorporated treaties); *Medellin v Texas*, 552 US 491 (2008) (US Supreme Court) (concluding that, inter alia, the UN Charter had not been incorporated into US law and was not, therefore, justiciable).

[118] See above at n 98.

[119] Arts 43 & 78 GCIV.

[120] *Prosecutor v Zejnil Delalić* et al (Trial Judgment) ICTY-96-21 (16 November 1998) [580]–[581].

Both IHL and IHRL thus serve to protect against arbitrary deprivations of liberty, in part, by requiring that review procedures be provided. Moreover, in certain respects, jurisprudence has developed a similar content to the IHL requirement of review and the IHRL requirement of *habeas corpus*. It was explained in section 3.3.1.1, for example, that the ICTY considers GCIV to require that the review body have the power to order release;[121] this, as noted above, is similarly required for courts carrying out *habeas* reviews.[122] It also seems self-evident that, in order properly to perform their function as checks on the detention authority of states, the IHL review procedures must operate impartially and independently from the authority that ordered internment.[123] This is inherent in the *habeas corpus* procedure, which must be performed by a court, situated outside the executive branch.[124] In these respects, the review procedures under IHL and IHRL are similar.

However, significant differences remain between the two, both on the text of the provisions and as they have been developed in jurisprudence. First, unlike *habeas corpus*, it is clear that GCIV does not require a court, and instead a non-judicial, administrative board (that is not outside the executive branch) suffices.[125] Second, case law has not elaborated on the procedures required in GCIV review proceedings, in contrast to IHRL, where, for example, legal counsel and the right to challenge the evidence against the detainee are considered important.[126] Third, no guidance on the scope of review under GCIV has been developed.[127] This is in contrast to the ICCPR and ECHR, for example,

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[121] *Prosecutor v Zejnil Delalić* et al (Appeals Judgment) ICTY-96-21-A (20 February 2001) [329].

[122] See above, text to nn 99–101.

[123] JS Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva 1958) 260; Pejic (n 53) 386; Chatham House and ICRC (n 66) 15.

[124] See above, text to nn 93–7.

[125] See arts 43 & 78 GCIV.

[126] See above, text to nn 104–8.

[127] See the discussion in section 3.3.1.1.

where the relevant provisions have been interpreted as requiring review of both the legality of detention and its compliance with the Covenant and Convention more generally.[128] Finally, as explained in section 3.3.2, POWs are entitled to no review under comparable to *habeas corpus*.

It is clear, therefore, that, notwithstanding their shared purpose, the review procedures under IHL and IHRL are fundamentally different, with the former leaving far more discretion to the detaining power. This difference is a result of the role of military necessity in IHL, reserving greater areas to the discretion of states in times of extraordinary circumstances.[129] That IHL is designed specifically for armed conflict, whereas IHRL is designed primarily for 'ordinary' situations, was explained above as the reason also for the different approaches taken to the standard for detention.[130]

5.2.4 Periodic review

Chapter three demonstrated that IHL requires periodic review of civilian internment in international conflicts.[131] As explained, the purpose of this is to re-examine the original determination that internment is necessary in light of changing circumstances; it thus helps to enforce the requirement that no person be interned 'for a longer time than the security of the Detaining State demands'.[132] As with initial review, periodic review does not extend to POWs, by virtue of the assumption that their status as enemy combatants renders their internment a necessity for the duration of hostilities.[133] Chapter four, furthermore,

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[128] See above, text to nn 109–11.

[129] N Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Isr L Rev 355, 360–61.

[130] See section 5.2.1.

[131] Arts 43 and 78 GCIV. See section 3.3.1.2.

[132] Pictet, *GCIV* (n 123) 261; *Delalić* (n 120) [581].

[133] See section 3.3.2

demonstrated that there is no requirement of periodic review under the IHL rules applicable in non-international conflicts.

Nothing in the text of the human rights treaties provides specifically for periodic review of detention, independent of *habeas corpus* review. However, jurisprudence has confirmed that IHRL too requires periodic review at 'reasonable intervals' in certain circumstances, e.g. where the original basis for detention may cease to apply. The HRC, for example, has held that Article 9(4) ICCPR, in certain cases, requires periodic review:

> The Committee observes … that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.[134]

This interpretation of the *habeas* provisions seems appropriate. First, none of the human rights treaties suggests that review may occur only once. Instead, each refers simply to the right of the individual to 'take proceedings', 'petition', or to have 'recourse' to a court, without suggesting that this is limited to an initial review.[135] Second, interpreting the *habeas* provisions so as to require periodic review helps to ensure no person is interned for longer than is justified, thus upholding the object and purpose of these provisions, i.e. to enforce the prohibition of arbitrary detention.

Finally, it is noteworthy that the HRC's case law above involved administrative, immigration detention.[136] In such cases, where the end-point of detention is undefined, the need for periodic review is clear given its importance in ensuring that detention does not become arbitrary. This need similarly exists with the kind of detention with which this

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[134] *A v Australia* (n 48) [9.4]. Similarly, see *C v Australia* (n 109) [8.3]; HRC, Draft General Comment No 35 (n 32) [13]. The ECtHR has taken the same view: *Luberti v Italy,* App No 9019/80, Judgment, 23 February 1984, [31]; *Bezicheri v Italy*, App No 11400/85, Judgment, 25 October 1989, [20]; *Assenov and others v Bulgaria*, App No 24760/94, Judgment, 28 October 1998, [162]; *Lebedev v Russia*, App No 4493/04, Judgment, 25 October 2007, [78]–[79]; ECtHR, *Guide on Article 5* (n 36) [187].

[135] See, e.g., arts 5(4) ECHR and 9(4) ICCPR.

[136] See above at n 134.

thesis deals (i.e. internment), and thus the same rationale as justifies the need for periodic review in immigration detention applies here.

5.2.5 Release from detention

As shown in section 3.4.1, civilian internees in international conflicts must be released once the reasons justifying their internment cease and, if not before, at the cessation of hostilities.[137] That release must occur where the reasons cease was explained as an essential aspect of the rule that internment only occur where necessary for security.[138] The obligation regarding POWs, on the other hand, is merely to release when hostilities cease, for the reasons necessitating their internment are assumed to co-exist with hostilities.[139] Chapter four argued that the same obligation to release where the justifications cease applies in non-international conflicts, based on its inseparability from the basic prohibition of internment that is not necessary as a result of the war.[140]

Although there is no explicit provision in the human rights treaties defining the point of release, jurisprudence has addressed this. Thus, the HRC has held that, '[i]n order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification'.[141] The requirement of release where the justification ceases is therefore similarly considered inherent to the prohibition of arbitrariness. Given that the prohibition of arbitrary detention lies at the heart of all of the key human rights treaties,[142] and given that the need for *continued* justification is inherent to this basic norm, the requirement that detainees be released

[137] Arts 132(1) and 133(1) GCIV.

[138] See section 3.4.1

[139] See section 3.4.2.

[140] See section 4.3.2.

[141] *Baban v Australia* (n 109) [7.2]. Similarly, see *C v Australia* (n 109) [8.2]; HRC, Draft General Comment No 35 (n 32) [13].

[142] See section 5.2.1.

where the reasons justifying their detention cease must apply under each of these treaty regimes.

An important point must be noted here which differentiates IHRL from IHL: certain human rights bodies are particularly sceptical of prolonged, indefinite detention.[143] This is in contrast to IHL, where indefinite detention is an inherent part of internment for security reasons. The ECtHR, whilst not considering indefinite detention itself to be unlawful, treats is as part of its proportionality assessment. Thus, in highlighting the need for proportionality between the importance of the purpose for which detention serves and the importance of the right to liberty, the Court has held that the 'duration of the detention is a relevant factor in striking such a balance'.[144] As detention becomes increasingly prolonged, therefore, one might reasonably argue that the burden required to justify its continuation should be increasingly high. We will return to this issue in chapter eight.

5.2.6 Conclusions on the rules under IHRL

The above sections have explored the five categories of procedural rules applicable to detention under IHRL. As demonstrated, similarities exist between those rules and the rules applicable to internment in international armed conflicts under IHL. However, it has also been shown that these rules differ in fundamental respects. Most importantly, regarding review, IHRL is more stringent than IHL, in its requirement of *court* rather than *administrative* review. In addition, human rights jurisprudence has developed detailed rules regulating these review proceedings. Moreover, IHRL appears far more sceptical of

[143] Pejic (n 53) 382–3; A de Zayas, 'Human Rights and Indefinite Detention' (2005) 87 IRRC 15. See, e.g., IACiHR, 'Annual Report: 1976', OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1 of 7 June 1977, Section II, Part II; UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, [60]; UN Working Group on Arbitrary Detention, *Obaidullah v United States*, A/HRC/WGAD/2013/10, 12 June 2013, [24].

[144] *Saadi v UK* (n 45) [70].

prolonged, indefinite detention than IHL, with the potential that, the longer it continues, the more likely it is to be labelled as ‘arbitrary’.

It was noted at the outset of this chapter that the goal of the remainder of this thesis is to consider the degree to which IHRL addresses the gaps left in this area by IHL. Whilst it was shown in section 5.1 that IHRL continues *prima facie* to apply in armed conflict, the practical application of the rules on detention in non-international armed conflicts remains to be examined in chapters six and seven. Before that, section 5.3 will conclude this chapter with an examination of the customary status of the rules explored above.

5.3 The Procedural Rules Applicable to Detention under Customary International Law

An examination of the extent to which customary international law contains procedural rules applicable to detention, and more specifically whether the treaty rules explored in section 5.2 have crystallised as custom, is necessary for three reasons. First, not all states are party to the general human rights treaties discussed in the previous sections, raising the question of what rules of international law, if any, apply to detentions by such states.[145] Second, whether IHRL obligations derive from treaties or general international law may impact on the effect of those obligations in domestic law, for many states adopt a dualist approach to treaties (requiring transposition into municipal law) and a monist approach to

[145] This is particularly pertinent for states not party to the ICCPR, in parts of the world that have no regional human rights conventions, such as China (which has signed but not ratified the ICCPR) and certain southeast Asian nations including Myanmar, Bhutan, Malaysia and Brunei: <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en> accessed 30 January 2014. Indeed, Myanmar, for example, has, since it gained independence in 1948, been embroiled in internal armed conflicts: Human Rights Watch (Report), ‘Untold Miseries: Wartime Abuses and Forced Displacement in Burma’s Kachin State’ (20 March 2012) <http://www.hrw.org/reports/2012/03/20/untold-miseries> accessed 14 November 2013. Whether any other rules of international law might apply in such situations, other than the minimal standards in IHL, must, therefore, be examined.

general international law (not requiring transposition).[146] If transposition is necessary, an individual will not be able to invoke the specific right in domestic courts until such transposition occurs.[147] Finally, the particular source from which these rules are derived may affect their binding nature *vis-à-vis* non-state armed groups party to non-international conflicts. As will be discussed in section 7.3, whereas human rights treaties bind only states, certain customary norms bind both states and non-state groups alike.

In section 4.3, an examination of customary IHL was carried out, limited to practice and *opinio iuris* relating to internment specifically in non-international armed conflict. The purpose of this was to explore whether the distinction between international and non-international conflicts with respect to the procedural regulation of internment has been eliminated through custom. It was shown that no such conclusion can be made, but that there was a basic customary rule applicable in non-international conflicts prohibiting internment where not necessary as a result of the conflict. This section is now concerned with customary international law generally, based on practice and *opinio iuris* in all situations. It will be shown that a general customary rule exists prohibiting arbitrary deprivation of liberty and that contained within this norm is the obligation to release where the reasons justifying detention cease. It will then be argued, however, that the other procedural rules of IHRL explored in this chapter, namely, the obligation to give reasons and the right to *habeas corpus*, are not so clearly part of customary international law, given the difficulty in demonstrating an *opinio iuris* to that effect.

[146] B Simma and P Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–9) 12 Australian YB Intl L 82, 85–6; T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP, Oxford 1989) 4–6.

[147] See, e.g., *Medellin v Texas* (n 117).

5.3.1 The prohibition of arbitrary deprivation of liberty

Regarding the arbitrary deprivation of liberty prohibition, it is worth repeating an earlier quote from chapter four. There, the ICRC Study on *Customary International Humanitarian Law* was relied upon, which concluded that 'all States have legislation specifying the grounds on which a person may be detained'.[148] Whilst the specific reasons for detention were noted to vary across states,[149] this constitutes widespread practice in favour of the view that detention must be based on pre-determined grounds, and it may be considered to demonstrate a general rejection of a right arbitrarily to detain. Indeed, this legislation is supported by constant reassertions by states in a vast range of different fora regarding the protection of the right to liberty.[150] This extensive practice in domestic law is in addition to the widespread practice of states ratifying the IHRL instruments discussed in this chapter, containing the procedural rules explored above.[151]

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[148] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (CUP, Cambridge 2005) 347.

[149] Ibid.

[150] See, e.g., HRC, 'Fifth Periodic Report: Finland', CCPR/C/FIN/2003/5, 24 July 2003, [131]–[134] (setting out the strict limitations on the deprivation of liberty under Finnish law); HRC, 'Fifth Periodic Report: Poland', CCPR/C/POL/2004/5, 26 January 2004, [157] (setting out the right to liberty under Polish law); HRC, 'Third Periodic Report: Azerbaijan', CCPR/C/AZE/3, 10 December 2007, [37], (stating the limited grounds on which persons may be detained under Azerbaijani law); Nepal, 'His Majesty's Government's Commitment on the Implementation of Human Rights and International Humanitarian Law', 26 March 2004, [3]–[10], annexed to International Commission of Jurists, *Nepal: The Rule of Law Abandoned* (ICJ, Geneva 2005) (committing to uphold the key aspects of the right to liberty, as elaborated in this chapter); UN Secretary-General, 'Report on Information Submitted by Governments Pursuant to Sub-Commission Res 7 (XXVII) of 20 August 1974', E/CN.4/Sub.2/1990/20, 19 July 1990, [2], [11] and [15], (stating that the Human Rights Commission of the Philippines had confirmed that every person residing in the Philippines had the right not to be detained unlawfully), cited in ICRC, Customary IHL Database: Practice Relating to Rule 99 Deprivation of Liberty (British Red Cross/ICRC) <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99> accessed 10 December 2013; Sri Lanka, Statement by the President of Sri Lanka, 'Directions Issued by Her Excellency the President, Commander-in-Chief of the Armed Forces and Minister of Defence', Colombo, 31 July 1997, [1]–[6] (stating that anyone detained must be so in accordance with the law and proper procedure), cited in ICRC, ibid; United Kingdom, 'Government Response to the Intelligence and Security Committee's Report on Rendition', Cm 7172, July 2007, 8 (confirming that 'the UK opposes any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law'), cited in ICRC, ibid.

[151] As at 18 December 2013, there are 167 parties to the ICCPR, 47 parties to the ECHR, 23 parties to the ACHR, 53 parties to the ACHPR, and 13 parties to the ArCHR (including Palestine).

It has been accepted that both national legislation and treaty ratification constitute legitimate forms of state practice for the purpose of determining the content of customary international law.[152] However, such practice can only lead to the crystallisation of customary rules where accompanied by an *opinio iuris*. Proving the existence of an *opinio iuris* in this area is complicated by the fact that the rules under discussion are codified in widely ratified treaties; the practice referred to above (e.g. national legislation), it might therefore be argued, is merely reflective of those states' *conventional* obligations, rather than any belief as to the content of *customary* law.[153] It is submitted, however, that these difficulties can be overcome so as to demonstrate that customary international law prohibits arbitrary deprivations of liberty in all situations. In this regard, both the practice of states not party to the general human rights treaties, together with certain UN practice, is important. Regarding the former, judicial and legislative practice of certain non-states parties to the ICCPR and regional treaties that suggests a rejection of unfettered detention power supports the proposition that the arbitrary deprivation of liberty is prohibited by custom.[154] As the practice of non-states parties, there is no question of this arising from

[152] See, e.g., M Akehurst, 'Custom as a Source of International Law' (1974–5) 47 BYIL 1, 8–9 and 43–4.

[153] RR Baxter, 'Treaties and Custom' (1970) 129 *Recueil des Cours* 27, 64 ('[a]s the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty') and ibid, 73 ('[a]s the express acceptance of the treaty increases, the number of states not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty').

[154] See, e.g., Myanmar, *Defence Services Act* (1959), s 49(a) (providing for the punishment of 'any person subject to this law who … unnecessarily detains a person in arrest or confinement'), cited in J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume II: Practice* (CUP, Cambridge 2005) 2335 [2594]; Malaysia, High Court (Kuala Lumpur), *Malek* case, Judgment, 18 October 2007, [18] (stating that '[t]he preservation of the personal liberty of the individual is a sacred universal value of all civilized nations and is enshrined in the Universal Declaration of Human Rights'), cited in ICRC, Customary IHL Database (n 150); China, *Constitution*, 1982, as amended in 2004, art 37 ('[f]reedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's courts … Unlawful detention or deprivation or restriction of citizen's freedom of the person by other means is prohibited'), cited in ICRC, ibid; Cooperation Council for the Arab States of the Gulf, 13th Session, Abu Dhabi, 21–3 December 1992, Final Communique, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc A/47/845-S/25020, 30 December 1992, 6 ('arbitrary arrests represent a total contravention of all the Charters, Law and Conventions of the International Community of Nations'—the UAE, Qatar and Bahrain were all members of the

any conventional obligations, and it is, therefore, especially important as practice contributing to the formation of a customary rule.[155]

Regarding UN practice, particularly resolutions of the Security Council and General Assembly, this constitutes an important source of the collective practice and *opinio iuris* of those states supporting a specific resolution.[156] Especially relevant here are resolutions relating to detention that refer to the international obligations, first, of non-states parties to the key human rights treaties, and, second, of states in general (i.e. without regard to particular states' treaty obligations). The former demonstrate a belief amongst those states supporting the resolution that, notwithstanding non-ratification of the ICCPR and other human rights treaties, the particular non-state party is bound by a norm of international law prohibiting arbitrary detention; such a norm, absent treaty obligations, must come from general international law.[157] The latter, by not differentiating between those states that are party to particular human rights treaties and those that are not, assume the existence of a rule of general international law prohibiting the arbitrary deprivation of

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Cooperation Council for the Arab States of the Gulf at this time and did not have any treaty obligations prohibiting the arbitrary deprivation of liberty), cited in ICRC, ibid.

[155] Similarly, see T Meron, 'Revival of Customary Humanitarian Law' (2005) 99 AJIL 817, 833.

[156] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, [118] (employing UN resolutions as evidence of the *opinio iuris* of those states supporting them); *Legality of Nuclear Weapons* (n 12) [70] (recognising that in certain cases UNGA resolutions can constitute evidence of *opinio iuris*); MD Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 EJIL 879, 898.

[157] See, e.g., the UNSC resolutions on South Africa, condemning arbitrary detentions, before that state ratified the ICCPR: UNSC Res 417 (1977), adopted unanimously, at [3(b)] (demanding '[r]elease [of] all persons imprisoned under arbitrary security laws and all those detained for their opposition to *apartheid*'); UNSC Res 473 (1980), adopted unanimously, at preamble (referring to the 'inalienable human and political rights as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights', art 9 of the latter prohibiting arbitrary detention); UNSC Res 569 (1985), adopted by 13 votes to none with 2 abstentions (UK and US) at [2] ('[*s*]*trongly* condemns the mass arbitrary arrests and detentions recently carried out by the Pretoria Government'). See also resolutions on Myanmar, condemning arbitrary detentions: UNGA Res 55/112 (2001), without vote, at [4] ('[*d*]*eplores* the continued violations of human rights in Myanmar, including … mass arrests'); UNGA Res 67/233 (2012), without vote, at [6] ('[*e*]*xpresses* concern about remaining human rights violations, including arbitrary detention); UNGA Res 66/230 (2011), 83-21-39, at [9] ('[*e*]*xpresses grave concern* at the continuing practice of arbitrary detention … and urges the Government of Myanmar to undertake without further delay a full, transparent, effective, impartial and independent investigation into all reports of human rights violations'). See also UNGA Res 40/161 A (1985), at [1]–[3] (condemning arbitrary detentions of Arabs by Israel and demanding their release, before Israel had ratified the ICCPR).

liberty.[158] Together, these two types of resolutions reflect a clear *opinio iuris* supporting the conclusion that arbitrary detention is prohibited under customary international law.

In addition, reference may be made to other sources that evidence an *opinio iuris* supporting the customary prohibition of the arbitrary deprivation of liberty. These come, for example, in the form of executive and judicial statements expressing a general rejection of the right of any state to detain arbitrarily.[159] Moreover, the UN Working Group on Arbitrary Detention, in a 2012 deliberation, similarly concluded that customary international law prohibits arbitrary deprivations of liberty.[160] Finally, this conclusion is supported by the American Law Institute's (ALI) authoritative *Restatement (Third) of the Foreign Relations Law of the United States*, which declares that '[a] state violates [customary] international law if, as a matter of state policy, it practices, encourages, or condones … prolonged arbitrary detention.'[161] Louis Henkin invoked the ALI's statement of customary human rights norms as an example of a new form of customary law, which

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[158] See, e.g., UNGA Res 61/171 (2006), without vote, at [8] ('*[o]pposes* any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law, and urges States to respect the safeguards concerning the liberty, security and dignity of the person'); UNGA Res 62/159 (2007), without vote, at preamble ('[*n*]*oting with concern* measures that can undermine human rights and the rule of law, such as the detention of persons suspected of acts of terrorism in the absence of a legal basis for detention and due process guarantees, the deprivation of liberty that amounts to placing a detained person outside the protection of the law …, the illegal deprivation of liberty and transfer of individuals suspected of terrorist activities'); UNGA Res 59/199 (2004), 186-0-0, at [3] ('… *urges* States to ensure, in particular, that no one within their jurisdiction is, because of their religion or belief, deprived of the right to life, liberty and security of person … and the right not to be arbitrarily arrested or detained'); UNGA Res 61/161 (2006), without vote, at [4(f)] (urges states 'to ensure that no one within their jurisdiction is deprived of the right to life, liberty or security of person because of religion or belief and that no one is subjected to … arbitrary arrest or detention on that account').

[159] See, e.g., *Kemal Mehinovic et al v Nikola Vuckovic* (2002) 198 F Supp 2d 1322 (US District Ct for the Northern District of Georgia), 1349; *A and others v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [130]; United Kingdom, 'Government Response to the Intelligence and Security Committee's Report on Rendition', Cm 7172, July 2007 at 8 (confirming that 'the UK opposes any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law'), cited in ICRC, Customary IHL Database (n 150).

[160] UN Working Group on Arbitrary Detention, 'Deliberation No 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty under Customary International Law' in UN Human Rights Council, 'Report of the Working Group on Arbitrary Detention', A/HRC/22/44, 24 December 2012.

[161] ALI, *Restatement (Third): The Foreign Relations Law of the United States, Vol II* (ALI, St Paul 1987) 161, s 702(e). Even the US Supreme Court in *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004) at 737 appeared to accept this.

emerges on the basis of 'common consensus' rather than practice and *opinio iuris*.[162] However, this section has demonstrated that the traditional tools of custom do in fact point to a prohibition of the arbitrary deprivation of liberty. Indeed, evidence of contrary practice does not undermine this finding, for the references above, e.g. to UN resolutions, confirm that such contrary practice is treated as a violation of international law and not as a negation of the customary rule.[163]

The content of this customary prohibition, however, is not entirely clear, for many of the references above, particularly the UN resolutions invoked as evidence of *opinio iuris*, do not elaborate on what constitutes 'arbitrariness' here.[164] The ordinary meaning of the term would suggest notions of an unrestrained 'exercise of will', of 'uncontrolled power or authority', as well as being 'uncertain', 'varying' or 'at the discretion or option of any one'.[165] As demonstrated in section 5.2.1, the notion of arbitrariness has been heavily elaborated by human rights bodies. Indeed, it is to this jurisprudence that a number of the authorities cited above refer in giving content to the customary prohibition of arbitrary detention. This was the approach, for example, of the UN Working Group on Arbitrary Detention, which, after concluding that arbitrary detention is prohibited under custom, drew on human rights treaties and case law to demonstrate that the prohibition covers detentions that are both illegal and arbitrary in the broader sense of the HRC.[166] The ICTY has adopted the same approach in its jurisprudence on the crime against humanity of imprisonment.[167] In interpreting the content of this underlying crime, the Trial Chamber

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[162] L Henkin, 'Human Rights and State "Sovereignty"' (1995/6) 25 Ga J Intl & Comp L 31, 35–9.

[163] Similarly, see *Nicaragua* (n 156) [186].

[164] See, e.g., UNSC Res 569 (1985) [2]; UNGA Res 40/161 A (1985) [1]–[3].

[165] *Oxford English Dictionary* (Online) <http://www.oed.com/> accessed 18 December 2013.

[166] UN Working Group on Arbitrary Detention (n 160) [61]–[63].

[167] The ICTY has jurisdiction over the crime against humanity of imprisonment under its statute: Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by UNSC Res 827 (1993), amended by UNSC Res 1877 (2009), art 5(e).

has held that 'any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5(e)'.[168] The Tribunal then looked to IHRL to give content to this prohibition, stressing the need for both a legal basis and non-arbitrariness in the broader sense.[169]

On the one hand, by drawing on the jurisprudence of human rights treaty bodies, the above approaches could be criticised on the basis that it is not clear how states not party to the relevant treaties could be bound by the jurisprudence of those treaty bodies. However, given that these elaborations of the notion of arbitrariness are consistent with that term's ordinary meaning, it is submitted that this is an appropriate approach to giving content to the customary norm.[170]

5.3.2 Release where the justifications cease

As was shown to be the case in both chapters three and four regarding IHL,[171] as well as in section 5.2.5, above, regarding human rights treaty law, the arbitrary deprivation of liberty prohibition in customary international law may similarly be considered to contain within it a requirement that detention only persist for so long as it is lawful and non-arbitrary. To repeat a quote from the HRC regarding the same rule in treaty law, '[i]n order to avoid a

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[168] *Prosecutor v Milorad Krnojelac* (Trial Judgment) IT-97-25-T, 15 March 2002, [112]. Similarly, see ECCC, Case File 001/18-07-2007/ECCC/TC, *KAING Guek Eav alias Duch*, Trial Judgment, 26 July 2010, [347] ('[i]mprisonment refers to the arbitrary deprivation of an individual's liberty without due process of law').

[169] *Krnojelac*, ibid, [114] and fn 346. Similarly, see *KAING Guek Eav alias Duch*, ibid, [348]; *Prosecutor v Ntagerura* et al (Trial Judgment) ICTR-99-46T (25 February 2004) [702]. The ICTY's case law here arguably supports the view that custom prohibits arbitrary deprivation of liberty. However, the Tribunal did not specify whether it considered arbitrary detention to be prohibited generally, or whether instead it considered it prohibited only when committed as a part of a widespread or systematic attack against a civilian population.

[170] See Akehurst (n 152) 51 ('… treaty rules which merely add precision to customary law are very likely to be accepted as customary rules in the future').

[171] See sections 3.4 and 4.3.2.

characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification'.[172]

5.3.3 Reasons for detention and *habeas corpus*

The customary status of the other procedural rules applicable to detention under the human rights treaties is less certain. The ICRC in its customary humanitarian law Study, when discussing the prohibition of arbitrary detention, also notes that both the right to be informed of the reasons for one's detention and the right to *habeas corpus* are 'part of the domestic law of most, if not all, States in the world.'[173] Similarly, as demonstrated in sections 5.2.2 and 5.2.3, these requirements have been codified in widely ratified treaties.

However, as noted above, this fact of widespread ratification, whilst constituting relevant state practice, can undermine claims that such practice is accompanied by an *opinio iuris*, given the difficulty in separating practice adopted pursuant to treaty obligations from practice pursuant to customary obligations.[174] Whilst this complication was resolved regarding the arbitrary detention prohibition by referring to UN resolutions that reflected a collective *opinio iuris* as to the customary character of that prohibition, no such reference is available here. This is because those resolutions tend to remain abstract, making reference only to arbitrary detentions without going into further detail regarding other procedural rights, such as the right to *habeas corpus*.[175] In addition, whilst states not party to human rights treaties adopt domestic laws requiring that reasons be given to detainees and access to *habeas corpus* be provided, this practice is not necessarily a result

[172] *Baban v Australia* (n 109) [7.2].

[173] Henckaerts, *Vol I* (n 148) 350–1.

[174] See above at text to n 153.

[175] See, e.g., UNGA Res 66/230 (2011) [9] ('[*e*]*xpresses grave concern* at the continuing practice of arbitrary detention …'); UNGA Res 61/161 (2006) [4(f)] (urging states not to subject anyone to 'arbitrary arrest or detention').

of a belief that it is required under general international law.[176] As a result, it is difficult to demonstrate an *opinio iuris* to the effect that these rights form part of the corpus of customary international law.

Space prevents a full discussion of the possibility of these rights constituting general principles of law in the sense of Article 38(1)(c) of the ICJ Statute. In any event, it is not clear that a different conclusion would be reached. It has been suggested that 'if all the principal domestic legal systems employ the same rule of law, that rule is a general principle of law'.[177] However, the present author is sceptical that, on this basis, the requirements that reasons for detention be given and *habeas corpus* be provided can be considered norms of general international law in the absence of evidence of an *opinio iuris* amongst states. Simply because domestic legal systems might align with regard to the regulation of a particular issue does not necessarily mean that a rule of international law thereby forms; rather, it may be that international law remains entirely silent on that issue.[178]

It must finally be conceded, however, that there is some practice endorsing the view that these rights are provided for under custom, including practice of both states[179] and international bodies.[180] Similarly, the rights to know the reasons for one's detention and to

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[176] See, e.g., Malaysia, *Malek* (n 154) [11], (noting that the Federal Constitution requires that the person arrested be informed of the grounds of his arrest); Myanmar, *Defence Services Act*, 1959, s49(a), cited in ICRC, Customary IHL Database (n 150).

[177] J Charney, 'Universal International Law' (1993) 87 AJIL 529, 535–6.

[178] MN Shaw, *International Law* (CUP, Cambridge 2012) 109.

[179] See, e.g., HCJ 7607/05, *Jamal Mustafa Yusef 'Abdullah (Hussin) v Commander of IDF Forces in the West Bank* (2005) 8 YIHL 443 (Israel Supreme Court) [9] ('… judicial review [of detention is] … required under the principles of customary international law'); *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ 1598, [107]; *Re Khodorkovskiy*, Case No KAS06-129, Russian Supreme Court (Cassation Chamber), 133 ILR 365 (finding the UN Body of Principles, which includes the rights to know the reasons for one's detention and the right to *habeas corpus*, to constitute custom).

[180] See, e.g., UN Human Rights Council Res 6/4, 28 September 2007, [5(d)] (calling on all states to provide detainees with access to a court to challenge the legality of their detention); UN Commission on Human Rights Res 2004/39, 19 April 2004, [3(c)] (calling on all states to respect and promote the right to *habeas*

habeas corpus feature amongst those principles that have been included in 'soft law' codifications of minimum humanitarian standards.[181] This is a very positive development, given the importance, as noted throughout this chapter, of both these rights in enforcing the prohibition of arbitrary detention. It is submitted that, in light of these developments, whilst it may be questioned whether these rights are currently provided for under custom, they appear to be emerging as such.

5.4 Conclusions

This chapter has explored the procedural rules applicable to detention under IHRL. Section 5.1 began by demonstrating that IHRL continues *prima facie* to apply in armed conflict, including non-international conflicts. This was a necessary preliminary issue to address, in order to demonstrate that IHRL is relevant to the scope of this research. Section 5.2 then examined the procedural rules applicable to detention under IHRL. Whilst various similarities were shown to exist with the equivalent rules under IHL applicable in international conflicts, there are a number of important differences between the two, which reflect the more permissive nature of IHL. These differences were said to result in large part from the fact that IHL was designed to apply solely in states of emergency, i.e. armed conflict, whereas IHRL was designed to be of general application at all times. As a result, IHL grants significant concessions to states under the name of military necessity, in contrast to IHRL. Moreover, IHRL has benefited from far greater

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corpus); UN Working Group on Arbitrary Detention, Deliberation No 9 (n 160) [47]; *Obaidullah v United States* (n 143) [35].

