

## REPORTS AND DOCUMENTS

# Expert meeting on procedural safeguards for security detention in non-international armed conflict\*

Chatham House and International Committee of the Red Cross, London, 22–23 September 2008

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An informal Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict was convened by the International Committee of the Red Cross (ICRC) and Chatham House, bringing together experts with a military, academic, government and NGO background. The discussion was focused on outstanding legal and operational issues linked to internment practice. The ICRC's 2005 position paper on Procedural Principles and Safeguards for Internment/Administrative Detention<sup>1</sup> and a list of practical questions prepared by the ICRC served as background documents for the discussion.<sup>2</sup>

The experts took part in their personal capacity. As the meeting was conducted under the Chatham House Rule the views reflected in this summary report are not attributed to individual persons or the institutions they represent.

While inevitably touching on both criminal and administrative detention/internment in situations of international armed conflict, occupation, and situations of violence below the applicability threshold of international humanitarian law, the debate was focused on security detention in non-international armed conflict. The report therefore covers only that issue; expansions into wider areas of discussion will be mentioned only where directly relevant.

\* The report was prepared by Els Debuf (Legal Advisor, ICRC) and benefited from the valuable comments made by Jelena Pejic (Legal Advisor, ICRC), Elizabeth Wilmshurst and Toby Fenwick (Chatham House).

## Preliminary questions: terminology, classification and interplay between legal regimes

The scope of the discussions was limited in two ways. First, the discussion only dealt with internment (in the sense of administrative detention) and thus excluded deprivation of liberty for the purposes of criminal proceedings. Internment was understood as the deprivation of liberty in armed conflict for security reasons – i.e. outside criminal proceedings – ordered by the executive. There was some discussion on when internment starts, i.e. whether from the moment of capture and whether it includes short-term deprivation of liberty without intent to hold a person for any significant length of time.<sup>3</sup> It was agreed that for the purposes of the discussion internment is meant to indicate the period of deprivation of liberty from the moment a decision to intern (i.e. to detain for security reasons) is taken until the person is released. Secondly, the debate focused on situations of non-international armed conflict (NIAC) and thus excluded questions regarding internment that only rise in situations of international armed conflict or occupation (covered by the four Geneva Conventions of 1949 and their First Additional Protocol of 1977)<sup>4</sup> or in other situations of violence – not reaching the threshold of armed conflict (usually called administrative or preventative detention, covered by domestic and human rights law).

In situations of NIAC, the relevant bodies of law for questions of internment are threefold: international humanitarian law (also known as the Law of Armed Conflict (LOAC) and hereinafter referred to as “IHL”), international human rights law (IHRL) and each State’s domestic law. The interplay between these bodies of law is not always easy to articulate, and can be complex to implement operationally.

First and most importantly, different bodies of law provide different rules on the legal bases and procedures for internment in NIAC. Moreover, in a complex situation such as a NIAC involving third State intervention in the territory of a

- 1 The position paper is entitled “Procedural Principles and Safeguards on Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, J. Pejic, *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375–391. It was attached as Annex I to an ICRC Report on “IHL and the Challenges of Contemporary Armed Conflicts” presented to the 30<sup>th</sup> International Conference of the Red Cross and Red Crescent held in Geneva in November/December 2007.
- 2 The issue of security detention was also discussed at an expert meeting convened by the ICRC and the Frederick K. Cox International Law Center at Case Western Reserve University in Cleveland, USA in 2007. The report of that meeting is available at: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/security-detention-report-300909?opendocument> (visited 14 December 2009).
- 3 In this context it remained unclear whether the 96-hour detention system implemented by ISAF nations in Afghanistan before transfer to Afghan authorities would qualify as internment. The International Security Assistance Force (ISAF) in Afghanistan is a NATO-led coalition of about 40 troop-contributing nations with a peace-enforcement mandate under Chapter VII of the United Nations Charter. See <http://www.nato.int/isaf/index.html> (visited 14 December 2009).
- 4 The four Geneva Conventions of 12 August 1949 are hereafter referred to respectively as GC I, II, III and IV. Their two Additional Protocols of 8 June 1977 are hereafter referred to respectively as AP I and AP II. Article 3 common to the four Geneva Conventions is hereafter referred to as “common article 3 GC” or “CA3 GC”.

“host” State, the different parties to the conflict may be bound by different sets of rules. Also, members of the same multinational force may have different IHRL obligations.

Secondly, there is the outstanding question of the exact interplay between IHL and IHRL in situations of armed conflict. The prevailing view is that IHRL continues to apply during armed conflict and is particularly relevant when addressing the issue of detention in NIAC. However, when giving concrete substance to interplay with IHL in practice, the different cultures of the two regimes need to be taken into account: “IHL” is not equal to “IHRL during armed conflict”. The two bodies of law – while similar in some of their purposes and on many points of substance – are designed to address very different contexts. Finally, while IHL imposes obligations on all parties to a conflict, including non-State actors, IHRL – in the current state of international law – can only be said to be directly binding on States.<sup>5</sup>

The latter issue raised another topic of the debate, namely that of the classification of situations of armed conflict. Whilst often a seemingly theoretical exercise, classification is extremely important as it defines which bodies of law apply to the situation at hand. IHL treaty law makes a distinction between international armed conflict (an armed conflict between two or more States, hereafter “IAC”) on the one hand, and non-international armed conflict (NIAC) on the other hand. The latter covers armed conflicts opposing a State and an organized non-State armed group, or opposing two or more such groups in a State’s territory.<sup>6</sup> Whilst correct, the simplicity of this definition hides the existing diversity of ongoing NIAC’s across the globe.<sup>7</sup>

While many different scenarios were discussed during the meeting, the focus remained on two types of NIAC in particular: that of a so-called “traditional NIAC” opposing a State and a non-State armed group in the territory of a State,

