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### International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

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## Chapter X      LOAC

This chapter's focus is on the regulation of the operational detention of insurgents in the different situational contexts of counterinsurgency governed by the law of IAC or by the law of NIAC. As concluded, the law of IAC and NIAC both apply situational contexts of counterinsurgency, so there is an imperative to closer examine the normative substance of the valid norms available in them. Unlike the deprivation of life in the conduct of hostilities, where the substantive requirements in the law of IAC and NIAC are quite similar, the law of IAC and NIAC differ fundamentally in relation to the deprivation of liberty. This justifies a separate discussion of the law of IAC and NIAC.

Therefore, the chapter is divided in two paragraphs. Paragraph 1 examines the normative substantive of the valid norms relative to operational detention in the context of IAC; paragraph 2 examines the normative substantive of the valid norms relative to operational detention in the context of NIAC.

### 1. Normative Substance of the Valid Normative Framework Relative to Operational Detention in the Context of IAC

This paragraph examines in more detail the substance of the valid normative framework relative operational detention. The approach adopted is to first determine the status of the insurgent within the valid normative framework governing operational detention as identified in Chapter V. Following this analysis, several requirements will be identified and examined that govern the criminal and security detention in the context of IAC.

#### 1.1. The Principle of Distinction

As concluded previously, the *principle* of distinction is a fundamental requirement under LOAC in relation to the question of which individuals may be directly attacked during armed conflict, and who is protected from such direct attack. However, it is submitted this principle is not limited to the conduct of hostilities, but pervades throughout the entire LOAC.<sup>1868</sup> As such, distinction also plays a fundamental role in the identification of who may be lawfully deprived of his liberty under LOAC (hereinafter: the *authoritative* personal scope of deprivation of liberty), and, in the alternative, who are to be protected from deprivation of liberty (hereinafter: the *prohibitative* personal scope of deprivation of liberty) for reasons related to the armed conflict once they have fallen into the hands of a party to the conflict.

In applying the principle of distinction to the concept of operational detention of insurgents, a preliminary issue to be dealt with concerns the deviation in LOAC between several categories of detainees. The primary category of detainees in the law of IAC concerns POWs, who may be interned for the duration of the armed conflict in order to prevent their return to the battlefield. Inherent in this concept is the idea that those who qualify as POWs, by virtue of their status as combatant, always pose a threat to the security of the

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<sup>1868</sup> Gill & Van Sliedregt (2005), 29.

detaining State. Based on the classic divide between combatants and civilians, a second category concerns civilians, who may be interned as well in the event, and for as long as they, as we shall see, pose a threat to the security of the State. A third category of detainees concerns civilians suspected of criminal offences, who are subjected to a judicial process. The preliminary question of relevance to be dealt with here is: do insurgents qualify as combatants or as civilians?

### 1.1.1. Regime Admissibility

#### 1.1.1.1. GC III

As noted previously, the law of IAC offers a detailed framework of norms governing the internment of POWs. Underlying the traditional concept of POW-*status* is the idea that, until his capture, an individual was a *privileged* or *lawful* combatant,<sup>1869</sup> i.e. a combatant who was authorized to take a direct part in the hostilities, thereby enjoying commensurate combatant *immunity*, because he complied with *all* the conditions of combatant-status.<sup>1870</sup>

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<sup>1869</sup> As envisaged in Article 1, 1907 HIVR, and later in Article 4 GC III and Article 43 AP I, although it must be stressed that POW-status is no longer exclusively linked to combatants. See also Ipsen (2008), 106-107.

<sup>1870</sup> These traditional conditions can be retrieved not only from Article 4A GC III, but also follow from Article 1, 1907 HIVR and Articles 43 AP I (for States party to AP I). A lawful combatant:

(1) is subordinate to a responsible command (Article 1, 1907 HIVR; Article 4A(2) GC III. This is a group requirement);

(2) is recognizable by a fixed distinctive emblem (Article 1, 1907 HIVR; Article 4A(2) GC III. This is primarily a group requirement; secondarily an individual requirement. See also Dinstein (2010), 49);

(3) carries his arms openly (Article 1, 1907 HIVR; Article 4A(2) GC III. This is an individual requirement); and

(4) conducts hostilities in accordance with LOAC (Article 1, 1907 HIVR; Article 4A(2) GC III; Article 43 AP I. This requirement is mainly collective, but also individual, and largely situation dependent. See extensively: Dinstein (2010), 50. Also: Gill & Van Sliedregt (2005), 33-34). These four conditions are presumed to be have been met by regular armed forces. Nonetheless, fulfillment of these conditions must be demonstrated in all cases, whether regular armed forces or irregular armed forces. As follows from (1942), *Ex parte Quirin et al.*, 35-36 as well as from (1968), *Bin Haji Mohamed Ali and Another v. Public Prosecutor*, 29 July 1968, 449-450, the presumption that regular armed forces always fulfill the traditional requirements can be rebutted.