[181] See, e.g., Declaration of Minimum Humanitarian Standards Adopted by an Expert Meeting Convened by the Institute for Human Rights, Abo Akademi University, Turku, Finland, 2 December 1990, art 4(3) (*habeas corpus*); UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 1988, GA Res 43/173, 9 December 1988, Principle 10 (requiring that reasons be given to detainees) and Principle 32 (*habeas corpus*).

elaboration by human rights treaty bodies, whereas IHL has only recently come to be interpreted by international criminal tribunals.

The final section (5.3) then considered the customary status of the IHRL rules, arguing that, whilst custom appears to prohibit arbitrary detention in all situations, it is less clear that the other rules explored in section 5.2 have crystallised as custom. However, that arbitrary detention is prohibited by customary international law is an important finding, given that a number of states remain non-parties to the general human rights treaties. Moreover, as will be demonstrated in section 7.3, the customary status of this prohibition has an important bearing on its binding nature *vis-à-vis* non-state armed groups.

Having discussed the relevant rules under IHRL, a number of complex questions arise regarding their application in non-international armed conflict. Whilst section 5.1 confirmed that IHRL continues *prima facie* to apply in armed conflict, the operation of the specific rules on detention in non-international conflicts can, in practice, be affected by a number of factors. First, the degree to which the application and interpretation of the human rights rules explored in this chapter are affected by other applicable rules of international law arises, e.g. whether applicable IHL might affect the content of these rules in non-international conflicts. Second, states parties to the various human rights treaties may, in specific non-international conflicts, wish to derogate from the rules on detention; the extent to which this is permissible must be considered. Third, whether non-state armed groups that are party to non-international conflicts are equally bound by these IHRL rules when interning is important, given the scarcity of relevant rules under IHL. Finally, the degree to which IHRL regulates detentions carried out by states when operating extra-territorially, in support of a 'host' state, must be considered, given that many non-

international conflicts now take this form.[182] These issues all go to the heart of the relevance of the human rights rules discussed in this chapter for non-international conflicts, and it is to these that we now turn in chapters six and seven. In particular, chapter six will consider the first issue, i.e. the impact of other applicable rules of international law on these human rights rules, whilst chapter seven will consider the remaining three issues.

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[182] As examples, see Iraq (section 6.2.2.1) and Afghanistan (section 6.2.2.2).

6. The Relationship between the IHL and IHRL Rules on Detention in Non-International Armed Conflict

The previous chapter examined the procedural rules applicable to detention under IHRL. It was shown in section 5.1 that, *prima facie*, IHRL continues to apply in armed conflict. However, section 5.4 noted four factors that might affect the actual operation of those rules in non-international armed conflicts, and the present chapter seeks to address the first factor there listed, i.e. the impact of other applicable rules of international law. In particular, this chapter will explore the interaction in non-international conflicts between the IHRL rules on detention and the minimal IHL rules discussed in chapter four. The first section below gives a brief introduction to the general relationship between IHL and IHRL as developed in the ICJ's jurisprudence. The purpose here is not to add to the literature on this topic, but rather to consider its implications for the present enquiry. Section 6.2 then explores the detention practices of states in specific non-international conflicts. This practice will demonstrate the overwhelming support for the view that states' IHRL obligations continue fully to regulate their detention practices in non-international armed conflicts, operating in parallel with applicable IHL.

6.1 The Relationship between IHL and IHRL

6.1.1 The ICJ's case law[1]

The relationship between IHL and IHRL has been the subject of significant debate.[2] This section will give a brief overview of the ICJ's approach to the general relationship

[1] Parts of this section are due for publication in L Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in M Andenas and E Bjorge (eds), *From Fragmentation to Convergence in International Law* (CUP, *forthcoming*).

[2] See, e.g., L Doswald-Beck and S Vité, 'International Humanitarian Law and Human Rights Law' (1993) IRRC 94; R Provost, *International Human Rights and Humanitarian Law* (CUP, Cambridge 2002); C Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Isr L Rev 310; O Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (OUP, Oxford 2011). See also the symposia on this topic in (2009) 14 JCSL 441–527; (2007) 40 Isr L Rev 306–660.

between IHL and IHRL and its implications for determining the practical application of the IHRL rules on detention in non-international conflicts. Whilst certain human rights treaty bodies have discussed this relationship for the purpose of their specific treaties, the focus in this section is on the ICJ as the only authoritative body to have done so regarding IHRL in general. The approach of the human rights treaty bodies will then be explored in chapter seven.

As noted in chapter five, the traditional bifurcation of IHL and IHRL has fallen away with the emerging consensus that IHRL continues, *prima facie*, to apply to the actions of states in relation to armed conflicts, alongside IHL.[3] The question of IHRL's interaction with IHL has, consequently, arisen. This raises few problems where the particular issue under consideration is regulated either by just one of the two bodies of law or by both bodies in the same way.[4] However, for those issues on which the two lay down different standards, such as detention and the use of force, where IHL is more permissive than IHRL, one is faced with having to determine how these regimes interact.[5]

The ICJ has discussed the relationship between IHL and IHRL on three occasions, in two advisory opinions and one contentious case.[6] Despite some differences, its methodology generally remained consistent. This comprised a two-stage test. First, the Court confirmed the continued applicability of IHRL in armed conflict, alongside IHL,

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[3] See section 5.1.

[4] For an example of the former, see the IHL rules on the right of prisoners of war to elect a prisoners' representative: arts 79–81 GCIII. For an example of the latter, see *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep 168, discussed below at text to nn 13–15.

[5] It was shown throughout chapter five that IHL is more permissive than IHRL regarding the procedural regulation of internment in both international armed conflicts and, especially, non-international conflicts, where there is a dearth of IHL rules.

[6] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion [1996] ICJ Rep 226, [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [106]; *DRC v Uganda* (n 4) [216].

subject to permissible derogation.[7] There are then three possible results of such parallel application:

> … 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.[8]

The second stage of the Court's analysis was to consider cases falling within this third category, i.e. where the facts raise issues under both IHL and IHRL.[9] In the *Nuclear Weapons* advisory opinion, the Court was concerned specifically with the interpretation of the human right not arbitrarily to be deprived of one's life under Article 6 ICCPR during armed conflict. Given that this was a 'hard case' (where IHL and IHRL lay down different standards), the Court had to consider the relationship between the relevant IHL and IHRL rules:

> The test of what is an arbitrary deprivation of life … falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[10]

The Court thus rationalised the relationship between IHL and IHRL here by interpreting the general standards of the latter in accordance with the more specific standards of the former, on the grounds that these were designed specifically for application in armed

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[7] Ibid.

[8] *Israeli Wall* (n 6) [106].

[9] *Nuclear Weapons* (n 6) [25]; *Israeli Wall*, ibid, [106]. The Court did not need to address this in *DRC v Uganda* (n) given the facts at issue: see below, text to nn 13–15.

[10] *Nuclear Weapons*, ibid, [25]. Whilst the Court similarly relied on the *lex specialis* nature of IHL in *Israeli Wall*, it implied that IHL *as a body of law*, as opposed to specific norms, was *lex specialis* to IHRL: *Israeli Wall*, ibid, [106]. This approach has been criticised, and instead it has been argued that determinations as to what is special and general should be made at the level of norms, rather than legal regimes: see, e.g., A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74 Nordic J Intl L 27, 42; M Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP, Oxford 2011) 98–101; L Doswald-Beck, 'International Humanitarian Law and the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1997) 35 IRRC 316.

conflict. Hence, if a particular deprivation of life is in accordance with applicable IHL, it is non-arbitrary under IHRL and, thus, also compatible with that body of law.[11] Indeed, the same result could have been reached by invoking the related principle of treaty interpretation found in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which calls for reference to be made to other 'relevant rules of international law applicable in the relations between the parties'.[12]

The ICJ's two-step analysis in *Nuclear Weapons* therefore involved, first, affirming the applicability of Article 6 ICCPR to deprivations of life during armed conflict and, second, enquiring into the relationship between that provision and applicable IHL. Importantly, in the two other instances in which the ICJ addressed this issue, the Court made clear that the secondary question regarding the relationship between these two bodies of law need not always be answered in practice. Thus, in both *Israeli Wall* and *DRC v Uganda*, the Court applied provisions of IHL and IHRL in parallel to the same facts, finding violations of both, without regard to the effect of IHL on the content of specific norms of IHRL.[13] Indeed, in *DRC v Uganda*, many of the issues arising under the right to life comprised systematic attacks against the civilian population.[14] It is clear that such acts constitute violations of both IHL (assuming civilians do not directly participate in hostilities) and IHRL, and thus no question arises as to how the two bodies of law interact. The Court was consequently able to apply both IHL and IHRL to the same facts and conclude that provisions of both were violated (including Article 6(1) ICCPR on the right to life and Article 51 API on the obligation not to make civilians the object of

[11] D Akande, 'Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons* Advisory Opinion of the International Court' (1998) 68 BYIL 165, 175 ('[t]he recognition of the applicability of the right to life during war and armed conflict did not therefore create any new substantive right which the victim would not already possess under international humanitarian law').

[12] On art 31(3)(c) generally, see C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279.

[13] *Israeli Wall* (n 6) [134]; *DRC v Uganda* (n 4) [217]–[220].

[14] *DRC v Uganda* (n 4) [206].

attack), without suggesting that the applicability of one body of law might affect the interpretation of the other.[15]

Where the Court considered it necessary to reconcile IHL and IHRL, it relied on the *lex specialis* nature of the former.[16] Its invocation of the principle of *lex specialis* here has been the subject of criticism on various grounds.[17] A full discussion of these criticisms is unnecessary for the present enquiry. However, it is submitted that the Court's approach here is best understood as an application of well-established methods of treaty interpretation, drawing on a principle that has a long historical pedigree in international law as an interpretive maxim.[18] This is clear in *Nuclear Weapons*, where it employed IHL to interpret IHRL in the specific context. This was possible given the open nature of the human right at issue (the prohibition of the *arbitrary* deprivation of life) and the context in which it was being applied (armed conflict). As with any other principle of treaty interpretation, a key objective sought in invoking the principle of *lex specialis* is to ascertain the common intentions of the states parties.[19] Joost Pauwelyn describes the policy behind the principle in the following way:

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[15] Ibid, [219].

[16] *Nuclear Weapons* (n 6) [25]; *Israeli Wall* (n 6) [106].

[17] See, e.g., Doswald-Beck (n 10); V Gowlland-Debbas, 'The Right to Life and Genocide: the Court and International Public Policy' in L Boisson de Chazournes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP, Cambridge 1999); Lindroos (n 10) 66; Milanovic (n 10) 115.

[18] M Akehurst, 'The Hierarchy of the Sources of International Law' (1974–5) 47 BYIL 273, 273 ('*lex specialis* is nothing more than a rule of interpretation'); Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Finalised by Martti Koskenniemi, 13 April 2006, A/CN.4/L.682, 34–5 ('[t]he principle that special law derogates from general law is a widely accepted maxim of legal interpretation'); ibid, 36 ('[t]he idea that special enjoys priority over general has a long pedigree in international jurisprudence as well').

[19] Commentaries confirm that this is a fundamental goal of treaty interpretation generally: A McNair, *The Law of Treaties* (OUP, Oxford 1961) 365; MS McDougal, HD Lasswell and JC Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, New Haven 1967) xvi; Sir H Lauterpacht, *The Development of International Law by the International Court* (CUP, Cambridge 1982) 27; A Clapham, *Brierly's Law of Nations* (7th edn, OUP, Oxford 2012) 349.

> … the principle of *lex specialis* is but a consequence of the contractual freedom of states, grounded in the idea that the 'most closest, detailed, precise or strongest expression of state consent', as it relates to a particular circumstance, ought to prevail … the *lex specialis* principle thus attempt[s] to answer one … question, namely: which of the two norms in conflict is the 'current expression of state consent'?[20]

Simply put, the *lex specialis* principle points to certain factors that can help approximate the common intentions of the parties, i.e. if states have developed a detailed set of rules to apply in a particular situation, one might validly infer an intention that such rules constitute the standards against which their conduct is to be judged in those situations. As the International Law Commission explains:

> When a "hard" case does emerge, then it is the role of *lex specialis* to point to a set of considerations with practical relevance: the immediate accessibility and contextual sensitivity of the standard. Now these may not be decisive considerations. They may be overweighed by countervailing ones. Reasoning about such considerations, though impossible to condense in determining rules or techniques, should not, however, be understood as arbitrary. The reasoning may be the object of criticism and whether it prevails will depend on how it succeeds in condensing what may be called, for instance, the "genuine shared expectations of the parties, within the limits established by overriding community objectives".[21]

Importantly, *lex specialis* has no independent, normative content itself, in the sense of being capable of indicating which norm is special and which general.[22] Rather, it operates as one factual element in that process of balancing numerous considerations that is at the heart of treaty interpretation:[23] 'shared expectations' or 'common intention' is the goal, and in seeking this we are not 'finding' such common intention but rather examining a

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[20] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, Cambridge 2003) 388. Also confirming that the principle of *lex specialis* seeks to give effect to the intentions of the state parties, see McNair, ibid, 219; Akehurst (n 18) 273; Lindroos (n 10) 36; G Verdirame, 'Human Rights in Wartime: A Framework for Analysis' [2008] EHRLR 689, 700.

[21] 'Fragmentation of International Law' (n 18) 48–9, quoting McDougal *et al* (n 19) 83.

[22] Lindroos (n 10) 66.

[23] Pauwelyn (n 20) 388.

plethora of different factors in order to attempt to 'condense' or 'approximate' such agreement.[24]

6.1.2 The procedural regulation of internment

The ICJ's case law is especially useful in confirming the appropriate methodology for determining the application and content of legal norms in particular situations. As demonstrated, the ICJ's starting point was that both IHL and IHRL apply in situations of armed conflict. This is consistent with the clear trend in practice supporting the *prima facie* application of states' international human rights obligations in armed conflict, alongside IHL.[25] It is also consistent with the text of the human rights treaties, which not only contain no provisions limiting their application to peacetime, but moreover imply their continued application in states of emergency by specifically including derogation clauses.[26] Consequently, regarding internment in armed conflict, the starting point is that all relevant rules of IHL and IHRL apply. The secondary question then arises as to whether the IHRL norms might be modified to suit the specific situation.[27] The ICJ made clear that such modification could occur in two ways:[28] first, a state may derogate from the relevant treaty provisions, subject to the conditions for permissible derogation; second, human rights rules might be interpreted with reference to applicable IHL as the *lex specialis* where that is consistent with the intentions of the states parties.

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24 McNair (n 19) 366.

25 See section 5.1. Indeed, as noted there, the US, traditionally sceptical of this trend, appears recently to have accepted this premise: HRC, 'Fourth Periodic Report: United States of America', CCPR/C/USA/4, 22 May 2012, [506]–[507].

26 See, e.g., art 4 ICCPR; art 15 ECHR.

27 Certain commentators have suggested that IHRL might, in some instances, be considered the *lex specialis*, which should then affect the interpretation of applicable IHL: see, e.g., Doswald-Beck (n 10). The present argument avoids having to consider this, however, by taking as its starting point the *full* application of the ordinary IHRL rules (alongside applicable rules of IHL), unless they can be modified to suit the specific situation.

28 *Nuclear Weapons* (n 6) [25]; *Israeli Wall* (n 6) [106].

Putting aside for now the question of derogation, to which we shall return in chapter seven, it must be asked whether the ICJ's *lex specialis* approach could be invoked here to rationalise the relationship between the IHL and IHRL rules on detention in international and non-international conflicts. The Court's jurisprudence confirms that the *lex specialis* maxim might be useful in resolving certain apparent conflicts between IHL and IHRL, where the IHRL norm is sufficiently open to allow for interpretation consistent with the relevant IHL norm.[29] The norm with which the Court was dealing in the *Nuclear Weapons* opinion allowed this: when applying the Article 6 ICCPR prohibition of arbitrary deprivation of life, what is 'arbitrary' can depend on the circumstances and, in armed conflict, can be determined by reference to the IHL rules on the conduct of hostilities. This might be considered a valid assumption of the intentions of states parties to the relevant human rights treaties, given that they have developed detailed IHL rules in this area.

The same arbitrariness standard features in the provisions on detention in most of the general human rights treaties.[30] The same possibility of consistent interpretation is therefore available with regard to the prohibition of arbitrary deprivations of liberty. Thus, in an international conflict, what is an arbitrary deprivation of liberty under Article 9(1) ICCPR, for example, could be determined by reference to the procedural rules applicable to internment under IHL.[31] The consequence would be that, where a person is interned in accordance with GCIII or GCIV, it would not be arbitrary in the sense of Article 9(1) ICCPR.[32]

[29] Similarly, see Milanović (n 10) 106.

[30] See, e.g., art 9(1) ICCPR; art 7(3) ACHR; art 6 ACHPR; art 14(1) ArCHR.

[31] Similarly, see Milanovic (n 10) 113–16. The difficulty posed by different states ratifying different treaties would not arise here, given the universal ratification of the 1949 Geneva Conventions, in which the internment regimes are found.

[32] Certain commentators take this view: W Kalin, 'Human Rights Law Relating to Arbitrary Detention During Armed Conflict: The Covenant on Civil and Political Rights and its Relationship with International Humanitarian Law' in The University Centre for International Humanitarian Law, 'Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict' (Geneva, 24–25

However, such consistent interpretation does not appear possible regarding certain other procedural rules under IHRL. In particular, it was shown in chapter five that a major difference between IHL and IHRL in this area concerns review of detention: whereas GCIV permits administrative review, IHRL requires court review.[33] On its face, this rule of IHRL does not appear susceptible to interpretation consistent with the IHL rules.[34] The same goes for the detention standard in Article 5(1) ECHR, which contains a closed list of permissible grounds for detention, rather than an open arbitrariness standard. To apply the IHL rules in this area as the *lex specialis* would, therefore, involve setting aside the IHRL provisions, insofar as they conflict with IHL, as opposed simply to interpreting the latter in accordance with the former.[35] Whilst employing the *lex specialis* principle in this way would differ from the manner in which it was employed by the ICJ, there is some support for such an approach. In this respect, Martti Koskenniemi has noted two different interpretations of the *lex specialis* principle:

> There are two ways in which law may take account of the relationship of a particular rule to general one. A particular rule may be considered an *application* of a general standard in a given circumstance … Or it may be considered as a *modification, overruling* or a *setting aside* of the latter.[36]

The second notion of *lex specialis* suggests that a special rule can have the effect of setting aside a general rule. It must be remembered, however, that the *lex specialis* principle plays

July 2004) 31–2 <http://www.adh-geneve.ch/pdfs/4rapport_detention.pdf> accessed 10 December 2013; S Marks and A Clapham, *International Human Rights Lexicon* (OUP, Oxford 2005) 75; N Rodley and M Pollard, *The Treatment of Prisoners under International Law* (3rd edn OUP, Oxford 2009) 490. The Israeli Supreme Court similarly adopted this approach of consistent interpretation: HCJ 3239/02*, Mar'ab et al v IDF Commander of Judea and Samaria et al,* 57(2) PD 349, [21].

[33] Compare, e.g. art 9(4) ICCPR and art 78 GCIV.

[34] See the discussion in section 7.1 on the extent to which these rules can be 'read down'.

[35] Similarly, see Milanovic (n 10) 113–16.

[36] 'Fragmentation of International Law' (n 18) 49. Regarding the second way in which *lex specialis* can operate, an analogy might be drawn to the European Court of Human Rights' (ECtHR) state immunity cases. Here, the Court held that art 6(1) ECHR does not apply where the general international law doctrine of state immunity applies, drawing on art 31(3)(c) VCLT: *Al-Adsani v UK*, App No 35763/97, Judgment (Grand Chamber), 21 November 2001, [50]–[56]; *Fogarty v UK*, App No 37112/97, Judgment (Grand Chamber), 21 November 2001, [36]–[37]; *McElhinney v Ireland*, App No 31253/96, Judgment (Grand Chamber), 21 November 2001, [36]–[37].

no normative role itself but, rather, simply operates as one among many factual elements to be taken into account in discerning the intentions of the states parties. Thus, where the states parties collectively intend for a rule of IHL to *set aside* an otherwise applicable rule of IHRL, then this may arguably be the result, and, so the argument goes, one might infer such an intention from the fact that states have developed a detailed legal regime under IHL to apply in the specific situation. It is important to note, however, that, even where *lex specialis* operates in this second, exclusionary sense, it does not displace IHRL as such; rather, it confirms the legal standard that is intended to prevail (e.g. IHL), with IHRL continuing to operate in the background, giving way to IHL only to the extent of the inconsistency.[37]

That the principle of *lex specialis* can operate in this second sense has been doubted, for example, by Marko Milanovic.[38] Indeed, one could argue that it conflates the application and interpretation of treaties.[39] It is beyond the scope of this section to conclude whether or not this approach is a valid application of the *lex specialis* principle. It is, however, important to acknowledge this approach as it finds some support in practice. This is the case, for example, regarding the application of the IHRL rules on detention in international armed conflicts. Thus, POWs and civilians interned according to GCIV are often not afforded the right to *habeas corpus*, with the IHL internment regimes instead being treated as the *lex specialis* to the exclusion of the IHRL rules. Indeed, this is the approach taken in the UK Ministry of Defence's *Manual on the Law of Armed Conflict,* which views IHL as operating so as to exclude POWs from exercising the right

[37] 'Fragmentation of International Law' (n 18) 56.

[38] See, e.g., Milanovic (n 10) 113–16.

[39] On this, see, e.g., McNair (n 19) 365. Although cf R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008) 27–9 (noting that interpretation and application are often inseparable).

to *habeas corpus*.[40] Similarly, during the initial international armed conflict in Iraq, following the 2003 invasion, coalition forces detained three categories of persons, all of whom were governed exclusively by IHL: POWs (governed solely by GCIII), security detainees, and those that committed offences against coalition forces (both of which were governed by Article 78 GCIV alone).[41]

Certain international institutions also support this approach. For example, the ICRC appears to take the view that civilian internment in international conflicts is regulated by GCIV alone, without reference to *habeas corpus*.[42] Moreover, in a 2006 UN report on Guantanamo detainees, the *lex specialis* nature of the GCIII rules on POW internment was acknowledged.[43] A similar approach has also been taken by the Inter-American Commission on Human Rights.[44]

Finally, certain commentators also seem to share this view. As Jelena Pejic notes regarding POW internment:

> It is generally uncontroversial that the Third Geneva Convention provides a sufficient legal basis for POW internment … The detaining State is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing …[45]

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[40] UK Ministry of Defence, *Manual on the Law of Armed Conflict* (OUP, Oxford 2004) section 8.115.1, citing *R v Superintendent of Vine Street Police Station, ex p Liebmann* [1916] 1 KB 268 and *R v Bottrill, ex p Kuechenmeister* [1947] KB 41. Although, in the recent case of *Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v Yunus Rahmatullah* [2012] UKSC 48, at [41], the court extended the writ (as a matter of domestic law) 'as of right' to an internee abroad protected by GCIV so long as they were under the control of the addressee of the writ. There seems no reason why the same approach would not be taken with regard to POWs.

[41] MN Schmitt, 'Iraq (2003 onwards)' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 375. Similarly, see 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 (Israeli Supreme Court) [17] (referring to art 78 GCIV as the *lex specialis* to the right to liberty).

[42] J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 386–7.

[43] UN Commission on Human Rights, 'Situation of Detainees at Guantanamo Bay', E/CN.4/2006/120, 27 February 2006, [19].

[44] Inter-American Commission on Human Rights (IACiHR), 'Report on Terrorism and Human Rights', OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, ch III [142]–[143].

[45] J Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 87. Similarly, see G Gaggioli and R Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the

That the IHL internment regimes in international conflicts prevail over inconsistent human rights rules appears, therefore, to be supported by certain states and international bodies. It must be reiterated, however, that it is not the purpose of this chapter to make a final judgment on this issue either way.[46] Instead, the question to be addressed is whether one could reasonably adopt a similar interpretation with regard to internment in *non-international* armed conflict. The difficulty with making such an argument is that, unlike in international conflicts, there are no explicit procedural rules applicable to internment in non-international conflicts under IHL. Rather, chapter four demonstrated that the only relevant rule is to be found in the humane treatment principle in common Article 3, which can be interpreted as prohibiting internment that is not necessary as a result of the conflict and as requiring release where the reasons for internment cease.[47] As such, compared with international conflicts, it is far less reasonable to infer an intention amongst states that IHRL is to be set aside by IHL here.

This notwithstanding, there remains considerable disagreement amongst states, international bodies and commentators regarding the relevance of IHRL in such situations. The example referred to in the introduction to this thesis illustrates this well. In noting the scarcity of applicable IHL rules in this area, the US sought to draw on the law of international armed conflict in developing an internment regime to govern its conflict with

European Court of Human Rights' (2007) 37 Isr YB Hum Rts 115, 123 (fn 38); LM Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict (2009) 40 Case W Res J Intl L 437, 454; Rodley and Pollard (n 32) 490; S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 90.

46 Indeed, one can point to examples where states, international bodies and commentators have applied the IHRL rules on detention in international armed conflicts: see, e.g., IACiHR (n 44) ch III [146]; UN Assistance Mission for Iraq, 'Human Rights Report: 1 April – 30 June 2007', [72] <http://www.ohchr.org/Documents/Countries/IQ/HRReportAprJun2007EN.pdf> accessed 4 February 2014; *Rahmatullah* (n 40); L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, Oxford 2011) 279; Rodley and Pollard (n 32) 491.

47 See sections 4.2.1 and 4.3.

al-Qaeda, considered by that state to be non-international in character.[48] The Human Rights Committee, as well as other UN bodies, on the other hand, considers the relevant legal framework, in the absence of clear IHL rules, to be Article 9 ICCPR.[49] Commentators similarly disagree here. Louise Doswald-Beck, for example, states that, since IHL is virtually silent here, 'human rights law applies without any possible contradiction'.[50] Jelena Pejic is critical of such suggestions, however, arguing that customary IHL contains an implicit legal basis to intern in non-international conflicts and should operate as the *lex specialis*, with grounds and procedures developed mirroring those in GCIV.[51] It was argued in chapter four that suggestions that IHL contains a legal basis to intern in non-international conflicts is neither reflected in state practice nor *opinio iuris*.[52] In any case, Pejic's argument appears more *de lege ferenda* than *de lege lata*.

This disagreement renders it necessary to consider how, notwithstanding the absence of detailed IHL rules that might be viewed as capable of displacing other norms, the IHRL rules on detention might nevertheless still be considered inapplicable in non-international conflicts.[53] This requires considering an alternative interpretive approach, the theory of which will be discussed in the following paragraphs and the practical application of which will be the subject of the remaining sections of this chapter. Thus, one might perceive the lack of an IHL internment regime for non-international conflicts not as a gap but rather a

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[48] 'Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay', *In Re: Guantanamo Bay Detainee Litigation*, Misc No 08-442 (TFH) (DDC 13 March 2009) 1 <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> accessed 21 November 2013. On this practice, see section 6.2.3.1.

[49] HRC, 'Concluding Observations: United States of America', UN Doc CCPR/C/US/CO/3/Rev.1, 18 December 2006, [18]; UN Commission on Human Rights, 'Situation of Detainees at Guantanamo Bay' (n 43) [24] (as noted, the Special Rapporteurs here considered IHL as *lex specialis* in international conflicts, demonstrating that their view regarding the applicable law in non-international conflicts was not a result of any perceived limitation on their subject-matter jurisdiction).

[50] Doswald-Beck (n 46) 277.

[51] Pejic (n 45) 93–6.

[52] See section 4.1.

[53] As noted, the possibility of derogation will be considered in section 7.1.

space within which states intentionally preserved their discretion, to enable them to tailor their approaches according to the circumstances. Laura Olson, for example, has cautioned against unreflectively applying IHRL to fill apparent gaps in IHL, using the example of the absence in GCIII of review mechanisms for challenging the necessity of POW internment: such silence arises not from a gap in the law but, rather, the assumption that POW internment is necessary *ipso facto* for the duration of hostilities.[54] Applying the human right to *habeas corpus* to fill this apparent gap, so the argument goes, would be inconsistent with this assumption.[55]

One might make a similar argument here, treating the broad discretion left by IHL in this area as intentional and excluding otherwise applicable rules of IHRL. There are, however, certain caveats that one should bear in mind. First, Olson's argument calls for a consideration of the reason underpinning an apparent 'gap' in IHL. Whilst this is useful for the example of POW internment review, the absence of procedural rules applicable in non-international conflicts under IHL does not benefit from the same principled basis. In particular, it was shown in chapter two that IHL's distinction between international and non-international conflicts arises from historical considerations regarding the scope of international law and concerns for preserving state sovereignty.[56] Such considerations, however, were shown to be anachronistic in light of subsequent developments in international law.

Second, Olson's approach of referring to IHRL as 'filling gaps' in IHL implies a different starting point to that adopted here, whereby IHL is considered to apply to the

[54] Olson (n 45) 454. See section 3.3.2.

[55] Ibid. Similarly, see Sivakumaran (n 45) 92. For the same interpretive approach being applied in other areas of international law, see M Wood, 'The International Tribunal for Law of the Sea and General International Law' (2007) 22 Intl J Marine & Coastal L 351, 361; M Paparinskis, 'Investment Treaty Interpretation and Customary Investment Law' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, Cambridge 2011) 77.

[56] See sections 2.1 and 2.3.1.

exclusion of IHRL, with the latter applying only where appropriate to fill gaps in the former. As explained above, the approach adopted here takes as its starting point that IHRL continues to apply in full alongside IHL.[57] The presumption, therefore, is that any internment carried out by a state is to be judged according to the relevant IHRL rules, in addition to the minimal rules of IHL, with that presumption rebutted only where IHRL is clearly intended to give way to IHL. However, in the absence of a detailed internment regime under IHL for non-international conflicts, which might indicate a shared intention amongst states that certain of their human rights obligations do not apply in such situations,[58] such intention would have to be found instead in their (subsequent) practice.[59] When practice does not confirm such an intention, the presumption holds, and the ordinarily applicable rules of IHRL continue to regulate detentions alongside the minimal rules of IHL. Where this is the case, were a state arbitrarily to intern in a non-international conflict, it would potentially violate both IHRL and IHL. As demonstrated above, the ICJ has confirmed that the same facts can lead to violations of both IHL and IHRL, without the former necessarily affecting the latter.[60]

A few words should be said about the above interpretive approach. According to this approach, subsequent state practice could be invoked as evidence of a common intention amongst states parties to a human rights treaty that a provision is inapplicable in a particular situation. This would be notwithstanding the fact that, on its text, that provision

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[57] See above at text to nn 25–6.

[58] It is worth reiterating that whether this is the case in international conflicts is beyond the scope of the present thesis.

[59] Art 31(3)(b) VCLT. Subsequent practice is constantly invoked as an important indication of the parties' intentions: *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, [49]; GG Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYIL 1, 20; McNair (n 19) 424; A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge 2007) 241; Gardiner (n 39) 225; J-M Sorel and VB Eveno, '1969 Vienna Convention, Article 31: General Rule of Intepretation' in O Corten and P Klein (ed), *The Vienna Conventions on the Law of Treaties: A Commentary, Volume I* (OUP, Oxford 2011) 826.

[60] *Israeli Wall* (n 6) [134]; *DRC v Uganda* (n 4) [217]–[220]. Similarly, see ACiHPR, *DRC v Burundi, Uganda and Rwanda*, Communication No 227/99 (2003), [79]–[80].

otherwise appears applicable. There is judicial and doctrinal support that subsequent practice is capable of modifying treaty terms or affecting their application.[61] However, it must be noted that some have doubted whether this could be so as a matter of treaty interpretation.[62] Reasons of space prevent an examination of the general validity of invoking subsequent practice in this way. However, given the considerable disagreement surrounding the application of IHRL in this area,[63] the following sections will, for the sake of argument, assume that invoking state practice in this manner can be valid. State practice will then be examined to consider whether it can be said to convey a shared intention amongst states that their human rights obligations do not apply to detentions carried out in relation to non-international conflicts. It will be shown that no such intention can be discerned, leaving the presumption of the full application of IHRL intact.