- 5 The ongoing debate on this question was reflected in the different opinions of meeting participants. Without concluding on the issue, the discussion highlighted the need to take into account that even if IHRL can be said to be binding on non-State actors, some of its obligations are of a nature that allows implementation only by States.
- 6 No distinction is made in this paper between NIAC as defined in common article 3 GC and NIAC as defined in art. 1 AP II since neither body of rules specifically regulates the legality of or grounds and process for internment. Article 3 is silent on internment, while AP II elaborates only certain aspects of a detention/internment regime.
- 7 The following typology was proposed by one expert and briefly discussed: Type 1 – armed conflict between two or more non-State actors (NSA), subcategories: in a functioning State v. in a weak or non-functioning or failed State; Type 2 – armed conflict between a State and a non-State actor in the territory of that State, subcategories: armed conflict without territorial control by a NSA, armed conflict with a NSA in control of a part of the territory but without a full governmental structure in the territory, armed conflict where one or more NSA exercise control over a territory, with a government-like structure in place and a stabilization of conflict with remaining potential for active hostilities (in the latter category, the issue of self-determination may come into play and affect the issues raised); Type 3 – armed conflict with third-State intervention, subcategories: third State(s) assisting the State in whose territory a NIAC against a NSA is ongoing, third State(s) assisting the host-State under UNSC cover, and finally a third State fighting a NSA in the territory of another State without the involvement of the territorial State in the conflict. To be noted that this typology was not endorsed by the participants but very much helped provide a “real world” context to the debate.

and that of a so-called “multinational-forces-NIAC” (MNF-NIAC), where a State that is confronting a non-State actor in its territory receives the assistance of a third State or of a multi-national force whose involvement is such that it becomes a party to the armed conflict (for example the ongoing conflicts in Afghanistan, Iraq or the Democratic Republic of the Congo). The term can be confusing and does not indicate a separate category of NIAC that would be covered by a different set of rules, but serves – if only in an imperfect way – to indicate situations where a traditional NIAC forms the basis of a conflict that takes on an “international dimension” through the intervention of third States. It was acknowledged that the issue of classification is not without controversy, that it merits further reflection and impacts directly on the discussions about internment in NIAC, but it was agreed by participants to focus on the two above-mentioned scenarios.<sup>8</sup>

What follows aims to reflect the debates on the three topics on the meeting agenda:

- i) the legal basis for internment in NIAC,
- ii) the right to information and to legal assistance, and
- iii) review (initial and periodic) of the continued necessity of internment.

It should be noted that these issues, and the issue of classification itself, are all intricately linked and that it is difficult to discuss them in an isolated way. For purposes of rigour and clarity, they are set out separately in the report, but references to connected issues and the way these impacted the debate are included. Also, while the focus was on IHL and on the two above-mentioned types of NIAC, participants agreed that any rules or guidelines regarding internment must be formulated in a way that would allow them to be implemented in a realistic way in the different types of NIACs, by both States and non-State actors. Finally, an examination of internment practice should aim at identifying a regime that would be most protective of internees’ rights, while being consistent with operational necessities. Therefore, the obvious starting point should be IHL (which inherently makes the above-mentioned balance), complemented by other bodies of law as appropriate.

## **Session 1 – The legal basis for internment in non-international armed conflict**

One of the most important legal challenges posed by internment in NIAC is that there is no explicit legal basis for this type of deprivation of liberty in any branch of international law. At the same time, in reality both States and non-State armed groups detain individuals for security reasons in NIAC and do so outside the

<sup>8</sup> The question of whether different types of NIAC impose a diversification of applicable rules was raised, but not discussed substantially as it fell outside the direct scope of the meeting.

framework of criminal proceedings. The legal basis for internment, the grounds and procedural safeguards applicable are questions of urgent concern to both policy and operational military personnel, the academic community, international think tanks, NGO's and others.

### An inherent right to intern under international humanitarian law?

The first question addressed was whether parties to a NIAC have the right to intern individuals to start with. During the meeting, consensus was reached quite easily about two parts of the answer to that question.

On the one hand, the experts agreed that there was not so much a "right" but rather an "authorization" inherent in IHL to intern persons in NIAC. It was suggested to speak of the "power to intern" or of a "qualified or conditional right to intern" rather than of a "right to intern". This was held to be consistent with both the spirit of IHL and from an IHRL perspective. The experts agreed that it flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat. Otherwise, the alternatives would be to either release or kill captured persons.

Moreover, even IHRL does not prohibit internment *per se*. What is prohibited, at all times, is the *arbitrary* deprivation of liberty. The definition of arbitrary deprivation of liberty in the context of an armed conflict is to be considered through the prism of IHL based on the *lex specialis* principle that governs the relationship between the two bodies of law.

If IHL provides an implied power to intern in NIAC and IHRL does not exclude it *per se*, the debate is then narrowed to the question of the parameters of such a power and how it may be practically exercised. Participants were of the view that, taking into account the exceptional nature of internment as recognized under both IHL and IHRL, any internment must be "necessary" for "imperative reasons of security" (meaning directly related to the armed conflict). There was also agreement that there must be "lawful authority" or a "legal basis" to intern and that internment can only be ordered on "permissible grounds" under international law. Finally, there was agreement that, leaving aside the issue of *habeas corpus* under IHRL, some form of review mechanism to initially and then periodically assess the lawfulness of internment (i.e. whether it is or remains necessary for security reasons and whether there is a legal basis) is required.<sup>9</sup> The burden of demonstrating the necessity of continued interment is on the interning authorities.

This framework for discussion reflected the logic that must govern any deprivation of liberty in order to meet the requirements of the IHRL prohibition of arbitrary detention (lawful authority and permissible grounds)<sup>10</sup> even though the

9 See below the summary of Session 3.

10 Article 9, para. 1, International Covenant on Civil and Political Rights (16 December 1966) (hereafter "ICCPR"); article 5, para. 1, European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950) (hereafter "ECHR").

implementation of those requirements needs to take into account the reality of armed conflict and the *lex specialis* constituted by the relevant IHL.

*There was prevailing agreement that any party to a NIAC has an inherent power or “qualified right” to intern persons captured. Internment is an exceptional measure that can only be ordered on certain grounds that must be stipulated in the legal basis for internment. The decision to intern must be reviewed initially to assess the lawfulness of internment and periodically to assess the continued necessity of internment.*<sup>11</sup>

## Permissible grounds for internment in NIAC

If there is an inherent authorization to intern under IHL the question arises as to what are the permissible grounds for internment in NIAC.

