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Regulating Detention in Non-International Armed Conflicts: Bridging International Humanitarian Law and Human Rights Protections

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ABSTRACT

This paper explores how international law regulates the treatment of detainees during non-international armed conflicts (NIAC) occurring outside Europe, specifically when a state party to the European Convention on Human Rights (ECHR) is involved. The complexities of detention in NIACs stem from the absence of clear legal frameworks under International Humanitarian Law (IHL), especially regarding arbitrary detention, which necessitates reliance on International Human Rights Law (IHRL). The paper examines the legality of detention, the interplay between IHL and IHRL, and the extraterritorial application of ECHR in such conflicts. The research highlights landmark cases that have shaped jurisprudence on the rights of detainees and the responsibilities of state parties involved in extraterritorial armed conflicts. It argues for the necessity of a coherent legal framework that bridges the gaps between IHL and IHRL to ensure humane treatment of detainees. By analyzing the current legal landscape and case law, the paper advocates for stronger legal protections for detainees in NIACs and the extension of IHRL to non-state actors, promoting a more robust and consistent international legal framework.

KEYWORDS

Non-international armed conflict, International Humanitarian Law, European Convention on Human Rights, Extraterritorial jurisdiction, Arbitrary detention

1. INTRODUCTION

The paper navigates the regulations in place to regulate the treatment of detainees in non-international armed conflicts (NIAC) outside of the territory of states party to European Convention of Human Right (ECHR). Since there is no exhaustive clause in international humanitarian laws (IHL) for NIAC and the consensus on application of international human rights laws (IHRL) is not uniform, the paper breaks down the enquiry into laws that may or may not be applicable in such extra-territorial NIACs. Starting with the legality of detention, the paper explores the debate on the authorisation of detention and the prohibition of arbitrary detention by state parties in NIACs. Since the question specifically mentions parties to the ECHR, the paper also addresses the extra-territorial jurisdiction of Convention states in such conflicts considering it is one of major hindrances in the application of IHRL (which is more informed in case of NIACs). Finally there is an assessment of the interplay between IHL and IHRL in the sphere of detention in NIACs based on recent landmark cases. The paper concludes that while IHL needs strengthening, there needs to be legal consensus on the default application of IHRL to fill the gaps in order to solidify the lawful protections extended to detainees in NIACs outside the territories of Convention states.

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

Treaty laws, before the adoption of the Geneva Conventions, were only concerned with inter-state conflicts and there were no regulatory mechanisms for internal conflicts within states. Till the nineteenth century, states were considered as the fundamental units of law, making them the subjects of law and individuals, the

objects of law. The rights granted to individuals were essentially due to nationality and intra-state issues were recognised as domestic, with states having complete sovereignty over them (Parlett, 2009).

In order to address the marginalisation of humanitarianism, especially in rising instances of civil wars confined to a single nation, there is a gradual recognition of non-international armed conflict (NIAC) with its codification in common Article 3 (CA 3) of the four Geneva Conventions, 1949. The Article identified "armed conflict not of international character" and occurring "in the territory of High Contracting parties" for the first time, extending non-discriminatory and humane treatment to "persons taking no part in the hostilities" including certain members of armed forces as enumerated in the Article (Art. 3, Geneva Conventions,1949). The negative connotation of armed conflicts "not" of international character is structured differently from the international armed conflicts (IAC) within the scope of Article 2, wherein all parties involved are State parties (Cross, 2021). The International Court of Justice (ICJ) observed that "there was no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called elementary considerations of humanity" (*Nicaragua v US,* 1986*).* The holding implied that common article 3 would apply in all armed conflicts even beyond a state's territory (*Nicaragua v US*, 1986*).* Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia reiterated that ICJ "confirmed that these rules reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character" (*Prosecutor v*

tadic, 1995*).*

Hence, "Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government" (Schmitt, Garraway and Dinstein, 2006, p. 2). NIAC can be described as one where "there is a protracted armed violence between governmental authorities and organised armed groups or between such groups within a State" (*Prosecutor v Tadic*, 1995*).* The definition is meant to differentiate NIACs from banditry, riots isolated acts of terrorism, or other similar situations (*Prosecutor v Haradinaj*, 2008).