For the purpose of POW-status of *irregular* armed forces, three additional conditions have been suggested (Dinstein (2010), 47), namely:

(5) a sufficient degree of organization or the armed group (Article 4(A)(2) GC III. This is a group requirement);

(6) the organized armed group must belong to a Belligerent Party (Article 4(A)(2) GC III. See also (1969b), *Military Prosecutor v. Omar Mahmud Kassem and Others*, Judgment of 13 April 1969, 470. This requirement is also presumed to be inherent 1907, HIVR. See Nurich & Barrett (1946), 567-569. This is a group requirement. It is undisputed that the term 'Belligerent Party' refers to, and is limited to, States. As explained by the ICRC Commentary to Article 4(A)(2) GC III, "[i]t is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power. These different cases are based on the experience of the Second World War, and the authors of the Convention wished to make specific provision to cover them." Pictet (1958a), 57; also (1995h), *The Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber), 1537 and

Combatants are members of the armed forces of a Party to the conflict, and it has been submitted that this results in their qualification as State agents under international law. This automatically brings insurgents, defined as *non-State actors* in the present Study, outside the scope of POW-status.<sup>1871</sup> The relevance of the valid norms of POW-status would arise only when there is doubt as to a captured person's status as POW or not.<sup>1872</sup> However, once it has been established that a captured person is not entitled to POW-status or treatment as such, other norms of the law of IAC may govern his relationship with the detaining Power. This will also be the presumption based upon which the present study continues. As a result, the primary focus of the subsequent analysis shifts to the deprivation of liberty under

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(7) the combatant must demonstrate a lack of duty of allegiance to the Detaining Power (Dinstein (2010), 43. Also: (1967), *Public Prosecutor v. Oie Hee Koi and connected appeals*, 4 December 1967, 857. This is an individual requirement).

It is undisputed that the first four conditions, as well as condition (7) determine POW-status. Conditions (5) and (6), however, are not generally recognized as State practice, although some States may adhere to them. Neither of them is specifically cited in conventional LOAC as a condition for POW-status (Solis (2009), 197-198).

<sup>1871</sup> Admissibility for protection under GC III can be established via two routes: (1) via Article 4 GC III, and (2) via Articles 43-45 AP I. The scope *ratione personae* of GC III, *firstly*, extends to the categories of persons recognized in Article 4 GC III, i.e. (1) the categories of persons eligible for POW-status as laid down in Article 4(A) GC III. Individuals belonging to the categories of personnel entitled to POW-status are entitled to this status, and the commensurate standards of treatment prescribed in GC III; (2) individuals, mentioned in Article 4(B) GC III, not entitled to the status of POWs, but nonetheless entitled to the standards of *treatment* under the regime of GC III; (3) *retained* personnel as mentioned in Article 4C G III *juncto* Article 33 G CIII and Article 28 GC I “with a view to assisting prisoners of war,” i.e. members of the armed forces qualifying as medical personnel, chaplains attached to the armed forces, and staff of National Red Cross societies or other voluntary aid societies duly recognized and authorized by their governments. They are not POWs (for they do not qualify as combatants), but while *retained* by the Detaining power they “shall [...] receive as a minimum the benefits and protection of [GC III], and shall also be granted all facilities necessary to provide for the medical care of, and religious ministrations to prisoners of war” (see Article 33 GC III). *Secondly*, and in deviation from the strict regime set forth in Article 4 GC III, GC III applies to members of armed forces, groups and units mentioned in Articles 43 AP I, which belong to a Party to the conflict; are organized; under a command responsible to a party to the international armed conflict; and subject to an internal disciplinary system.<sup>1871</sup> Following Article 44(3) AP I, such members will retain the *status* of combatant, and as a result that of POW when they, individually, and at the time of their capture (Article 44(5) AP) fulfill the obligation to distinguish themselves from the civilian population while engaged in an attack or a military operation preparatory to an attack, and in exceptional “situations in armed conflicts” – such as occupied territories – by carrying their arms openly during each military engagement and as long as they are visible to the enemy while engaged in a military deployment preceding the launching of an attack in which they are to participate. Following Article 45 AP I, a person taking a direct part in hostilities and falling into the power of a party to the conflict shall be *presumed* POW, and be protected by GC III (1) if he claims the status of POW; (2) if he appears entitled to such status; or (3) if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. In case of doubt as to the status of POW, Article 45 AP I stipulates that the individual continues to be entitled to the status of POW and subsequent protection by GC III until such time as his status has been determined by a competent tribunal. Compare Article 5 GC III, which does not refer to continued recognition of status of POW, but stipulates that in case of doubt an individual “shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