There was agreement that internment must meet a “necessity” standard in order to be lawful. However, it is more difficult to assess how this can translate into an objective, standard that can be implemented. “Necessity” gives expression to the fact that internment must be seen as an exceptional measure, as it removes an individual’s right to liberty recognized under both IHL and IHRL. While in some cases the necessity criterion is obviously fulfilled, there are many grey areas where it is not. In such cases, much depends on the specific context of the military operation at hand, on the available alternatives and – as argued by many – on a certain amount of “common sense”.

The most recurrent ground invoked for internment in NIAC – and probably the only permissible ground – is that of “imperative reasons of security”. The term is borrowed from the text of article 78 of GC IV – where it constitutes the ground for internment in situations of occupation; other legal provisions in different bodies of law are phrased in similar terms to reflect the same concept. The word “imperative” refers back to the “necessity” concept and the “reasons of security” refers to the type of ground allowing for the extraordinary measure of internment. It seems to be clear that this ground is acceptable under IHL, even in NIAC. However, it would probably not be acceptable under IHRL due to the lack of specificity, which begs the question of whether the interning State must derogate from its relevant human rights obligations for internment not to be considered arbitrary detention (art. 5, para. 1 ECHR, art. 9, para. 1 ICCPR).

11 For illustrative purposes, the provisions on internment of civilians in IAC or during occupation meet the above-mentioned test in the following way:

- Legal basis: explicit authorization to intern in art. 41, para 1, art. 78, para. 1, GC IV.
- Permissible grounds:
  - only if the security of the Detaining Power makes it absolutely necessary (art. 42, para. 1, GC IV) or if necessary, for imperative reasons of security (art. 78, para. 1, GC IV)
  - voluntary internment, when necessary (art. 42, para. 2, GC IV)
- Review mechanism: initial and periodic review in order to judge the (continued) legality of the internment (art. 43, para. 1 and art. 78, para. 2, GC IV).

The majority of operational experts argued that whilst it is easy to provide examples that clearly pass or fail the “imperative reasons of security” test, the borderline cases pose significant challenges as there is neither a concrete definition nor practical guidelines on what the concept of “imperative reasons of security” exactly means. State practice is of limited help, as it is difficult to establish an exhaustive list of specific activities that would in all circumstances fall within or outside the legal standard.<sup>12</sup>

What is clear is that internment must be necessary for security reasons, and not just convenient or useful for the interning power. A concrete example is that internment for the sole purpose of obtaining intelligence is impermissible. Also, a person may not be interned for the sole purpose of being exchanged against other persons in the hands of the adverse party or to be used as a “bargaining chip” in negotiations – such internment would amount to hostage-taking, which is explicitly prohibited under IHL in both IAC and NIAC. Finally, it is of crucial importance that internment not be used as an (disguised) alternative to criminal proceedings. Internment is conceived and implemented as a preventive measure and therefore may not be used to punish a person for earlier criminal acts. If a person is held solely on suspicion of involvement in criminal activity his or her deprivation of liberty will only be permitted if it is in accordance with the applicable criminal law procedure and relevant human rights law.<sup>13</sup> However, as internment is based on the threat posed by an individual, his or her past activities may well be an important factor in assessing whether the individual constitutes or may constitute a significant enough threat to the security of the interning Power to justify internment.

In the discussion, participants coalesced around a two-tiered test to assess whether an individual presents a sufficient threat to allow his or her internment. The first element of the test is whether, on the basis of his or her activity (which as such is not necessarily criminally prosecutable), it is “highly likely” or “certain” (the threshold is unclear) that he or she will commit further acts that are harmful (directly and/or indirectly, the threshold is unclear)<sup>14</sup> to the interning Power and/or to those whom the interning Power is mandated to assist or protect, such as the host nation, the civilian population or public order (the threshold is again unclear). The second element of the test is whether internment is necessary to neutralize the threat posed. It was stressed that if the interpretation of “imperative reasons of security” as the permissible ground for internment is too wide, there is a risk of abuse. The security threat must be assessed on an individual basis and the decision to intern (as distinct from the decision to capture) must be taken at a

12 Some governments were said to look at domestic law regulating the deportation of immigrants on national security grounds for guidance on the meaning of “imperative reasons of security” for internment in NIAC.

13 As to article 68 GC IV in the specific situation of occupation, see note 1, p. 381, footnote 21.

14 Some experts indicated that on the ground, their militaries looked for inspiration to article 78 GC IV and relied on similar criteria for interpreting the concept of ‘direct participation in hostilities’.

sufficiently high level of command to allow for an adequate assessment of both the threat and the necessity to intern in light of the context and available alternatives.

Experts stressed the importance of the continuous updating and verification of information that resulted in a threat assessment leading to internment. Ideally, this should be continuously ongoing, but must be done at least at every instance of review. The less the information is corroborated, the less certain is the continuing threat posed by an individual and thus the less justifiable is the continued internment. What must be avoided is that initial information on the existence of a threat (unless very clear and specific) remains in an internee's file without being corroborated or further updated.

*The experts were of the view that “imperative reasons of security” seems to constitute a permissible ground for internment taking into account the specific circumstances and given the available alternatives. Internment that is merely convenient or useful for the interning power, or internment for the sole purpose of information gathering, or undertaken in order to facilitate the exchange of detainees or negotiations is not lawful. Given that it is a preventive measure, internment should not be used as an alternative to criminal proceedings. The decision to intern must be taken on an individual basis and at a sufficiently high level of command to ensure an adequate assessment of the threat and of the necessity to intern. The information upon which threat and necessity assessments are based must be updated and verified throughout the duration of internment.*

## The legal basis for internment in NIAC

The distinction proposed by the ICRC between “legal basis” and “permissible grounds” for internment is supported by requirements flowing from general IHRL under which a deprivation of liberty may be ordered on the basis of lawful authority and on specified grounds permitting a restriction of liberty. The permissible grounds for internment in NIAC have been discussed above. What could be the lawful authority or the legal basis for internment?

### *International humanitarian law*

Treaty law applicable in NIAC (CA3 GC and AP II where applicable) does not provide an explicit legal basis for internment. It could be argued that such a legal basis exists in customary IHL.

### *International human rights law*

IHRL does not explicitly provide a legal basis for internment (or administrative detention as it is often called) based on security reasons; internment may thus constitute arbitrary detention and be in violation of IHRL.