A final point must be noted before moving onto an examination of state practice. If practice can have the effect suggested above, it is submitted that that practice must be accepted (or acquiesced to) by *all* states party to the relevant human rights treaty. Not only is this often considered a requirement for the use of subsequent practice in treaty

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[61] See, e.g., *Nuclear Weapons* (n 6) [55]–[56] (holding that the 1925 Gas Protocol does not apply to nuclear weapons, based on the practice of states parties establishing a common intention that effect); *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Rep 16, [22] (accepting Security Council practice which appeared to amend art 27(3) of the UN Charter on the voting requirements for UN Security Council Resolutions); *Israeli Wall* (n 6) [24]–[28] (referring to subsequent practice of the General Assembly and Security Council evolving over time with regard to the meaning of art 12(1) of the UN Charter and the division of competences between the two organs); *Soering v United Kingdom*, App No 14038/88, Judgment, 7 July 1989, [103] (accepting in principle that subsequent practice could amend the ECHR). Similarly, see G Nolte, 'Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, Oxford 2011) 142 (confirming the use of subsequent practice in these ways by the ICJ).

[62] Sorel and Eveno (n 59) 826 (referring to an 'uncertainty' in this area); G Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP, Oxford 2013) (referring to the deletion of art 38 of the ILC's draft articles on the law of treaties, which would have provided for treaty modification through subsequent practice, as evidence that subsequent practice cannot operate in such a manner). Indeed, art 29 ACHR prohibits interpreting a right in the Convention in a manner that restricts it to a greater extent than is provided for in the ACHR.

[63] See above, text to nn 48–51.

interpretation generally,[64] but it must especially be the case with human rights obligations due to their nature as 'community interests' or truly 'multilateral obligations', supplementing the historically bilateralist international legal order.[65] By this is meant that human rights obligations cannot be broken down into a web of bilateral relationships; rather, they are obligations *erga omnes*, owed equally by each state party to every other state party (as well as to individuals within their jurisdiction).[66] In the words of the ICJ:

> All the other States parties have a common interest in compliance with these obligations by the State … That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.[67]

As a consequence of the *erga omnes* nature of human rights obligations, it is submitted that all states parties would have to acquiesce to the practice establishing that certain provisions of a human rights treaty are inapplicable in a situation to which they otherwise appear applicable.[68] Were it otherwise the case, certain states parties would effectively be able to 'contract out' through practice and agree amongst themselves to apply less protective rules, which would then violate the rights of the other states parties (as well as

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64 Aust (n 59) 243; Gardiner (n 39) 236–7.

65 The language employed borrows from B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217, 242–3, and J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325. Similarly, see R Jennings and A Watts, *Oppenheim's International Law, Volume I: Peace* (9th edn, OUP, Oxford 1992) 4 (comparing human rights as *erga omnes* obligations with traditional bilateral rules).

66 On the *erga omnes* nature of human rights obligations generally, see *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment [1970] ICJ Rep 3, [33]–[34]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections, Judgment [1996] ICJ Rep 595, [31]; *Prosecutor v Anto Furundzija*, Trial Judgment, IT-95-17/1-T (10 December 1998) [151]; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment [2012] ICJ Rep 422, [68].

67 *Belgium v Senegal*, ibid, [68].

68 Similarly, see J Alvarez, 'Limits of Change by Way of Subsequent Agreements and Practice' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP, Oxford 2013) 126 ('I suggest that where a treaty creates a third party beneficiary … as in the case of human rights treaties … the capacity for the states parties to modify their treaty through practice faces additional constraints').

individuals).[69] This argument is not undermined by the existence of explicit provisions on formal amendment in certain human rights treaties that allow for amendment amongst a sub-set of states parties only.[70] *All* states parties have specifically consented to such non-universal amendment when ratifying the treaty, and it is limited to cases of formal amendment following the prescribed procedures. No equivalent provisions exist in the human rights treaties regarding interpretation/informal amendment through subsequent practice, and this must therefore require the acquiescence of all parties. Indeed, this is the general, customary rule also for formal amendment of *erga omnes* treaties that contain no provision on such matters.[71] The threshold for rebutting the presumption that IHRL regulates detentions in non-international conflicts is therefore high, and it is to an examination of relevant state practice that we now turn in the following sections.

6.2 State Practice in Specific Non-International Armed Conflicts

This section will explore state practice regarding detention in specific non-international conflicts. It will be shown that no clear intention as to the inapplicability of the relevant IHRL rules can be inferred; rather, practice demonstrates a broad recognition that those rules regulate detentions in relation to non-international conflicts.

The conflicts are divided into three categories: traditional non-international conflicts (i.e. conflicts between states and non-state armed groups that are confined to the territory of the relevant state); internationalised non-international conflicts (i.e. non-international

[69] This same reasoning has been applied to explain why breaches of human rights obligations cannot be justified as lawful countermeasures, in contrast to more traditional, bilateral and bilateralisable obligations: S Borelli and S Olleson, 'Obligations Relating to Human Rights and Humanitarian Law' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010). Although note B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 482, 526–9.

[70] See, e.g., art 51(2) ICCPR, art 51 ArCHR, and art 76(2) ACHR (all of which provide for a specific amendment procedure, requiring two thirds of the states parties to agree). See also art 68 ACHPR (providing a similar procedure but requiring a simple majority).

[71] Art 41(1)(b)(i) VCLT. Similarly, see Pauwelyn (n 20) 436–7 (stating that so-called 'integral obligations' cannot be modified *inter se*, but require all parties to agree on the modification).

conflicts in which the 'host' state is supported by a foreign state); and transnational armed conflicts (conflicts between states and non-state armed groups that transcend the boundaries of a single state). For some of these examples, their status as non-international armed conflicts is controversial. However, for present purposes, it is sufficient that the state(s) whose practice is under scrutiny considered it a non-international armed conflict or did not object to that characterisation. The conflicts have been selected on the basis of their geographical spread, contemporaneity, and the amount of publicly-available information regarding detention practices.

6.2.1 Traditional non-international armed conflicts

6.2.1.1 Colombia

That the conflicts waged in Colombia since the 1960s, in particular those between the government on the one hand and the *Feurzas Armadas Revolucionarias de Colombia* (FARC) and *Ejército de Liberación* (ELN) on the other, constitute non-international armed conflicts has been widely acknowledged, including by the Colombian President and Supreme Court.[72] Commentators too have recognised this and suggested that APII applied in the mid-1990s when hostilities reached their peak.[73]

In this context, recent detention practice of the Colombian government is illuminating. In January 2008 a new system of detention became applicable under Colombian law generally, and this follows a purely human rights, criminal law-approach to the procedural regulation of detention, applicable even to detentions carried out in relation to the non-international conflicts.[74] Under this system, a person must be taken

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72 F Szesnat and A Bird, 'Colombia' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 215.

73 Szesnat and Bird, ibid, 227.

74 Human Rights Council, 'Report of the Working Group on Arbitrary Detention: Addendum, Mission to Colombia (1 to 10 October 2008)', A/HRC/10/21/Add.3, 16 February 2009, [22]–[33].

before a judge within 36 hours of being detained to verify the legality of detention and check that their rights have been respected.[75] If declared valid, formal charges must be brought and a criminal trial must take place within 90 days.[76] *Habeas corpus* is available for alleged cases of arbitrary detention.[77] The armed forces are not empowered to execute arrest warrants; instead, prosecutors who are so authorised accompany the armed forces to conflict zones.[78]

The above notwithstanding, the UN Human Rights Committee (HRC) and UN Working Group on Arbitrary Detention (UNWGAD) have noted that, in practice, mass arbitrary arrests continue to be prevalent in Colombia.[79] These problems aside, it is clear that the legal regime governing conflict-related detentions is modelled on the human rights law framework for criminal detention, rather than the IHL model of administrative detention.[80] Consequently, persons are often detained on charges of rebellion or terrorism.[81] Importantly for our purposes, this was not merely a policy-based decision but, rather, a consequence of Colombia's assumption that its conflict-related detention operations continued to be governed by its IHRL obligations. This is confirmed by Colombia's derogation from particular paragraphs of Article 9 ICCPR at numerous points

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[75] Ibid, [26].

[76] Ibid, [33].

[77] Ibid, [32].

[78] Ibid, [59] (noting also that, in practice, these rules have been breached). A new law that granted arrest and detention powers to the military was previously declared unconstitutional by the Colombian Constitutional Court: see US State Department, 'Country Reports: Colombia' (2004), s 1(g).

[79] HRC, Concluding Observations: Colombia, CCPR/C/COL/CO/6, 4 August 2010, [20]; Human Rights Council (n 74) [63].

[80] Similarly, see Szesnat and Bird (n 72) 240.

[81] Human Rights Council (n 74) [74]. The US State Department reports that, during 2011 alone, Colombia held more than 1,920 detainees accused of 'rebellion' or 'aiding and abetting insurgence' and that there is a tendency for lengthy pre-trial detentions: US State Department, 'Country Reports: Colombia' (2011), ss 1(e) and 1(d).

throughout the 1990s as a result of the conflicts, demonstrating its recognition that, absent derogation, detention operations remained fully regulated by that provision.[82]

The practice of Colombia is also enlightening in that it confirms that a human rights-based framework for detention is suitable for non-international conflicts, with the in-built facility of derogation employed where necessary to broaden the state's powers. This is especially important given that, in other areas, notably the use of force, Colombia considers it necessary to revert to an IHL framework in developing applicable rules.[83] Indeed, this reliance on IHRL is true not only for states employing a purely criminal law-based approach to detention, as with Colombia, but also where the state adopts an internment regime. This was the case, e.g., regarding the UK during the 'Troubles' in Northern Ireland, in which it adopted an internment regime by derogating from Article 5 ECHR, demonstrating that IHRL, by providing for derogation, is not necessarily ill-suited for such situations.[84] The extent to which states can validly derogate from the IHRL rules on detention is explored in detail in section 7.1.

6.2.1.2 Sri Lanka

The non-international armed conflict between the central Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) that lasted for three decades ended in May

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[82] See, e.g., derogation from art 9(3) dated 29 May 1994; derogation from art 9 dated 21 March 1996; derogation from art 9(1) dated 18 June 1996: <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec> accessed 27 August 2013.

[83] C von der Groeben, 'The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces' (2011) 16 JCSL 141.

[84] See section 7.1.2 for the relevant case law. Whilst the UK did not regard this situation as an armed conflict to which IHL applied, commentators have argued that, in fact, it did reach the threshold of a non-international armed conflict: S Haines, 'Northern Ireland: 1968–1998' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 130–5.

2009, and in August 2011 the government lifted its 28 year-long state of emergency.[85] This notwithstanding, persons allegedly affiliated with the LTTE continued to be detained under the 1979 Prevention of Terrorism Act (PTA).[86] More generally, '[t]housands of people continued to be held in relation to the former armed conflict at temporary and permanent places of detention around the country, and arrests continued.'[87]

The ICRC reported that those detained as part of the conflict included both 'security detainees' and 'former LTTE fighters who had surrendered to the security forces'.[88] Regarding the legal basis for detention, the ICRC confirmed that alleged LTTE fighters were detained under both emergency regulations and the PTA.[89] Under the emergency regulations adopted several years before the end of the conflict, any person 'acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services' could be detained for up to 18 months.[90] Whilst such persons should have been presented before a magistrate within 30 days, the courts had no authority to order release, a power left to the executive.[91]

In addition to the emergency regulations, Sri Lanka's PTA permits administrative detention, '[w]here the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity'.[92] Such persons may be detained for

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85 ICRC, 'Sri Lanka' in ICRC, *Annual Report 2011* (ICRC, May 2012) 245. Sri Lanka recognised this as a non-international armed conflict: Sri Lankan Ministry of Defence, 'Humanitarian Operation: Factual Analysis July 2006 – May 2009' (Ministry of Defence, July 2011) 2 [8].

86 ICRC, ibid. Similarly, see Human Rights Watch, 'Sri Lanka: "Bait and Switch" on Emergency Law' (7 September 2011) <http://www.hrw.org/news/2011/09/07/sri-lanka-bait-and-switch-emergency-law> accessed 1 December 2013.

87 ICRC, ibid, 248.

88 ICRC, 'Sri Lanka' in ICRC, *Annual Report 2008* (ICRC, May 2009) 212.

89 ICRC, 'Sri Lanka' in ICRC, *Annual Report 2009* (ICRC, May 2010) 228.

90 Human Rights Watch, *Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka* (HRW, New York 2010) 17.

91 Ibid, 18.

92 Prevention of Terrorism Act 1979, s 9(1) <http://www.sangam.org/FACTBOOK/PTA1979.htm> accessed 1 February 2014.

a maximum of 18 months.[93] The PTA excludes courts from reviewing detention orders.[94] Instead, an advisory board, established by the President and comprising at least three members, considers representations made by the detainee or a person on their behalf.[95] To enable such representations to be made, the detainee is to be informed of the 'unlawful activity in connection with which' the detention order was made.[96] The board has no power to order release but merely advises the Minister.[97]

The administrative detention regimes under the emergency regulations and the PTA are incompatible with what ordinarily is required under IHRL, particularly given the absence of judicial review of the legality of detention.[98] The PTA, in particular, seems closer to the GCIV internment regimes applicable in international conflicts, using an administrative body to review detentions. However, both regimes fall short of what would be required under GCIV (were that applicable), as interpreted by the ICTY, given that the review bodies do not have the power to order release.[99]

It might be inferred from this that Sri Lanka considered its obligations under Article 9 ICCPR to be inapplicable to detentions related to the non-international conflict. However, such an inference cannot validly be made as Sri Lanka derogated from particular paragraphs of Article 9 throughout the conflict, clearly indicating its recognition that that provision was otherwise applicable.[100] As with Colombia, therefore, Sri Lanka

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[93] Ibid, s 9(1).

[94] Ibid, s 13(2).

[95] Ibid, ss 13(2) and (3).

[96] Ibid, s 13(2).

[97] Ibid, s 13(3).

[98] See section 5.2.3.

[99] *Prosecutor v Zejnil Delalić* et al (Appeals Judgment) ICTY-96-21-A (20 February 2001) [329].

[100] See, e.g., derogation from art 9(3) on 18 May 1983, ended on 11 January 1989; derogation from art 9(2) on 20 June 1989, ended on 4 September 1994; derogation from arts 9(2) and 9(3) on 30 May 2000, ended on 2 May 2010: <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec> accessed 27 August 2013.

operated on the assumption that its IHRL obligations applied in full, utilising derogation to broaden the scope of permissible action. Indeed, international bodies judged Sri Lanka's detention operations against the IHRL standards, criticising it for transgressing those rules.[101]

6.2.1.3 Nepal

Nepal's decade-long non-international armed conflict between the government and the Communist Party of Nepal-Maoist (CPN-M) began in February 1996 when the CPN-M launched its 'people's war' with a view to overthrowing the existing government.[102] In May 2006, CPN-M declared a general ceasefire, with a comprehensive peace plan signed by both sides in November of that year.[103] The parties involved in the conflict, as well as external observers, acknowledged that this constituted a non-international armed conflict to which common Article 3 applied.[104]

Internment was permitted via two routes under Nepalese law. First, soon after fighting began, the government reactivated the Public Security (2nd Amendment) Act 1991 (PSA) which permitted preventive detention for up to 12 months on the grounds of 'the interest of the common people'.[105] The Act purported to exclude judicial review of detention orders.[106] However, the non-derogable constitutional writ of *habeas corpus* was

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[101] See, e.g., HRC, 'Concluding Observations: Sri Lanka', CCPR/CO/79/LKA, 1 December 2003, [13]; Human Rights Watch (n 90) 3, 20–1.

[102] PJC Schimmelpenninck van der Oije, 'International Humanitarian Law from a Field Perspective – Case Study: Nepal' (2006) 9 YIHL 394, 396.

[103] Ibid, 401.

[104] Ibid, 404; UN Office of the High Commissioner for Human Rights (OHCHR), *Nepal Conflict Report: An Analysis of Conflict-Related Violations of International Human Rights Law and International Humanitarian Law between February 1996 and 21 November 2006* (OHCHR, Geneva 2012) 63–4.

[105] Schimmelpenninck van der Oije (n 102) 396.

[106] OHCHR (n 104) 153.

held to prevail over the Act, allowing such orders to be challenged.[107] Second, the Terrorist and Disruptive Activities (Control and Punishment) Act 2002 provided, *inter alia*, for preventive detention for up to 90 days 'upon appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist and disruptive act'.[108] This was subsequently replaced by the Terrorist and Disruptive Activities (Control and Punishment) Ordinance 2004 (TADO), which extended the period of lawful preventive detention to up to one year, to be authorised by a civilian authority, usually the Chief District Officer (CDO).[109] However, '[c]redible reports suggest that CDOs sign detention orders under TADO without any serious consideration of the necessity of the detention.'[110] As with the PSA, TADO sought to exclude judicial review of detention.[111] This notwithstanding, the legality of arrests pursuant to TADO was frequently challenged before the Supreme Court and Appellate Courts.[112] At the conclusion of the ceasefire agreement in 2006, most persons held under the PSA and TADO were released.[113]

The internment regimes under the PSA and TADO left considerable discretion to the detaining authorities and sought to exclude any form of review (judicial or otherwise) of the decision to detain. Whilst the Nepalese courts responded to this by asserting their jurisdiction to hear *habeas* claims, the grounds for detention under the PSA and TADO

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[107] Ibid.

[108] UN Commission on Human Rights, 'Report of the Working Group on Involuntary or Enforced Disappearances: Mission to Nepal', E/CN.4/2005/65/Add.1, 28 January 2005, [45].

[109] Ibid.

[110] Ibid, [47].

[111] OHCHR (n 104) 154 (fn 502).

[112] OHCHR, ibid, 154. Similarly, see HRC, 'Second Periodic Reports of States Parties: Nepal', CCPR/C/NPL/2, 8 June 2012, [110] ('[d]uring the period of emergency, the SC [Supreme Court] received about 200 petitions of habeas corpus, and, in over 60 of them it issued orders requiring the security forces and the Government to release the detainees').

[113] ICRC, 'Nepal' in ICRC, *Annual Report 2006* (ICRC, May 2007) 191.

were likely too vague to satisfy the IHRL standard.[114] It is clear, however, that Nepal considered the ICCPR to apply to these detentions notwithstanding the conflict. Importantly, Nepal derogated from certain provisions of the ICCPR, indicating its belief that that treaty continued to apply during the conflict.[115] None of these derogations, however, involved Article 9 ICCPR, and, although Nepal declared a number of states of emergency, pursuant to which it suspended the constitutional right not preventively to be detained, it explicitly stated that it was not suspending the right to *habeas corpus*, leaving its domestic courts to continue to exercise their powers of review.[116] That Article 9 ICCPR applied to Nepal's detentions in relation to its non-international conflict was also confirmed by international bodies, which consistently reviewed its practices in light of that provision.[117]

6.2.1.4 Democratic Republic of the Congo

The detention practices of the various parties to the conflicts waged within the Democratic Republic of the Congo (DRC) over the last two decades are reflective of the lack of legal clarity in this area. In contrast to the preceding examples of state practice, this section will demonstrate that in the DRC no detention regime was developed during these conflicts. Rather, individuals were detained arbitrarily with no procedural safeguards. It will also be shown, however, that the DRC's practice demonstrates an assumption that the IHRL rules

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[114] On the need for certainty in the grounds for detention under the IHRL standard, see, e.g., *Medvedyev and others v France*, App No 3394/03, Judgment, Grand Chamber, 29 March 2010, [80]; HRC, Draft General Comment No 35: Article 9, CCPR/C/107/R.3, 28 January 2013, [22].

[115] See, e.g., its derogations dated 8 March 2002, 16 February 2005, and 29 March 2005, none of which specifically derogates from art 9 ICCPR: see <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec> accessed 27 August 2013.

[116] See, e.g., its derogation dated 29 March 2005, which specifically states that it has not derogated from *habeas corpus*: <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec> accessed 27 August 2013. The right to *habeas corpus* is specifically non-derogable under the Constitution: see UN Commission on Human Rights (n 108) [15].

[117] See, e.g., UN Commission on Human Rights (n 108) [37]–[50]; OHCHR (n 104) 153.

on detention fully applied, and there was no suggestion that the existence of non-international conflicts led to a setting aside of those rules.

Given the complexity of the various conflicts involving the DRC, it is useful to refer to the structure employed by Louise Arimatsu in her study on the character of those conflicts, in which she divides the period into four distinct categories: the period preceding the outbreak of the First Congo War (Spring 1993 to Summer 1996); the First Congo War (July 1996 to Summer 1998); the Second Congo War (August 1998 to July 2003); and the period since the end of the Second Congo War and the establishment of the transitional government.[118] During each period, various conflicts involving different parties were waged on the territory of the DRC, including non-international armed conflicts between the incumbent *de jure* government and non-state armed groups.[119] Regarding detentions carried out by government and non-state forces, Arimatsu notes:

> During the conflicts, the State authority, under both Mobutu and Kabila, claimed sweeping powers of detention on the grounds of "reasons of security" with little concern for integrating procedural guarantees or for complying with minimum standards on the conditions of detention. The right to detain was also asserted by rebel groups during the Second Congo War which was clearly at odds with both domestic law and human rights law since neither envisages the right of non-state actors to detain.[120]

Space prevents a full discussion of detention practices during each conflict period. However, practices during the latter two periods are indicative of the general issues here. Thus, during the Second Congo War,[121] the UN Special Rapporteur on the DRC noted that there were a number of different armed conflicts, of varying characters, on the territory of the DRC, including non-international conflicts between the government of the DRC on the one hand and the *Rassemblement Congolais pour la Démocratie* (RCD) and *Mouvement*

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[118] L Arimatsu, 'The Democratic Republic of Congo: 1993–2010' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 147–8.

[119] Ibid.

[120] Ibid, 199–200.

[121] On this period, see ibid, 167–85.

national pour la libération du Congo (MLC) rebel groups on the other.[122] Reports of arbitrary detentions carried out by the DRC government during this period were common.[123] Indeed, the UN Special Rapporteur referred to the right to liberty as 'one of the least respected rights' in the DRC during this period and that '[p]olitical leaders, activists, union leaders, journalists, soldiers, students, traditional chiefs, priests and pastors, attorneys acting in their professional capacity and refugees are constantly being arrested for no apparent reason.'[124] Whilst often no justification was given for detentions, '[t]he reason most often cited [was] collusion with the rebels'.[125] The Special Rapporteur examined the legality of these detentions against the IHRL standards, criticising, for example, the failure of the government to take all detainees promptly before a judge to determine the legality of their detention.[126]

The final period in Aritmatsu's study followed the establishment of the transitional government and the fighting thereafter between the government on the one hand and the *Congrès national pour la défense du peuple* (CNDP) and *Forces démocratiques de libération du Rwanda* (FDLR) rebel groups on the other.[127] This has been treated by both Kinshasa and external observers as constituting a non-international armed conflict.[128] Once again, reports of arbitrary detentions by the government during this period were

[122] UN General Assembly, 'Report of the Special Rapporteur on the Situation of Human Rights in the Democratic Republic of the Congo pursuant to General Assembly Resolution 53/160 and Commission on Human Rights Resolution 1999/56', A/54/361, 17 September 1999, [20]. Although there was no clear indication of Kinshasa's view of the character of the conflicts during this period, it seems that they operated on the assumption that those involving the MLC and RCD constituted non-international armed conflicts: Arimatsu (n 118) 172.

[123] See, e.g., UN Security Council, 'Second Report of the Secretary-General on United Nations Mission in the Democratic Republic of the Congo', S/2000/330, 18 April 2000, [55].

[124] 'Report of the Special Rapporteur' (n 122) [50].

[125] Ibid.

[126] Ibid.

[127] On this period, see Arimatsu (n 118) at 185–96.

[128] See ibid, 189; Amnesty International, 'Written Submission to the Human Rights Council', A/HRC/S-8/NGO/1, 27 November 2008; UN Security Council, 'Presidential Statement on the Situation Concerning the DRC', S/PRST/2008/38, 21 October 2008.

widespread and condemned by the international community.[129] As with all previous periods, the standards against which these detentions were judged were those under IHRL. The HRC, for example, in its concluding observations on the DRC, whilst acknowledging the existence of a non-international armed conflict,[130] nonetheless required that all deprivations of liberty meet the stipulations under Article 9 ICCPR.[131] It criticised the practice of lengthy detentions without warrant or trial,[132] and arbitrary detentions by the government security forces.[133]

The detentions carried out by the DRC in relation to these conflicts were, therefore, constantly reviewed by observers against the ordinarily applicable rules of IHRL. It is clear that the DRC's detention practices did not satisfy these requirements, given the absence of clear, reasonable grounds for detention and the lack of judicial review.[134] Indeed, such detentions would also fail to comply with the less demanding GCIV rules.[135] Importantly for our purposes, the DRC nonetheless recognised that IHRL continued to govern its detention operations. In its periodic report to the HRC, the DRC noted that it had made no derogation nor declared any state of emergency during the period, concluding that, 'the Democratic Republic of the Congo remained under an ordinary law

[129] See, e.g., UNGA Res 58/196 (2004) [2(e)]; Human Rights Council, 'Report of the High Commissioner on the Situation of Human Rights and the Activities of Her Office in the Democratic Republic of the Congo', A/HRC/10/58, 1 March 2009, [39]–[44]; Human Rights Council, 'Third Joint Report of Seven United Nations Experts on the Democratic Republic of the Congo', A/HRC/16/68, 3 March 2011, [9].

[130] HRC, 'Concluding Observations: Democratic Republic of the Congo', CCPR/C/COD/CO/3, 26 April 2006, [13].

[131] Ibid, [19].

[132] Ibid.

[133] Ibid, [23].

[134] On these requirements under IHRL, see sections 5.2.1 and 5.2.3. On the DRC's non-compliance, see, e.g., Amnesty International, 'DRC: Deadly Alliances in Congolese Forests', 3 December 1997, AFR 62/033/1997, 27–31; 'Report of the Special Rapporteur' (n 122) [50]; HRC (n 130) [13].

[135] See, e.g., the requirement that civilian internment be necessary for security and subject to periodic review in arts 42–3 and 78 GCIV. See sections 3.2.1 and 3.3.1.

regime.'[136] There was no suggestion, therefore, that the DRC's detention practices during these non-international conflicts were not subject to the procedural rules under IHRL.

The preceding sections have all discussed the detention practices of states involved in traditional non-international conflicts. As explained in section 6.1.2, in order to rebut the presumption that IHRL applies to detentions in relation to non-international conflicts, a general practice excluding their application would have to be demonstrated. The above practice has, in fact, shown the opposite to be true: states and international bodies have consistently operated in a manner that suggests the presumption prevails. The following sections will now consider non-international armed conflicts in which states operate outside their territory. It will be shown that, whilst the application of the IHRL rules on detention in such situations is more controversial, it can still be said that states generally consider their detention practices to be regulated by their IHRL obligations.

6.2.2 Internationalised non-international armed conflicts

6.2.2.1 Iraq (post-2003)

The initial invasion of Iraq by coalition forces in March 2003 and the subsequent military occupation constituted an international armed conflict.[137] However, following the establishment of an interim Iraqi government and handover of sovereign authority by the occupying powers in June 2004, the coalition forces operated within Iraq with the consent of the newly-established government in conflict with insurgents; as a result, the conflict thereafter was non-international in character, a classification accepted by those

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[136] HRC, 'Third Periodic Report: Democratic Republic of the Congo', CCPR/C/COD/2005/3, 3 May 2005, [59].

[137] See Schmitt (n 41) 358–67.

involved.[138] The detention practice following this change is therefore of direct relevance to this thesis.

Following the transition from international to non-international armed conflict, the number of persons detained by the mutli-national forces in Iraq (MNF-I) increased considerably, with 4,000 recorded in Spring 2004 and 11,350 one year later.[139] At their height in 2007, coalition forces were detaining over 26,000 persons.[140] Following the June 2004 transition, the legal basis for detention shifted from that provided by GCIII and GCIV to Security Council Resolution (SCR) 1546.[141] This empowered MNF-I 'to take all necessary measures to contribute to the maintenance of security and stability in Iraq', which was elaborated in a letter from US Secretary of State Colin Powell, annexed to the Resolution, as including 'internment where this is necessary for imperative reasons of security'.[142] This language was clearly based on the grounds established by Article 78 GCIV for civilian internment in occupied territory, which was the applicable regime preceding the transition. Indeed, Michael Schmitt noted that 'the transition had little practical influence on operational matters for US forces.'[143] However, following expiration of Security Council authorisation in December 2008, any detentions by

[138] Ibid, 368–9 (confirming that both US and UK officials accepted this classification); *HM, RM, HF v the Secretary of State for the Home Department* [2012] UKUT 409 (IAC), [36] and *Regina v Gul* [2012] EWCA Crim 280, [20] (noting the UK government's acceptance that the situation in Iraq constituted a non-international armed conflict). Also confirming this change in the classification of the conflict, see: UNSC Res 1546 (2004); ICRC, 'Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority' (5 August 2004) <http://www.icrc.org/eng/resources/documents/ misc/63kkj8.htm> accessed 25 January 2014. Although cf AE Wall, 'Civilian Detentions in Iraq' in MN Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill, The Hague 2007) 421–2 (arguing that the conflict remained international in character).

[139] B Graham, 'US to Expand Prison Facilities in Iraq', *Washington Post* (10 May 2005) A15, cited in Wall, ibid, 414.

[140] BJ Bill, 'Detention Operations in Iraq: A View from the Ground' in RA Pedrozo (ed), *The War in Iraq: A Legal Analysis* (2010) (Vol 86, US Naval War College International Law Studies) 411.

[141] Thus, the UK relied on UNSC Res 1546 (2004) as the legal basis for its internment of Al-Jedda: ECtHR, *Al-Jedda v United Kingdom*, App No 27021/08, Judgment (Grand Chamber), 7 July 2011, [16]. The authorisations provided for in SCR 1546 were renewed by subsequent SCRs: see, e.g., UNSC Res 1637 (2005); UNSC Res 1723 (2006); UNSC Res 1790 (2007).

[142] UNSC Res 1546 (2004), Annex.

[143] Schmitt (n 41) 379.

coalition forces had to be authorised by the Iraqi government in accordance with domestic Iraqi criminal law and human rights law.[144] As noted by Brian Bill, 'the Security Agreement [between Iraq and the US following expiration of UN authorisation] moved away from the "imperative threat" administrative internment model to one that is based on criminal detention overseen by the Iraqi judiciary.'[145]

In elaborating the 'imperative reasons of security' standard in SCR 1546, guidance was issued to coalition forces and the following non-exhaustive list of examples where this standard would be satisfied has been offered:

> … attacks on Coalition Forces; interference with the mission accomplishment or movement of Coalition Forces; entering or attempting to enter a restricted area; illegal weapons possession; or committing, attempting, conspiring, threatening or soliciting another to commit/aid/abet the commission of a serious crime against Coalition Forces. Additionally, members of terrorist organizations or insurgent groups known to carry out attacks on Coalition Forces could also be detained for imperative reasons of security.[146]

Whilst the 'imperative reasons of security' standard is taken from the conduct-based civilian internment regimes in GCIV, the final sentence of the above quote suggests that this includes a status-based element akin to that in GCIII. Moreover, '[o]fficially, individuals could be detained for their intelligence value for no more than 72 hours; however, anecdotal evidence suggested that longer intelligence detentions were common.'[147] It was argued in chapter three that both status-based internment and internment on the basis of intelligence value are incompatible with the GCIV standards, and, given that SCR 1546 sought to extend that standard to the non-international conflict

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[144] Ibid (also noting the problems that arose as a result).

[145] Bill (n 140) 416–7. Similarly, see D Webber, 'Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?' (2012) 6 J Nat Sec L & Ply 167, 194.