In addition, AP I extends *treatment* under GC III to members of organized armed groups who do not fulfill the requirements set forth in Article 44(3) AP I and have forfeit their right to POW-status.

<sup>1872</sup> Article 5 GC III.

GC IV and AP I and to the question of whether insurgents may be deprived of their liberty under the relevant norms set forth in those instruments.<sup>1873</sup>

#### 1.1.1.2. GC IV

The scope *ratione personae* of GC IV has been subject of examination previously, in Chapter VI of Part C.1., where we examined the normative substance of the valid norms of LOAC pertaining to the use of force as a measure of law enforcement. There, we concluded that GC IV applies in so far insurgents are not

- nationals of that Occupying Power.<sup>1874</sup>
- nationals of a State which is not bound by the Convention;<sup>1875</sup>
- nationals of a neutral State who find themselves *in the territory of a belligerent State*,<sup>1876</sup> and nationals of a co-belligerent State, while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are;<sup>1877</sup>
- individuals protected by GC I, II and III<sup>1878</sup>

and find themselves in the hands of a counterinsurgent State party to an IAC (which may be the case in non-consensual TRANSCOIN) or constituting an Occupying Power.

Also, we concluded that GC IV applies not only to insurgents who did not directly participate in the hostilities (peaceful civilians), but also to those who did.

#### 1.1.1.3. AP I

The scope *ratione personae* of AP I is wide. In the context of deprivation of liberty, it designates who are combatants and who are entitled to POW-status or treatment under GC III.<sup>1879</sup> Of particular relevance to the present study is also Chapter I of Section III, AP I,

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<sup>1873</sup> On that note, GC III is – admittedly – not entirely irrelevant. Similar to the principle of distinction in the normative framework governing hostilities, the framework governing deprivation of liberty follows a system of deduction: as follows from Article 4(4) GC IV, individuals only qualify for protection under GC IV if they do not qualify for protection under GC III (even though it must also be ruled out that an individual does not qualify for protection under GC I and II. In view of the present chapter, admissibility for protection under GC I and II will however not be further discussed). In other words, in order to determine whether an individual may be deprived of his liberty under GC IV, it must first be ruled out that he is protected under GC III. It is expressive of the compartmentalized system and confirms that there is no intermediate status. As confirmed by the ICRC Commentary to Article 4 GC IV: “Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.” Pictet (1958a), 51. See also: ICRC (1949), 68.

<sup>1874</sup> Article 4(1) GC IV. This exception is included because, as a principle, international law does not interfere in a State’s relations with its own nationals, with the exception of Article 70(2) GC IV. Pictet (1958a), 46.

<sup>1875</sup> Article 4(2) GC IV. This provision has become obsolete, given today’s universal ratification of GC IV.

<sup>1876</sup> Arai-Takahashi argues that Article 4(2) GC IV does not exclude nationals of a neutral State who are present in the occupied territory. See also Von Glahn, Glahn (1957), 91-92. However, the phrase “in the territory of a belligerent State” refers to occupied territory, which still belongs to the occupied belligerent State.

<sup>1877</sup> Article 4(2) GC IV. Citizens of neutral States or co-belligerent States in normal diplomatic relationships with the detaining Power were deliberately left out because in 1949, during the negotiations leading to the Geneva Conventions it was assumed that sovereign States would protect their own citizens.

<sup>1878</sup> Article 4(4) GC IV.