- While the ECHR provides an exhaustive list of permissible grounds for deprivation of liberty (art. 5, para. 1), detention for security reasons is not on the list.



Therefore, some experts argued that any internment in a NIAC would – unless an explicit basis were anchored in IHL, the *lex specialis* in armed conflict – require lawful derogation by a State party from its obligation under article 5, paragraph 1, ECHR.

- Outside the ECHR framework, the situation is less clear as the ICCPR does not enumerate a list of permissible grounds for deprivation of liberty like the ECHR does. The Human Rights Committee (the monitoring body for the ICCPR, hereafter “HRC”) has not pronounced itself (yet) on the question of whether derogation from the right to liberty (art. 9, para. 1, ICCPR) is necessary for a State to be able to intern for security reasons in NIAC. It is likewise unclear whether it is the right to liberty of person that must be derogated from (article 9, para. 1) or only the right to judicial review (article 9, para. 4) where internment review would be conducted by a non-judicial body.
- To be noted that to be in conformity with IHRL (both ECHR and ICCPR), the grounds and procedure for internment (as for any other deprivation of liberty) must be prescribed by law and not be arbitrary.

### *Self-defence*

While some States have invoked the *jus ad bellum* concept of self-defence as a legal basis for internment, there was general consensus that such invocation is troublesome – if not outright invalid – under international law. For almost all experts it was clear that self-defence in its *jus ad bellum* sense does not constitute a legal basis for internment in NIAC.

### *Domestic law of the interning power*

A domestic law providing explicitly for the possibility of internment and spelling out permissible grounds and procedures governing it could constitute a legal basis for internment in a NIAC required under international law. However, several questions remain and this area requires more research in order to provide for clear answers.

- First, does the form of the legal instrument matter? Can an executive order be sufficient or must there necessarily be a legislative act? The answer is unclear, but there was an obvious preference (if not obligation) for a legislative act.
- Additionally, when States act abroad it is unclear whether their domestic law may be relied on as a legal basis for internment in NIAC when they are acting outside their territory.
- Third, any domestic legal basis relied upon by a State to intern in NIAC (whether in its own territory or in another country) must be in accordance not only with IHL but also with the State’s IHRL obligations. It remains unclear whether the State must derogate from its IHRL obligations when adopting such

a law. For ECHR signatory States, the ECHR appears to mandate derogation from article 5, paragraph 1, in order to implement internment in NIAC (or to introduce a system of administrative detention in peace-time). The ICCPR is less clear on this issue, and the HRC has not yet pronounced itself on the matter. There is, however, no recorded instance in which a State that interned in a NIAC abroad derogated from its IHRL obligations. Where a State acts at home it is more inclined to derogate from its obligations in order to provide for deprivation of liberty outside criminal proceedings (internment or administrative detention).

### *Domestic law of the host-State in a multinational forces-NIAC scenario*

The question arises as to whether the intervening State(s) can intern on the basis of the domestic law of the host State and if so under what conditions. The discussion during the meeting was not conclusive, but several important and interesting points were raised:

- Similar to what was noted above: can the legal basis for internment be an executive decision or does there need to be a specific legislative act?
- The issue of extra-territorial applicability of both domestic and international human rights law (see above) comes into play and informs the debate on the legal basis for internment in such a scenario.
- The issue of derogation is (further) complicated by the question of whether it is the host State or the interning State that has to (or not?) derogate from its IHRL obligations. The solution remains unclear.
- When third States are part of a multinational force that acts under the umbrella of an international or regional organization (e.g. UN, NATO, EU), issues of attribution arise. Are tasks associated with internment the responsibility of the interning State or of the international or regional organization or are they shared? And if they are incumbent on the organization, is that organization bound by IHRL (both international and regional?) and does it/can it derogate from IHRL in order to enact a legal basis for internment in NIAC? The answers to these questions involve issues that go well beyond the scope of the discussion at the expert meeting but are crucial in the debate on internment in MNF-NIAC. They will most likely be given different responses by the different organizations. Apart from raising these questions, the discussions focused more specifically on the United Nations Security Council (UNSC) since this body can take binding decisions on all States (under Chapter VII of the UN Charter).

### *UNSC Resolutions*

The experts agreed that a United Nations Security Council Resolution (hereafter “UNSCR”) under Chapter VII of the Charter could possibly constitute a legal basis

for internment when the measure of internment and the permissible grounds for it are explicitly mentioned in the resolution.<sup>15</sup> Some experts argued that the “all necessary measures” phrase commonly used in Chapter VII resolutions can constitute a legal basis for internment by multinational forces taking part in an armed conflict. However, other experts argued that the phrase is too vague to provide a legal basis for internment, i.e. to be interpreted as giving lawful authority. Human rights bodies are also unlikely to accept the latter but have made no pronouncements on the matter thus far. It was concluded that a Chapter VII UNSCR could possibly provide the legal basis for internment in NIAC. There was, however, no agreement on the level of specificity required of the language of such a resolution.

### *Bilateral agreements*

- Given the lack of clarity of international law and the novel scenario of MNF-NIAC in which the MNF interns persons who pose a security threat, instruments of a more operational nature have been relied on to deal with the issue on the ground. While some troop-contributing States have argued that a legal basis for internment may be provided for in bilateral agreements concluded with a host State, the validity of that argument was challenged by participants to the meeting. Moreover, it remains unclear whether in such a case, the host State, the troop-contributing state or both would need to derogate from their IHRL obligations to allow for internment.
- Bilateral agreements could take the form of a Status of Forces Agreement (“SOFA”). Some experts argued that SOFAs are not a direct source of law, but rather agreements on the extent to which the domestic law of the host State covers actions of the sending States’ forces. Others argued that, as bilateral treaties, SOFAs may create rights and obligations between the contracting parties, but that the latter are still subject to their obligations under general international law (including IHL and IHRL). It was accepted that, in common with bilateral agreements, a SOFA could not be used to circumvent States’ international obligations, and that although a SOFA is not an ideal legal vehicle for internment in NIAC it may have some utility as long as its provisions regarding internment are in accordance with international law. Therefore, for it to constitute an adequate legal basis for internment, the grounds and the procedure must not only be made explicit, but must also conform to the relevant IHL and IHRL.