Common Article 3 aimed at lowering the threshold for extending basic protection to individuals in a NIAC. This was supplemented with the additional protocol II (AP 2) added by the 1977 amendment, which recognises that the victims of non-international armed conflict/ internal wars, that do not fall within the ambit of existing laws and treaties 'remain under the protection of the principles of humanity and the dictates of the public conscience' (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977). In addition to those not participating in combat, CA 3 explicitly applies to those rendered 'hors de combat' by reasons of sickness, wounds, detention or any other cause. The fundamental focus of this paper will be on those detained in NIAC. "Detention" refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release (Human Rights Committee, 2014, para. 13). A specific type of non-criminal, non-punitive detention imposed for security reasons in an armed conflict is known as internment (International committee of the Red Cross, 2015). While the recognition of international humanitarian law

(IHL) as *lex specialis* in International Armed Conflict (IAC) is widely accepted, it remains rudimentary when it comes to NIACs. To add to the jurisprudential void, the parties to NIACs are often non-state armed groups or non-state actors and the obligations of state parties under human rights treaties are not legally shared by the non-state parties (Dörmann, 2012, p. 349). Since IHL does not exhaustively provide for rules to be followed in NIAC and given the consistently rising number of such armed conflict, the international courts along with the nations are trying to fill the lacunae in conjunction with IHRL while attempting to find legitimacy in customary IHL.

3. THE LEGALITY OF DETENTION IN NON-INTERNATIONAL ARMED CONFLICTS

According to the Lotus Case (*France v Turkey*, 1927), the principle that 'whatever is not explicitly prohibited by international law is permitted' was derived from underlying principle of state sovereignty and their flexibility to act independently within the larger international framework (limited only by prohibitive international rules). Going beyond the narrow approach of the case, the Human Rights Committee (HRC) noted that a detention may be authorised by domestic law and still remain arbitrary. Since international humanitarian law (IHL) does not provide for a definition of 'arbitrary', the HRC in its General Comment 35 notes that 'arbitrariness', as enshrined in international human rights law (IHRL) should not be interpreted as 'against the law' but to 'include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality' (HRC, 2014). A study of the International Committee of the Red Cross (ICRC) on customary IHL concluded that the prohibition of arbitrary detention was "a norm of customary international law applicable

in both international and non-international armed conflict" (Henckaerts and Doswald-Beck, 2005, Rule 99). Similarly, the prohibition of arbitrary detention was said to constitute a "peremptory norm of international law that cannot be subject to derogation" according to Human Rights Committee General Comment No. 29 (Human Rights Committee, 2001).

Murray (2017) argues that it is better to interpret international humanitarian law as providing implicit authority to detain since its absence would make all detention by armed groups illegal and its prohibition would preclude any kind of regulation. He reasons that despite the absence of an explicit legal basis to intern individuals in these conflicts, the existence of specific rules that restrict their power to detain means that the normative position does not intend to provide complete freedom of action (Murray, 2017). Megret (2020) reads the international law framework as being sympathetic to states fighting non-state actors on their territories and hence not prohibiting detention for that purpose in NIACs; he suggests that the 'ambiguous character' of detention in NIACs does not explicitly grant detention powers to non-state actors 'whilst not taking it away from States'. (Megret, 2020, p. 177)

Prohibition on arbitrary detention necessitates the need for laying down guidelines for what constitutes 'non-arbitrary or lawful' detention. The absence of specific rules or procedure for detention in NIAC, both in CA3 and AP2, have led many scholars to question the implied authorisation of detention and the clarity around the norms that would constitute valid grounds for detention/internment in a NIAC. It is submitted that the absence of detail is a common feature of International Law as noted by Aughey and Sari that "just because the law of armed conflict does not regulate the exercise of a particular power in great detail does

not mean that it does not recognise the existence of that power at all." (Sari and Aughey, 2015)

In the absence of explicit legitimization or authorization, what remains contested in most cases is often the ambiguity between the regulation of an action and while doing so, providing a legal basis for the commission of such action. Hill-Cawthorne (2014) addresses this complex issue delicately, she states that "IHL does not restrict States with regard to detention in NIACs anymore than it does restrict their ability to detain in IACs. States are not prohibited from detaining in NIACs, and, in that sense, are therefore permitted by IHL to detain. IHL simply does not itself provide a legal basis to do so. That legal basis must be found elsewhere." They further explain that "it is routine for areas of law to regulate a practice without providing a source of authority for that practice" (Hill-Cawthorne and Akande, 2014).