<sup>1879</sup> See Articles 43 and 44 AP I.

which sets out the field of application of persons in the power of a party to the conflict. It follows from Article 72 AP I that the provisions relevant to the deprivation of liberty in Section III are supplementary to those applicable to protected persons under GC IV. Hence, the provisions of Article 75 AP I also apply to them.<sup>1880</sup> Article 73 AP I extends the applicability of Parts I and III GC IV to “[p]ersons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence.”

Of particular relevance is Article 75 AP I. It applies to “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol.”

According to the ICRC Commentary, for persons to benefit from the protections under Article 75 AP I, they must fulfill three conditions:

- (1) they must be in the power of a Party to the conflict;
- (2) they must be affected by armed conflict or by occupation;
- (3) they must not benefit from more favorable treatment under the GCs or under AP I.<sup>1881</sup>

These persons concern:

- (1) nationals of States not parties to the conflict;
- (2) nationals of allied States;
- (3) persons having become refugees after the beginning of hostilities, and stateless persons;<sup>1882</sup>
- (4) mercenaries;
- (5) other persons denied POW-status, i.e. unlawful combatants who do not benefit from more favourable treatment in accordance with GC IV, such as civilians who directly participate in hostilities, on an individual basis or as a member of an organized armed group;
- (6) persons protected under GC IV, but who are subject to derogations in accordance with Article 5 of GC IV.<sup>1883</sup>
- (7) persons protected under GC IV, additional to the protections set out therein.<sup>1884</sup>

After having established which persons find protection under GC IV and AP I, the next question is whether this treaty offers a legal basis for the two forms of operational detention subject to examination in the present study.

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<sup>1880</sup> As well as “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.” See Article 72 AP I.

<sup>1881</sup> Sandoz, Swinarski & Zimmerman (1987), § 3009.

<sup>1882</sup> As noted, Article 73 AP I extends the protection of GC IV to persons who were refugees and stateless persons before the beginning of the hostilities. According to the ICRC Commentary, stateless persons always enjoy the protection of GC IV, as they by definition do not have the nationality of the State in whose hands they are, as required by Article 4(1) GC IV. Sandoz, Swinarski & Zimmerman (1987), § 2936 and 3028.

<sup>1883</sup> Given the customary nature of Article 75 AP I, its substantive content binds all States. In its customary form, Article 75 AP I is therefore of supplementary value to States party to GC IV, but not party to AP I.

<sup>1884</sup> Following Article 72 AP I.

## 1.1.2. Legal Basis for Operational Detention in GC IV

### 1.1.2.1. Criminal Detention

*Firstly*, and relevant to situations of OCCUPCOIN, insurgents may be deprived of their liberty for *criminal justice* purposes in the execution of the Occupying Power's obligation under Article 43, 1907 HVR to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>1885</sup> As part of this positive obligation, the Occupying Power is entitled to take affirmative measures such as the arrest, and subsequently criminal detention of individuals for violation of the penal laws in force in the occupied territory in order to protect the civilian population's ordinary standard of public order and safety. This includes the prosecution of unlawful combatants for commission of crimes prohibited by the Occupying Power, such as the taking up of arms against the Occupying Power, or the commission of war crimes.

The logical benchmark to determine whether an individual poses a threat to public order and safety is his very violation of the penal laws in force in the occupied territory. While principally under a negative obligation to respect the laws in force in the occupied territory,<sup>1886</sup> the Occupying Power is nonetheless authorized to enact legislation "essential to fulfil its obligations under [GC IV], to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."<sup>1887</sup> To that effect, the Occupying Power is authorized to adopt laws that permit the criminal detention of individuals for conduct which was previously not prohibited, provided such laws do not violate international law.<sup>1888</sup>

In sum, therefore, the authoritative personal scope of deprivation of liberty for law enforcement purposes may consist only of people who are suspected and convicted of violating the penal laws in force in the occupied territory.

Of interest for the situation of TRANSCOIN, GC IV does not provide a legal basis for the deprivation of liberty for criminal purposes, i.e. when a counterinsurgent State in the course of a TRANSCOIN-operation captures and arrests an insurgent for violation of its own penal laws. Nonetheless, the implied authority to do so may be assumed to be present. CA 3 and Article 37 GC IV impose the obligation upon the State to treat such detainees humanely. Also, it is a rule of customary law, as recognized by the ICRC, that "no one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; [...]"<sup>1889</sup> from which it may be concluded that criminal detention is permitted.

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<sup>1885</sup> Article 43, 1907 HVR. See also Article 64 GC IV.