15 The only example of such explicit wording is UNSC resolution 1546 (2004) and the letters attached to it in relation to the MNF in Iraq.

### *National Standard Operating Procedures (“SOP”)*

- It was agreed that although a SOP must always reflect the law it is not a source of law and therefore cannot provide the lawful authority or legal basis for internment. While it may specify the procedures or outline the practical implementation of internment, SOPs need to rely on another, pre-existing lawful authority providing a legal basis for internment (e.g. domestic law, explicit UNSCR, etc.).

### *What about non-State actors parties to a conflict?*

What is their legal basis for internment?

- As a party to an armed conflict a non-State armed group also has an inherent authorization to intern (see above). This is a direct consequence of the principle of equality of rights and obligations of the parties under IHL and has to be the starting point of the discussion. As equality of belligerents provides an incentive for non-State actors to respect IHL, it would be unhelpful to depart from this principle in the context of internment. *Note:* this means that – under IHL – a non-State armed group cannot be penalized for interning persons as long as the internment is otherwise in accordance with IHL. This does not, however, mean that such behaviour cannot be penalized under the domestic law of the relevant State.
- Domestic law or a UNSC resolution has never included a direct legal basis for a non-State actor to intern (or otherwise deprive of liberty for that matter) any person in a NIAC. Hence, as treaty IHL does not offer an explicit legal basis for any of the parties to a NIAC, the question as to how a non-State actor can exercise the inherent right to intern under IHL remains unanswered.

*Treaty IHL does not provide an explicit legal basis for internment in NIAC. IHRL does not provide for such a legal basis either and enacting a legal basis at the national level may very well require derogation from human rights obligations. Domestic law can provide a legal basis for internment if the grounds and procedure are explicitly provided for and are in accordance with IHL and the relevant IHRL. It is unclear whether a State’s domestic law can provide a legal basis for internment when its forces intern outside its territory. A UNSC resolution can provide a legal basis for internment but the experts disagreed on the level of specificity of wording that would be required for it to have this effect, particularly where the conditions of detention would otherwise be contrary to international law. There was no consensus on whether bilateral agreements and SOFA’s could provide a legal basis for internment in NIAC. A SOP and the law of self-defence however cannot constitute such legal basis. Finally, while they recognized that non-State actors party to a NIAC also have an inherent “qualified right to intern” under IHL, it remains unclear how this right could be translated into an actual legal basis to intern.*

## Additional remarks

It was argued by several experts that providing a legal basis for internment in treaty IHL would be the most adequate answer to the realities on the ground. The only other way to secure a legal basis would be to obtain a specific enabling UNSC resolution or an appropriate domestic legislative act, both of which may often be unavailable and difficult to obtain. Both the adoption of a UNSCR and the adoption of a legislative act take time and are burdened by political factors not necessarily related to the armed conflict. A standing IHL provision would have the additional benefit that, in being general, it would not fall prey to political factors unrelated to the concrete NIAC's in which it may be applied.

It was also clear from the discussions that there is an operational need to have a legal framework for internment in NIAC that ensures respect of States' obligations under both IHL and IHRL. The broad results of the meeting as summarized above thus need to be complemented by additional research (for example on customary IHL as a legal basis for internment in NIAC) and – if proven to be necessary – the adoption of new rules.

## Session 2 – The right to information and legal assistance for internees in NIAC

An internee has the right to be informed promptly, in a language he or she understands, of the reasons for his or her internment so as to be able to challenge its lawfulness. While admitting the legal and practical controversy, the ICRC's position paper<sup>16</sup> posits that an internee should also be allowed to have legal assistance. The second session of the Expert Meeting was dedicated to an analysis of the practical implications and concrete elements of these two procedural safeguards, compliance with which has proved difficult to ensure on the ground.

### The right to information: When? What? How? For whom?

While clear on the right of an internee to prompt information about the reasons for his or her internment, international law does not shed much light on the practical details of that obligation: what information must be released at what time, by whom and to whom? IHL offers very little guidance and whilst IHRL is clear in cases of criminal detention, it is much more difficult to assess the exact scope of obligations under IHRL in case of internment in NIAC, where the military necessity element has to be taken into account.

Participants accepted that under IHL an internee's right to full disclosure of all available information can be restricted for reasons of military necessity; and that it can probably be restricted under IHRL in the light of special circumstances

16 See note 1 above.

such as the existence of an armed conflict.<sup>17</sup> The question is how to strike a balance between the military's need to protect its means and methods of intelligence-gathering in practice, with an internee's right to know the reasons for internment so as to be able to challenge its lawfulness as soon as practically possible. Whilst the principle is clear, there is no certainty about how to implement the balance in practice. The debate during the meeting demonstrated how difficult it is and will be to forge agreement on these matters.

### *What's in the balance?*

From a government/military perspective, there are seemingly conflicting considerations. On the one hand, the need to protect intelligence sources and methods, suggesting the need to restrict the right to information. On the other hand, a more or less expansive international law obligation to provide internees with information necessary to effectively challenge the legality of their deprivation of liberty, suggesting the need to release all available information. According to some experts, experience has shown that providing internees with proper information makes them more cooperative with the authorities and thus contributes to the security of the interning authorities (in particular the guard forces) on the ground.

From an internee's perspective, the right to information is made up of three elements. First, there is the right to know why and on what grounds he or she is being held and what consequences he or she may face (internment or criminal prosecution, likely duration of the internment, etc.). These rights are inherent in the principle of humane treatment. Second, the right to information is directly linked to an internee's ability to challenge the lawfulness of his or her internment (to challenge of the veracity of the facts, i.e of the necessity to intern). Third, to avoid the danger of internment turning into actual disappearance, there is the related issue of informing family and/or friends of the internment.

The discussion focused on how security and intelligence interests (including the classification of information) must and can be balanced against internees' right to effectively challenge the lawfulness of internment.

### *When – what – to whom?*

The starting point for the discussion was that an internee is entitled to more information than that he or she is “a threat” or is “being held for imperative reasons of security”. The information on the reasons for internment must enable the internee to meaningfully challenge the legality of his or her internment and its continued necessity.