It is necessary to understand that detention in itself is neither prohibited nor deemed to be unlawful in case of IAC (protections and exceptions are comprehensively covered in Additional Protocol I), it is however argued that the law on armed conflict does not authorise the power to detain in NIAC but imposes restrictions on such claim to the power to detain. (Hill-Cawthorne and Akande, 2014) The ICRC requires that the deprivation of liberty must be based on 'valid and pre-determined' grounds and for that it has chosen to rely on IHL and IHRL for identifying the customary nature of this rule given that "both frameworks aim to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention". (Henckaerts and Doswald-Beck, 2005, p. 344) The crux of the argument is that the existence of rules and clause on detention in

international law is not to legitimise but to acknowledge the existence of such practice in NIAC and to regulate it to honour and preserve human dignity. (Sivakumaran, 2012, pp. 68–69)

4. LAWS AND DOCTRINES GOVERNING DETENTION IN NON-INTERNATIONAL ARMED CONFLICT

The previous section has highlighted that in IHL, Common Article 3 (CA 3) of the Geneva Convention and Additional Protocol II are the primary instruments governing NIACs. CA 3 extends the basic humane treatment, inter alia, to those placed 'hors de combat' by detention and prohibits discriminatory practices based on 'race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.' (Geneva Conventions, 1949) Although it provides basic safeguards against ill-treatment, essential guarantees including a fair trial guarantee to ensure the affording of minimum humane treatment, it does not provide for explicit rules acknowledging the requirements of specific groups or for necessary grounds and procedures for internment.

IHL has an exhaustive protection regime for detainees in IACs (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977) but remains ambiguous on a similar clearly worded framework in case of NIACs. The Additional Protocol II, especially Articles 4 and 6, add to the protections and extend regular safeguards and dignified treatment to the detainees by directing the detaining authorities to ensure that necessary provisions are made available, especially regarding "persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained" (Additional Protocol II, 1977, art. 5). The provisions include medical care and examination, protection against the "rigours of

the climate and the dangers of the armed conflict", availability of food and water, provisions for health and hygiene, spiritual assistance, freedom to practice one's faith, safe working condition, separate quarters for men and women, communication with the outside world, the possible evacuation of detainees, and education of children (Art. 4,5,6, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977). AP II, despite being more detailed, fails to supplement CA 3 by remaining silent on grounds and procedures for internment or on rules for the transfer of detainees.

Customary IHL prohibits the "arbitrary" deprivation of liberty in both international and non-international armed conflicts. (Henckaerts and Doswald-Beck, 2005, pp. 344–52) According to the interpretation by a non-binding ICRC study, the basis for internment must be previously established by law and provides for two procedural requirements as the basis for the principle of legality (i) an 'obligation to inform a person who is arrested of the reasons for arrest'; and (ii) an 'obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention', described as the 'so-called writ of habeas corpus'. (Henckaerts and Doswald-Beck, 2005, pp. 348–51) Customary IHL, like the Geneva Convention, does not provide for procedural aspects for internment or transfer of detainees. According to ICRC's (2014) concluding note, the broad regulations in customary laws are neither specific nor sufficient in guiding the detaining authorities to create and execute a robust system of detention.

The lack of clarity in terms of detention in NIACs in IHL has necessitated the need to look elsewhere with an increasing number of NIACs. The ICJ in Nuclear Weapons Advisory Opinion

(1996, para 25) opined that "the protection of the International Covenant on Civil and Political Rights (ICCPR) 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". The ICJ has reiterated the application of IHRL in armed conflicts on several occasions including DRC v. Uganda (2005, para. 216). Unanimous recognition by bodies like the Human Rights Committee (HRC) and the Committee against torture (CAT) has been granted to the application of IHRL in situations of armed conflicts. (HRC, 2004; HRC, 2014; CAT, 2017) Regional human right bodies have agreed that the treaties that apply to their regions continue to hold relevance in situations of armed conflicts, both international and non-international (Frisso, 2018, p. 169).