[146] Wall (n 138) 430–1.

[147] Ibid, 431.

in Iraq, these practices should be seen as transgressing the internment authority established in that resolution.[148]

The procedures for internment review during the non-international conflict phase were similarly based on GCIV.[149] On 27 June 2004, the Coalition Provisional Authority (CPA) issued a revised version of the review process elaborating the new authorisation for internment under SCR 1546.[150] That memorandum required, *inter alia*, that any detainee held for longer than 72 hours have their detention reviewed within 7 days, with periodic reviews at least every 6 months.[151] Furthermore, it stated that no internee could be held for longer than imperative reasons of security demand, and any person must either be released or transferred to Iraqi criminal jurisdiction within 18 months.[152] Where, for imperative reasons of security, it was considered that internment should last longer than 18 months, an application was required to the Joint Detention Committee, comprising senior representatives of the MNF, Interim Iraqi Government and the UK Ambassador.[153]

More detailed rules were elaborated by coalition members. For US detainees, for example, a military magistrate reviewed the case of those held for more than 72 hours to determine whether a reasonable basis existed for believing they posed an imperative threat to security.[154] However, release could only be ordered by the MNF-I Deputy Commanding General for Detention Operations.[155] If detention continued, the detainee's case was

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148 Section 3.2.1.

149 Bill (n 140) 416.

150 CPA Memorandum No 3 (Revised), CPA/MEM/27 June 2004/03, available at <http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf> accessed 9 December 2013.

151 Ibid, ss 6(1)–(3).

152 Ibid, s 6(5).

153 Ibid, s 6(6).

154 Wall (n 138) 433.

155 Ibid, 431.

considered for criminal prosecution in Iraq.[156] If the facts justifying internment did not constitute a criminal offence under Iraqi law, or if there was insufficient evidence, the detainee was forwarded to the Combined Review and Release Board (CRRB), comprising nine members (three MNF-I officers from the military police, military intelligence and a judge advocate, and six representatives from the Iraqi government); this performed an initial appeal of the magistrate's decision within 90 days and six-monthly periodic reviews thereafter, to determine whether the detainee was considered an imperative threat to security.[157] The MNF-I Deputy Commanding General for Detention Operations had the final say on release, although 'CRRB recommendations to release were followed over 99% of the time.'[158]

The CRRB was criticised for the brevity of its consideration of cases, spending 'no more than a couple of minutes on each'.[159] Detainees also had no right to appear.[160] These deficiencies led to the creation of the Multi-National Force Review Committee (MNFRC), which performed periodic reviews: 'The single biggest innovation was that the detainee was to appear before the board and participate in the hearing.'[161] The procedures for Article 5 GCIII tribunals were applied to the MNFRC by analogy, comprising three members (a senior officer presiding, with one of the other members being a 'senior enlisted person').[162] The detainee could raise any evidence they wished, make a statement, and challenge the evidence against them.[163] The board then voted by majority on whether

[156] Ibid, 433.
[157] Ibid, 433–4.
[158] Ibid, 434.
[159] Ibid, 436.
[160] Bill (n 140) 428.
[161] Ibid.
[162] Ibid, 430.
[163] Ibid, 431.

it considered them an imperative threat to security.[164] The final say over release remained with the Deputy Commanding General for Detention Operations.[165] The MNFRC process was continually refined, for example, by offering Personal Representatives (to assist but not advocate) to certain detainees appearing before the Committee (especially juvenile detainees), following an ICRC recommendation.[166]

The US' internment regime was clearly modelled on that for civilian internees in international armed conflict.[167] Thus, internment was permitted for 'imperative reasons of security' and was subject to initial and periodic administrative review. Whilst the standard for internment was interpreted as permitting status-based internment, those detained on this basis were still entitled to initial and periodic review (unlike under GCIII). This analogy to GCIV was similarly the approach taken by other coalition members.[168] However, the reviewing authorities, such as the CRRB, would not satisfy the GCIV requirements, according to the ICTY's interpretation, as they did not have the power order release.[169]

The analogy was therefore drawn to the internment regimes applicable under IHL in international conflicts, rather than the more protective (judicial) procedures under IHRL. Coalition forces did not derogate from any human rights treaties regarding their military operations in Iraq (states have never done so regarding operations abroad), and this has been said to indicate a general consensus that human rights treaties do not apply in such situations.[170] Indeed, the US has previously taken the view that its international human

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[164] Ibid.

[165] Ibid.

[166] Ibid, 433–4.

[167] Ibid, 416.

[168] See, e.g., the details of the UK's internment regime in Iraq, discussed in *Al-Jedda* (n 141) at [11]–[13].

[169] *Delalić* (n 99) [329].

[170] MJ Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Isr L Rev 453, 477.

rights obligations apply neither extra-territorially nor in armed conflict.[171] The extra-territoriality of the IHRL rules on detention will be explored in section 7.2, and it will be shown there that practice confirms the continued application of those rules when states detain persons outside their territory. Regarding application in armed conflict, the US' view has since concretised into an acceptance of the *prima facie* applicability of IHRL in armed conflict, subject to IHL as the *lex specialis*.[172] This is precisely the question under consideration in this chapter, and it was explained above that for state practice to establish that a human rights treaty provision does not apply in situations to which it appears *prima facie* applicable, requires acceptance by the other states parties due to the *erga omnes* nature of those obligations.[173]

However, the practice of other coalition states, which are party to the same human rights treaties as the US (e.g. the ICCPR), does not support the US' view. Thus, the UK confirmed explicitly that the ICCPR applies to detainees held abroad in military detention.[174] Moreover, in *Al-Jedda v UK*, regarding the UK's detention practice in Iraq, the UK government did not dispute the *prima facie* applicability of Article 5 ECHR to detentions conducted in the context of the non-international conflict there; its arguments, rather, were based solely on the attribution of the internment to the UN and the relevance of Article 103 of the UN Charter.[175] At no point, however, did the UK suggest that the character of the situation as a non-international armed conflict or its location abroad affected the application of Article 5 ECHR. Similarly, international bodies have confirmed

[171] See, e.g., HRC, 'Third Periodic Reports of States Parties Due in 2003: United States of America', CCPR/C/USA/3, 28 November 2005, 109–11. Similarly, see P Alston, J Morgan-Foster and W Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19 EJIL 183, 185–90.

[172] HRC, 'Fourth Periodic Report: United States of America', CCPR/C/USA/4, 22 May 2012, [506]–[507].

[173] See section 6.1.2.

[174] HRC, 'Information Received from UK on the Implementation of the Concluding Observations', CCPR/C/GBR/CO/6/Add.1, 3 November 2009, [24]. Similarly see PC Tange, 'Netherlands State Practice' (2006) 37 NYIL 233, 336.

[175] *Al-Jedda* (n 141) is discussed in detail under section 7.1.2.

that detention operations of coalition forces in Iraq, including the US, were regulated in full by those states' international human rights obligations.[176] It cannot, therefore, be concluded that practice in Iraq rebuts the presumption that the IHRL rules on detention applied to the non-international conflict there.

6.2.2.2 Afghanistan (post-2001)

Following the US-led invasion into Afghanistan in October 2001, an international armed conflict arose between the coalition forces on the one hand and Afghanistan (with the Taliban as the *de facto* government) on the other.[177] However, by most accounts, the conflict subsequently became non-international in character, following the holding of the Loya Jirga in Kabul and the establishment of the Afghan Transitional Government in June 2002.[178] This has been accepted by the states involved.[179]

Amongst the coalition states, the US operated the most developed internment regime in Afghanistan. The legal basis for detention during the non-international conflict phase varied depending on whether it was part of Operation Enduring Freedom (OEF) or the International Security Assistance Force (ISAF), the latter of which arguably derived its authority (including the authority to detain) from Security Council Resolutions and

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[176] UNSC, Report of Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004), S/2005/373, 7 June 2005, [72]; HRC, 'Concluding Observations of the Human Rights Committee: United States of America', CCPR/C/USA/CO/3, 15 September 2006, [18]; United Nations Assistance Mission for Iraq (n 46) [72]; *Al-Jedda* (n 141).

[177] A Cole, 'Legal Issues in Forming the Coalition' in M Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (2009) (Vol 85, US Naval War College International Law Studies).

[178] R Geiß and M Siegrist, 'Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?' (2011) 93 IRRC 11, 13–14. There is a minority view, however, that the conflict continued to be of an international character: Y Dinstein, 'Terrorism and Afghanistan' in M Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (2009) (Vol 85, US Naval War College International Law Studies).

[179] F Hampson, 'Afghanistan 2001–2010' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 255 (noting that this has been accepted by the UK, US and Germany); *GS (Existence of Internal Armed Conflict) Afghanistan v Secretary of State for the Home Department*, CG [2009] UKAIT 00010, cited in Hampson, ibid, and *Regina v Gul* (n 138) [20] (the UK government stating its view that a non-international armed conflict exists in Afghanistan).

agreement with the Afghan government.[180] However, as Stephane Ojeda notes, there was no clear legal basis for detentions by states outside the context of ISAF, given the absence of Security Council authorisation or clear agreement with the Afghan authorities.[181]

The grounds for detention applied by the US were re-stated in a July 2010 memo, which confirmed that those subject to detention were persons who

> … planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harboured those responsible for those attacks … [and] persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[182]

As with the detention standard in Iraq, this contains both conduct and status-based elements.[183] Moreover, it appears heavily focused on past behaviour rather than present or future security threat, on which the IHL internment regimes applicable in international conflicts are premised.[184] Whilst past behaviour may be relevant in considering present or future threat, undue focus on this risks internment being retributive rather than preventive, which in turn risks indefinite detention. Where detention is considered necessary in response to past acts, the criminal justice system should be used.[185]

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[180] See, e.g., UNSC Res 1707 (2006), [2]. Similarly, see C Greenwood, 'International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces', [18], Report submitted to the Federal Court of Canada in *Amnesty International Canada and British Columbia Civil Liberties Association v Chief of the Defence Staff for the Canadian Forces, Minister of National Defense and Attorney-General of Canada*, Judgment, 12 March 2008, [2008] FC 336; MC Waxman, 'The Law of Armed Conflict and Detention Operations in Afghanistan' in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (2009) (Vol 85, US Naval War College International Law Studies) 345; S Ojeda, 'US Detention of Taliban Fighters: Some Legal Considerations' in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (2009) (Vol 85, US Naval War College International Law Studies) 365.

[181] Ojeda, ibid, 365. Cf JA Bovarnick, 'Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy' [June 2010] The Army Lawyer 9, 22.

[182] Memorandum from Robert Harward, Vice Admiral, US Navy, Deputy Commander, Detention Operations, US Department of Defense, to U.S. Military Forces Conducting Detention Operations in Afghanistan (July 19, 2010) 2, cited in Human Rights First, *Detained and Denied in Afghanistan: How to Make U.S. Detention Comply with the Law* (Human Rights First, New York, May 2011) 10 (fn 45).

[183] This approach will be evaluated in chapter eight when discussing the *lex ferenda*.

[184] See section 3.2.

[185] Pejic (n 42) 381.

Internment review was carried out by various administrative boards established and replaced by the US over time.[186] Each comprised a board of military officers reviewing the detainee's status without the detainee present or able to make submissions.[187] By 2006 all cases were taken before an Enemy Combatant Review Board (ECRB), comprising five officers, within 75 days.[188] The ECRB could recommend to the commanding general by majority vote whether the individual should continue to be detained.[189] Where detention continued, the ECRB performed six-monthly periodic reviews.[190]

In September 2009, the Obama Administration introduced a new system for detainee review at Bagram (now Parwan) airbase, known as Detainee Review Boards (DRBs).[191] Under the DRB process, detainees receive 'timely notice' of the facts justifying internment.[192] Within 60 days, they should be given an initial review, to be repeated thereafter every 6 months.[193] DRBs consist of three officers, and 'no board members will be among those directly involved in the detainee's capture or transfer'.[194] Detainees have personal representatives (PRs) whose job it is to present the facts in the most favourable light for the detainee.[195] Both hearsay and classified evidence are admissible, the latter discussed in closed session which the detainee cannot attend and shown to the PR who is not allowed to discuss it with the detainee.[196] During unclassified sessions, the detainee

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[186] Human Rights First (n 182) 7.

[187] Ibid.

[188] Waxman (n 180) 350.

[189] Ibid.

[190] Ibid.

[191] Hampson (n 179) 269.

[192] US Department of Defense, 'Memorandum for US Military Forces Conducting Detention Operations in Afghanistan: Detainee Review Board Policy Memorandum' (11 July 2010) 6 [11] <www.politico.com/pdf/PPM205_bagrambrfb.pdf> accessed 10 December 2013.

[193] Ibid, 2 [7].

[194] Ibid, 3 [9a] and 3 [9a(4)].

[195] Ibid, 4–5 [9e].

[196] Ibid, 8 [12i(6)] and 7 [12h].

may attend and present evidence, including witnesses.[197] The DRB uses a 'preponderance of the evidence standard' and determines, first, 'whether the criteria for internment are met' and, if so, 'whether internment is necessary to mitigate the threat posed by the detainee, by taking into account the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society.'[198] However, the 'Commander [of Detention Operations in Afghanistan], or his designee, is the [final] approval authority for the transfer or release of detainees in Afghanistan'.[199]

As in Iraq, the US' internment regime in Afghanistan was clearly modelled on GCIV as a matter of policy, rather than IHRL.[200] This is demonstrated most clearly by the initial and periodic administrative review processes for internees.[201] However, whilst certain features of the DRB process go further than would be required under GCIV (e.g. by providing a PR and the right to call witnesses), once again, the absence of a power to order release by the DRB would fall short of GCIV, were that Convention applicable as law.[202]

As in Iraq, the US took the view that no procedural rules applied under international law to its detention operations in the non-international conflict in Afghanistan, given its rejection of the extra-territorial application of IHRL and the non-applicability of the GCIII and GCIV internment regimes.[203] However, as was also the case in Iraq, other states disagreed with the US here. Thus, other members of the coalition, particularly those party

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[197] Ibid, 7 [12h] and [12i].

[198] Ibid, 2 [6c] and 8 [12n].

[199] Ibid, 11 [13a].

[200] Waxman (n 180) 348–9.

[201] Section 1024 of the National Defense Authorization Act 2012, HR 1540, introduced a new rule that persons not entitled to the constitutional writ of *habeas corpus* must have a status determination by a military judge. US federal courts have rejected *habeas* jurisdiction over Bagram detainees and, as such, s 1024 will apply to them: *Fadi Al Maqaleh* et al *v Robert Gates* et al (21 May 2010) (DC Cir Ct).

[202] *Delalić* (n 99) [329].

[203] Hampson (n 179) 265–6.

to the ECHR, were reluctant to intern, due to their concern that they would be held responsible for violating Article 5 ECHR; they consequently held individuals for security reasons only up to 96 hours, after which they would either be transferred to a coalition partner (the US or Afghanistan) or released.[204] More generally, other coalition members made clear their view that IHRL applied to detainees held in Afghanistan.[205] Indeed, international bodies have consistently criticised the US' detention operations in Afghanistan for their failure to comply with IHRL.[206] The Afghan government similarly does not dispute the applicability of IHRL to its detention operations in the non-international conflict; the problem, rather, lies with implementation of and adherence to those rules.[207] Indeed, 'Afghan law does not appear to permit indefinite detention for national security reasons', and instead Afghanistan generally relies on a human rights-based, penal model for detention.[208] Once again, therefore, the practice of the US suggesting the non-applicability of the IHRL rules on detention in non-international conflicts abroad does not find support from other states generally.

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204 S Pomper, 'Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead' in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (2009) (International Law Studies, Vol 85) 535; Hampson (n 179) 271.

205 See, e.g., PC Tange, 'Netherlands State Practice' (2006) 37 NYIL 233, 336; Germany, Bundestag, Reply by the Federal Government to the Minor Interpellation by the Members Winfried Nachtwei, Alexander Bonde, Volker Beck (Cologne), further Members and the Parliamentary Group Bündis 90/Die Grünen – BT-Drs 16/6174, Basic Law and International Law in Deployments Abroad of the Federal Armed Forces: Treatment of Persons Taken into Custody, BT-Drs, 16/6282, 29 August 2007, 5–13 ('[t]he legal guarantees for persons taken into custody in the context of deployments abroad of the Federal Armed Forces are individually listed in the order of 26 April 2007 … With it, inter alia the existing international law obligations of the Federal Republic of Germany, such as … the International Covenant on Civil and Political Rights (ICCPR) or the European Convention for the Protection of Human Rights (ECHR) as well as constitutional law parameters are implemented'), cited in ICRC, Customary IHL Database: Practice Relating to Rule 99 Deprivation of Liberty (British Red Cross/ICRC) <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99> accessed 10 December 2013; Canada, 'Canada's Mission in Afghanistan: Measuring Progress', Report to Parliament, Government of Canada, 26 February 2007, 12, cited in ICRC, Customary IHL Database, ibid.

206 See, e.g., UN Commission on Human Rights (n 43) [24]; Human Rights First (n 182) 13–19.

207 Hampson (n 179) 272.

208 Webber (n 145) 190.

6.2.3 Transnational armed conflicts

6.2.3.1 US conflict with al-Qaeda

The US' conflict with al-Qaeda, although concentrated mostly in Afghanistan since 9/11, has included operations conducted in Pakistan, Yemen and Somalia.[209] Whilst the legal nature of the hostilities between the US and al-Qaeda remains disputed,[210] US courts and the Obama Administration consider them to constitute a single, global non-international armed conflict.[211] The US' detention practice is, therefore, relevant to the present enquiry.

Beyond the detention of persons in Afghanistan and Iraq, the majority of those detained as part of this conflict were held by the US Department of Defence at the US Naval Base in Guantánamo Bay, Cuba. As will become clear, the procedural frameworks adopted by the US to govern these detentions, as with those in Iraq and Afghanistan, have been based on the IHL regimes applicable in international conflicts. Regarding the legal basis and grounds for detention, both the Bush and Obama Administrations relied on Congress' September 2001 authorisation to the President

> … to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[212]

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[209] S Shane, M Mazzetti and RF Worth, 'Secret Assault on Terrorism Widens on Two Continents', *The New York Times* (15 August 2010), A1.

[210] N Lubell, 'The War (?) Against Al-Qaeda' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 428. See discussion in section 2.2.1.2.

[211] On the Obama Administration's view, see US Department of Justice, White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force' (undated; made public on 4 February 2013) 3 <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf> accessed 23 November 2013. On the US courts' view, see *Gherebi v Obama*, 609 F Supp 2d 43 (DDC 2009) 57, fn 8; *Hamlily v Obama*, 616 F Supp 2d 63 (DDC 2009) 73.

[212] Authorization for Use of Military Force, Pub. L. 107–40, 115 Stat 224 (18 September 2001) (AUMF) s 2(a). The Obama Administration considers this to be the legal basis for detentions in the conflict with al-Qaeda: see 'Respondents' Memorandum' (n 48) 1.

The US Supreme Court has held that this is a sufficient legal basis for detentions in the conflict with al-Qaeda (as a matter of domestic law).[213] However, given the extraterritorial nature of this conflict, whether this could also constitute a legal basis for detentions for *international law* purposes, and more specifically IHRL, is more controversial, for to exercise extra-territorial prescriptive jurisdiction without the 'host' state's consent requires a link to those individuals covered.[214] Whilst space prevents a detailed discussion of this issue, it is conceivable that such a jurisdictional link could be established on the basis of the protective principle.[215]

Pursuant to the domestic law authorisation, the Obama Administration applied the same detention standard in its conflict with al-Qaeda as that noted above for Afghanistan.[216] As noted, that standard contains both conduct and status-based elements.[217] The problems posed by such an approach will be discussed in section 8.2 when considering how the law might best develop in this area.

Regarding the review procedures for Guantanamo detainees, these were developed over time, in light of domestic US case law. Following the decisions of the Supreme Court in June 2004 in *Rasul v Bush* and *Hamdi*,[218] the government established Combatant Status Review Tribunals (CSRTs), which played the role of an initial review procedure,[219] although they could be reconvened subsequently should new information come to light.[220]

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[213] *Hamdi v Rumsfeld,* 542 US 507, 519 (2004) (US Supreme Court).

[214] AV Lowe, 'Jurisdiction' in M Evans (ed), *International Law* (2nd edn, OUP, Oxford 2006) 340–2.

[215] W Estey, 'The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality' (1997) 21 Hastings Intl & Comp L Rev 177, 199–204.

[216] For the detention standard, see above at text to n 182. Applying this standard to the conflict with al-Qaeda see 'Respondents' Memorandum' (n 48) 2.

[217] See above at text to n 183.

[218] *Rasul v Bush*, 542 US 466 (2004); *Hamdi* (n 213).

[219] US Department of Defence, 'Combatant Status Review Tribunal (CSRT) Process at Guantanamo' (July 2007) 1 <http://www.defense.gov/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf> accessed 24 November 2013.

[220] Ibid, 2.

The tribunals were 'composed of three neutral commissioned officers not involved in the capture, detention or interrogation of the detainee.'[221] Each detainee was given a Personal Representative (PR) of officer rank that assisted them throughout the process.[222] The detainee could attend all open sessions of the CSRT, which did not include sessions involving deliberation and voting or evidence 'that would compromise national security if held in the open.'[223] Only the CSRT and PR, but not the detainees themselves, could see classified evidence.[224] The detainee could call witnesses and question those called by the Tribunal.[225] The CSRT decided by majority whether, by a preponderance of the evidence, the detainee was an enemy combatant (the standard of detention originally employed by the Bush Administration).[226] The decision was then forwarded to the Director of the CSRT who could either approve it or return the file to the CSRT for reconsideration.[227]

If detention continued, it 'would be authorized indefinitely subject to an annual review to assess the continued detention justification.'[228] This annual review was conducted by an Administrative Review Board (ARB), which would examine whether the detainee continued to pose a threat and whether any other reasons may have justified

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[221] Ibid.

[222] Ibid, 3.

[223] Ibid.

[224] Ibid, 4 and 5.

[225] Ibid, 3.

[226] Ibid, 3 and 4. For the purposes of CSRT proceedings, 'enemy combatant' was defined as 'an individual who was part of or supporting Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces': Deputy Secretary of Defense, 'Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Policy: Implementation for Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba' (14 July 2006) 1 (encl 1) <http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf> accessed 24 November 2013.

[227] Deputy Secretary of Defense, 'CSRT Procedures', ibid, 9 (encl 1).

[228] GS Corn and PA Chickris, 'Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness: Rethinking the Review Tribunal Representation Model' (2012) 11 Santa Clara J Intl L 115, 144.

continued detention, such as intelligence value.[229] The composition and procedures of the ARBs were similar to the CSRTs.[230] The recommendation of the ARB was passed on to the Deputy US Secretary of Defense who had the final say over release or continued detention.[231]

The Obama Administration revised the review procedures in March 2011 and established Periodic Review Boards (PRBs).[232] PRBs comprise senior US government officials and carry out an initial review of the detention.[233] The procedures are similar to the CSRT procedures and include provision of a PR (a military officer) who advocates on behalf of the detainee and challenges the government's evidence, as well as the right of the detainee to argue before the PRB, call witnesses, and have access to all evidence, except where withholding is 'necessary to protect national security'.[234] The standard against which continued detention is judged is that it must be 'necessary to protect against a continuing significant threat to the security of the United States.'[235] The final decision on release or continued detention rests with the Secretary of Defence.[236] For those that remain

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[229] Deputy Secretary of Defense, 'Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Policy: Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba' (14 July 2006) 2 <http://www.defense.gov/news/Aug2006/d20060809 ARBProceduresMemo.pdf> accessed 24 November 2013.

[230] For an overview of the ARB procedures, see generally Deputy Secretary of Defense, 'ARB Procedures', ibid.

[231] Ibid, 6 (encl 3).

[232] Executive Order 13,567 (7 March 2011), 'Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force'.

[233] Ibid, s 9(b).

[234] US Department of Defense, 'Memorandum for Secretaries of the Military Departments *et al*: Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567' (reissue 4 November 2013) 10, 13, 15 <http://www.dtic.mil/whs/ directives/corres/pdf/DTM-12-005.pdf> accessed 10 December 2013.

[235] Ibid, 6. The National Defense Authorization Act 2012 (n 201) at s 1023(b)(1) states that 'the purpose of the periodic review process is not to determine the legality of any detainee's law of war detention, but to make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States'.

[236] National Defense Authorization Act 2012 (n 201) s 1023(b)(2). Similarly, see US Department of Defense, 'Executive Order 13567' (n 234) 18.

in detention, continued assessments of the feasibility of prosecution must be made.[237] This same procedure is then repeated on a triennial basis.[238] In addition, every six months, each detainee is subjected to a file review by the PRB, whereby the information on each is reviewed, with the detainee permitted to make written submissions; where 'a significant question is raised' as to the necessity of detention, a full PRB is then convened.[239]

It is clear that the US' detention models have consistently been based on those applicable in international conflicts under IHL. Interestingly, whilst the initial and periodic administrative review procedures mirror those under GCIV, the specific procedures adopted by the CSRT were based on the procedures applied by Article 5 GCIII tribunals under US law.[240] As in Iraq and Afghanistan, the US has taken the view that its detention operations in the conflict with al-Qaeda are not governed by IHRL.[241] However, once again, this view is not shared by other states. Indeed, a significant number of states have criticised the Guantanamo detention facility, emphasised the applicability of IHRL to detainees held there, and called for its closure.[242] As Anthony Dworkin notes, 'objections to Guantánamo were based above all on … the sweeping and often arbitrary nature of

[237] Executive Order 13,567 (n 232), s 6.

[238] Ibid, s 3(b).

[239] Ibid, s 3(c).

[240] US Department of Defence (n 219) 1. On art 5 GCIII, see section 3.3.2.

[241] UN Commission on Human Rights, 'Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva Addressed to the Secretariat of the Commission on Human Rights', UN Doc E/CN.4/2003/G/80, 22 April 2003, 4–5.

[242] See, e.g., *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* et al [2002] EWCA Civ 1598, [107]; *Khadr v Canada (No 1)* [2008] SCC 28 (Canadian Supreme Court), [25]; JR Crook (ed), 'Contemporary Practice of the United States Relating to International Law' (2006) 100 AJIL 690, 709; K Kaikobad and others, 'United Kingdom Materials on International Law, Part Six: VIII (Human rights and fundamental freedoms)' (2007) 78 BYIL 737, 752–5; UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: United States of America', A/HRC/16/11, 4 January 2011, [11], [27], [39], [40], [41], [51], [92.58], [92.136], [92.137], [92.155], [92.156], [92.157], [92.158], [92.159], [92.160] (statements and recommendations by, respectively, Russia, Republic of Korea, Libya, UK, France, Spain, Iran, Democratic People's Republic of Korea, Cuba, Venezuela, Egypt and Ireland, China, Sudan, Viet Nam, and Switzerland).

American decisions about whom to detain.'[243] More generally, the US' practice of treating its military engagements with al-Qaeda as an armed conflict, governed by IHL alone, is at odds with the approach of other states. The UK, for example, responded to the 9/11 attacks by derogating from Article 5 ECHR and adopting the Anti-Terrorism, Crime and Security Act 2001, providing for administrative detention, demonstrating its view that Article 5 ECHR was otherwise fully applicable.[244] Finally, as in Iraq and Afghanistan, the US' detention practices here have been scrutinised by numerous international bodies, all of which apply the IHRL rules on detention as the relevant standards.[245]

It should finally be noted that, in addition to the above administrative procedures, Guantanamo detainees are now also entitled to the domestic writ of *habeas corpus* in US courts, following a series of US Supreme Court judgments.[246] Interestingly, the US relied on these judgments in response to the Human Rights Committee's concluding observations, in which it had called on the US to extend the right to *habeas corpus* in Article 9(4) ICCPR to Guantanamo detainees.[247] It is noteworthy, however, that the Circuit Court for the District of Columbia has suggested that such *habeas* petitions require

[243] A Dworkin, 'Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism' (European Council on Foreign Relations Policy Brief, ECFR/13) (May 2009) 6 <http://ecfr.3cdn.net/1e18727eafdddcceb7_81m6ibwez.pdf> accessed 23 December 2013.

[244] See, e.g., UK House of Lords, Statement by the Parliamentary Under-Secretary of State, Home Office, Hansard, 11 March 2003, Vol 645, Debates, cols 1291–94, cited in ICRC, Customary IHL Database (n 205). Similarly, see HRC, 'Fifth Periodic Report: Canada', CCPR/C/CAN/2004/5, 18 November 2004, [61]–[68] (discussing new counter-terrorism laws introduced in light of 9/11, which were based on pre-existing criminal law detention powers).

[245] See, e.g., UN Commission on Human Rights (n 43) [24]; HRC (n 176) [18]; UN Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Mission to the United States of America', A/HRC/6/17/Add.3 (22 November 2007) [14]; UN Working Group on Arbitrary Detention, *Obaidullah v United States*, A/HRC/WGAD/2013/10, 12 June 2013.

[246] The key cases were: *Rasul* (n 218); *Hamdan v Rumsfeld*, 548 US 557 (2006); *Boumediene* et al *v Bush* et al, 553 US 723 (2008). Congressional attempts to overrule these failed: see, e.g., Pub L No 109-148, 119 Stat 2680 (2005), at § 1005(e) (the Detainee Treatment Act 2005); Pub L No 109-366, 120 Stat 2600 (2006), §§ 7(a)(1) & (b) (Military Commissions Act 2006).

[247] HRC (n 172) [569]–[572].

only a minimal scope of review, undermining the degree to which they satisfy Article 9(4) ICCPR.[248]

6.3 Conclusions on State Practice

It was argued in section 6.1.2 that the default legal position regarding detentions in relation to non-international conflicts is that they are regulated both by the minimal rules of IHL explored in chapter four and the more detailed rules of IHRL explored in chapter five; this presumption arises from the text of human rights treaties, as well as the broad acceptance that IHRL, *prima facie*, applies in armed conflict.[249] This presumption was then said to be rebuttable either where the state derogates or, potentially, where it can be established that the states parties to the relevant human rights treaties collectively intend for their human rights obligations not to apply in such situations.[250] In international conflicts, there is support for inferring such an intention from the fact that states have developed internment regimes specifically for those situations, suggesting that it is against those that their conduct is to be judged.[251]

In non-international conflicts, however, no internment regime exists under IHL from which one might derive a similar intention. This notwithstanding, there remains considerable disagreement over the applicability of IHRL here. In light of this disagreement, it was considered how else one might derive a common intention amongst states parties that a human rights treaty provision does not apply in non-international conflicts. It was suggested that one might arguably derive such an intention from the

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[248] *Al-Bihani v Obama*, 590 F.3d 866 (2010) (DC Cir Ct). On the requirements of Article 9(4) ICCPR, see section 5.2.3.

[249] See above, text to nn 25–6.

[250] See above, text to n 28.

[251] Although, it was noted that certain commentators question whether the *lex specialis* principle can have this effect: text to nn 38–9.

subsequent practice of the states parties, and hence the above sections examined state practice in a number of non-international conflicts. In so doing, it was shown that practice does not establish a shared intention as to the inapplicability of the IHRL rules here. Rather, the opposite appears to be true. Thus, the examples of traditional non-international conflicts made clear that the states involved operated on the presumption that the IHRL rules on detention continued fully to apply. Regarding the examples of internationalised and transnational non-international conflicts, there was admittedly clear practice from the US that its human rights obligations did not regulate its detention operations. However, this was countered by other states, including coalition partners, which were of the view that IHRL continued to govern detentions.

The general practice explored above thus confirms that the US' position in these cases is not legally tenable. The *erga omnes* nature of human rights obligations means its rejection of the applicability of IHRL violates not only the rights of those it detains but also the rights of all other states parties under relevant human rights treaties (e.g. the ICCPR). It was also noted that the US' view was, in part, premised on its rejection of the extraterritorial application of IHRL. It will be shown in section 7.2, however, that states continue to be held responsible under IHRL for persons they detain outside their territory.