As to the “when” question, two indications were put forward. First, the principle is “as much as possible as soon as you can”; “as soon as you can” meaning

17 It was agreed that – depending on the nature of the restriction – a lawful derogation from relevant human rights instruments might be required.

that the information on the reasons for internment must be shared with the internee either immediately or as soon as withholding the information is no longer necessary to protect the source or method of intelligence-gathering on which the decision to intern was based. Secondly, the longer the internment lasts the more stringent the obligation to provide information becomes, meaning that length of time in internment shifts the balance in the internee's favour. However, the participants did not agree on what the timeframes were or what the sensitivity of the sources was.

As to the "what" question, there seemed to be consensus among the experts that the right to information could only be restricted where it was absolutely necessary for security reasons, the latter being understood largely as "to protect intelligence sources and methods". From there, the discussion quickly moved on to the issue of classified information, which will be dealt with below. All agreed that during the internment process all possible efforts must be undertaken to corroborate available information, update it and make it available to the authorities deciding on (continued) internment. As soon as a piece of information not previously shared can be shared without endangering security or intelligence-gathering, it must be shared with the internee and/or a person intervening in the process on the latter's behalf.

As to the "whom" question, it is clear that in principle the information must be released directly to the internee; he or she can then decide with whom to share it. As an alternative, when it is impossible to tell a detainee directly (for example because of a detainees' location, for security reasons or for the protection of intelligence sources), his legal representative should be provided with the information even if it cannot all be shared with the internee. Should this not satisfy the security or intelligence gathering necessities, at least the review body (for initial and periodic review) must have access to all information on the reasons for (continued) internment. The rationale that needs to guide decision-making is that whenever possible it is the internee who must be informed. Where it is a third person or body, the purpose is to ensure that the internee is not arbitrarily interned and is released as soon as justified reasons for his or her internment cease to exist. The system should be geared to fulfil that purpose.

### *Classified information: how to ensure that the balance is rightly struck?*

Much of the debate focused on intelligence and the issue of classified information. Experts tried to find the right balance between the need to classify information to protect sources and methods of intelligence-gathering and an internee's right to access the information on which internment is predicated in order to be able to meaningfully contest its veracity.

Two important remarks were made that should have an impact on the way in which the balance is struck. First, experience in some contexts has shown that "over-classification" is a problem on the ground. This was said to be the result of decisions made by staff in the field who opt to classify information when there is ambiguity over whether it should be classified or not, leading to inappropriate and

possibly unlawful withholding of information from internees. Secondly, in some contexts intelligence informing a decision to intern is often obtained from informants who exaggerate or provide untruthful information in order to settle personal or communal scores (the “vendetta problem”). It was accepted that this was especially likely in the early stages of a conflict where the tactical level human intelligence network is likely to be fragmentary.

Some experts pointed out that problems regarding classified information should not be blown out of proportion, given that in many NIACs the parties do not dispose of sophisticated intelligence and do not have a system of classification worthy of that name.

The following suggestions were made with regard to the issue of dealing with classified information in the framework of an internment procedure:

- When classification is necessary to protect a source of information, all necessary measures must be taken over time to make the information available to the internee or a legal representative without revealing the source (e.g. where there are multiple sources of information, through release of the information from the less sensitive source, or by implementing security measures to protect the source without withholding the information).
- Internment procedures should allow an internee or his or her legal representative to request declassification of information from an authority with the power to declassify it. It was noted that even if a significant proportion – or a majority – of requests are turned down this should not be taken to mean that the process is de facto ineffective.
- Classification as an obstacle to satisfying the internee’s right to information can be taken into account to a certain extent but is not without limits: the right to information is part of the absolute obligation of humane treatment and is an essential precondition for any internment review to be meaningful. It is up to the military authorities to come up with a way to demonstrate that the procedure adopted is in accordance with their obligations under international law.
- It was put forward by several experts that there exist ways of handling classified information in administrative or judicial review. Suitably developed, these procedures should be used as much as possible and should be developed in order to satisfy the requirements of IHL and IHRL.
- Enabling a review body to access classified information may well be an incentive for those who initially classify it to be more careful about collecting quality information and deciding whether it needs to be classified.

Apart from the protection of intelligence, reality also shows that the denial of the right to information may feature as part of an interrogation strategy. Acute psychological stress has been used to obtain information and some experts pointed out that “keeping the internee in the dark” as to the reasons for, the duration of, and the procedures governing internment significantly contributes to inducing a state of acute psychological stress. The legal implications of such conduct by detaining authorities were not discussed further, but raise important questions



with regard to the scope of the right to information as part of the obligation of humane treatment.

*A balance must be struck, but cannot contravene the law*

“As much as possible as soon as possible” seemed to be the standard suggested by operational military personnel for guiding the disclosure of information to internees. However, most experts agreed that the standard is too vague to satisfy existing legal obligations. Article 75, paragraph 3, AP I, applicable in IAC and arguably as a matter of customary law in NIAC, obliges the parties to an armed conflict to inform detainees and internees of the reasons for detention or internment. This is a firm obligation and not a recommendation; moreover, it is part of a set of fundamental guarantees protecting persons in the power of the adversary. The implementation of this obligation relies on the good faith of the interning power, but it is difficult to give exact and concrete guidelines on how the balance should be struck in a specific context. The measure of discretion enjoyed by interning authorities must not be used to shield acts characterized by bad faith.

One way of addressing the necessary balance proposed during the meeting was the idea of phasing in the release of information. Information provided to an internee at the time of capture or at the time of the internment could be more restricted (in line with security concerns) than information provided at the time of the initial and later on periodic review. The experts seemed to accept that the longer internment lasts, the less security constraints may be relied on to justify restrictions on an internee’s right to information.

There was agreement that procedures must be put in place to ensure that classification of information is properly carried out and, apart from this general principle, that at least when the legality and the continued necessity of an internment decision are reviewed (both at initial and periodic review) the review body should have access to all classified information or include at least one member with security clearance. Also, in case classified information is alleged to be incomplete or incorrect, or in case it is alleged that there is no need for classification, there should be a procedure to request de-classification by a competent authority. At least one expert suggested looking at how classified information is dealt with in court-martial proceedings to find inspiration for ways of addressing the issue. Israeli practice was mentioned, where the review body (which is judicial in nature), has access to all classified information and can order declassification when judged necessary to fulfil an internee’s right to information. It was also stressed that information should be shared to the extent possible with the internee’s legal representative, or an independent lawyer appointed by the interning power.