IHRL provides for more elaborate safeguards for the liberty and security of detainees, attributing responsibility to the detaining authority (states). Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), for instance, provides that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"(ICCPR, 1976, Art. 9). This right can also be found in the Inter-American System, in Articles 1 and 25 of the 1948 American Declaration of the Rights and Duties of Man, and Articles 7(1), (2) and (3) of the American Convention on Human Rights (ACHR, 1948). Article 6 of the African Charter on Human and People's Rights (ACHPR, 1987) and Article 14 of the Arab Charter on Human Rights also contain similar wording. A rather different and more exhaustive provision is included in Article 5 of the European Convention on Human Rights (ECHR, 1950). In addition to prohibiting arbitrary

detention, it includes a list of grounds on which a person may be lawfully deprived of his or her liberty. (ECHR, 1950, Art. 5 (1)). The convention also provides for conditions for derogation from the said grounds, by the detaining states in Article 15 (ECHR, 1950, Art. 15).

The application of human rights treaties in armed conflicts, in principle, is not contested. However, practical implementation of such treaties remains subject to establishing the jurisdiction of the state in question, over those detained/ interned during an armed conflict, especially when the conflict takes place outside of the physical territory of the state. The next section will assess the applicability of IHRL in case of armed conflicts (especially NIACs) taking place outside of the state territory and whether such conflict falls within the 'jurisdiction' of the detaining state (which is party to ECHR).

5. EXTRA-TERRITORIALITY OF ECHR

In various instances of conflict taking place outside the detaining state, the European Court of Human Rights (ECtHR) has interpreted the guidelines set out in the ECHR. In Cyprus v. Turkey (1974), the Supreme Court ruled regarding the allegations of several breaches of the Convention committed by Turkey in Northern Cyprus following the Turkish military operations in 1974-

"*In Art. 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone "within their jurisdiction" …. The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the*

Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad." (Cyprus v Turkey, 1974, para. 8)

In its leading case, *Banković v Belgium* (2001), the ECtHR affirmed that Article 1 of ECHR is "essentially territorial" in its scope, however in exceptional circumstances acts of Contracting States performed, or producing effects, outside their territories can still fall within their "jurisdiction" for the purposes of Article 1 of the ECHR. The court noted four examples of exceptions namely:

1. Extradition or expulsion cases involving the extradition or expulsion of a person from the territory of a member State that raises concerns about possible death or ill-treatment in the receiving country, or, in extreme cases, the lawfulness of detention or denial of a fair trial under in the receiving State.

2. Cases where the acts of State authorities produced effects or were performed outside their own territory

3. Effective control cases where a Contracting Party exercises effective control of an area outside its national territory as a consequence of (lawful or unlawful) military action

4. Diplomatic or consular cases, and flag jurisdiction cases.

Issa and Others v. Turkey (2004) dealt with the alleged killing of Iraqi shepherds by Turkish soldiers on the territory of Iraq. The court recognised the extra-territorial application of the Convention outside the legal space of the Contracting States and held that "Article 1 of ECHR cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the

territory of another State, which it could not perpetrate on its own territory" (*Issa v Turkey*, 2004)

The concept of extra territorial jurisdiction was further clarified by the Grand Chamber in its leading 2011 case, *Al-Skeini and Others v. the United Kingdom* (2011). The court cemented its two models of extra territorial jurisdiction namely the 'personal model' and the 'spacial model'.

The personal model of jurisdiction is described as the "exercise of physical power and control" and hence of the jurisdiction of the State through its agents outside its territory "over the person in question" (para 136). Such circumstances place the state under the obligation "to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'" (para 137). In the same ruling, the Court stated that the spacial model is one which "occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration" (para 138). In its landmark ruling it stated, "where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention'" (para.139). Based on its

observations, the court established a jurisdictional link between the individuals who were killed and the British authorities.