<sup>1886</sup> Article 64(1) GC IV, "with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." In so far it concerns crimes punishable under the penal codes of the occupied territory, a local court has jurisdiction.

<sup>1887</sup> Article 64(3) GC IV.

<sup>1888</sup> Following Article 66 GC IV, a military court established by the Occupying Power has jurisdiction to administer offences of penal laws established by the Occupying Power.

<sup>1889</sup> Rule 101, ICRC (2005a).

### 1.1.2.2. Security Detention

While principally imposing a prohibition to do so, GC IV also permits the internment of protected persons, namely when “in accordance with the provisions of Articles 41, 42, 43, 68 and 78.” Article 42 GC IV permits the internment of non-repatriated persons in the power of the counterinsurgent State, party to the conflict, as an exceptional measure “if the security of the Detaining Power makes it absolutely necessary.” This provision would apply in situations of TRANSCOIN where the law of IAC applies to the relationship between the counterinsurgent State and insurgents. In the context of OCCUPCOIN, Article 78 GC IV is of relevance. It permits the Occupying Power to *intern* persons protected under GC IV when necessary for “*imperative reasons of security*”.<sup>1890</sup>

The element of ‘security’ is not further defined in LOAC. The ICRC Commentary to Article 78 GC IV is not helpful in clarifying the meaning of “security”.<sup>1891</sup> According to the ICTY, the term “security” is not susceptible of being more precisely defined and

[t]he measure of activity deemed prejudicial to the internal or external security of the State which justifies internment or assigned residence is left largely to the authorities of that State itself.<sup>1892</sup>

This provides States considerable leeway to decide what type of conduct poses a threat to its security. Security, however, is public order based. There is little doubt that individuals captured while taking a direct part in the hostilities pose a threat to the security of the Occupying Power.<sup>1893</sup>

However, the concept of ‘security’ is not limited to individuals taking a direct part in the hostilities.<sup>1894</sup> It also includes individuals not taking a *direct* participation of hostilities, but who, for example, indirectly contribute to the hostilities, or do not contribute to the hostili-

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<sup>1890</sup> The general basis for internment can be found in Article 5 GC IV and Article 27 GC IV. The text of Article 5 GC IV infers that deprivation of liberty for reasons of security is generally permissible, as it authorizes the Occupying Power to derogate from the right to communication in cases of absolute military security “[w]here in occupied territory an individual protected person is detained [...] as a person under definite suspicion of activity hostile to the security of the Occupying Power.” Article 27 GC IV permits a Party to the conflict to “take such measures of control and security in regard to protected persons as may be necessary as a result of the war.” As an ultimate form of such measures of control and security, GC IV permits in exceptional circumstances the “assigned residence or internment of protected persons.” A general basis for these measures is found in Article 41(1) GC IV, which provides the Detaining Power (to include the Occupying Power in whose hands the protected persons remains) a legal basis for the assigned residence or internment of protected persons. These measures are recognized as the *most severe measure of control* and may *only* be resorted to if the Detaining Power considers the measures of control and security referred to in Article 27 GC IV to be *inadequate*. Assigned residence and internment shall be carried out in conformity with Articles 42 and 43 GC IV. Article 42 GC IV provides that the *unvoluntary* assigned residence or internment of protected persons is a measure at the discretion of the Detaining Power “only if the security of the Detaining Power makes it *absolutely necessary*.” In the alternative, internment must take place on the specific request of a protected person, i.e. voluntarily “if his situation renders this step necessary.”

<sup>1891</sup> On the ambiguity of “imperative”, see also (1979b), *Ben Zion v. IDF Commander of Judea and Samaria et al.*, HCJ 369/79, *Israel Supreme Court*.

<sup>1892</sup> (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-21-T, *Judgment of 16 November 1998 (Trial Chamber)*, § 574. See also Pictet (1958a), 257-258: “It did not seem possible to define the expression “security of the State” in a more concrete fashion. [...]”

<sup>1893</sup> For example, based on Israel’s Detention of Unlawful Combatants Statute of 2002, an individual qualifying as an unlawful combatant resulting from his direct participation in hostilities or his membership of an organized armed group may be subjected to security detention based on the rebuttable presumption that he is a threat to Israel’s security.