In conclusion, it is clear that no general consensus can be said to exist amongst states that their IHRL obligations do not regulate their detention operations in non-international conflicts. Rather, practice overwhelmingly supports the default legal position that IHRL continues to apply in such situations, alongside the minimal rules of IHL explored in chapter four. Indeed, as will be demonstrated in the following chapter, the practice of human rights treaty bodies confirms this. The consequence is that the same facts (e.g. an unnecessary detention by a state of a civilian in a non-international conflict)

may lead to violations of both IHRL and IHL, as has been consistently recognised in jurisprudence.[252]

[252] ACiHPR, *DRC v Burundi, Uganda and Rwanda* (n 60) [79]–[80]; *Israeli Wall* (n 6) [134]; *DRC v Uganda* (n 4) [217]–[220].

7. The Practical Application of the IHRL Rules on Detention in Non-International Armed Conflicts

The previous chapter demonstrated that the IHRL rules on detention fully apply to detentions in relation to non-international armed conflicts, alongside the minimal rules of IHL explored in chapter four. It remains to be seen, however, how these IHRL rules in practice operate in non-international conflicts, including the extent to which the exigencies of the situation may be taken into account in interpreting the specific content of the rules. The present chapter seeks to answer this question with a comprehensive examination of the jurisprudence of the human rights treaty bodies. This will be the subject of section 7.1 below. Whilst the general content of these rules was discussed in chapter five, the focus here is on what these rules demand from states in the kinds of emergency situations that are the subject of the present enquiry.

The remaining sections will then discuss two further complex issues regarding the practical application of the IHRL rules on detention in non-international conflicts: their extra-territorial application and their binding nature *vis-à-vis* non-state armed groups. Whilst it will be demonstrated in section 7.2 that states continue to be held responsible under IHRL for detentions they conduct abroad, section 7.3 will highlight the limitations regarding the application of these rules to non-state groups. Given the absence of detailed IHL rules in this area that bind armed groups, this demonstrates a major shortcoming of the current *lex lata*, offering an opportunity to discuss how this might be remedied in the concluding chapter.

7.1 The Practice of Human Rights Treaty Bodies

This section will explore the practice of human rights treaty bodies in this area. Their practice is important for several reasons. First, as the authoritative interpreters of the

treaties, their jurisprudence is important here.[1] Second, the case law offers an opportunity to explore how these IHRL rules are applied in practice and, more specifically, the extent to which they may be modified to take account of the exigencies of the situation. In so doing, three lines of enquiry are explored: first, does the particular treaty body apply the treaty rules on detention in full to detentions in relation to non-international conflicts? As part of this line of enquiry, reference will be made to the treaty bodies' jurisprudence on the relationship between IHL and IHRL. The goal here is to consider whether the practice of the treaty bodies confirms the conclusions made in the previous chapter. Second, if so, can those rules be 'read down' so as to take account of the exigencies of the situation (outside the context of derogation)? Third, to what extent is derogation from the procedural rules on detention permitted? It will be shown that, whilst the treaty bodies unanimously answer the first line of enquiry affirmatively (confirming the conclusions made in the previous chapter), their approaches to the second and third differ considerably. A proposal for reconciling their approaches will then be made in section 7.1.5.

Before examining these three lines of enquiry, a brief introduction to the notion of derogation should be made. With the exception of the ACHPR, each of the human rights treaties referenced in this thesis provides for derogation

> [i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed … to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the state's] other obligations under international law.[2]

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1 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Merits Judgment [2010] ICJ Rep 639, [66]–[68]; S Ghandhi, 'Human Rights and the International Court of Justice: The *Ahmadou Sadio Diallo* Case' (2011) 11 HRLR 527, 533–8.

2 Art 4(1) ICCPR; art 15(1) ECHR; art 27(1) ACHR; art 4(1) ArCHR.

Given that a 'public emergency' would arguably exist where the threshold for a non-international armed conflict has been reached,[3] and given that the procedural rules applicable to detention are not explicitly listed as non-derogable,[4] one is faced with the question of whether these rules are in fact capable of addressing the silence of IHL in this area. However, it must be borne in mind that the derogation provisions place important limits on the extent of permissible derogation, most importantly by restricting it to the 'extent strictly required by the exigencies of the situation'. This requires that *both* the general derogation *and* each measure adopted pursuant thereto are not only necessary to respond to the threat but also proportionate to that end, that is, the least rights-restrictive option.[5] More generally, derogating measures 'must be of an exceptional and temporary nature.'[6] With that in mind, we can now turn to the practice of the human rights treaty bodies regarding our three lines of enquiry.

7.1.1 Human Rights Committee (HRC)

Regarding our first line of enquiry, it is first to be noted that that the HRC's approach to the general relationship between IHL and IHRL appears to leave no room for the claim that Article 9 ICCPR does not apply in full in non-international conflicts. The HRC has opined that

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

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[3] It may be that a non-international conflict that is limited to one part of the country could not justify derogating measures applicable throughout the whole country: *Greek* case (1969) 12 YB 1, [153] (European Commission on Human Rights); ECtHR, *Sakik and others v Turkey*, App Nos 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94, Judgment, 26 November 1997, [39].

[4] Art 4(2) ICCPR; art 15(2) ECHR; art 27(2) ACHR; art 4(2) ArCHR.

[5] HRC, General Comment No 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, [4]; R Higgins, 'Derogations under Human Rights Treaties' (1976) 48 BYIL 281, 282–3.

[6] HRC, General Comment No 29, ibid, [2].

> specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.[7]

Based on this, there seems to be scope for the HRC to invoke IHL as an interpretive aid in the same sense as the ICJ in the *Nuclear Weapons* advisory opinion,[8] i.e. what is an 'arbitrary' deprivation of life in Article 6 ICCPR might be interpreted by reference to IHL.[9] However, given the emphasis by the HRC that IHL and IHRL are 'complementary, not mutually exclusive',[10] there would appear to be no room for the argument that the minimal IHL rules applicable to internment in non-international conflicts (discussed in chapter four) set aside Article 9 ICCPR. This is confirmed by its jurisprudence, in which it has consistently applied Article 9 ICCPR in full to detentions in relation to non-international armed conflicts.[11] Indeed, other international bodies too have applied Article 9 ICCPR in full to detentions in non-international conflicts.[12]

Given this, the second line of enquiry requires consideration of the extent to which Article 9 ICCPR might be 'read down' to take account of the exigencies of such

[7] HRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, [11]. Similarly, see HRC, Report of 7 Special Rapporteurs: Mission to Lebanon and Israel (7–14 September 2006), UN Doc A/HRC/2/7, 2 October 2006, [16].

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

[9] W Kalin, 'Universal Human Rights Bodies and International Humanitarian Law' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar, Cheltenham 2013) 444.

[10] The HRC makes this point in particular with regard to the rules on detention in HRC, Draft General Comment No 35: Article 9, CCPR/C/107/R.3, 28 January 2013, at [67].

[11] See, e.g., *Sarma v Sri Lanka*, CCPR/C/78/D/950/2000, 31 July 2003, [9.3]; HRC, 'Concluding Observations: Sri Lanka', CCPR/CO/79/LKA, 1 December 2003, [13]; HRC, Concluding Observations: Colombia, CCPR/CO/80/COL, 26 May 2004, [9]; HRC, 'Concluding Observations: Democratic Republic of the Congo', CCPR/C/COD/CO/3, 26 April 2006, [19]; HRC, 'Concluding Observations: United States of America', CCPR/C/US/CO/3/Rev.1, 18 December 2006, [18]; HRC, Concluding Observations: United Kingdom, CCPR/C/GBR/CO/6, 30 July 2008, [14]; *Traoré v Côte d'Ivoire*, CCPR/C/103/D/1759/2008, 17 January 2011, [7.5]; *Maharjan v Nepal*, CCPR/C/105/D/1863/2009, 2 August 2012, [8.6]; HRC, Draft General Comment No 35 (n 10) [67].

[12] UN Commission on Human Rights, 'Situation of Detainees at Guantanamo Bay', E/CN.4/2006/120, 27 February 2006, [24]; UN Assistance Mission for Iraq, 'Human Rights Report: 1 April – 30 June 2007', [72] <http://www.ohchr.org/Documents/Countries/IQ/HRReportAprJun2007EN.pdf> accessed 4 February 2014; Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', UN Doc A/HRC/21/50, 15 August 2012, [63]–[73]; UN Working Group on Arbitrary Detention, *Obaidullah v United States*, A/HRC/WGAD/2013/10, 12 June 2013.

situations. The goal here is to consider what the relevant treaty rules require in situations of emergency, where the state has *not* derogated. The HRC's jurisprudence on states of emergency (outside the context of derogation) suggests that there is very limited scope for reading down Article 9. For example, the Committee held that the CSRT and ARB procedures for Guantanamo detainees did not satisfy Article 9(4) due, *inter alia*, to 'their lack of independence from the executive branch and the army … [and the] restrictions on the rights of detainees to have access to all proceedings and evidence'; it concluded that the US must ensure that all detainees

> … are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard.[13]

Moreover, in the context of Israel's administrative detention practices, the HRC confirmed, notwithstanding the security situation, the importance of informing detainee's promptly and in sufficient detail of the reasons for their detention (Article 9(2) ICCPR) and providing them with legal counsel in order to challenge the legality of their detention.[14]

The procedural safeguards in Articles 9(2) and (4) ICCPR are, therefore, interpreted strictly. However, the HRC has held the arbitrariness standard in Article 9(1) itself to be context-sensitive: '[t]he existence and nature of a public emergency which threatens the life of the nation may … be relevant to a determination of whether a particular arrest or detention is arbitrary'.[15] The HRC's approach is, therefore, to take the state of emergency

[13] HRC, 'Concluding Observations of the Human Rights Committee: United States of America', CCPR/C/USA/CO/3, 15 September 2006, [18]. Similarly, see UN Commission on Human Rights, 'Report of the Working Group on Involuntary or Enforced Disappearances: Mission to Nepal', E/CN.4/2005/65/Add.1, 28 January 2005, [45]–[50].

[14] HRC, 'Concluding Observations: Israel' CCPR/CO/78/ISR, 21 August 2003, [12]–[13]; HRC, 'Concluding Observations: Israel' CCPR/C/ISR/CO/3, 3 September 2010, [7].

[15] HRC, Draft General Comment No 35 (n 10) [69]. Although note UN Commission on Human Rights (n 13) [45]–[50] (demonstrating the impermissibility of vague security grounds as a basis for detention).

into account in the initial determination of the arbitrariness of the detention, with no room for the subsequent procedural safeguards, such as *habeas corpus*, to be read down in light of the situation.

The above is consistent with the HRC's jurisprudence regarding our third line of enquiry, on the possibility of derogation from Article 9 ICCPR. The Committee has held both the prohibition of arbitrary detention and the right to *habeas corpus* to be non-derogable. The former is considered non-derogable on the basis that violations thereof are said to violate 'humanitarian law or peremptory norms of international law',[16] whilst the non-derogability of *habeas corpus* is said to arise from its role in protecting other, explicitly non-derogable rights.[17] Other bodies, too, consider these rights to be non-derogable under the ICCPR.[18]

The present author's view of the HRC's approach to the second and third lines of enquiry will be addressed in section 7.1.5. Before that, however, the approaches of the other treaty bodies must first be considered.

7.1.2 European Court of Human Rights (ECtHR)

Regarding our first line of enquiry, certain commentators have argued that the ECtHR has drawn on the more permissive principles of IHL when applying the ECHR in armed conflict.[19] This suggests that the Court might be willing to set aside (or at least read down)

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[16] HRC, General Comment No 29 (n 5) [11].

[17] Ibid, [16].

[18] See, e.g., UN Working Group on Arbitrary Detention (UNWGAD), 'Deliberation No 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty under Customary International Law' in Human Rights Council, 'Report of the Working Group on Arbitrary Detention', A/HRC/22/44, 24 December 2012, [47]–[51].

[19] See, e.g., HJ Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 86 IRRC 789; C Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 IRRC 501; P Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' [2008] EHRLR 732, 734; N Melzer, *Targeted Killings in International Law* (OUP, Oxford 2008) 391; A Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence' (2008) 19 EJIL 161; E

Article 5 ECHR in favour of applicable rules of IHL. Commentators have made such claims regarding the Turkish and Chechen cases,[20] for example, arguing that the Court's references to the IHL requirement of minimising incidental loss of civilian life suggests an acceptance of the targeting of 'opposition forces … even in the absence of an immediate threat'.[21]

However, it must be noted that 'the degree of force used against [opposition forces] directly was not considered' in these cases.[22] Indeed, a number of commentators argue that, notwithstanding implicit references in these cases to IHL, the Court continued to apply the normal ECHR standards.[23] It is submitted that this is the more accurate reading of the Court's approach here. Thus, in *Ergi v Turkey*, whilst the Court did make reference to the need for the state to avoid 'incidental loss to civilian life', it also confirmed that all force must be proportionate to the aims in Article 2(2) ECHR and that operations be planned accordingly.[24] No inference can therefore be made that lethal force against non-civilians was lawful; indeed, the evidence was inconclusive as to the presence of 'non-civilians'.[25] Moreover, in *Isayeva* et al *v Russia* and *Isayeva v Russia*, the government

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Tamura, 'The *Isayeva* Cases of the European Court of Human Rights: The Application of International Humanitarian Law and Human Rights Law in Non-International Armed Conflicts' (2011) 10 Chinese J Intl L 129.

[20] *Ergi v Turkey*, App No 23818/94, Judgment (Merits), 28 July 1998; *Isayeva v Russia*, App No 57950, Judgment (Merits), 24 February 2005; *Isayeva, Yusupova and Bazayeva v Russia*, App Nos 57947/00, 57948/00 and 57949/00, Judgment (Merits), 24 February 2005.

[21] Droege (n 19) 533. Referring to the IHL requirement, see, e.g., *Ergi v Turkey*, ibid, [79].

[22] L Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?' (2006) 86 IRRC 881, 884.

[23] See, e.g., W Abresch 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 EJIL 741; C Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies' (2007) 47 Va J Intl L 839, 851–6; F Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law From the Perspective of a Human Rights Treaty Body' (2008) 90 IRRC 549, 561; L Moir, 'The European Court of Human Rights and International Humanitarian Law' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar, Cheltenham 2013) 481–6.

[24] *Ergi v Turkey* (n 20) [79], citing *McCann and others v UK*, App No 18984/91, Judgment (Merits), 17 September 1995, [148]–[150].

[25] Ibid, [80].

made no claim to be exercising any right under IHL, but rather argued that its actions were justified under Article 2(2)(a) ECHR, in response to alleged force by armed groups.[26] Whilst the Court referred to the need to minimise civilian injury,[27] it also confirmed that *any* lethal force must be necessary to achieve one of the purposes in Article 2(2) ECHR and proportionate to that end.[28] Indeed, in *Isayeva*, after stating that the state's actions may have fallen under Article 2(2)(a) by virtue of the presence of non-state armed groups, the Court held that it exceeded what was permitted by that provision.[29] The Court thus made no suggestion in any of these cases that certain actions that would otherwise have been unlawful under Article 2 ECHR were considered lawful by virtue of the application of IHL.

This holds true also for Article 5 ECHR. Importantly for our first line of enquiry, the ECtHR recently addressed a case of internment by the UK in the context of the non-international armed conflict in Iraq, applying Article 5(1) ECHR as the governing standard.[30] It was explained in chapter five that this provision lists the exhaustive grounds on which detention may be based and, in so doing, does not include preventive, security detention; derogation is therefore necessary for internment to be lawful.[31]

In *Al-Jedda v UK*, the petitioner had been interned by the UK on the basis that it was 'necessary for imperative reasons of security' in accordance with SCR 1546.[32] The applicant complained that this was in violation of Article 5(1) ECHR, not being based on

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[26] *Isayeva et al* (n 20) [160]; *Isayeva* (n 20) [170].

[27] *Isayeva et al* (n 20) [177].

[28] Ibid, [169]–[171]; *Isayeva* (n 20) [172]–[178].

[29] *Isayeva* (n 20) [191].

[30] *Al-Jedda v United Kingdom*, App No 27021/08, Judgment (Grand Chamber), 7 July 2011. The following discussion of *Al-Jedda* was originally published in L Hill-Cawthorne, 'The Copenhagen Principles on the Handling of Detainees: Implications for the Procedural Regulation of Internment' (2013) 18 JCSL 481.

[31] Section 5.2.1.

[32] *Al-Jedda* (n 30) [11] and [16].

any of the grounds listed therein.[33] The UK made two, alternative arguments in response: first, that Al-Jedda's detention was attributable to the UN and not, therefore, within the UK's jurisdiction according to Article 1 ECHR; second, that the detention was based on SCR 1546 which, by virtue of Article 103 of the UN Charter, displaced the obligations under Article 5(1) ECHR.[34] The Court found in favour of Al-Jedda, rejecting the UK's first claim on the basis that the UN did not exercise the requisite level of control for a holding of attribution.[35] Regarding the UK's second claim, it held that, since SCR 1546 did not create an 'obligation' to intern, there was no conflict between that resolution and the UK's obligations under Article 5(1) ECHR; Article 103 of the UN Charter was thus inapplicable, leaving Article 5(1) ECHR intact.[36]

Importantly, Al-Jedda was interned in October 2004, when the armed conflict in Iraq was of a non-international character.[37] The Court nonetheless made clear that Article 5(1) ECHR fully applied unless explicitly set aside by a binding SCR,[38] or through derogation.[39] Whilst the Court did not address the applicability of the other paragraphs of Article 5 ECHR, its reasoning would seem equally applicable to those, including Article 5(2) requiring that reasons be given to the detainee and Article 5(4) requiring *habeas corpus*. Consequently, for states party to the ECHR that have neither derogated from Article 5 ECHR nor had that provision explicitly set aside by a SCR, any detentions carried out as part of a non-international conflict (whether at home or abroad) remain fully

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[33] Ibid, [59].

[34] Ibid, [60]. Art 103 of the UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[35] Ibid, [74]–[86].

[36] Ibid, [97]–[110].

[37] ICRC, 'Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority' (5 August 2004) < http://www.icrc.org/eng/resources/documents/misc/63kkj8.htm> accessed 25 November 2013. See discussion in section 6.2.2.1.

[38] *Al-Jedda* (n 30) [102].

[39] Ibid, [99].

regulated by that provision, regardless of applicable IHL. Indeed, at no point did the UK government suggest that the Article 5 framework was inapplicable by virtue of the existence of a non-international armed conflict.[40]

Having confirmed that the ECtHR applies Article 5 ECHR in full to detentions in non-international conflicts, the second line of enquiry requires considering the possibility of reading down the Article 5 ECHR requirements to take account of the exigencies of such situations. The ECtHR addressed this issue in *Ireland v UK*, in which it had to examine the conformity of the UK's internment regime in Northern Ireland with the Convention.[41] The first part of the judgment sheds light on our enquiry into the degree to which the Article 5 requirements can be read down. The Court held that the UK's internment regime was incompatible with Article 5 ECHR, not falling into any of the grounds for permissible detention listed in Article 5(1); for any internment to be lawful under the Convention, derogation from Article 5(1) would be necessary.[42] In addition, the fact that, 'in general, [internees] were simply told that the arrest was made pursuant to the emergency legislation and they were given no further details' violated Article 5(2).[43] Finally, the review procedures under the emergency legislation, which consisted of an advisory committee and commissioners, were held not to satisfy Article 5(4) on several grounds.[44] First, the advisory committee could only recommend, but not order, release.[45]

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[40] It has been suggested that in future cases states should argue that IHL applies as the *lex specialis*: J Pejic, 'The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law' (2011) 93 IRRC 837, 850. However, as demonstrated above, the ECtHR has never (explicitly or implicitly) applied IHL to the exclusion of the ECHR, and it thus remains to be seen whether such an argument would be accepted. Two cases pending at the time of writing will likely address this: *Hassan v UK*, App No 29750/09; *Georgia v Russia*, App No 13255/07.

[41] *Ireland v UK*, App No 5310/71, Judgment (Merits), 18 January 1978.

[42] Ibid, [194]–[196].

[43] Ibid, [198].

[44] Ibid, [200].

[45] Ibid, [200]. Similarly, see *A and others v UK*, App No 3455/05, Judgment (Grand Chamber), 19 February 2009, [202] ('[t]he reviewing "court" must not have merely advisory functions but must have

Second, neither the advisory committee nor the commissioners afforded 'the fundamental guarantees inherent in the notion of "court"'.[46] Regarding the advisory committee, comprising a judge and two laymen, detainees had no legal right to appear, to be legally represented, to challenge the grounds for internment, or to call or examine witnesses.[47] Regarding the commissioners, the Court held these not to satisfy Article 5(4), *inter alia*, because only the Chief Constable or Secretary of State could refer a case to them; detainees could not refer their case themselves.[48] Moreover, the availability of the common law writ of *habeas corpus* also failed to satisfy Article 5(4) as the scope of review was insufficiently wide.[49] Specifically, courts could intervene only if there had been

> … bad faith, absence of a genuine suspicion, improper motive or failure to comply either with the statutory procedures or with such principles of the common law as were held not to be excluded by the language of the Regulation; however, they could not in general enquire into the reasonableness or fairness of the suspicion or of the decision to exercise the power.[50]

This jurisprudence confirms, therefore, that, even in situations of emergency, the reasons for detention must be sufficiently detailed and review of a sufficiently wide scope must be by a judicial body with the power to order release, offering fundamental guarantees, including the right to legal representation and to call and examine witnesses. It should be noted, however, that the ECtHR has shown some willingness to take account of security concerns in certain aspects of *habeas* proceedings. Thus, it has confirmed that, whilst the

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the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful').

[46] *Ireland v UK* (n 41) [200].

[47] Ibid, [84]. Similarly, see *Chahal v UK*, App No 22414/93, Judgment (Grand Chamber), 15 November 1996, [130]–[131] (found a violation of art 5(4) as the advisory panel, chaired by a judge, did not have the authority to order release, the individual had no right to legal representation and they were given only an outline of the national security case against them).

[48] *Ireland v UK* (n 41) [200].

[49] Ibid, [200].

[50] Ibid, [82] and [84].

reviewing court must have access to all the evidence,[51] certain evidence can be withheld from the detainee so long as most of that relied upon was open to the detainee and sufficiently precise.[52]

Our third line of enquiry concerns the extent to which states parties can derogate from Article 5 ECHR. The ECtHR seems to take a different approach to the HRC here, which, it will be remembered, considers Article 9 ICCPR non-derogable. It was on this issue that the Court focused in the second part of its *Ireland v UK* judgment, holding that the UK's derogation from Article 5 was permissible.[53] It first confirmed that the Troubles in Northern Ireland constituted a 'public emergency threatening the life of the nation'.[54] It then went on to hold that, given the growth in violence in the region, derogation from Article 5(1) ECHR and the introduction of internment could not be said to go beyond what was 'strictly required by the exigencies of the situation'.[55] Furthermore, the Court concluded that the derogations from Articles 5(2) and (4) ECHR equally complied with this proportionality requirement.[56] It considered the existence of review procedures particularly relevant in holding that the UK had not gone beyond what was necessary: 'the advisory committee … afforded, notwithstanding its non-judicial character, a certain measure of protection that cannot be discounted'.[57] Procedures for the review of detention were, therefore, a necessary condition for the validity of derogation from Article 5.[58]

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[51] *Chahal v UK* (n 47) [130]–[131].

[52] *A and others* (n 45) [220].

[53] *Ireland v UK* (n 41) [202]–[224].

[54] Ibid, [205].

[55] Ibid, [212]–[214].

[56] Ibid, [215]–[221].

[57] Ibid, [218]–[219]. It is also noteworthy that amendments to the internment regime made in August 1973 included the requirement that 'the Secretary of State had to refer to a commissioner the case of anyone held under a detention order for one year since the making of the order or for six months since the last review' (ibid, [88]). This clearly mirrors the procedural review provisions in GCIV: see section 3.3.1.2.

[58] Similarly, see *Lawless v Ireland (No 3)*, App No 332/57, Judgment (Plenary), 1 July 1961, [37]; *Brannigan and McBride v UK*, App Nos 14553/89 and 14554/89, Judgment (Merits), 25 May 1993, [66];

The ECtHR's jurisprudence thus suggests that states may validly derogate from Article 5 ECHR, although the Court will judge the necessity and proportionality of such derogation, in part, on the presence of safeguards. This is in contrast to the HRC, discussed above. The ECtHR has more recently confirmed the permissibility of derogating from Article 5(1) for the purposes of introducing internment.[59] However, regarding derogation from Articles 5(2) and (4), the age of the above cases must be acknowledged, and whether they would be decided in the same way today remains to be seen.[60] Given the subsequent developments in the jurisprudence of other human rights treaty bodies in favour of the non-derogability of the procedural rules on detention, the ECtHR may follow suit, particularly given the requirement in Article 15 ECHR that any derogation be compatible with the state's other obligations under international law. As noted, a proposal for moving forward in this area will be discussed in section 7.1.5, after examining the jurisprudence of the remaining treaty bodies.

7.1.3 Inter-American institutions

The Inter-American Commission (IACiHR) and Court (IACtHR) of Human Rights have been far more explicit about their use of IHL than the HRC or ECtHR, applying it as the *lex specialis* when interpreting the ACHR and ADRDM, in the same manner as the ICJ in *Nuclear Weapons*.[61] Thus, in *Abella v Argentina*, the Commission applied the IHL rules on the conduct of hostilities when interpreting the right to life under the ACHR, concluding that the targeting of non-state fighters was not a violation of the ACHR or

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Aksoy v Turkey, App No 21987/93, Judgment (Merits), 18 December 1996, [83]; *A and others* (n 45) [184].

[59] *A and others v UK* (n 45).

[60] L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, Oxford 2011) 97.

[61] CM Cerna, 'The History of the Inter-American's System's Jurisprudence as Regards Situations of Armed Conflict' (2011) 2 J Intl Humanitarian Legal Studies 3.

IHL, as such individuals, by virtue of their direct participation in hostilities, were lawful targets under the latter.[62] The Commission therefore applied IHL as the governing standard, without also considering whether the IHRL requirements of necessity and proportionality had been met. Indeed, the Commission has applied IHL in a similar way when considering the procedural regulation of detention in international armed conflicts.[63]

The IACtHR has similarly held that IHL 'may be taken into consideration as elements for the interpretation of the American Convention.'[64] However, it is not clear how the Court would treat a case where IHL establishes a lower level of protection than IHRL. Whilst it is yet to face such case, Conor McCarthy argues that its jurisprudence implies that a state's responsibility under Article 1 ACHR would not arise where a particular action, although unlawful according to the normal standards of the ACHR, was lawful under IHL.[65]

Notwithstanding their willingness to draw on IHL as an interpretive aid generally, with regard to the procedural rules on detention in Articles 7 ACHR and XXV ADRDM, the inter-American institutions have applied these provisions in full to detentions by the state in the context of non-international armed conflicts. Thus, in a 2011 admissibility decision regarding an armed confrontation between Colombian forces and rebels, both parties, as well as the IACiHR, accepted Article 7 ACHR as the governing standard for

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[62] *Juan Carlos Abella v Argentina*, Report No 55/97, 18 November 1997, [178]. Similarly, see *Franklin Guillermo Aisalla Molina (Ecuador v Colombia)*, Inter-State Petition IP-02 (Admissibility), Report No 112/10, 21 October 2010, [113]–[126]. Note that the IACtHR later held that neither it nor the Commission are competent to rule on state compliance with IHL: *Las Palmeras v Colombia*, Judgment (Preliminary Objections), IACtHR (Ser C) No 67 (2000).

[63] See, e.g., IACiHR, *Detainees in Guantanamo Bay, Cuba: Request for Precautionary Measures* (13 March 2002); IACiHR, 'Report on Terrorism and Human Rights', OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, ch III [142]–[143]; *Djamel Ameziane v United States,* Report No 17/12, Admissibility Decision, 20 March 2012, [28].

[64] *Las Palmeras* (n 62) [32]; *Bámaca Velásquez v Guatemala*, Judgment, IACtHR (Ser C) No 70 (2000) [209]; *Serrano-Cruz Sisters v El Salvador*, Judgment (Preliminary Objections), IACtHR (Ser C) No 118 (2004) [119].

[65] C McCarthy, 'Human Rights and the Laws of War under the American Convention on Human Rights' [2008] EHRLR 762, 778.

detentions by the state of alleged members of non-state groups.[66] Similarly, the IACtHR, in *Bámaca Velásquez v Guatemala*, held Article 7 ACHR to have been infringed as a result of the state's detention and disappearance of a member of a non-state group party to a non-international conflict: 'Although this is a case of the detention of a guerrilla during an internal conflict …, the detainee should have been ensured the guarantees that exist under the rule of law, and been submitted to a legal proceeding.'[67] Importantly, the Court also recognised that the IHL rules applicable in non-international conflicts can be utilised when interpreting certain provisions of the ACHR.[68] It clearly did not, however, feel that this could be done with regard to the legality of detention, for which it relied entirely on the framework provided by Article 7 ACHR.

Having confirmed that both the Commission and Court apply the human rights treaty rules on detention in non-international conflicts, the second line of enquiry regarding the possibility of reading down the requirements of these rules must be considered. The IACiHR addressed the extent to which Article XXV ADRDM can be read down in *Coard* et al *v United States*,[69] concerning the US invasion and occupation of Grenada, which both parties in the case recognised as an international armed conflict.[70] The Commission had to consider the legality of detentions by the US, and it applied Article XXV, interpreting it with reference to Article 78 GCIV.[71] Interestingly, the

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[66] *Luis and Leonardo Caizales Dogenesama v Colombia*, Report No 152/11, 2 November 2011, especially at [22]–[23] and [50]. Similarly, see *Extrajudicial Executions and Forced Disappearances of Persons (Peru)*, Report No 101/01, 11 October 2001, [216]–[225]; *James Zapata Valencia and Jose Heriberto Ramirez Llanos v Colombia,* Report No 79/11, 21 July 2011, [123]–[131].

[67] *Bámaca Velásquez v Guatemala* (n 64) [143] (footnotes omitted). Similarly, see *Case of Ituango Massacres v Colombia*, Judgment, IACtHR (Ser C) No 148 (2006), [139]–[153].

[68] *Bámaca Velásquez v Guatemala* (n 64) [209].

[69] *Coard* et al *v United States*, Report No 109/99, 29 September 1999.

[70] Ibid [44].

[71] Ibid [45]–[59].

Commission considered Article XXV and Article 78 as 'largely in accord',[72] interpreting their requirements symbiotically:

> … pursuant to the terms of the Fourth Geneva Convention and the American Declaration, [the requirement of *habeas corpus*] could have been accomplished through the establishment of an expeditious judicial or board (quasi-judicial) review process carried out by United States agents with the power to order the production of the person concerned, and release in the event the detention contravened applicable norms or was otherwise unjustified.[73]

Whilst the Commission seems to defer to Article 78 GCIV in that it does not require that a *court* carry out the review, it goes further than this provision in requiring that the reviewing authority have the power to 'order the production of the person concerned, and release in the event that detention' is unlawful.[74]

The Commission, therefore, made clear that, for the purposes of *habeas corpus* under Article XXV ADRDM, a 'quasi-judicial' board consisting of US agents with the power to order the production of the detainee and release would suffice. This suggests that the formal requirements of *habeas corpus* could be read down so as to require an administrative, as opposed to judicial, review. Whilst the Commission in that case was invoking Article 78 GCIV as the *lex specialis*,[75] its reasoning would extend to situations where Article 78 GCIV does not apply as a matter of law (including non-international armed conflicts), as it considered its interpretation to be consistent with Article XXV generally, making clear that, where Article 78 GCIV and Article XXV 'provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual.'[76]

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[72] Ibid [55].

[73] Ibid [58].

[74] As noted, the ICTY has interpreted art 43 GCIV as requiring that the reviewing authority have the power to order release: *Prosecutor v Zejnil Delalić* et al (Appeals Judgment) ICTY-96-21-A (20 February 2001) [329].

[75] *Coard et al v US* (n 69) [42].

[76] Ibid.

In extraordinary situations, therefore, the Commission is clearly willing to read down what is normally required by Article XXV ADRDM.