The court reiterated its principles on the jurisdiction in *Hassan v United Kingdom* (2014). The case concerned the capture and detention of the applicant's brother (an Iraqi national) by the British forces during the hostilities in Iraq in 2003. Relying on its *Al-Skeini* judgement, the Court found that from his capture until his release from Camp Bucca the applicant's brother was within the physical power and control of the UK soldiers and thus fell within UK jurisdiction. This included the use of force by agents of a Convention State in the territory of another State (Hassan v United Kingdom, 2014).

Having established confirmation of state jurisdiction, the international law framework provides for several safeguards for the victim to prevent their exploitation at the hands of detaining authority. The following section analyses the practical implementation of the international law framework, the dilemmas that arise between the application of IHL and IHRL in NIACs and the recognition and redressal of the rights of detainees. While most issues have been addressed in principle, the practical application creates more complexities, and the courts continue to address issues as they arise case by case.

6. NEED FOR IHRL IN NIAC TO FILL THE GAPS IN IHL

IHL was initially developed to 'humanise' the military endeavours of states by providing minimum protection for the rights and dignity of those involved in wars/conflicts and those, inadvertently caught in such situations. The above sections have addressed that IHL with the Geneva Conventions and the Additional Protocol I very exhaustively regulate the protection of human rights in an international armed conflict, however, it

shows several gaps and inadequacy in addressing significant issues (especially related to detention, for the purposes of this paper) in NIACs. Dormann (2012) concludes that there are several normative gaps and areas in which IHL requires strengthening to extend humanitarian protection in case of detention in NIACs (Dörmann, 2012, p. 358). With the development and refinement of IHRL in due time and the increase in the number of non-international armed conflicts, laws governing the treatment of detainees would benefit from being addressed broadly by adding to the IHL discourse. It is arguably for this reason that human rights treaties are being attributed increasing relevance in understanding the source of authorisation for detention and its extent thereof, for actions of states in NIACs.

The ECtHR has added to the jurisprudence on the question of the interaction of IHL and IHRL (in this case particularly ECHR) in terms of detention by a state authority extraterritorially in a NIAC in a few cases.

Al-Jedda v. The United Kingdom (2013), is a case in point which involved multi-national forces in Afghanistan and Iraq. The case was initiated by Mr Al-Jedda, who had been interned for imperative reasons of security by UK forces at the Sha'aibah Divisional Temporary Detention Facility in Basrah City between October 2004 and December 2007. He alleged that his internment in Iraq by the UK forces was in violation of Art. 5 of ECHR. The British government argued that Al-Jedda's internment was carried out pursuant to UNSC Resolution 1546, which created an obligation on the UK to detain him and which, pursuant to Article 103 of the UN Charter, overrode obligations under the ECHR. The resolution authorised the multinational forces to take "all necessary measures" to ensure security and stability in Iraq. These measures included detention 'where necessary for

imperative reasons of security'. The Government contended that the UNSC resolution worked as an authorisation for the internment and prevailed over the existing international law doctrines (Al-Jedda v United Kingdom, 2013).

The court while discussing the application of IHL found that "even assuming that the effect of Resolution 1546 was to maintain, after the transfer of authority from the Coalition Provisional Authority to the Interim Government of Iraq, the position under international humanitarian law which had previously applied, the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial…… In the court's view it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort" (*Al-Jedda v United Kingdom*, 2013). Consequently, the court held that there was no conflict between UK's obligations under the UN charter resolution (as the resolution was not worded to that effect) and under ECHR and that the detention was a breach of Art. 5(1) of ECHR as it did not fall within any of the permitted grounds of detention in the convention.

The more recent case of Serdar Mohammed v Ministry of Defence (2014) had similar facts. Serdar Mohammed was captured by UK forces in Afghanistan on 7 April 2010 during a planned combat operation. He was held at a UK base in Helmand Province and detained for a period of three and a half months, when he was transferred to the Afghan authorities. The court held that Mr. Mohammed's continued detention after 96 hours amounted to a breach of Afghan law and Article 5 of the Convention. The court attributed the responsibility for the detention of Mohammed to the UK forces, outside of the ISAF command. It held that neither the