<sup>1894</sup> Gehring (1980), 85.



ties at all, but nonetheless otherwise pose a threat to the security. As stated in the ICRC Commentary to Article 42 GC IV, which is the general provision authorizing internment in an IAC, and which uses the phrase “security of the State”:

Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage; the provisions of Article 5 of the present Convention may also be applied in such cases.<sup>1895</sup>

Other conduct that may be perceived as threats, however, constitute no threats to the security. As held by experts, “[...] ordinary crimes, such as random acts of domestic violence or non-organised larceny, may not be controlled appropriately in this manner.”<sup>1896</sup> The above also applies to individuals interned for their intelligence value. As has been argued, an individual intelligence value alone may not serve as an “imperative reason of security” leading to internment, unless the individual also poses a threat to the security of the Occupying Power.<sup>1897</sup> In addition,

[...], the mere fact that a person is a *subject* of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.<sup>1898</sup>

Similarly, mere affiliation with the hostilities or an organized armed group is not sufficient. As held by the Israel High Court in *A. v. Israel*:

[...] in order to detain a person it is *not* sufficient for him to have made a remote, negligible or marginal contribution to the hostilities.

[I]t is *insufficient* to show any tenuous connection with a terrorist organization [but there must be a] connection and contribution to the organization [...] that are sufficient to include him in the cycle of hostilities in its broad sense.<sup>1899</sup>

Following the above, it may be concluded that an Occupying Power only acts within its power of internment if it is able to demonstrate that an individual, by virtue of his activities,

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<sup>1895</sup> Pictet (1958a), 257-258, affirmed in (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-21-T, *Judgment of 16 November 1998 (Trial Chamber)*, § 576. The criteria leading to the qualification of ‘serious’ and ‘legitimate’ are not further defined and remain subjective. See also the ICRC’s Commentary to Article 5 GC IV that permits the derogation of certain rights and privileges of spies and saboteurs when their acts are “hostile to the security of the state.” In the view of the ICRC “[t]he idea of activities prejudicial or hostile to the security of the State, is very hard to define. That is one of the Article’s weak points. What is meant is probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals. The clause cannot refer to a political attitude towards the State, so long as that attitude is not translated into action.” Pictet (1958a), 56.

<sup>1896</sup> UCIHL (2004), 19.

<sup>1897</sup> Pejic (2005), 380; Arai-Takahashi (2010), 485.

<sup>1898</sup> Pictet (1958a), 257-258 [emphasis added]. See also the ICRC’s Commentary to Article 5 GC IV which permits the derogation of certain rights and privileges of spies and saboteurs when their acts are “hostile to the security of the state.” In the view of the ICRC “[t]he idea of activities prejudicial or hostile to the security of the State, is very hard to define. That is one of the Article’s weak points. What is meant is probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals. The clause cannot refer to a political attitude towards the State, so long as that attitude is not translated into action.” Pictet (1958a), 56.

<sup>1899</sup> (2008a), *A. and B v. Israel*, *CrimA 3261/08*, § 21.

knowledge or qualifications poses a real threat to its present or future internal and external security. For example, mere intelligence, residency or political allegiance is insufficient for internment unless it can be linked to a substantiated threat to that security.

This power to intern necessitates the answering of two questions. *Firstly*, when does an insurgent pose a threat to the *security* of the counterinsurgent State? *Secondly*, when is this threat sufficiently imperative to *necessitate* his internment? As both elements are in essence substantive requirements, they will be dealt with in paragraph 3.1.2.1 below.

It thus follows from the structure of GC IV that the deprivation of liberty of individuals recognized as protected persons under Article 4 GC IV that cannot be justified under one of the bases set out above is unlawful. This general protection follows from Article 27(1) GC IV, which is recognized as “the basis of the Convention”<sup>1900</sup> and holds that “[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity” with the exception of “such measures of control and security in regard to protected persons as may be necessary as a result of the war.”

It equally follows from the structure of GC IV that persons not falling under the scope *ratione personae* of GC IV (via Article 4) may not be deprived of their liberty on the legal bases provided by GC IV. The basis for their deprivation of liberty must then be available elsewhere, most notably in AP I.

### 1.1.3. Legal Basis for Operational Detention in AP I

While addressed to persons *in the power of* a party to the conflict, AP I does not explicitly outline the legal basis or bases for operational detention.

In relation to persons *also* protected under GC IV, the protective measures set out in Article 75 AP I do not interfere with the authority for operational detention already present in GC IV, but rather presumes that it takes place – whether it concerns criminal detention or security detention. Whether such may be the case is thus dependent on the identification of the position of such individuals under GC IV and the crossing of the relevant thresholds for deprivation of liberty embodied therein, as discussed above.