The IACtHR has implied that it is less willing to do this. Whilst the Court has not had the opportunity to elaborate on the specific procedural safeguards required under Article 7(6) ACHR (on *habeas corpus*),[77] it has emphasised the *judicial* character of *habeas corpus*, stating in its advisory opinion on *Habeas Corpus in Emergency Situations* that '[i]mplicit in this … is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency'.[78] It is unclear how to reconcile this emphasis on an independent, judicial body to review the lawfulness of detention with the IACiHR's acceptance in *Coard v US* of a board of US (non-judicial) agents, and it remains to be seen how this jurisprudence will develop in the future.

Finally, regarding the third line of enquiry, the Commission and Court have held the following procedural rules to be non-derogable under the inter-American system: the requirement of a legal basis for detention, the right to be informed of the reasons for detention, the right to legal counsel, and the right to *habeas corpus* and periodic review.[79] Of course, the Commission's willingness to read down these rules might reduce the need to derogate. We will come back to this in section 7.1.5.

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[77] B Farrell, 'The Right to Habeas Corpus in the Inter-American Human Rights System' (2010) 33 Suff Transnat L Rev 197, 219–20.

[78] *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, IACtHR (Ser A) No 8 (1987), [30]. Similarly, *Durand and Ugarte v Peru*, Judgment, IACtHR (Ser C) No 68 (2000), [93]–[110].

[79] See, e.g., IACtHR, *Habeas Corpus in Emergency Situations*, ibid; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, IACtHR (Ser A) No 9 (1987); IACiHR, 'Report on Terrorism and Human Rights' (n 63) Ch III [126]–[127] and [139].

7.1.4 African Commission on Human and Peoples' Rights (ACiHPR)

Pursuant to our first line of enquiry, the Commission's jurisprudence on the general relationship between IHL and IHRL has tended to mirror the ICJ's approach in *DRC v Uganda*,[80] simply noting violations of both IHL and IHRL, without exploring the relationship between the two.[81] This was the case, for example, in *DRC v Burundi, Uganda and Rwanda*, in which the Commission found the respondent states responsible for, *inter alia*, killings and rapes in violation of GCIV, API, and the ACHPR.[82]

The Commission has not, therefore, shown any willingness to interpret the ACHPR in accordance with IHL, let alone to set aside its provisions in favour of the latter. This is demonstrated by its jurisprudence on the procedural rules on detention in Article 6 ACHPR. As noted in chapter five, whilst Article 6 is very general, without a number of the specific rights found in other human rights treaties (such as *habeas corpus*), the Commission has elaborated on its specific content.[83] This has been done most fully in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.[84] In common with the other treaty bodies, the ACiHPR has applied Article 6 ACHPR, as developed in its jurisprudence and in the *Principles and Guidelines*, to detentions by states in relation to situations likely reaching the level of non-international armed conflicts.[85]

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[80] *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep 168, [217]–[220].

[81] DL Tehindrazanarivelo, 'The African Union and International Humanitarian Law' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar, Cheltenham 2013) 508–12.

[82] Communication No 227/99 (2003), [79]–[80].

[83] Art 6 reads: 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

[84] ACiHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted at 33rd session in Niamey, Niger, 29 May 2003, preamble <http://www.achpr.org/instruments/fair-trial/> accessed 11 December 2013.

[85] See, e.g., *Commission nationale des droits de l'Homme et des libertés v Chad*, Communication No 74/92 (1995), [23]–[26]; *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Communication Nos 140/94, 141/94, and 145/95 (1999), [50]–[51]; *Huri – Laws v Nigeria*, Communication No 225/98 (2000), [42]–[44]; *Kazeem Aminu v Nigeria*, Communication No 205/97

This takes us to our second line of enquiry, on the possibility of reading down the requirements of Article 6 ACHPR to take account of the exigencies of a non-international conflict. Much of the Commission's case law on Article 6 has dealt with flagrant breaches, leaving little need to go into detail regarding what is and what is not permitted under that provision. It has, however, demonstrated a clear concern at ensuring that states of emergency are not invoked as a basis for undermining the object and purpose of Article 6. In *Amnesty International v Sudan*, for example, it found a violation of Article 6 due to the vague grounds for detention and the absence of an independent review under a 1989 emergency decree providing for the detention of anyone 'suspected of being a threat to political or economic security'.[86] More specifically, a violation of the right to *habeas corpus* was found because 'appeal in the case of arrest lies to the body whose president orders the arrest'.[87] Furthermore, in *Huri—Laws v Nigeria*, the Commission found a violation of Article 6 for the detention of two persons under the 1984 State Security (Detention of Persons) Decree on the grounds that reasons were not given for their detentions and neither was given a fair hearing to challenge their detention.[88] The Commission's jurisprudence therefore confirms that the requirements that persons only be detained on reasonable and foreseeable grounds, that reasons be given for a detention, and that detainees be given an independent, judicial review are the minimum safeguards demanded by Article 6 ACHPR.

Regarding our third line of enquiry, the Commission has confirmed that derogation from Article 6 ACHPR is not permissible, given the absence of a derogation provision in

(2000), [21]; *Amnesty International and others v Sudan*, Communication Nos 48/90, 50/91, 52/91, and 89/93 (2003), [58]–[60]; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication Nos 279/03 and 296/05 (2009), [169]–[179].

86 *Amnesty International v Sudan*, ibid, [58]–[60].

87 Ibid, [60]. Similarly, see *Constitutional Rights Project* et al *v Nigeria* (n 85) [20] (stressing the need for independence from the executive).

88 *Huri – Laws v Nigeria* (n 85) [42]–[44].

the Charter.[89] Thus, 'even a situation of … war … cannot be cited as justification by the State violating or permitting violations of the African Charter'.[90] The focus in much of the jurisprudence has been on the non-derogability of *habeas corpus*. Thus, in its *Principles and Guidelines*, the Commission states that '[n]o circumstances whatever must [*sic*] be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures.'[91] In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, the Commission rejected Nigeria's plea that state security necessitated the suspension of *habeas corpus* on the basis that '[i]t is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform.'[92] Like the HRC and the inter-American institutions, the ACiHPR, therefore, does not permit derogation from the procedural rules applicable to detention.

7.1.5 Conclusions on treaty body practice: a proposal for reconciling their approaches

The practice of the human rights treaty bodies regarding our first line of enquiry unanimously confirms the conclusions in chapter six: the IHRL rules on detention continue fully to apply to detentions carried out in relation to non-international conflicts. As such, there is no 'displacing' of states' international human rights obligations in this area by IHL. Rather, as demonstrated in section 6.2 and confirmed in the sections above, states generally justify their detention practices in non-international conflicts (whether criminal or administrative) 'through' IHRL, by either derogating from the treaty

[89] *Commission nationale des droits de l'Homme et des libertés v Chad* (n 85) [23]–[26].

[90] *DRC v Burundi*, *Rwanda and Uganda* (n 82) 65.

[91] *Principles and Guidelines* (n 84) Principle M.5(e). Similarly, see ibid, Principle R.

[92] *Constitutional Rights Project* et al *v Nigeria* (n 85) [33].

provisions with which such practices conflict or by seeking to read down what is required by those provisions.[93]

The validity of such justifications was the subject of the second and third lines of enquiry explored above, which addressed the practical application of these rules by human rights treaty bodies and, in particular, the extent to which they can be modified to take account of the exigencies of the situation. There was shown to be less agreement amongst treaty bodies here. First, there seems to be disagreement between the ECtHR and the other treaty bodies regarding the derogability of the procedural rules on detention. Whereas the HRC, ACiHPR and inter-American institutions take the view that many or all of these rules are non-derogable, the ECtHR's jurisprudence suggests that states may derogate from each of the rules, so long as procedural safeguards remain in place. To some extent, this difference is inevitable given the different structure of Article 5 ECHR compared with the other treaties. In particular, whereas the other treaties prohibit 'arbitrary' detention, leaving states open to implement internment regimes that are not 'arbitrary', Article 5(1) ECHR gives an exhaustive list of permissible grounds for detention, none of which allows for preventive, security detention. For states party to the ECHR, therefore, derogation is necessary in order to adopt internment regimes.[94] Regarding derogation from the other paragraphs of Article 5 ECHR, it was noted that the age of the Court's case law in this area leaves some doubt as to the approach it would take today.

Second, the treaty bodies have explored the extent to which the procedural rules on detention may be 'read down' to take account of the exigencies of the situation, outside the context of derogation. In so doing, the HRC, ECtHR, IACtHR and ACiHPR have highlighted aspects of these rules that they consider incapable of being read down. In particular, whilst the existence of a public emergency may be relevant in considering the

[93] See, e.g., the examples of Colombia and the UK in section 6.2.1.1.

[94] *Ireland v UK* (n 41) [194]–[196]; *A v Others* (n 45) [172].

'arbitrariness' of a detention,[95] the grounds on which it is based must not be vague.[96] Moreover, the reasons for detention must promptly be conveyed to detainees in sufficient detail.[97] Finally, judicial review must be available, which provides an independent and impartial review of a sufficiently wide scope of the reasonableness of detention and which has the power to order release.[98] As part of this review, the detainees must be given legal counsel, as well as have the right to appear, call witnesses and view the evidence against them.[99]

The IACiHR seems to depart from the other treaty bodies here. In particular, it has suggested that a 'quasi-judicial' board of government agents would suffice for the purposes of *habeas corpus*.[100] The Commission did, however, emphasise that the purpose of this board is to ensure that detention is not left to the sole discretion of a state agent, and that it must have the power to order production of the person concerned and release.[101] Notwithstanding its view of the non-derogability of these rules, therefore, the Commission seems to enable the kind of detention regimes adopted by states in armed conflicts by reading down the requirements of the rules on detention. As noted, it remains unclear how to reconcile this with the IACtHR's jurisprudence.[102]

There are, therefore, important differences between the approaches of the treaty bodies with regard both to derogation from the IHRL rules on detention and the extent to which those rules may be read down. To move forward, a uniform approach to these

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[95] HRC, Draft General Comment No 35 (n 10) [69].

[96] UN Commission on Human Rights (n 13) [45]–[50]; *Amnesty International v Sudan* (n 85) [58]–[60].

[97] *Ireland v UK* (n 41) [198]; HRC, 'Concluding Observations: Israel', 21 Aug 2003 (n 14) [12]–[13]; *Huri – Laws v Nigeria* (n 85) [42]–[44].

[98] HRC (n 13) [18]; *Ireland v UK* (n 41) [200]; *A and others* (n 45) [202]; *Chahal v UK* (n 47) [130]–[131]; *Habeas Corpus in Emergency Situations* (n 78) [30]; *Amnesty International v Sudan* (n 85) [60].

[99] HRC (n 13) [18]; *Ireland v UK* (n 41) [200]; *A and others* (n 45) [216]–[217].

[100] *Coard* et al *v United States* (n 69) [58].

[101] Ibid.

[102] *Habeas Corpus in Emergency Situations* (n 78) [30].

issues is desirable, not least because many states are party to more than one of these treaties. It is submitted that an appropriate compromise can be found by relying on the object and purpose of these rules to interpret the extent to which they can be read down. As emphasised both in chapters three and four regarding IHL and in chapter five regarding IHRL, these procedural rules serve the common purpose of ensuring that no person is arbitrarily deprived of their liberty and, to this end, providing a check on the executive's detention powers.[103] When considering the extent to which the exigencies of a situation can be taken into account to interpret the IHRL rules, this underlying object and purpose must be given weight.[104]

This approach can also then help to determine the extent to which derogation should be permissible. It is submitted that, where the exigencies of the situation render it necessary to derogate, the state should be able to do so, but only to a limited extent. It is conceded that this is in contrast to the views of the HRC, IACiHR, IACtHR and ACiHPR, which, as noted, consider some or all of these procedural rules to be non-derogable. However, the concerns of those bodies in prohibiting derogation can be addressed by limiting the extent of permissible derogation. First, it must be remembered that derogation does not leave the state's actions unregulated; derogation must be shown to be 'strictly required by the exigencies of the situation'.[105] It is here that the necessity and proportionality requirements are found, i.e. derogation, and the measures adopted pursuant

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[103] Confirming that this is the *raison d'être* of the IHL provisions, see, e.g. *Prosecutor v Zejnil Delalić* et al (Trial Judgment) ICTY-96-21 (16 November 1998) [580]; 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, [29]. Confirming the same for the IHRL provisions: ECtHR, *Guide on Article 5: Right to Liberty and Security* (Council of Europe/ECtHR 2012), [1]; HRC, Draft General Comment No 35 (n 10) [43] and [45]; *Tibi v Ecuador*, Judgment, IACtHR (Ser C) No 114 (2004), [129]; *Constitutional Rights Project* et al *v Nigeria* (n 85) [33].

[104] This is in accordance with customary rules on treaty interpretation: art 31(1) VCLT.

[105] See, e.g., art 4 ICCPR; art 15 ECHR. See also UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', E/CN.4/1985/4, 28 September 1984, [54] ('[t]he principle of strict necessity shall be applied in an objective manner').

thereto, are permitted only where necessary, and no more than is necessary, to respond to the emergency.[106] Second, and following on from the first point, only those rules that are incapable of being interpreted so as to take account of the exigencies of a situation should be considered derogable, for it is only from those rules that derogation could be *necessary*. The approach advocated here will now be demonstrated by reference to each procedural rule.

First, regarding the arbitrary deprivation of liberty prohibition, as the HRC has noted, what is 'arbitrary' in a particular situation is necessarily context-specific, and the existence of a non-international armed conflict may be taken into account in making this determination.[107] Given the openness of this norm, it is submitted that derogation therefrom should be impermissible, as the kinds of necessity-based considerations that are provided for via derogation can be factored into the arbitrariness standard itself; consequently, it could never be necessary to derogate.[108] As noted in chapter five, contained within this norm is also the requirement of release where the reasons justifying detention cease; this too must be considered non-derogable, for detention beyond the point for which it is justified can never be necessary.[109] Indeed, as explained in chapter five, the arbitrary detention prohibition does not, as such, prevent a state from adopting an internment regime.[110] However, as noted by the ACiHPR and UN Commission on Human Rights, even in extraordinary situations (e.g. where there is a threat to state security), the legal grounds on which detention are based must not be overly vague, lest they be open to abuse so as to undermine the arbitrary detention prohibition.[111] It is also worth repeating

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[106] See above at text to n 5.

[107] HRC, Draft General Comment No 35 (n 10) [69].

[108] UNWGAD, Deliberation No 9 (n 18) [47]–[51].

[109] Section 5.2.5.

[110] Section 5.2.1.1.

[111] UN Commission on Human Rights (n 13) [45]–[50]; *Amnesty International v Sudan* (n 85) [58]–[60].

here that, as demonstrated in chapter four, IHL does not provide a legal basis to intern in non-international conflicts; to do so lawfully, states must therefore find such a basis elsewhere, e.g. in domestic law or a SCR.[112]

The different structure of Article 5(1) ECHR means the above argument cannot apply here. Thus, given the closed list of permissible grounds for detention in that provision, where it is necessary to adopt an internment regime, the state must derogate. As demonstrated, the right to derogate for these purposes has been recognised by the ECtHR.[113]

Second, in a similar manner to the basic arbitrariness standard, the requirement that the reasons for detention be given to the detainee may, to an extent, be interpreted so as to take account of the exigencies of the situation. Thus, certain evidence might reasonably be withheld from the detainee for national security reasons, so long as the undisclosed evidence does not form the majority of evidence against them.[114] Moreover, regarding the requirement that reasons be conveyed 'promptly', a slightly longer delay than normal might be acceptable where the situation is such as to make immediate disclosure to the detainee impossible.[115]

It is submitted, however, that, when interpreting the extent to which this right can be read down, its object and purpose must be borne in mind. Thus, the reasons given for detention must always be sufficiently detailed to serve their purpose of providing the necessary factual information so as to enable the detainee to challenge their detention.[116] To hold otherwise would effectively be to extinguish the right to *habeas corpus*. It is also

[112] Section 4.1.

[113] *Ireland v UK* (n 41) [212]–[214]; *A and others* (n 45).

[114] *A and others* (n 45) [220].

[115] *Kerr v UK*, App No 40451/98, Admissibility Decision, 7 December 1999.

[116] HRC, Draft General Comment No 35 (n 10) [25]; *Kerr v UK*, ibid; *Van der Leer v Netherlands*, App No 11509/85, Judgment, 21 February 1990, [28].

because of this fundamental role of the right that it should never be considered derogable.[117] As a result, subject to the limited degree to which the right can be read down, it is submitted that detainees should in all circumstances be informed of the reasons for their detention so as to enable them to challenge it.

The third procedural rule under IHRL, relating to review of detention, differs from the previous two, in that it leaves little scope for any possible reading down. Thus, the relevant provisions require *court* review of the legality of detention.[118] Given this, it is submitted that this right should be interpreted strictly, with little room for taking account of the exigencies of the situation. Thus, the review, both initial and periodic, should be by an ordinary court, i.e. a judicial body, fully independent of the executive and the parties, with the power to order the production of the person concerned and release.[119] These proceedings should offer the essential judicial guarantees, including the right to appear, to be legally represented, and to call and challenge witnesses.[120] This interpretation is consistent with the object and purpose of *habeas corpus*, which, as noted, is to protect against arbitrary detention and provide a check on the detention power of the executive;[121] the most effective means of doing so is for an independent judiciary to be charged with this task.

Given that the right to *habeas corpus* cannot be interpreted to take account of the exigencies of the situation, it is submitted that it should be seen as derogable, but only to a limited extent. Here, the jurisprudence of the ECtHR is useful, for whilst the Court has not held *habeas corpus* to be non-derogable, it has made clear that procedural safeguards must

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[117] Similarly, see IACiHR, 'Report on Terrorism and Human Rights' (n 63) Ch III [139].

[118] See, e.g., art 9(4) ICCPR; art 5(4) ECHR.

[119] Human rights treaty bodies generally take the same view: see above, text to n 98.

[120] Human rights treaty bodies generally take the same view: see above, text to n 99.

[121] *Tibi v Ecuador* (n 103) [129]; *Constitutional Rights Project* et al *v Nigeria* (n 85) [33]; *Khudyakova v Russia*, App No 13476/04, Judgment, 8 January 2009, [93]; HRC, Draft General Comment No 35 (n 10) [43] and [45].

always remain in place.[122] In *Ireland v UK*, the existence of such safeguards was treated by the Court as important evidence that the UK had not gone beyond what was 'strictly required by the exigencies of the situation' (the proportionality assessment).[123] Thus, where it is actually necessary, and no more than is necessary, a state should be able to derogate from the right to *habeas corpus* so as to allow a body other than an ordinary court to review the legality and reasonableness of detention. In order to comply with the necessity and proportionality requirements, however, the basic object and purpose of this right should be preserved, and the reviewing body should always be independent from the authority that ordered detention (as well as the parties) and should have the power to order release where the detention is found to be unlawful or unreasonable.[124] Moreover, derogation must be temporary, such that full *habeas* review should resume as soon as possible.[125] This, it is submitted, would address the concerns of those bodies that consider *habeas corpus* to be non-derogable, whilst promoting the idea that *court* review of detention should always be the norm, with any other forms of review only being permissible in the most extraordinary circumstances. Indeed, a similar approach was followed by experts when adopting the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.[126]

It must finally be noted that certain commentators have questioned whether providing *habeas* review in non-international armed conflict is practical, particularly given

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[122] See above, text to nn 57–8.

[123] *Ireland v UK* (n 41) [218]–[219].

[124] These basic requirements have similarly been read into the review provisions in GCIV: see section 3.3.1.

[125] HRC, General Comment No 29 (n 5) [2].

[126] UN Commission on Human Rights, 'The Siracusa Principles' (n 105) [70(d)] ('[w]here persons are detained without charge, the need for their continued detention shall be considered periodically by an independent review tribunal').

the large numbers of persons often detained in such situations.[127] Indeed, this problem was acknowledged by the US Supreme Court in *Boumediene v Bush.*[128] The impracticality of court review, however, should not be assumed. Indeed, an *amicus* brief by Israeli military experts to the courts in *Boumediene* rebutted claims that judicial review of detention in the US' conflict with al-Qaeda would be impractical, drawing on Israel's experience, in which it provides *habeas corpus* to the many more it holds as security detainees.[129] The approach advocated above would allow for derogation from *habeas* review where there is a genuine necessity to depart from this ordinary requirement, whilst continuing to ensure independent review of detention, without assuming such a necessity exists simply because the threshold for a non-international armed conflict has been reached.

We will return to the proposals made above in the concluding chapter, when discussing how the law here might best develop. Before that, however, two final questions regarding the practical application of IHRL here must be addressed. First, traditional interpretations of IHRL consider it as binding only on states, in contrast to IHL, which binds both states and non-state groups party to non-international conflicts.[130] Second, IHRL is viewed by some as applicable only within a state's territory and not to its operations abroad. IHL, on the other hand, applies in all non-international conflicts, whether fought at home or abroad. The final two sections will explore these remaining issues of applicability for the IHRL rules on detention.

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[127] See, e.g., M Sassoli and LM Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 IRRC 599, 622.

[128] *Boumediene* et al *v Bush* et al, 553 US 723 (2008), 770.

[129] Brief of *Amici Curiae* Specialists in Israeli Military Law and Constitutional Law in Support of Petititioners, *Boumediene* et al *v Bush* et al, On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[130] On the binding nature of IHL for non-state groups, see section 4.4.

7.2 Extra-Territorial Application of IHRL

It has been shown that the procedural rules applicable to detention under IHRL continue fully to apply, subject to permissible derogation, in non-international conflicts. This is confirmed in the practice both of states and human rights treaty bodies. However, sections 6.2.2 and 6.2.3 explored state practice in two situations that are considered by some to constitute non-international conflicts: internationalised non-international conflicts and transnational armed conflicts. What differentiates these from 'traditional' non-international conflicts is that they involve states using force extra-territorially. It was shown that the US took the view that IHRL was not applicable in these situations, in part due to their extra-territorial character.[131] The present section will demonstrate that, contrary to this view, state responsibility continues to be invoked under human rights treaties for detention operations abroad. This is especially important given that, as shown in the examples of Iraq and Afghanistan,[132] many non-international conflicts are now of this type.

The focus in this section is on the practice of international and regional bodies and the extent to which they have applied the relevant treaty rules on detention extra-territorially. Reasons of space, however, prevent a detailed evaluation of this practice. Indeed, in discussing the extraterritorial application of the IHRL rules on detention, this section falls within a much broader debate concerning the extraterritoriality of human rights treaties generally, and it would not be possible to make a meaningful contribution to that well-developed literature within the limited space available.[133] Rather, the purpose

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[131] See, e.g., HRC, 'Third Periodic Report: United States of America', CCPR/C/USA/3, 28 November 2005, 109–11. For academic support of such a view, see MJ Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Isr L Rev 453.

[132] On these, see sections 6.2.2.1 and 6.2.2.2.

[133] See, e.g., T Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78; F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Oxford 2004); S Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the 'War

here is the much more modest one of demonstrating that, in practice, states are held responsible under IHRL for their detention operations abroad.

Before exploring treaty body practice, the clauses of the key human rights treaties regarding their scope of application must be noted. The treaties discussed in this thesis may be divided into three categories for this purpose. The first category comprises the ECHR, ACHR and ArCHR, all of which specify that they apply within each state party's 'jurisdiction'.[134] As shown below, this has been interpreted to include both control over territory and control over individuals abroad. The second category comprises the ICCPR, which has an apparently narrower scope of application, applying 'to all individuals within its territory *and* subject to its jurisdiction'.[135] Whilst this has been interpreted so as to restrict the ICCPR's application to the sovereign territory of states parties,[136] the HRC and ICJ have held that it should be interpreted as requiring the application of the Covenant *both* in state party territory *and* extraterritorially where they exercise jurisdiction.[137] The final category comprises the ACHPR and ADRDM, neither of which has any clause restricting their application. Consequently, the ICJ, ACiHPR and IACiHR have been free to apply the ACHPR and ADRDM to the actions of states parties outside their territory.[138]

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on Terror'' (2005) 87 IRRC 39; M Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 NILR 349; A Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580; R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Isr L Rev 503; Dennis (n 131); M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, Oxford 2011); K da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff, The Hague 2012).

[134] Art 1 ECHR; art 1(1) ACHR; art 3(1) ArCHR.

[135] Art 2(1) ICCPR (my emphasis).

[136] See, e.g., HRC (n 131) 109–11; HRC, 'Second Periodic Report: Israel', CCPR/C/ISR/2001/2, 4 December 2001, [8]; Dennis (n 131).

[137] HRC, *Lopez Burgos v Uruguay*, CCPR/C/13/D/52/1979, 29 July 1981, [12.1]–[12.3]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 [107]–[111]; *DRC v Uganda* (n 80) [219].

[138] *Coard* et al *v United States* (n 69) [37]; ACiHPR, *DRC v Burundi, Rwanda and Uganda* (n 82) [79]–[80]; ICJ, *DRC v Uganda* (n 80) [219]. On the extraterritoriality of the ACHPR, compare C Anyangwe 'Obligations of State Parties to the African Charter on Human and Peoples' Rights' (1998) 10 African J Intl & Comp L 625, 627 and TS Bulto, 'Patching the "Legal Black Hole": The Extraterritorial Reach of

Each treaty has, therefore, been applied to the conduct of states parties outside their territory where they exercise jurisdiction. It remains to be shown in what circumstances states are considered to exercise 'jurisdiction' and whether the situations with which this thesis is concerned fall within these circumstances. In his study on the extraterritorial application of human rights treaties, Marko Milanović demonstrates that human rights jurisprudence has developed two key models of 'jurisdiction', the 'spatial model', requiring effective territorial control, and the 'personal model … based on various forms of state authority and control over individuals'.[139] The spatial model is the higher threshold to meet, and would only cover detentions abroad in a territory[140] over which the detaining state exercises effective control.[141]

The personal model offers a broader basis on which all persons detained by a state abroad would be protected by the latter's human rights treaty obligations. The personal basis for jurisdiction has been applied to determine the extra-territorial application of the ICCPR,[142] ECHR,[143] ACHR,[144] and ADRDM.[145] The ECtHR Grand Chamber explained the personal model as follows:

States' Human Rights Duties in the African Human Rights System' (2011) 27 South African J Hum Rts 249.

[139] Milanović (n 133) 118.

[140] An alternative reading of the spatial model views it as control over *areas* or *places*, which might cover detention centres abroad: *Al-Saadoon and Mufdhi v United Kingdom*, Admissibility Decision, App No 61498/08, 30 June 2009, [88].

[141] The UK Court of Appeal and House of Lords, e.g., both concluded that, given the level of insurgency in Basra, the UK lacked effective control over that territory for the purposes of the ECHR, notwithstanding its status under IHL as an occupying power: *R (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening)* [2005] EWCA Civ 1609, [124] (per Lord Justice Brooke); *R (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening)* [2007] UKHL 26, [83] (per Lord Rodger).

[142] *Lopez Burgos v Uruguay* (n 137) [12.1]–[12.3]; *Celiberti de Casariego v Uruguay*, CCPR/C/OP/1, 29 July 1981, [10.1]–[10.3]; HRC, General Comment No 31 (n 7) [10].

[143] *Issa v Turkey*, App No 31821/96, Judgment, 16 November 2004, [71]; *Ocalan v Turkey*, App No 46221/99, Judgment (Grand Chamber), 12 May 2005, [91]; *Al-Skeini and others v UK*, App No 55721/07, Judgment (Grand Chamber), 7 July 2011, [137]. It is noteworthy that these cases came after the Court's suggested limitation of the ECHR to its *espace juridique*: see *Bankovic v United Kingdom*, App No 52207/99, Admissibility Decision, 12 December 2001, [75] and [80].

[144] *Franklin Guillermo Aisalla Molina* (n 62) [91].

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.[146]

The requirement of the exercise of 'control and authority over an individual' would be met where a state detains an individual abroad. In the ECtHR's language, the rules 'that are relevant to the situation' would then apply, which, in the case of detention, include the procedural rules under the relevant human rights treaty. Indeed, human rights bodies have consistently held that individuals detained abroad fall within the detaining state's jurisdiction for the purposes of the relevant treaty provisions; this has been the case with the HRC,[147] ECtHR,[148] and IACiHR.[149]

Thus, when states detain individuals abroad in the context of a non-international armed conflict, they remain bound by the procedural rules on detention under those human rights treaties to which they are party.[150] Indeed, as was noted in chapter six, whilst the US has taken the view that its detention operations in the conflicts in Iraq and Afghanistan are not regulated by their human rights treaty obligations, other coalition partners took the contrary view, accepting the extraterritoriality of their obligations under IHRL.[151]

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145 *Coard* et al *v United States* (n 69) [37]; *Alejandre v Cuba*, Report No 86/99, 29 September 1999, [25].

146 *Al-Skeini* (n 143) [137].

147 *Lopez-Burgos v Uruguay* (n 137) [12.1]; *Celiberti v Uruguay* (n 142) [10.1]; HRC (n 13) [18]; HRC, Draft General Comment No 35 (n 10) [65].

148 *Ocalan v Turkey* (n 143) [91]; *Al-Saadoon* (n 140) [87]–[88]; *Medvedyev and others v France*, App No 3394/03, Judgment (Grand Chamber), 29 March 2010, [66]–[67]; *Al-Jedda* (n 30) [85] and [75]; *Al-Skeini* (n 143) [136].

149 *Coard* et al *v United States* (n 69) [37].

150 Similarly, see G Verdirame, 'Human Rights in Wartime: A Framework for Analysis' (2010) 6 EHRLR 689, 698. The discussion here has focused on states' negative obligations. Jurisprudence suggests that the extent to which a state is bound by its positive obligations to protect individuals from arbitrary detention by non-state actors (including armed groups) abroad will likely depend on *territorial* control: *Loizidou v Turkey*, App No 15318/89, Judgment (Preliminary Objections), 23 February 1995, [62]; *Bankovic* (n 143) [70]; *DRC v Uganda* (n 80) [179].

151 See, e.g., HRC, 'Information Received from the United Kingdom of Great Britain and Northern Ireland on the Implementation of the Concluding Observations of the Human Rights Committee',

7.3 Human Rights Obligations of Non-State Armed Groups

Chapters six and seven have thus far examined the extent to which IHRL regulates detentions by *states* in non-international armed conflict. It has been shown that the relevant rules fully apply to detentions by states in relation to non-international conflicts, thereby helping to address an issue left open by IHL. However, it remains to be seen the extent to which the IHRL rules also regulate detentions by non-state armed groups in non-international conflicts. This question falls within a broader debate regarding the human rights obligations of non-state actors generally.[152] Whilst a detailed discussion of this issue is beyond the scope of the present thesis, it will be shown that there is an emerging consensus that IHRL binds non-state groups in certain situations, although it remains to be seen whether this will come to be universally accepted. However, in many other situations, only persons detained by the state will benefit from the protections under IHRL. This is notwithstanding the frequency with which non-state groups intern persons in such situations.[153] Moreover, even if it is accepted that these human rights rules bind armed groups, a number of difficulties arise in applying those rules to such groups. Consequently, it will be shown that IHRL is not sufficient to protect victims of non-international conflicts from arbitrary deprivations of liberty.[154]

It was traditionally thought that IHRL binds only *states* and not non-state actors.[155] In recent years, however, this traditional view has been challenged in both doctrine and

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CCPR/C/GBR/CO/6/Add.1, 3 November 2009, [24]. See further references in sections 6.2.2.1 and 6.2.2.2.

[152] See, e.g., P Alston, *Non-State Actors and Human Rights* (OUP, Oxford 2005); A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford 2006).

[153] See section 4.4 for examples.

[154] Similarly, see J Pejic, ‘Conflict Classification and the Law Applicable to Detention and the Use of Force’ in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, Oxford 2012) 90–1.