UN resolution authorising the deployment of ISAF nor Article 103 of the UN charter could displace Article 5 of the ECHR. To this end, J Leggatt reasoned that the UN resolution enabled the ISAF to detain only till such time as was necessary before handing the detainee over to Afghan forces and such limited powers of detention were not in conflict with ECHR- they were even 'compatible'. He concluded that the rules of laws of armed conflicts regulate and recognise detention in NIACs but do not authorise it since there was no credible evidence that customary law authorised power to detain on security grounds by the state parties. The judgement delivered by him also denied the application of *lex specialis* in NIACs and went on to state that "the only way in which the European Court or a national court required to apply Convention rights can hold that IHL prevails over Article 5 is by applying the provisions for derogation contained in the Convention itself, and not by invoking the principle of lex specialis (*Serdar Mohammed v Ministry of Defence*, 2014)

While the court of appeal agreed with this line of judgement, the Supreme Court opined otherwise. The Supreme Court held that the authority to detain beyond the specified time (96 hours) for 'imperative reasons of security' emanates from the UNSC resolutions. The court itself admitted that the Security Council was neither a treaty nor a legislation (para 25) and lacked procedural safeguards (para 67). The Court made the Convention state responsible for listing grounds for detention in its domestic legislation, in order to comply with Article 5 of ECHR and to leave sufficient room for the detainees to challenge its lawfulness thereof (*Serdar Mohammed v Ministry of Defence*, 2017).

7. CONCLUDING DISCUSSION

The cases mentioned above address the concerns related to treatment of detainees, outside Europe (in this case Afghanistan and Iraq, where state parties are against non-state parties) by states which are party to ECHR. Having mentioned the protections and safeguards present in IHL and IHRL, to answer the question of how international law regulates the treatment of detainees in NIACs, it is imperative to understand how the laws apply in such situations and how they complement or oppose one another. At the crux of the argument lies the interpretation of courts and its effect on the human rights element in armed conflicts which involve states party to the ECHR.

The Supreme Court's holding in Serdar Mohammed is problematic (i) UNSC is not a legislative body and does not have a consensus of relevant parties (ii) It is a partisan body and the interests of the dominant states might not always complement the Laws on Armed Conflict and Human Rights laws. The judgement generated conflict within years of consensus on the application of IHRL in times of armed conflict (IACs and NIACs). It also contradicted the holding in Al-Jedda case which had similar facts. These case-by-case exceptions add to the inconclusively as to the application of treaties and conventions in place.

IHL remains weak in its protection of detainees in case of extra-territorial NIAC and in absence of a treaty law, leaves several gaps. Whether the gaps should be filled by default implementation of IHRL is still a matter of an ongoing debate. While regional IHRL instruments may be applicable on state parties extraterritorially, there is no clarity regarding their application on non-state parties. Additionally, if states derogate from their obligations or formulate their own domestic rules or regulations, IHRL will either have to be compatible or would simply fail to apply (*Serdar Mohammed v Ministry of Defence*, 2014). The International legal framework

requires strengthening and clarity in order to strike a better balance between the military objectives and humane treatment of all parties in NIACs outside the territory of the Convention state.

8. BIBLIOGRAPHY

Primary Sources

1. **Case List**
   - Al-Skeini v United Kingdom (2011) 55721/07 ECtHR
   - Al-Jedda v United Kingdom [2013] UKSC 62
   - Banković v Belgium (2001) 52207/99 ECHR
   - Cyprus v. Turkey (1974) 25781/94 ECtHR
   - DRC v. Uganda [2005] ICJ Rep 168
   - France v Turkey [1927] 10 PCIJ
   - Issa and Others v. Turkey (2004) 31821/96 ECtHR
   - Hassan v United Kingdom [2014] 29750/09 GC ECtHR
   - Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] 226 ICJ
   - Nicaragua v United States of America [1986] 14 ICJ
   - Prosecutor v Dusko Tadić [1999] IT-94-1-A ICTY
   - Prosecutor v Ramush Haradinaj [2008] T-04-84-T ICTY
   - Serdar Mohammed v Ministry of Defence [2014] 1369 QB EWHC
   - Serdar Mohammed v Ministry of Defence [2017] UKSC 1