It was suggested to undertake a comparison with article 5 GC III tribunals that deal with the status determination of captured belligerents in international armed conflict. Some States have spelled out the exact procedures to be implemented in order to comply with this IHL obligation. It was also pointed out that inspiration could be drawn from the implementation by States of articles 42 and 78 GC IV (even though the practice is rather limited).

Finally, when the right to information of internees is restricted for reasons of military necessity, international human rights law will probably require that a State derogate from its relevant human rights obligations (art. 9, para. 2 ICCPR, art. 5, para. 2 ECHR).

*When discussing internees' right to information, many experts with a military background raised important practical obstacles, almost exclusively related to the protection of intelligence information, methods and sources. It was pointed out, however, that the protection of intelligence and the issue of classified information are limited to sophisticated armies, who are not the majority of parties to non-international armed conflicts around the world. The discussion did not resolve differences of opinion about the way in which the right balance between military necessity and an internee's right to information may be struck due to the range of practical considerations raised. Nevertheless, the legal obligation to promptly inform an internee of the reasons for his or her internment was underlined by all. Thus, more efforts will need to be made to find ways of addressing the practical obstacles that may in no case serve to justify violating an internee's right to information.*

## Legal assistance for internees in NIAC: When? What? How?

Most of the experts were of the view that internees should have legal assistance whenever this is feasible, both in terms of being informed and counselled on the legal framework governing internment and in terms of benefiting from the advice of a legal expert who could represent their interests in the internment review process.

However, practical obstacles to legal assistance based on insufficient resources were quickly put on the table. It was pointed out, for example, that interning powers often lacked qualified lawyers deployed with the armed forces and that in many contexts there were few qualified, competent and available local lawyers.

The general view was that legal assistance is important and should not be denied whenever its provision was possible. While it may be understandable that qualified legal assistance cannot be provided on the battlefield itself, access to a lawyer should be allowed and/or facilitated once a person has been transferred to an internment facility. If there are not enough competent and qualified lawyers available in the host country appropriate arrangements should be made to increase the availability of lawyers by training local lawyers or bringing in lawyers from the interning State, by allowing a single lawyer to represent more than one internee, by training relevant personnel on the procedural aspects of an internment regime so as to enable them to efficiently inform and assist internees, etc.

The availability of a legal representative could be a solution for the above-mentioned problem of disclosure of classified information. There are systems in which an internee is not granted access to such information, but where a lawyer with the necessary security clearance (and the necessary independence and

impartiality) enjoys access and can intervene on the internee's behalf. It was also pointed out that at least the internment review body must have access to all available information in order to be able to competently rule on the lawfulness of initial and/or continued internment.

*Internees should be provided with legal assistance in internment whenever feasible. When available, it should not be restricted without serious justification based on imperative reasons of security. Creative efforts should be made to address resource problems. The presence of a legal representative can also be part of a solution to the problem of how to handle classified information in internment review proceedings.*

### Right of the internee to appear in review proceedings

This issue was only very briefly touched upon. While there was agreement on the fact that an internee should have the right to personally appear in the review proceedings (physically or through video link for example), practical obstacles were quickly raised. Again, resource and security considerations were flagged – but so were certain creative solutions such as using videoconferences, taking the reviewers to the internees rather than the internees to the reviewers, etc.

*An internee should be given the possibility to personally appear in the internment review process. Efforts should be made to overcome practical obstacles to such participation.*

## Session 3 – Independent and impartial review of internment in NIAC

Independent and impartial review of the necessity of internment is the most important procedural safeguard against arbitrary detention.

As discussed above, parties to a NIAC may intern persons only for imperative reasons of security. Therefore, it is essential that the necessity of an internment decision be reviewed promptly after it is made, and periodically thereafter if the internment is continued. A review process is explicitly provided for in situations of international armed conflict (art. 43 GC IV) and occupation (art. 78 GC IV). IHL governing NIAC does not explicitly regulate internment review. However, it is submitted by the ICRC – and widely accepted – that at least an initial review and a six-month periodical review should be provided for.

The body that initially and then periodically reviews an internment decision must be independent and impartial. Against this background, in the third meeting session the experts discussed the nature, composition and other characteristics that a body charged with internment review in NIAC should have in order to fulfil the requirements of independence and impartiality.

On a preliminary note, some participants suggested that a distinction should be made between two different procedures for challenging the lawfulness of internment in NIAC:

- 1° Initial and periodic review of the (continued) necessity of internment for reasons related to the conflict, meaning that a person can only be lawfully interned as long as internment is necessary for imperative reasons of security. The organisation of internment review is an IHL obligation on the parties to an armed conflict.<sup>18</sup>
- 2° The right under IHRL for any person deprived of liberty to challenge the lawfulness of his or her detention (internment in the present case) without delay, before the courts of the detaining power. The process is initiated on the detainee's initiative. In the view of the UN Human Rights Committee, the right is non-derogable and thus a person cannot be denied the right to "habeas corpus".

The two forms of review were often mixed up in the discussion since they are similar and may be linked. For the purposes of this summary report they will be referred to as "internment-review" (1°) and "habeas corpus" (2°) and treated separately.

### Internment-review: the IHL paradigm

It was generally accepted by the experts that internment review must be carried out individually for every internee in a NIAC (initially and periodically if the internment is continued) and that the body carrying it out must be independent and impartial.

The questions for discussion therefore related to the nature of the review body and the characteristics it must have to be considered independent and impartial. Most experts resolved the matter by seeking inspiration in the law applicable to international armed conflict and occupation and thus applied an IHL paradigm. A number of experts, however, argued in favour of a human rights-oriented approach and thus an internment review that would bear more resemblance to a *habeas corpus* procedure.

### *Nature of the body*

In situations of international armed conflict and occupation an interning power can choose whether the internment review body is to be a court or an administrative board. IHL in NIAC does not provide explicit guidance on the matter.