[155] See, e.g., *Prosecutor v Dragoljub Kunarac* et al (Trial Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) [470]; L Moir, *The Law of Internal Armed Conflict* (CUP, Cambridge 2002) 194; L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (CUP, Cambridge 2002) 38–55.

practice.[156] Both the Security Council and General Assembly, for example, have called for adherence to IHL *and* IHRL by both states and non-state groups in non-international conflicts.[157] Christian Tomuschat argues that, in these resolutions, the Security Council and General Assembly are purporting to state the law as it currently stands.[158] Other bodies, too, have assumed that IHRL creates obligations for non-state armed groups.[159]

Notwithstanding the above trend, it remains unclear as to the basis of obligation of non-state groups in these cases. The statements by the General Assembly and Security Council, for example, make little or no reference to the basis or source of obligations.[160] That said, notwithstanding the various grounds advanced for the binding nature of IHRL vis-à-vis non-state groups, the view that they are bound where they exercise territorial control 'has attracted the most support and represents, by some margin, the predominant

[156] Certain commentators consider IHRL to bind non-state groups in non-international conflicts: D Fleck, 'Humanitarian Protection Against Non-State Actors' in JA Frowein *et al* (eds), *Verhandeln für den Frieden—Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer, Berlin 2003); C Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in H Fischer *et al* (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (BWV, Berlin 2004); A Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 IRRC 491.

[157] See, e.g., UNGA Res 67/262 (2012), [2] (Syria); UNSC Res 1834 (2008), preambular [4] (Chad); UNSC Res 1814 (2008), [16] (Somalia); UNSC Res 1464 (2003), [7] (Côte d'Ivoire); UNSC Res 1468 (2003), [2], UNSC Res 1417 (2002), [4], and UNGA Res 53/160 (1998), [4], (DRC); UNGA Res 57/230 (2002), [3(b)], and UNGA Res 54/182 (1999), [3(a)] (Sudan); UNSC Res 1213 (1998), [7] (Angola); UNGA Res 48/153 (1993), [4] (the former Yugoslavia).

[158] Tomuschat (n 156) 586.

[159] See, e.g., *Institut de Droit International*, 'The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts, in which Non-State Entities are Parties' (Session of Berlin – 1999), art II <http://www.idi-iil.org/idiE/resolutionsE/1999_ber_03_en.PDF> accessed 11 December 2013; UN Commission on Human Rights, 'Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Philip Alston: Mission to Sri Lanka', UN Doc E/CN.4/2006/53/Add.5, 27 March 2006, [26]; Human Rights Council, 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict', A/HRC/12/48, 25 September 2009, [305]; *Informe de la Comisión para el Esclarecimiento Histórico*, *Guatemala Momoria del Silencio*, Vol I, 1999, 46 [20], cited and translated in J-M Henckaerts and C Wiesener, 'Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?' in R Kolb and G Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar, Cheltenham 2013) 152.

[160] See, e.g., UNGA Res 67/262 (2012), [2] (Syria) (referring generally to 'human rights abuses' and 'violations of international humanitarian law' by anti-government armed groups); UNSC Res 1834 (2008), preambular [4] (Chad) (referring to 'serious violations of human rights and international humanitarian law' by armed groups).

view to date.'[161] Indeed, practice of UN and other bodies endorses this view that non-state groups are bound by IHRL where they control territory.[162]

It remains to be seen, however, what the source of obligation is in such situations (e.g. treaty or custom). There is no reason in principle why human rights treaties could not bind non-state actors (including armed groups) in addition to states parties. It was shown in chapter four that, where the states parties intend a treaty to bind individuals, then such can be the result.[163] However, whilst it was shown that such an intention is clear regarding IHL treaties, the same cannot be said for human rights treaties, as neither their text nor subsequent practice demonstrates a clear intention that they bind non-state armed groups. Indeed, the text suggests that they bind states parties only.[164]

It has been suggested that non-state groups in control of territory could be bound by the human rights treaty obligations of the state with sovereign authority over that territory, based on the HRC's view regarding state succession, that 'once the people are accorded the protection of the rights under the [ICCPR], such protection devolves with territory'.[165]

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[161] S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 96, citing, e.g., NS Rodley, 'Can Armed Opposition Groups Violate Human Rights?' in KE Mahoney and P Mahoney (eds), *Human Rights in the Twenty-First Century* (Martinus Nijhoff 1993); Zegveld (n 155) 148–51; C Ryngaert, 'Human Rights Obligations of Armed Groups' [2008] RBDI 355. Similarly, see Tomuschat (n 156) 588; JA Hessbruegge, 'Human Rights Violations Arising from the Conduct of Non-State Actors' (2005) 11 Buff Hum Rghts L Rev 21, 40–1.

[162] See, e.g., UN Commission on Human Rights, Mission to Sri Lanka (n 159) [26]; UN Commission on Human Rights, 'Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Philip Alston', E/CN.4/2005/7, 22 December 2004, [76]; Human Rights Council, Mission on the Gaza Conflict (n 159) [305] and [1369]; UN Secretary-General, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) [188] <http://www.refworld.org/docid/4db7b23e2.html> accessed 5 February 2014; Human Rights Council, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya', UN Doc A/HRC/17/44, 1 June 2011, [72]; Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', UN Doc A/HRC/21/50, 16 August 2012, 47, Annex II [10].

[163] See section 4.4.2.

[164] See, e.g., art 2(1) ICCPR ('[e]ach *State party* …') (my emphasis); art 1 ECHR ('[t]he High Contracting Parties shall secure …'); art 1(1) ACHR ('[t]he State Parties to this Convention undertake …'). Although note the 'duties' contained in ACHPR, Part I, ch II.

[165] On the HRC's view, see HRC, General Comment No 26: Continuity of Obligations, CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, [4]. Similarly, see MT Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 EJIL 469; R Mullerson, 'The Continuity and Succession

However, there are two problems with this. First, it is not clear that this *sui generis* approach to state succession has, or indeed will, crystallise as a customary norm.[166] Second, even were it so to crystallise, the focus remains on *state* succession, and there is no suggestion that the same principle applies where *non-state* actors control territory.

It is submitted that the more plausible source of human rights obligations of non-state armed groups is custom. As chapter five demonstrated, the arbitrary deprivation of liberty prohibition under the general human rights treaties has crystallised as custom.[167] It was explained in section 4.4.3 that customary international law can bind non-state armed groups: as the ICJ made clear in the *Reparations* case, what constitutes an actor with international legal personality, and with rights and duties derived therefrom (including under custom), varies depending on the needs of the international community.[168] Particularly where non-state groups control territory, a clear need arises that they be bound by customary human rights norms, lest their territorial control create a gap in the protection afforded to individuals. Such a gap could arise as the state's positive obligation to protect individuals from arbitrary detention by non-state actors would likely not extend to insurgent-held territory, due to the absence of the requisite degree of control for such obligations to apply.[169] Given the very general terms in which the UN and other bodies

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of States, by Reference to the Former USSR and Yugoslavia' (1993) 42 ICLQ 473. Applying this to the case of non-state armed groups in control of territory, see Tomuschat (n 156) 588; A Cullen and S Wheatley, 'The Human Rights of Individuals in *De Facto* Regimes under the European Convention on Human Rights' (2013) 13 HRLR 691, 717–23.

[166] MN Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 984. The generally accepted view is that newly created states emerge free from the conventional obligations of the former sovereigns: DP O'Connell, *State Succession in Municipal and International Law: Volume II* (CUP, Cambridge 1967) 88. The main exceptions to this lie with boundary and territorial treaties: see Vienna Convention on Succession of States in Respect of Treaties, 1946 UNTS 3 (adopted 23 August 1978, entered into force 6 November 1996), arts 11 and 12.

[167] Section 5.3.1.

[168] *Advisory Opinion Concerning Reparation for Injuries Suffered in the Service of the United Nations* (*Reparations)* [1949] ICJ Rep 174, 178.

[169] Milanović (n 133) 106–7. Although cf the ECtHR's approach in *Case of Ilascu and others v Moldova and Russia*, App No 48787/99, Judgment (Grand Chamber), 8 July 2004, [322]–[352].

referred to above speak when discussing the human rights obligations of non-state armed groups, and in particular the absence of any reference to particular treaties, there is a strong argument that it is customary human rights norms which they have in mind.[170] As such, non-state groups in control of territory should be considered bound by the customary human rights rule prohibiting arbitrary deprivations of liberty.

Finally, it is to be noted that non-state armed groups may become bound by additional human rights norms through their consent. As noted in chapter four regarding IHL, such consent commonly is expressed through either unilateral declarations or bilateral agreements between the relevant state and non-state group.[171] Certain non-state groups have used both avenues to commit themselves to honour additional human rights norms.[172] Indeed, a number of unilateral and bilateral commitments incorporate the procedural rules on detention under IHRL. For example, in the 2011 Manual issued by the National Transitional Council (NTC) in Libya, a purely IHRL-model was adopted for all detainees other than 'fighters', requiring release unless held on criminal charges and tried before a court in accordance with the Libyan criminal code.[173] Similarly, the 1990 San José agreement between the government of El Salvador and the FMLN contained a number of procedural rules relating to detention that mirror those under IHRL.[174] As such,

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[170] See references above at n 160.

[171] Section 4.4.

[172] Sivakumaran (n 161) 107–51. See, e.g., Political Programme of the Ogaden National Liberation Front (Ethiopia); Appeal of the Communist Party of Nepal (Maoist), 16 March 2004, both cited in Sivakumaran, ibid, 123.

[173] Manual, National Transitional Council, Libya (19 May 2011) <http://www.ejiltalk.org/wp-content/uploads/2011/08/Final-Libyan-LOAC-Guidelines-17-May-2011.ppt> accessed 11 December 2013.

[174] For the text of the agreement, see 'Document 9: Note Verbale dated 14 August 1990 from El Salvador transmitting test of the Agreement on Human Rights signed at San José, Costa Rica, on 26 July 1990 between the Government of El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN), A/44/971-S/21541, 16 August 1990' in UN, *The United Nations and El Salvador: 1990–1995* (The UN Blue Book Series Volume IV, 1995) 107–9.

the agreement demands from both sides that individual liberty be respected,[175] that individuals be arrested 'only if ordered by the competent authority in writing and in accordance with the law',[176] that anyone arrested be informed of the reasons for the arrest,[177] that detainees be ensured the right to assistance from legal counsel,[178] and that '[t]he fullest possible support shall be given to ensuring the effectiveness of the remedies of *amparo* and *habeas corpus*.'[179]

7.3.1 Concluding remarks: the inadequacy of IHRL

As noted at the outset, it has not been the purpose of this section to engage in a detailed analysis of the extent to which IHRL binds non-state actors generally; such an endeavour is beyond the scope of this thesis. Rather, the aim has been to explore those situations in which non-state armed groups might be bound by the IHRL rules on detention. In so doing, it has been shown that there is an emerging consensus in favour of the binding status of IHRL for non-state groups that control territory.[180] This leaves a considerable proportion of detainees (i.e. those held by non-state groups that do not control territory) without protection under IHRL. Moreover, it was argued that even those non-state groups in control of territory appear to be bound only by customary human rights norms. Chapter five demonstrated that, regarding the procedural regulation of detention, only the basic prohibition of arbitrary deprivations of liberty can confidently be said to have crystallised

[175] Art 2, *chapeau.*

[176] Art 2(b).

[177] Art 2(c).

[178] Art 2(e).

[179] Art 4. Similarly, see Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines (signed 16 March 1998 in The Hague, Netherlands), Part III, art 2(5) <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/phil8.pdf> accessed 11 December 2013.

[180] If control of territory is the defining criterion, then arguably the LTTE in north and east Sri Lanka, FARC in Colombia and the Sudan People's Liberation Movement in south Sudan would each have been bound by customary human rights law: Sivakumaran (n 161) 98.

as custom. As a result, the dearth of procedural rules under IHL applicable to internment in non-international conflicts cannot be considered to be remedied by IHRL, given these limitations on its binding nature for non-state groups.

What is more, even applying the customary human rights prohibition of arbitrary deprivations of liberty to non-state groups creates problems. In particular, because the human rights rules were developed for states, they may not be appropriate for regulating detentions by non-state groups. For example, as shown in chapter five, the prohibition of arbitrary deprivations of liberty requires, *inter alia*, that all detentions have a legal basis.[181] Non-state armed groups, however, can point to no such legal basis. Chapter four demonstrated that IHL provides no legal basis to intern in non-international conflicts,[182] and domestic law generally permits only state authorities to detain, treating detentions by non-state actors as illegal.[183] In consequence, applying the IHRL rules on detention to non-state armed groups could result in all detentions carried out by such groups, regardless of any apparent necessity on security grounds, being violations of the customary human rights norm prohibiting arbitrary detentions. IHRL would, therefore, fail to regulate effectively detentions carried out by such groups, risking non-compliance.[184] We will return to this issue in chapter eight.

It is therefore clear that relying on IHRL alone to regulate internment in non-international conflicts provides insufficient protections for individuals. There remains considerable doubt over the extent to which those rules bind non-state armed groups and thus protect persons detained by them. Moreover, even where non-state groups may be

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[181] Section 5.2.1.

[182] Section 4.1.

[183] LM Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict (2009) 40 Case W Res J Intl L 437, 452.

[184] Ibid, 453; D Casalin, 'Taking Prisoners: Reviewing the International Humanitarian Law Grounds for Deprivation of Liberty by Armed Opposition Groups' (2011) 93 IRRC 743.

considered bound (such as where they control territory), the state-centric nature of the rules arguably makes them inappropriate for regulating the actions of such groups. This leaves the current law in a deficient state and raises the question of how it should be developed. It is to this question that we now turn in the concluding chapter.

8. Conclusion: Developing an Internment Regime for Non-International Armed Conflicts

The preceding chapters explored the current *lex lata* regarding the procedural regulation of internment in non-international armed conflict. This chapter will now conclude the thesis with a proposal for how the law in this area might be developed. In so doing, the approach taken is to *build upon* the current law as elaborated in the previous chapters, rather than replace it with a new legal regime.

It should be noted at the outset that the proposals made here are not intended to form the basis for a new treaty, for such multilateralism in this area is unlikely in the near future. Instead, it is suggested that these proposals form the basis for policies of non-governmental organisations that work with those involved in non-international armed conflicts. First and foremost, this would include the ICRC, which in 2011 included on its agenda the formulating of new guidance on detention in non-international armed conflict.[1] Second, organisations such as Geneva Call work directly with non-state armed groups in encouraging the adoption of deeds of commitment.[2] Whilst originally aimed at obtaining commitments on adherence to the ban on anti-personnel mines, it has since expanded to include commitments on the protection of women and children in armed conflict. Organisations of this nature provide an essential avenue for involving non-state groups in the norm-making process, thus increasing the legitimacy and compliance-pull of such norms.[3] It is submitted that the proposals below would form an appropriate starting point for a deed of commitment relating to the procedural rights of internees. Finally, given that

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[1] 31st International Conference of the Red Cross and Red Crescent 2011, Resolution 1: Strengthening Legal Protection for Victims of Armed Conflict; ICRC, 'Detention in Non-International Armed Conflict: The ICRC's Work on Strengthening Legal Protection' (26 November 2013) <www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm> accessed 13 December 2013.

[2] See <www.genevacall.org> accessed 13 December 2013.

[3] See generally A Roberts and S Sivakumaran, 'Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 YJIL 107.

the proposals are intended to build upon the current *lex lata*, they might also usefully form a reference point for human rights bodies (including UN and treaty bodies) in considering the extent to which derogation from human rights relating to detention is permissible.

8.1 Building on the Current Law

It has been demonstrated that the current *lex lata* regarding internment in non-international conflicts is derived from both IHL and IHRL. Thus, chapter four argued that both conventional and customary IHL prohibit internment in non-international conflicts where it is not actually necessary as a result of the conflict.[4] Moreover, chapter six showed that the far more detailed rules under IHRL continue fully to apply, absent derogation, in non-international conflicts, alongside this basic IHL norm.

However, these IHRL rules are limited in two respects. First, section 5.3 noted that not all states are party to a general human rights treaty, leaving detentions by such states regulated at the international level only by customary human rights law (in addition to the basic IHL rule). Second, section 7.3 demonstrated that, whilst there is a growing acknowledgment that IHRL binds non-state armed groups in certain circumstances (e.g. where they control territory), the source of such obligations currently appears limited to custom. As with those detained by states not party to a human rights treaty, therefore, those held by non-state groups are similarly protected at most by only customary IHRL and the basic IHL rule. This is of particular concern as it was shown that only the basic prohibition of arbitrary deprivations of liberty in IHRL can confidently be said to have crystallised as custom.[5] Consequently, those detained by states without human rights treaty obligations and by armed groups do not enjoy the other procedural safeguards applicable under human rights treaties, such as the right to *habeas corpus*. Moreover, it

[4] See sections 4.2.1 and 4.3.

[5] See section 5.3.

was also shown that applying even that basic IHRL prohibition of arbitrary detention to non-state groups is problematic, given its genesis in the law applicable to states. The current *lex lata* cannot, therefore, be considered adequate to protect persons interned in non-international armed conflicts.

8.1.1 Eliminate the distinction between categories of armed conflict?

In response to the lack of clear, adequate rules in this area, certain commentators have advocated extending (all or parts of) the internment regimes applicable under IHL in international armed conflicts to non-international conflicts.[6] Indeed, chapter six demonstrated that states party to non-international conflicts have often adopted internment regimes that mirror those under GCIII and GCIV.[7] This was similarly the approach taken in the Copenhagen Principles on the Handling of Detainees in International Military Operations, adopted in October 2012.[8] An initiative of the Danish Ministry of Foreign Affairs, the Copenhagen Principles were the result of a five year-long process involving

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6 See, e.g., Chatham House and ICRC, 'Meeting Summary: Procedural Safeguards for Security Detention in Non-International Armed Conflict', London, 22–3 September 2008, 4–6, 16 <http://www.chathamhouse.org.uk/files/15558_il220908summary.pdf> accessed 10 December 2013; B Oswald, 'Detention of Civilians on Military Operations: Reasons for and Challenges to Developing a Special Law of Detention' (2008) 32 Melb UL Rev 524, 548–9; M Sassóli and LM Olson, 'The Relationship between International Humanitarian Law and Human Rights law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 IRRC 599, 623–7; J 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* (Oxford University Press 2012) 95–6; E Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Editions A Pedone/Hart, Paris/Oxford 2013) 502–14.

7 See, e.g., sections 6.2.1.2 (Sri Lanka) and 6.2.2.1 (Iraq).

8 'The Copenhagen Process on the Handling of Detainees in International Military Operations, The Copenhagen Process: Principles and Guidelines' (October 2012) (hereinafter 'Copenhagen Principles') <http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20 Process%20Principles%20and%20Guidelines.pdf> accessed 24 January 2013. Annexed thereto is the 'Chairman's Commentary to the Copenhagen Process: Principles and Guidelines' (hereinafter 'Chairman's Commentary'). The following is a brief excerpt from L Hill-Cawthorne, 'The Copenhagen Principles on the Handling of Detainees: Implications for the Procedural Regulation of Internment' (2013) 18 JCSL 481.

multilateral meetings with representatives from states and several organisations.[9] The Principles, which are not intended to affect the current legal obligations of the participants,[10] cover a range of issues relating to detainees and are intended for application in peace operations and non-international armed conflicts abroad.[11] With regard to the procedural regulation of internment, they clearly draw by analogy from GCIV, seen, *inter alia*, in the provision on review:

> 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.[12]

It is clear that, like GCIV, initial and periodic review would be satisfied by an administrative, as opposed to judicial, body.

Such approaches can be seen as part of the general trend in favour of the elimination of the distinction between international and non-international conflicts. Chapter two demonstrated that the basis for this distinction in the traditional limitation of international law to inter-state matters no longer applies, given the emergence of intra-state structures of obligation.[13] Moreover, the sovereignty arguments often raised in favour of preserving what remains of the distinction were shown to be valid only for certain issues; such arguments cannot justify the exclusion of the procedural rules applicable to internment from non-international conflicts.[14]

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9 Copenhagen Principles (n 8), preambular [1]. The 24 states are there listed as: Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom, and the United States of America. It should be noted that this number is a little lower than the 28 states that reportedly attended the Second Copenhagen Conference in June 2009: see T Winkler, 'The Copenhagen Process on Detainees: A Necessity' (2010) 78 Nordic J Intl L 489 at 497.

10 Copenhagen Principles (n 8), preambular [2].

11 Copenhagen Principles (n 8), preambular [9].

12 Copenhagen Principles (n 8) Principle 12.

13 Section 2.1.

14 Section 2.3.1.

However, it was also shown that, more recently, the preservation of the distinction between categories of conflict has been advocated on humanitarian grounds.[15] It has long been recognised that victims of non-international conflicts require protection under international law,[16] and the traditional means by which this was achieved was to draw on the rules of IHL originally applicable only in international conflicts.[17] However, alongside these developments emerged IHRL, also applicable to the state's actions vis-à-vis those within its jurisdiction. These rules are more protective than IHL, illustrated by the procedural regulation of internment.[18] As demonstrated in chapters five and six, the IHRL rules on detention continue to apply in non-international conflicts, such that extending the GCIII and GCIV internment regimes to those situations could, by operating as the *lex specialis*, serve to *undermine* these protections under IHRL.[19] For this reason, it is submitted that eliminating the distinction between international and non-international conflicts in this area, and applying the GCIII and GCIV internment regimes to the latter as the *lex specialis*, would be a regressive step—not only are those regimes much more permissive than IHRL, but, as chapter three demonstrated, the IHL rules also leave a number of issues unanswered, resulting in considerable discretion for the detaining power.

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[15] See section 2.3.2.

[16] JS Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva 1958) 27 (noting a draft convention on civil wars at the 1912 International Red Cross Conference).

[17] See, e.g., *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) [127]. Commentators, too, have advocated this approach: A Duxbury, 'Drawing Lines in the Sand – Characterising Conflicts for the Purposes of Teaching International Humanitarian Law' (2007) 8 MJIL 259, 268; E Crawford, 'Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20 LJIL 441; K Mastorodimos, 'The Character of the Conflict in Gaza: Another Argument Towards Abolishing the Distinction between International and Non-International Armed Conflicts' (2010) 12 ICLR 437.

[18] This was demonstrated throughout chapter five.

[19] Similarly, see D Kretzmer, 'Rethinking Application of IHL in Non-International Armed Conflicts' (2009) 42 Isr L Rev 8.

8.1.2 Developing an internment regime for non-international armed conflicts

Whilst the distinction between types of conflict in this area should, therefore, be retained, the internment regimes applicable in international conflicts can nonetheless be drawn on in developing a regime for non-international conflicts. This is the approach taken in the present chapter, and the proposal made here is to build upon the current *lex lata*.[20]

Before setting out the proposals, some consideration of the relationship between the current law and the proposed internment regime is necessary. First, an internment regime designed specifically for non-international conflicts would help to address the shortcomings with the current *lex lata* outlined above. Thus, it would develop the minimum rules applicable to internment in non-international conflicts by both states not party to a general human rights treaty, as well as non-state armed groups. The regime would build upon the current international legal norms applicable to these actors, which, as noted, currently comprise only the basic IHL rule prohibiting unnecessary internment, as well as the customary human rights prohibition of arbitrary deprivations of liberty.

In addition, the internment regime would also provide guidance to states that are party to one or more of the general human rights treaties by setting out the minimum humanitarian standards applicable. Such guidance is necessary to give clarity to the operation of conventional human rights obligations in non-international conflicts and, in particular, the extent to which those obligations can be 'read down' or derogated from. Chapters six and seven showed a near unanimous practice amongst states and human rights treaty bodies that IHRL regulates detentions in relation to non-international

[20] Others too have recognised the need for developments to build on, rather than replace, existing law: see, e.g., University Centre for International Humanitarian Law, 'Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict', Graduate Institute of International Studies, Geneva, 24–5 July 2004, 41; J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375; T Davidson and K Gibson, 'Experts Meeting on Security Detention Report' (2009) 40 Case W Res J Intl L 323, 340–42; JB Bellinger and VM Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law' (2011) 105 AJIL 201.

conflicts.[21] The treaty bodies diverge, however, in their approaches to the possibility of reading down and/or derogating from the IHRL rules on detention.[22] A compromise between these different approaches was then proposed in section 7.1.5, which advocated emphasising the object and purpose of these rules when interpreting their minimum requirements.[23] It was argued there that the prohibition of arbitrary deprivation of liberty and the requirement that reasons be given are sufficiently open to allow for the exigencies of the situation to be taken into account. Consequently, it was suggested that derogation from these rules is impermissible.[24] The exception here is Article 5(1) ECHR, from which derogation is necessary in order to introduce an internment regime.[25]

Like Article 5(1) ECHR, the right to *habeas corpus* in each of the human rights treaties is not open to the same reading down as the basic prohibition of arbitrary detention. It was therefore argued that, in keeping with their text and object and purpose, the *habeas* provisions should be applied strictly even in non-international conflicts. Thus, *habeas corpus* requires *judicial* review of detention, with the usual fundamental guarantees applying.[26] Where it is actually necessary, however, to depart from these standards, it was argued that derogation should be permitted, albeit to a limited extent. In particular, it was shown that the necessity and proportionality requirements could limit derogation from *habeas corpus* by requiring, at a minimum, that an alternative review body be established that is independent from the authority that ordered detention (as well as the parties) and that has the power to order release.

[21] See sections 6.2 (on state practice) and 7.1 (on human rights treaty body practice).

[22] Compare, e.g., sections 7.1.2 (ECtHR) and 7.1.3 (inter-American institutions).

[23] The following is a brief outline of the arguments made in section 7.1.5.

[24] Similarly, see HRC, General Comment No 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, [11]; IACiHR, 'Report on Terrorism and Human Rights', OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, ch III [127].

[25] *A and others v UK*, App No 3455/05, Judgment (Grand Chamber), 19 February 2009, [172].

[26] Similarly, see *Ireland v UK*, App No 5310/71, Judgment (Merits), 18 January 1978, [200]; HRC, 'Concluding Observations: United States of America', CCPR/C/USA/CO/3, 15 September 2006, [18].

The internment regime proposed in this chapter would elaborate these *minimum* standards that must be applied by states with conventional human rights obligations, as interpreted above. For example, the internment standard would be defined in a manner that is compliant with the IHRL prohibition of arbitrary detention. Moreover, where it is necessary and proportionate to derogate from *habeas corpus*, the internment regime would clarify the minimum procedures that the state must offer for their derogation to be valid. It must be emphasised that this regime is intended to comprise *minimum* rules; in a specific case, derogation from *habeas corpus*, for example, may only be permitted to a more limited extent. For non-state armed groups and states without human rights treaty obligations, however, the proposed regime would constitute the generally applicable rules in non-international conflicts, building upon the basic norms that currently apply to these actors.

As noted, in developing this internment regime, the IHL regimes applicable in international armed conflicts may be drawn on, with the proviso that we learn from the shortcomings of those rules and their development in doctrine and practice.[27] The sections below will now elaborate on the provisions of the proposed internment regime. Section 8.2 will demonstrate the inappropriateness of drawing by analogy from GCIII, whilst section 8.3 will argue that GCIV is a useful starting point here.

8.2 Analogising to GCIII

It will be remembered from chapter three that GCIII permits status-based internment for the duration of hostilities, with no review of the necessity of internment.[28] The examples of state practice in chapter six demonstrate that certain states have similarly interned persons in non-international armed conflicts on the basis of status, specifically

[27] See the discussion on this throughout chapter three.

[28] Arts 21 & 118 GCIII.

membership of non-state armed groups.[29] Indeed, the Copenhagen Principles take the view that '[a] person may be detained [e.g.] for … belonging to an enemy organised armed group'.[30] Moreover, armed groups in non-international conflicts have also detained members of state armed forces.[31] Based on this practice, it might be argued that we should draw by analogy from GCIII in developing an internment regime for non-international conflicts.

However, it is submitted that the GCIII internment regime could not appropriately be transplanted to non-international conflicts. In particular, the two elements of that regime (internment on the basis of status and for the duration of hostilities) pose significant problems when applied to non-international conflicts. Regarding status-based internment, whilst IHL does, to an extent, recognise different statuses of person in non-international conflicts,[32] the absence of a clearly defined status of 'combatant', to which a status-based internment regime could apply, poses problems, particularly regarding the non-state side.[33] Without this, differentiating between 'combatants' and 'civilians' becomes problematic, raising the possibility of arbitrary, indefinite internment of civilians.[34] Moreover, it is important to differentiate between the 'armed forces' and the civilian (political or humanitarian) elements of non-state groups, for it is only the former

[29] See, e.g., sections 6.2.1.2 (Sri Lanka) and 6.2.2.2 (Afghanistan).

[30] Chairman's Commentary (n 8) [1.3].

[31] See, e.g., 'Report of the Independent International Fact-Finding Mission on the Conflict in Georgia: Volume II', September 2009, 360–2 (South Ossetian forces detaining Georgian armed forces).

[32] N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva 2009) (hereinafter 'ICRC Guidance') 28 (noting that the wording of common art 3 and APII demonstrates that civilians, armed forces, and organised armed groups 'are mutually exclusive categories also in non-international armed conflict').

[33] JK Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference' (2007) 54 NILR 315, 321. Cf the situation in international armed conflicts: section 3.1.

[34] Kleffner, ibid, 323.

for whom the label 'combatant' might be appropriate.[35] However, 'the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.'[36]

Attempts have, however, been made to define membership of non-state armed forces. In its *Guidance on Direct Participation in Hostilities*, the ICRC suggested that members of non-state armed groups may be targeted on the basis of status, akin to combatant targeting in international armed conflicts.[37] The ICRC adopted a functional test for membership of armed groups.[38] Thus, those performing a 'continuous combat function' are said to constitute members of the non-state armed forces.[39] In pertinent part:

> … individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.[40]

This approach has been criticised for being too narrow.[41] A more liberal test for membership, also based on function, has been advocated by the Obama Administration and the DC district court in the *habeas corpus* cases involving Guantanamo detainees.[42] In defining membership, Judge Walton in *Gherebi v Obama* held that '"persons who receive and execute orders" from the enemy's "command structure" can be considered members

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[35] ICRC Guidance (n 32) 32; Sassòli and Olson (n 6) 607–8.

[36] ICRC Guidance (n 32) 33.

[37] Ibid, 27.

[38] Ibid, 32–3; N Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 NYU J Intl L & Pol 831, 839. Similarly, see Sassòli and Olson (n 6) 623.

[39] ICRC Guidance (n 32) 33.

[40] ICRC Guidance (n 32) 34.

[41] K Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 NYU J Intl L & Pol 641, 676.

[42] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In Re: Guantanamo Bay Detainee Litigation*, Misc No 08-442 (TFH) (DDC 13 March 2009) 6–7 <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> accessed 5 October 2013; *Hamlily v Obama*, 616 F Supp 2d 63 (DDC 2009) 75.

of the enemy's armed forces'.[43] The DC court's more liberal definition, compared to the ICRC's, is seen in Judge Walton's point that 'armed forces' is wider than 'fighters' (those performing a 'continuous combat function') and that the key issue is whether the individual receives and carries out orders from the 'enemy force's combat apparatus'.[44]

In addition to the difficulty with defining membership, identifying persons who fall within those definitions also presents problems. Whilst certain non-state forces, such as the FARC in Colombia, the LTTE in Sri Lanka and the Kosovo Liberation Army, have been known to distinguish themselves,[45] making the determination of membership more objective, these are within the minority.[46] Absent an objectively identifiable emblem or uniform, the detaining power would be required to make a determination of each individual's function. Identifying an individual as a member of a non-state group will thus often involve a significant degree of discretion. Indeed, it is the discretion exercised when interning civilians, which explains GCIV's requirement of review.[47] Chapter three explained, however, that GCIII does not provide an equivalent review for POWs.[48] Extending the GCIII internment regime thus raises the possibility of error without any chance of rectification via review, risking arbitrary detention on the mistaken belief that individuals are members of non-state forces. This would contravene both the basic IHL rule applicable in non-international conflicts prohibiting internment that is not necessary as a result of the war, as well as the prohibition of arbitrary deprivations of liberty in

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[43] *Gherebi v Obama*, 609 F Supp 2d 43 (DDC 2009) 68, citing CA Bradley and JL Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 Harv L Rev 2047, 2114–5; *Hamlily* (n 42) 75.