Secondary Sources

1. **Treaties, Conventions and Commentaries**
   - Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31
- Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85
- Geneva Convention Relative to the protection of Civilian persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287
- Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 238
- ICRC, 'Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report', 32nd International Conference of the Red Cross and Red Crescent, 32IC/15/19 [2015]
- ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', opinion paper, November 2014. Available at: https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwikuajYlNL-AhUNR8AKHYsxBhAQFnoECBEQAQ&url=https%3A%2F%2Fwww.icrc.org%2Fen%2Fdownload%2Ffile%2F3223%2Fsecurity-detention-position-paper-icrc-11-2014.pdf&usg=AOvVaw0YDL5Xb6hc5GWzptuRhFJN
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"), 1125 U.N.T.S. 609

- UN Committee Against Torture (CAT), General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018
- UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13 [2004]
- UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person) CCPR/C/GC/35 [2014]

2. Academic Articles

- Cross, N.R. (2021) "Commentary on the Third Geneva Convention," *Cambridge University Press eBooks* [Preprint]. Available at: https://doi.org/10.1017/9781108979320.
- Dörmann, K. (2012) "Detention in Non-International Armed Conflicts," *International Law Studies*, 88, pp. 347–366. Available at: https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1067&context=ils.
- Frisso, G.M. (2018) "The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights," *Israel Law Review*, 51(2), pp. 169–191. Available at: https://doi.org/10.1017/s0021223718000055.
- Henckaerts, J.-M. and Doswald-Beck, L. (2005) "Customary International Humanitarian Law Vol.1," *International Committee of Red Cross*
- Hill-Cawthorne, L. and Akande, D. (2014) *Does IHL Provide a Legal Basis for Detention in Non-International armed Conflicts?* Available at: https://www.ejiltalk.org/does-ihl-provide-a-legal-basis-

for-detention-in-non-international-armed-conflicts (Accessed: April 6, 2023).

- Human Rights Committee (2014) *General Comment No. 35 Article 9: Liberty and Security of Person*. UN Doc CCPR/C/GC/35.
- Jinks, D. (2014) "International Human Rights Law in Time of Armed Conflict," in *Oxford University Press eBooks*. Oxford University Press, pp. 656–674. Available at: https://doi.org/10.1093/law/9780199559695.003.0026
- Megret, F. (2020) "Detention by Non-State Armed Groups in NIACs: IHL, International Human Rights Law and the Question of the Right Authority," in *T.M.C. Asser Press eBooks*. T.M.C. Asser Press, pp. 169–194. Available at: https://doi.org/10.1007/978-94-6265-339-9_7
- Murray, D. (2017) "Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward," *Leiden Journal of International Law*, 30(2), pp. 435–456. Available at: https://doi.org/10.1017/s0922156517000061
- Parlett, K. (2009) "The Individual in the International Legal System," *Cambridge University Press*, pp. 14–16. Available at: https://doi.org/10.1017/cbo9780511921858
- Pejic, J. (2011) "The protective scope of Common Article 3: more than meets the eye," *International Review of the Red Cross*, 93(881), pp. 189–225. Available at: https://doi.org/10.1017/s1816383111000130

- *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (1977). International Committee of the Red Cross.
- Report of the Steering Committee for Human Rights (CDDH) adopted at its 92nd meeting (2020) *THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER*. Council of Europe. Available at: https://www.echr.coe.int/LibraryDocs/COE-2020-The_place_of_the_ECHR_in_the_European_and_international_legal_order.pdf (Accessed: April 17, 2023)
- Sari, A. and Aughey, S. (2015) "Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence," *International Law Studies*, 91(1), p. 2. Available at: https://ore.exeter.ac.uk/repository/bitstream/10871/16760/2/Sari-and-Aughey_ILS_2015_02_03.pdf
- Schmitt, M., Garraway, C. and Dinstein, Y. (2006) "The San Remo Manual on the Law of Non-International Armed Conflict: With Commentary," *International Institute of Humanitarian Law*, p. 2. Available at: http://humanrightsvoices.org/assets/attachments/documents/The.Manual.Law.NIAC.pdf#page5
- Sivakumaran, S. (2012) *The Law of Non-International Armed Conflict*. Oxford University Press.