18 It was submitted by a good number of experts that a State must derogate from art. 9, para. 1 ICCPR and/or art. 5, para. 1 ECHR in order to intern in a NIAC. The question of whether derogation is needed from art. 9, para. 4 ICCPR and/or art. 5, para. 4 ECHR is different, as it relates to the right of *habeas corpus*. Independent of an IHL required internment review the right to *habeas corpus* must be derogated from only if internees are not given the opportunity to exercise that right.

The advantages and disadvantages of both options: a judicial body – meaning a court – or an administrative body were discussed.

The main advantage of a court – in principle – is that it offers better guarantees of independence and impartiality and respect for essential procedural safeguards. The main disadvantage is that a court – in principle – is not accustomed to dealing with cases of security internment in a situation of armed conflict and that it is not feasible to expect military forces to collect evidence according to judicial standards in war. In practical terms, it may be difficult to bring internees before a court for security and/or logistical reasons in active theatres of war. Court proceedings can be and usually are slow.

The main advantage of an administrative body is that it can be (and in IAC and occupation is foreseen as being) set up specifically for the purpose of internment review, meaning that it can be adapted to the specific context and type of deprivation of liberty involved. The main disadvantage of ad hoc administrative bodies is that there is little, if any regulation, on their composition, powers and procedures making it difficult to ensure independence and impartiality as well as effective implementation of the necessary procedural safeguards.

The experts were of the view that the nature of an internment review body (judicial versus administrative) is less important than the fact that it must be independent and impartial. It was admitted that in some contexts courts were neither independent nor impartial and that, conversely, an administrative internment review body may live up to those standards. Nevertheless, the preference of many experts was that internment review should be carried out by a judicial body.

It was concluded that while there is no obligation for internment review to be conducted by a court, this task must be performed by a body that is independent and impartial. The reasons given by those who wished to retain the possibility of an administrative board were twofold. First, because of the balance that must be struck between military necessity and operational limitations in armed conflict on the one hand, and the rights of internees, on the other. In a NIAC, especially a MNF-NIAC, it will not always be possible to ensure that the courts of the interning power carry out internment review. Also, it would not always be appropriate given that court proceedings are time-consuming and may actually delay release. Secondly, the equality of rights and obligations of the parties to an armed conflict under IHL means that there must be an alternative to judicial review that could be utilized by non-State armed groups who are unlikely to have any – recognized – court system. Again, the important issue is that persons are not arbitrarily interned and that their internment is reviewed by a body that can effectively do so and order release as soon as internment is no longer necessary.

### *Independence and impartiality*

How can the independence and impartiality of an internment review body – whether judicial or administrative in nature – be ensured?

Several points were made:

- Transparency of the procedures and their implementation was said to be crucial;
- Most experts agreed that to be independent a review body should have direct decision-making power, i.e. not only have the power to continue internment but also to order release without that decision being subject to further confirmation by operational command. To address the command's possible concerns an appeal could be provided, but should be subject to the appellant bringing forward new and additional information that would justify continued internment;
- Access to all available information on a case is crucial for review to be meaningful. Security clearance for access to classified information related to a case should be given to at least one, if not all members, of the review body;
- Members of the review body should be appointed from outside the chain of operational command or at least be effectively independent from the latter's influence;
- The review body should be made up of permanent members and internment-review should be their only task. This would enable them to both understand the process itself and to ensure the effective functioning of the review mechanism;
- At least one of the review body's members should be a qualified lawyer.

### *Habeas corpus*: an IHRL-paradigm

Under international human rights law, any person deprived of liberty has the right to challenge the lawfulness of detention before a court without delay (art. 5, para. 4 ECHR, art. 9, para. 4 ICCPR). The right to judicial review of detention is often referred to as the right to “*habeas corpus*”.

Based on the premise that IHRL does not cease to apply in times of armed conflict an internee would, apart from IHL internment review as outlined above, also have the right to *habeas corpus* as a second legal avenue for challenging the lawfulness of internment. The participants did not, however, come to a consensus on this matter. The debate raised many interesting and important questions, but unfortunately there was not enough time to discuss them in more detail. The following is therefore a summary of the main positions and issues raised.

#### *The “yes” view*

Some experts argued that the right to *habeas corpus* remains fully applicable in armed conflict. Other experts were of the view that a State could only exclude the availability of this procedure by lawfully derogating from its obligations under IHRL in NIAC. Yet others argued that the availability of the right to *habeas corpus* for persons interned in a NIAC could be made dependent on the absence or the exhaustion of an IHL-based internment review. It remained unclear whether

derogation from the right to *habeas corpus* would be required in cases where the IHL internment review was available.

An additional question was posed in the specific context of an MNF-NIAC: if the right to *habeas corpus* exists, before which country's courts should the proceedings be brought? Some experts argued that the proceedings should be brought before the courts of the "host" State, i.e. in whose territory internment takes place. Others strongly rejected this option and argued that the proceedings should only be brought before the domestic courts of the State interning extra-territorially.

### *The "no" view*

A small minority of participants argued that IHRL does not continue to apply in times of armed conflict and that the right to *habeas corpus* is therefore not available to individuals interned.

A few experts opposed the extra-territorial applicability of IHRL in the specific context of a MNF-NIAC and argued that human rights, including the right to *habeas corpus*, do not apply to individuals interned in relation an armed conflict by a State acting outside its own national territory.

*Internment review by an administrative board or a court is mandatory under IHL. All parties to an armed conflict are obliged under IHL to set up a mechanism to review – initially and periodically – the lawfulness of internment. Whether administrative or judicial in nature a review body must be independent and impartial and allow the internee to mount a meaningful challenge to the lawfulness internment. While there are no formal rules on how to ensure the independence and impartiality of a review body several proposals were discussed that could be implemented on a case-by-case basis.*

*There was disagreement on whether the right of a person deprived of liberty – including internees in NIAC – to habeas corpus as provided for under international human rights law remains intact. If it does, the interplay between this procedure and internment review under IHL also raises legal and practical questions to which there are no clear answers.*

*As regards the practical implementation of an internment review procedure (sessions 2 and 3), the issue of both human and financial resources was raised, mainly by operational personnel. While experts were generally of the view that insufficient resources cannot serve to justify non-compliance with legal obligations, many stressed that the resource issue must be taken into account when designing an internment regime in practice. It was recommended that a feasibility evaluation be made whenever resource sensitive obligations are involved.*