[44] *Gherebi* (n 43) 69.

[45] Kleffner (n 33) 334 (fn 90); Watkin (n 41) 678; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, Oxford 2004) 143 (fn 25).

[46] Kleffner (n 33) 334; ICRC Guidance (n 32) 32–3; Sassòli and Olson (n 6) 609; *A v State of Israel*, Crim A 3261/08 (11 June 2008) (Israeli Supreme Court) 23.

[47] Arts 43 & 78 GCIV. See section 3.3.1.

[48] Section 3.3.2.

customary human rights law. Drawing on GCIII would, therefore, undermine the current *lex lata* which, as noted, should be built upon, rather than replaced.

The other aspect of the GCIII internment regime—internment for the duration of hostilities—poses further problems in non-international conflicts. The Obama Administration and the DC court, for example, argued that members of al-Qaeda may be interned for the duration of hostilities.[49] Chapter three explained that the philosophy underpinning this rule in international conflicts is that combatants are assumed to pose the threat of returning to the battlefield until hostilities cease.[50] It must be borne in mind, however, that both customary IHRL and IHL applicable in non-international conflicts require release of *all* internees as soon as the reasons justifying internment cease, lest internment become arbitrary.[51] The difficulty here is that 'the informal … structures of most organized armed groups and the elastic nature of membership' means that those initially interned as 'members' may not continue to be so for the duration of hostilities.[52] As with membership, functional criteria may be sufficient to constitute *de facto* withdrawal from non-state forces. As the ICRC notes, '[d]isengagement from an organized armed group … [may] be expressed through conclusive behaviour, such as a lasting physical distancing from the group'.[53] The internee in such a case may no longer pose the threat of rejoining hostilities. An example of this arose in *Basardh v Obama*, arising out of the Guantanamo *habeas* litigation, in which Judge Huvelle acknowledged that the detainee had ostracised himself from al-Qaeda, through his well-publicised cooperation with the US authorities, to such an extent as no longer to constitute a member of that group.[54]

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[49] *Hamlily* (n 42) 70.

[50] Section 3.4.2.

[51] See sections 4.3.2 (IHL) and 5.3.2 (IHRL).

[52] ICRC Guidance (n 32) 33.

[53] Ibid, 72.

[54] *Basardh v Obama*, 612 F Supp 2d 30 (DDC 2009). Cf *Awad v Obama*, 608 F 3d 1 (DC Cir 2010) 18.

Detention for the duration of hostilities was thus unnecessary.

The above concern is exacerbated by the indeterminacy in the point at which hostilities cease in non-international armed conflicts, raising the chances of extremely prolonged detention.[55] Indeed, this could be problematic for compliance with the customary human rights prohibition of arbitrary deprivation of liberty, given the trend referred to in chapter five whereby human rights bodies are increasingly sceptical of prolonged, indefinite detention.[56] Moreover, it is for this reason why applying the GCIII internment regime to govern detentions by non-state groups of regular state forces would also be problematic, notwithstanding that that regime was designed primarily with state forces in mind.[57] The indeterminacy in the point at which hostilities cease in many non-international conflicts would make applying the GCIII rule on release particularly difficult.

In light of the above, it is submitted that the GCIII internment regime is inappropriate for application in non-international armed conflicts. The next section will now demonstrate how GCIV might be useful here.

8.3 Analogising to GCIV

By being premised on individual *conduct* as opposed to *status*, the GCIV internment regime offers a more useful framework from which we may draw inspiration, as it helps to address the concerns raised above. For example, as demonstrated in chapter three, GCIV permits internment only for so long as it is actually necessary for security, thus avoiding

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[55] Similarly, see *In re Guantanamo Detainee Cases*, 355 F Supp 2d 443 (DDC 2005) 465–6; cf *Al-Bihani v Obama and others* [2010] 140 ILR 716 (DC Cir) 727; CA Bradley and JL Goldsmith, 'Congressional Authorization and the War on Terrorism' (2004–5) 118 Harv L Rev 2047, 2124–5; Sassòli and Olson (n 6) 624; MC Waxman, 'The Structure of Terrorism Threats and the Laws of War' (2010) 20 Duke J Comp & Intl L 429, 452–4; Bellinger & Padmanabhan (n 20) 228–33.

[56] See section 5.2.5.

[57] Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn CUP, Cambridge 2010) 41.

the concern that persons could be held beyond this point (and thus arbitrarily) were the assumption under GCIII that persons be interned for the duration of hostilities extended to non-international conflicts.[58] Similarly, initial and periodic review of the necessity of internment could help to provide a check on any discretion that might be exercised by the detaining authority.[59]

GCIV is therefore a useful starting point in developing an internment regime for non-international conflicts. Each category of procedural rules under GCIV will now be considered for application in non-international conflicts, drawing on the criticisms and elaborations of those rules discussed in chapter three. Their ability to satisfy and enforce the current *lex lata*, and thus to build upon that framework, will be the principal frame of reference.

8.3.1 Standard for internment

The standard for internment must be such as to satisfy the current *lex lata* applicable in non-international conflicts, comprising both IHL's prohibition of internment that is not actually necessary as a result of the conflict,[60] as well as the customary human rights prohibition of arbitrary deprivation of liberty.[61] This is especially important, given that both of these norms were argued to be non-derogable and bind all parties in non-international conflicts, states and non-state groups alike.[62] In light of this, the Article 42(1) GCIV standard, permitting internment 'only if the security of the Detaining Power makes

[58] Art 132(1) GCIV. See section 3.4.1.

[59] Arts 43(1) & 78(2) GCIV. See section 3.3.1.

[60] Section 4.2.1.

[61] Section 5.3.1.

[62] On non-derogability, see section 7.1.5. On the binding nature of these rules for non-state groups, see sections 4.4 (IHL) and 7.3 (IHRL). It was noted in section 7.3, however, that the customary human rights prohibition of arbitrary deprivations of liberty appears currently only to bind non-state groups in control of territory. By contrast, the IHL norm applies to any group that is a party to a non-international armed conflict.

it absolutely necessary', seems more appropriate than the Article 78(1) GCIV standard, which, as explained in chapter three, is subjective, in that it permits internment where the 'Occupying Power *considers* it necessary, for imperative reasons of security'.[63] Indeed, as chapter four demonstrated, Article 27(4) GCIV, on which the basic IHL norm applicable in non-international conflicts was said to be based, requires that measures of security (e.g. internment) *actually* be necessary as a result of the war.[64] Similarly, the IHRL prohibition of arbitrary detention requires that any detention *actually* be necessary, and no more than is necessary, for the legitimate purpose sought.[65] The objective standard in Article 42(1) GCIV therefore seems more appropriate for non-international conflicts than the standard in Article 78(1) GCIV, and the decision on internment should be taken at a high level of command to allow for consideration of its actual necessity.[66] It should be repeated here that there is an 'assumption [in IHRL] that the criminal justice system is able to deal with persons suspected of representing a danger to State security'; internment can only be employed where *actually* necessary to address the security threat, which includes the requirement that the criminal justice system cannot contain that threat.[67]

Chapter three, however, demonstrated that the GCIV standards, particularly the 'security' prong, leave significant discretion to the detaining power. This could be problematic since human rights jurisprudence confirms that, as part of the arbitrary deprivation of liberty prohibition, the grounds for detention must be 'clearly defined' and

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[63] See section 3.2.1.

[64] See section 4.2.1.

[65] HRC, *A v Australia*, CCPR/C/59/D/560/93, 3 April 1997, [9.2]; IACtHR, *Chaparro Alvarez and Lapo Iniguez v Ecuador*, Judgment, IACtHR (Ser C) No 170 (2007) [93]; *Saadi v UK*, App No 13229/03, Judgment, 29 January 2008, [70].

[66] Similarly, see Chatham House and ICRC (n 6) 6.

[67] Pejic (n 20) 380; Chatham House and ICRC (n 6) 5. See section 5.2.1.1.

'foreseeable in application'.[68] Whilst the Article 42(1) GCIV standard might fail to satisfy this requirement, this concern can be mitigated in a number of ways, all of which have been discussed in the previous chapters. First, as noted above, the prohibition of arbitrary deprivation of liberty in IHRL is sufficiently open to take account of the exigencies of a non-international conflict; the situation can affect what qualifies as 'arbitrary'.[69] For example, whilst internment where 'the security of the Detaining Power makes it absolutely necessary' might, in ordinary situations, be considered too vague, the existence of a non-international armed conflict could be such as to allow this less specific standard, along with the elaborations of it noted below. The standard must not, however, be so broad as to allow detention to be entirely within the discretion of the detaining authority.[70]

Second, we can draw on elaborations of this standard in doctrine and practice. Thus, chapter three demonstrated that doctrine and practice have endorsed the view that, to satisfy the GCIV internment standards, 'the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.'[71] More specifically, '[s]ubversive activity … or actions … of direct assistance to an opposing party' may satisfy the standard if the detaining authority 'has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage'.[72] It was argued in section 3.2.1 that attempting further to define *in abstracto* the situations that may be considered security

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[68] *Medvedyev and others v France*, App No 3394/03, Judgment (Grand Chamber), 29 March 2010, [80]. Similarly, see IACiHR, *Dayra María Levoyer Jiménez v Ecuador*, Report No 66/01, 14 June 2001, [37]; ACiHPR, *Amnesty International and others v Sudan*, Communication Nos 48/90, 50/91, 52/91, and 89/93 (2003), [58]–[60].

[69] HRC, Draft General Comment No 35: Article 9, CCPR/C/107/R.3, 28 January 2013, [69].

[70] *Amnesty International v Sudan* (n 68) [58]–[60]. Similarly, see Chatham House and ICRC (n 6) 8 (warning that, whilst the internment standard in Colin Powell's annexed letter to UNSC Res 1546 (2004) is arguably sufficient, a UNSC Res authorising simply 'all necessary measures' probably would not be).

[71] *Prosecutor v Zejnil Delalić* et al (Trial Judgment) ICTY-96-21 (16 November 1998) [577]. This standard was originally included in Pictet, *GCIV* (n 16) 257–8. The standard has been adopted for international conflicts in UK Ministry of Defence, *Manual* (n 45) at 230.

[72] *Delalić*, ibid, [576].

threats necessitating internment would risk being either under- or over-inclusive. In a specific situation, however, by making known to the population in advance the kinds of actions that would constitute a security threat justifying internment, the vagueness of the Article 42(1) GCIV standard can further be mitigated.[73]

Third, we can learn from other areas of international law in which state security may be invoked as a basis for departing from the ordinary rules. For example, chapter three[74] noted that the ICJ, ECtHR and ECJ have all addressed national security claims of states by treating separately the two issues of national security and necessity, with the result that, whilst deference is given to the state in defining what constitutes a threat to its security, the necessity element is an objective standard susceptible to judicial review.[75] As the necessity requirement in Article 42(1) GCIV is objective (cf Article 78(1) GCIV), it offers a reasonable counterbalance to the discretion left to the detaining authority under the security element of the internment standard. As will be shown below, this necessity element can then be utilised by the reviewing body as an objective check on detention authority.

Fourth, we can also draw on the *limits* to the GCIV detention authority that have been developed.[76] For example, the following characteristics, by themselves, are considered insufficient to render internment necessary for security reasons: nationality or alignment with the opposing party;[77] being of military age;[78] possessing intelligence

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[73] Indeed, in *Steel and others v UK*, App 24838/94, Judgment, 23 September 1998, at [54], the ECtHR emphasised that the legal basis for detention must be sufficiently detailed so as to enable individuals to know what the consequences of their actions will be.

[74] Section 3.2.1.

[75] D Akande and S Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' (2003) 43 Va J Intl L 365, 382–3 and 396–8.

[76] See section 3.2.1.

[77] *Delalić* (n 71) [577]; *Prosecutor v Zejnil Delalić* et al (Appeals Judgment) ICTY-96-21-A (20 February 2001) [327]; *Prosecutor v Dario Kordić and Mario Čerkez* (Trial Judgment) ICTY-95-14/2-T (26 February 2001) [284]; EECC, *Civilians Claims, Ethiopia's Claim 5 (Ethiopia/Eritrea)*, Partial Award, 17

value;[79] and following particular political or religious opinions or practices.[80] These limits help to ensure that nobody is unnecessarily or arbitrarily interned, in contravention of IHL and IHRL. In addition, as section 3.2.1 demonstrated, jurisprudence has confirmed that GCIV permits internment only where the *individual* poses a threat necessitating internment; alleged membership of a particular group, by itself, is insufficient.[81] It was also acknowledged, however, that internment on the basis of membership of particular groups and the need for an individual threat are not necessarily inconsistent. Rather, the approach of the Israeli Supreme Court was advocated, whereby the particular role of the individual within the group be considered to determine whether that role is such as to render the individual a security threat.[82] The same approach can be applied in non-international conflicts, which should help to protect against the risks posed by extending pure status-based internment to non-state armed groups, discussed above.

Finally, as noted in section 7.3.1, the requirement of a legal basis for detention, which forms part of the customary human rights prohibition of arbitrary deprivation of liberty, poses particular difficulties in non-international conflicts, given the absence of such a legal basis in applicable IHL.[83] Whilst the legal basis for internments by the *state* will often be found in domestic law, the absence of a legal basis for *non-state* armed groups could result in any detention by them violating the customary human rights

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December 2004, 135 ILR 427, [102]–[104]; Pictet, *GCIV* (n 16) 258; UK Ministry of Defence, *Manual* (n 45) 230.

[78] *Delalić* (n 71) [577]; *Kordić and Čerkez* (n 77) [284]; Pictet, *GCIV* (n 16) 258.

[79] *Hamdi* et al *v Rumsfeld* et al, 542 US 507 (2004), 521 (US Supreme Court); Pejic (n 20) 380; Chatham House and ICRC (n 6) 5; Davidson and Gibson (n 20) 343–4.

[80] Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva 1987) 871; Israel, MOJ, Fact Sheet on Administrative Detention (2003) 3, cited in Debuf (n 6) 406.

[81] *Delalić* (n 71) [578]; *Kordić and Ćerkez* (n 77) [285]; *Prosecutor v Milorad Krnojelac* (Trial Judgment) ICTY-97-25 (15 March 2002) [123]; Pictet, *GCIV* (n 16) 258; Pejic (n 20) 381.

[82] *A v Israel* (n 46) [21].

[83] See section 4.1.

prohibition of arbitrary deprivation of liberty, even if necessary for security.[84] In the absence of an internment regime being adopted in law for non-international armed conflicts, one solution to this might be to rely on decrees adopted by non-state armed groups as capable of providing the legal basis for their detentions. Indeed, non-state groups, particularly those in control of territory, have been known to adopt legislation pertaining to the activities within the territory they control.[85] On the one hand, such decrees would fall short of what is normally required of a legal basis for detention. Thus, the UN Working Group on Arbitrary Detention has stated that such a law should either have been adopted through a democratic process or developed in long-standing practice by an independent judiciary.[86] Decrees of armed groups would clearly fail to meet this. On the other hand, they might offer sufficient notice to those within the territory controlled by the group of the kind of activity deemed prejudicial to security and thus which could lead to internment.

8.3.2 Reasons for internment

Like the arbitrary deprivation of liberty prohibition, it was argued that the IHRL requirement that the reasons for detention be given to the detainee should be considered non-derogable, since the right is a *sine qua non* to availing oneself effectively of the right to *habeas corpus*; indeed, the right was also shown to be sufficiently open to take account of the exigencies of the situation.[87] IHL similarly requires that reasons be given to civilian

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[84] LM Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40 Case W Res J Intl L 437, 451–3.

[85] See, e.g., Communist Party of Nepal-Maoist, Public Legal Code 2060 (2003/04); LTTE, Tamil Eelam Child Protection Act (Act No 3 of 2006), cited in S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 140.

[86] UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004, [54(a)].

[87] See section 7.1.5.

internees in international armed conflicts.[88] Such a rule should therefore be incorporated into an internment regime for non-international armed conflicts.[89]

That the exigencies of a situation may be factored into this requirement will mean that its application could be affected in practice. Thus, as described in section 7.1.5, it may be justified to have a short delay before which the reasons are conveyed to the internee, for example, because they need to be taken from the zone of hostilities to a detention facility.[90] Moreover, certain details regarding the factual basis for detention or the evidence concerning the detainee may reasonably be withheld from them where necessary for security reasons.[91] However, the object and purpose of this right indicate that the information given must always be sufficiently detailed so as to allow the detainee to challenge the grounds on which they are detained.[92] The review body (on which see below) should have the power to consider the necessity of withholding information from the internee on security grounds.[93]

8.3.3 Review of internment

It was argued in section 7.1.5 that the text of the human rights treaty provisions on *habeas*

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[88] Art 75(3) API.

[89] Similarly, see Copenhagen Principles (n 8) Principle 7; Pejic (n 20) 384; Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 1988, UNGA Res 43/173, 9 December 1988, Principle 10.

[90] See Chatham House and ICRC (n 6) at 13, where it notes that certain experts considered that an appropriate balance between an internee's rights and the necessities of the situation might be a phased release of information, with more general reasons given at the point of capture and more detailed reasons given at the initial review stage.

[91] See, e.g., the discussion in section 7.1.2 on the ECtHR's case law here: *A and others* (n 25) [220] (confirming that withholding evidence from the detainee, but not from the court, for security reasons is acceptable so long as most of the evidence relied upon is open to the detainee and sufficiently detailed). Similarly, see Chatham House and ICRC (n 6) 10.

[92] HRC, Draft General Comment 35 (n 69) [25]; ECtHR, *Van der Leer v Netherlands*, App No 11509/85, Judgment, 21 February 1990, [28]; *Juan Humberto Sanchez v Honduras*, Judgment, IACtHR (Ser C) No 99 (2003), [82]. Similarly, see Chatham House and ICRC (n 6) 11.

[93] Chatham House and ICRC (n 6) 13 (noting Israeli practice, where the court could order that evidence be declassified).

corpus cannot be read down to permit non-judicial forms of review.[94] It was also argued that the right to *habeas corpus* should be seen as derogable to a limited extent, such that, where it is necessary and proportionate to do so, a state should be permitted temporarily to derogate from the requirement of *court* review of detention and instead provide an alternative method of review.[95] However, the review body should always be independent of the authority that ordered detention and should have the power to order release where detention is found to be unlawful. This, it was argued, would enforce the basic rule in IHRL that no person be arbitrarily deprived of their liberty.

This alternative form of review should be elaborated in an internment regime for non-international armed conflicts, so as to highlight the minimum procedures that must be provided by states derogating from *habeas corpus* under a human rights treaty. In addition, this minimum review mechanism would provide a much-needed safeguard for detainees held by states not party to a human rights treaty and by non-state armed groups in non-international conflicts. This review mechanism might reasonably be modelled on the initial and periodic review procedures in Article 43(1) GCIV, which provides for review of internment 'as soon as possible by an appropriate court or administrative board' as well as bi-annual periodic review by the same body. Indeed, similar approaches have been advocated in various fora when developing minimum humanitarian standards.[96]

Chapter three, however, noted that the GCIV provisions on review are vague and

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[94] Whilst the other human rights treaty bodies took the same view, the IACiHR was shown to differ here: *Coard* et al *v United States*, Report No 109/99, 29 September 1999, [58].

[95] This approach was accepted by the ECtHR: *Ireland v UK* (n 26) [218]–[219].

[96] Body of Principles (n 89) Principle 32(1); UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', E/CN.4/1985/4, 28 September 1984, [70(d)]. The Turku Declaration borrows from the less defined review procedures in art 78 GCIV: Declaration of Minimum Humanitarian Standards Adopted by an Expert Meeting Convened by the Institute for Human Rights, Abo Akademi University, Turku, Finland, 2 December 1990, art 11.

leave considerable discretion to the detaining authority.[97] It is important that the same level of discretion is not extended to non-international armed conflicts, lest the arbitrary detention prohibition in IHRL, as well as the IHL prohibition of internment that is not necessary as a result of the conflict, be undermined. To address this, we can draw on the elaborations of Article 43(1) GCIV that were shown in chapter three to have been developed in doctrine and practice. First, the reference to administrative 'board' confirms that the decision cannot rest with a single person.[98] Furthermore, given the complex legal questions that arise in such proceedings, it would be preferable if at least one of the members were a lawyer.[99] Second, the reviewing authority must operate impartially and independently from the authority that ordered detention.[100] This, at a minimum, requires that the review tribunal be independent of the chain of command that ordered detention.[101] Third, the review authority must examine the actual necessity of internment for protecting against the stated security threat. Thus, as noted above, internment is permitted under Article 42(1) GCIV only where it is absolutely necessary for reasons of security. Whilst the security element leaves discretion to the detaining authority, the necessity element offers an objective benchmark against which the reviewing authority can judge the internment.[102] Moreover, as part of this review, the board should consider whether the individual can be transferred to the criminal justice system.[103] This was the practice, for

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[97] See section 3.3.1.

[98] Pictet, *GCIV* (n 16) 260; Pejic (n 20) 387.

[99] Similarly, see Chatham House and ICRC (n 6) 17.

[100] Pictet, *GCIV* (n 16) 260; Pejic (n 20) 386–7; Chatham House and ICRC (n 6) 15.

[101] Similarly, see UK Ministry of Defence, *Joint Doctrine Publication 1-10: Captured Persons (CPERS)* (2nd edn, MOD, 2011), Annex 1B [1B3]. The Copenhagen Principles, although requiring impartiality, do not require independence from the chain of command: Copenhagen Principles (n 8) Principle 12.

[102] See above, text to nn 74–5.

[103] It was noted that there is human rights practice promoting the use of criminal proceedings over administrative detention: see, e.g., Pejic (n 20) 380–1. For the non-state side, transfer to the criminal jurisdiction may not be possible, however.

example, of the US in Iraq.[104] Fourth, the authority must have the power to order release, binding on the detaining authority.[105] Fifth, the burden of proof must rest on the detaining authority to demonstrate that internment is actually necessary, and no more than is necessary, to protect against the stated security threat.[106]

Sixth, periodic review should be provided at least every six months, as required in GCIV, although more frequent periodic review should be available where possible, as its purpose is to ensure release where the reasons justifying detention no longer apply; it thus serves to enforce the basic prohibition in IHL of unnecessary internment, binding on all parties to non-international conflicts.[107] The UK's recent *Joint Doctrine Publication on Captured Persons*, for example, requires initial review within 48 hours and periodic review no less than every 28 days.[108] Where the resources of the detaining authority do not permit this, an alternative might be to provide a file review between full periodic reviews, as is the practice of the US regarding Guantanamo detainees.[109] Additionally, periodic review should be performed whenever new information regarding an internee comes to light.[110]

Finally, the specific procedures adopted by the reviewing authority should be conducive to allowing the internee to present their case as strongly as possible. As such,

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[104] AE Wall, 'Civilians Detentions in Iraq' in MN Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill, The Hague 2007) 433.

[105] *Delalić* (n 77) [329]. The Copenhagen Principles do not require this: compare, e.g., the statement that it 'may be appropriate' for the reviewing authority in cases of penal detention to have the power to order release, with the absence of any such reference with regard to the reviewing authority in cases of security detention: Chairman's Commentary (n 8) [13.2].

[106] *Delalic* (n 77) [329]; HCJ 466/86, *Abu Bakr v Judge of the Military Court in Schechem*, 40(3) PD 649, 650–1 (Israeli Supreme Court), cited in Y Dinstein, *The International Law of Belligerent Occupation* (CUP, Cambridge 2009) 176.

[107] Pictet, *GCIV* (n 16) 261.

[108] UK Ministry of Defence (n 101) Annex 1B [1B5].

[109] Executive Order 13,567 (7 March 2011), 'Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force', s 3(c).

[110] Similarly, see Chairman's Commentary (n 8) [12.3].

internees should have personal representatives to advise them,[111] as well as the ability to make oral and written statements and to call and challenge witnesses, where practically available.[112] As demonstrated in chapter six, such procedures have, to varying degrees, been adopted by states in certain non-international conflicts.[113]

8.3.4 Release

The requirement of release where the reasons justifying detention cease was shown in chapter five to be inherent in the customary human rights prohibition of the arbitrary deprivation of liberty.[114] This requirement was also shown in chapter four to be part of customary IHL's basic prohibition of internment that is not necessary as a result of the conflict.[115] As such, all parties to non-international conflicts, both states and non-state groups alike, are required under custom to release internees where the reasons justifying their internment cease. Any internment regime for non-international conflicts must, therefore, include such a norm.[116] Indeed, the relevant rule in GCIV, requiring release where the reasons cease and, if not before, when hostilities cease, may be transplanted to non-international armed conflicts.[117]

An important caveat must be noted, however. Section 5.2.5 explained that certain

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[111] Similarly see Body of Principles (n 89) Principle 17; Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict, University Centre for International Humanitarian Law, Geneva, 24–5 July 2004, 44 (noting that, whilst it may not be practical to provide a lawyer immediately at capture, once removed from the battlefield and taken to a detention centre, a lawyer should be provided); Pejic (n 20) 388; Chatham House and ICRC (n 6) 14.

[112] Similarly see Pejic (n 20) 389; Chatham House and ICRC (n 6) 15.

[113] See, e.g., the discussion of the Multi-National Force Review Committee in Iraq in BJ Bill, 'Detention Operations in Iraq: A View from the Ground' in RA Pedrozo (ed), *The War in Iraq: A Legal Analysis* (2010) (Vol 86, US Naval War College International Law Studies) 428–34.

[114] See section 5.3.2. Similarly, see HRC, *C v Australia*, CCPR/C/76/D/900/1999, 28 October 2002, [8.2]; HRC, *Baban et al v Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, [7.2]; HRC, Draft General Comment No 35 (n 69) [13].

[115] See section 4.3.2.

[116] Similarly, see Pejic (n 20) 382–3; Copenhagen Principles (n 8) Principle 4.2.

[117] Arts 132(1) and 133(1) GCIV.

human rights bodies appear sceptical of prolonged, indefinite detention.[118] On the one hand, the indefinite nature of detention is an inherent feature of internment during armed conflict, and if the law is to be effective here, it cannot prohibit internment for the reason that it does not have a pre-determined end-point.[119] However, this scepticism of IHRL towards prolonged, indefinite detention could nonetheless be useful here in protecting detainees from arbitrary deprivations of liberty. To that end, it is submitted that, the longer detention continues, the more burdensome it should be on the detaining power to justify it before the reviewing authority.[120] Indeed, the principle of proportionality as developed in human rights jurisprudence is particularly useful here. Thus, the ECtHR has confirmed that

> … a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty … The duration of the detention is a relevant factor in striking such a balance.[121]

As detention continues, the proportionality balance will therefore shift in favour of release, requiring increasingly convincing evidence that continued internment is necessary.

8.4 Concluding Remarks

The proposals above recommend drawing by analogy from the GCIV internment regimes and the developments thereof in doctrine and practice. Importantly, it was made clear that the distinction between international and non-international armed conflicts in this area should not be eliminated, lest the current legal protections afforded to those detained in

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[118] IACiHR, 'Annual Report: 1976', OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1 of 7 June 1977, Section II, Part II; UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN. 4/2004/3, 15 December 2003, [60]; UN Working Group on Arbitrary Detention, *Obaidullah v United States*, A/HRC/WGAD/2013/10, 12 June 2013, [24].

[119] This is confirmed by practice acknowledging that internment is not necessarily inconsistent with IHRL: see section 5.2.1.1.

[120] Similarly, see CFH 7048/97, *Anonymous v Minister of Defence*, 54(1) PD 721 (Israeli Supreme Court) [25].

[121] *Saadi v UK* (n 65) [70].

non-international conflicts be undermined. Instead, it was suggested that the current *lex lata* be built upon, ensuring that the proposed internment regime complies with the basic customary rules of IHL and IHRL, which earlier chapters showed bind all parties in non-international conflicts.[122] Thus, the proposed regime offers a framework, currently lacking in the law, to states without conventional human rights obligations and to non-state armed groups, giving content to their basic obligations under IHL and customary IHRL. In addition, for the majority of states with human rights treaty obligations, the proposals are intended as minimum humanitarian standards that states can apply 'through' their IHRL obligations (e.g. via derogation).

It is submitted that the approach above represents an appropriate balance between military necessity and humanitarian concerns, for internment is permitted but only where subject to strict safeguards. Importantly, as noted, derogation, e.g. from *habeas corpus*, cannot be an automatic measure once a non-international armed conflict has come into existence; rather, it is permitted only where *actually* necessary, and no more than is necessary, in the prevailing circumstances.[123] Indeed, the practice of Colombia, discussed in section 6.2.1.1, demonstrates that internment need not be necessary in a non-international conflict, and instead the criminal model of detention could sufficiently respond to threats to state security. Similarly, the practice of Israel confirms that, whilst the introduction of internment may be necessary, derogation from *habeas corpus* need not be.[124]

[122] The exception, as noted, is that customary human rights law appears, presently, to be binding only on non-state armed groups that control territory: section 7.3.

[123] See, e.g., art 4(1) ICCPR; art 15(1) ECHR; HRC, General Comment No 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, [4]; R Higgins, 'Derogations under Human Rights Treaties' (1976) 48 BYIL 281, 282–3.

[124] Brief of *Amici Curiae* Specialists in Israeli Military Law and Constitutional Law in Support of Petititioners, *Boumediene* et al *v Bush* et al, On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. This is discussed in section 7.1.5.

IHL, however, is premised on the different presumption, 'that the existence of an armed conflict automatically invokes a certain 'basic level' of military necessity'.[125] It is this presumption that explains IHL's more permissive approach to internment, relative to IHRL.[126] Were the distinction between categories of conflict to be eliminated in this area, those more permissive IHL rules might then be said to apply as the *lex specialis* in non-international conflicts, effectively undermining the more protective human rights treaty norms that already bind most states.[127] The more permissive IHL rules on internment would then become the governing legal standards regardless of whether it was actually necessary in the prevailing circumstances to depart from the stricter human rights standards. The approach advocated here allows us to move away from this presumption and preserve the ordinary law regime (IHRL), so long as it is not actually necessary to depart therefrom.[128]

Of course, for non-state groups and for states not party to a human rights treaty, the proposed regime would form the principal applicable norms in any situation reaching the level of a non-international armed conflict. Unlike states with conventional human rights obligations, no derogation would be necessary for them to 'access' this regime. It may be argued that this approach is inappropriate, as it would require non-state armed groups to adhere to less restrictive rules than states that have *not* derogated from their human rights treaty obligations. However, such differentiated obligations arise not from any inequality

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[125] R Geiß, 'Military Necessity: A Fundamental "Principle" Fallen into Oblivion' (2008) 2 ESIL Proc 554, 559. Similarly, see WG Downey Jr, 'The Law of War and Military Necessity' (1953) 47 AJIL 251, 256–60 (arguing that military necessity in IHL leads to a presumption that one can, inter alia, target and capture members of the enemy armed forces).

[126] This was demonstrated throughout chapter five.

[127] This notion of *lex specialis* was discussed regarding internment in international armed conflict in section 6.1.2.

[128] This approach is based on a more general proposal by the present author for developing the law of non-international armed conflict: L Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Isr L Rev (forthcoming).

under IHL,[129] but rather from the voluntary assumption of stricter obligations under human rights treaties by most states, which in turn would restrict their ability to 'access' the more permissive internment regime. As demonstrated in section 6.2, states already accept the application of IHRL in these situations, and, in so doing, many resort to derogation in order to broaden their discretion. From the perspective of states with human rights treaty obligations, therefore, the proposed regime would not require a significant change from their current practice, whilst offering them greater clarity regarding minimum humanitarian standards. Moreover, given the current lack of rules applicable to non-state armed groups and to states without human rights treaty obligations, the proposed regime would offer an important development on the current law.

[129] On the importance of equality of belligerents under IHL for compliance, see Sassòli and Olson (n 6) 609–10; F Bugnion, '*Jud Ad Bellum, Jus In Bello* and Non-International Armed Conflicts' (2003) 6 YIHL 167; C Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn OUP, Oxford 2008) 10–11. Cf G Blum, 'On a Differential Law of War' (2011) 52 Harv Intl LJ 163.

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