The question of deprivation of liberty of “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol” is more ambiguous. It may be concluded from the explicit use of the words “arrest”, “detention” and “internment” in Article 75 AP I that the deprivation of liberty – be it for reasons of criminal justice or security – is contemplated as a matter of fact.<sup>1901</sup> As for the legal basis to do so, the absence of an explicit prohibition at least suggests that the operational detention of such individuals is authorized. One route in closing this gap would be to rely on the customary nature of GC IV. However, while there it is relatively undisputed that the content of GC IV (and all GC’s for that matter) have now attained customary status,<sup>1902</sup> the question remains open whether its scope *ratione personae* includes the persons protected in Article 75 AP I (and not already protected by GC IV).

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<sup>1900</sup> Pictet (1958a), 199-200.

<sup>1901</sup> Article 75(3) AP I. See also Sandoz, Swinarski & Zimmerman (1987), § 3076.

<sup>1902</sup> Meron (2006).

It is submitted that the lawfulness of the desired conduct calls for the application of the Martens clause, i.e. that the deprivation of liberty in the concrete circumstances must be established by reaching an *ad hoc* and reasonable compromise between military necessity and humanitarian interests in view of the “principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” It is submitted that such compromise is to be reached on the basis of considerations not more lenient than those determining the criminal detention or security detention of protected persons as authorized under GC IV.

#### 1.1.4. The Resulting Authoritative and Prohibited Personal Scopes of Operational Detention

In sum, it can be concluded that the *authoritative* personal scope of operational detention in the law of IAC relevant to insurgents not qualifying as POW consists of:

- all individuals recognized as protected persons as meant in Article 4 GC IV and who may be deprived of their liberty:<sup>1903</sup>
  - o for *law enforcement* purposes in the execution of the Occupying Power’s obligation “to restore, and ensure, as far as possible, public order and safety;”<sup>1904</sup>
  - o by means of *internment* pursuant a decision of the Occupying Power when necessary for “imperative reasons of security;”<sup>1905</sup>
- all individuals falling under the protective scope of Article 75 AP I and whose deprivation of liberty is warranted for reasons analogous to those permitting the deprivation of liberty under GC IV.

The *prohibitive* personal scope of operational detention in the law of IAC relevant to insurgents not qualifying as POW consists of:

- all individuals falling within the scope *ratione personae* of Article 4 GC IV, but whose deprivation of liberty:
  - o for *law enforcement* purposes is not warranted by the Occupying Power’s obligation “to restore, and ensure, as far as possible, public order and safety.”<sup>1906</sup>
  - o cannot be (reasonably) regarded necessary for “imperative reasons of security;”<sup>1907</sup>
- all individuals falling under the protective scope of Article 75 AP I and whose deprivation of liberty is *not* warranted for reasons analogous to those permitting the deprivation of liberty under GC IV.

The deprivation of liberty of persons falling under the prohibitive personal scope of operational detention under LOAC constitutes unlawful confinement under LOAC. Historical precedents for this qualification of arbitrary deprivation of liberty in armed conflict can be found in the case law of the war crime tribunals post World War II.<sup>1908</sup> “Unlawful confine-

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<sup>1903</sup> Article 4 GC IV; Article 73 AP I.

<sup>1904</sup> Article 43, 1907 HVR.

<sup>1905</sup> Articles 42 and 78 GC IV.

<sup>1906</sup> Article 43, 1907 HVR.

<sup>1907</sup> Articles 42 and 78 GC IV.

<sup>1908</sup> See, *inter alia*, (1947a), *Notomi Sueo and Others, Netherlands Temporary Court-Martial at Makassar (Judgment, 4 January 1947)*; (1947b), *Trial of Shigeki Motomura and 15 Others, Netherlands Temporary Court-Martial at Makassar (Judgment, 18 July 1947)*; (1948a), *Trial of Hans Albin Rauter, Netherlands Special Court in 's-Gravenhage (The Hague Judgment delivered on 4th May 1948) and Netherlands Special Court of Cassation (Judgment delivered on 12th January 1949)* (ibid., § 2626).

ment” of civilians is a grave breach of GC IV<sup>1909</sup> and under the ICC Statute,<sup>1910</sup> the Statute of the ICTY<sup>1911</sup> and UNTAET Regulation 2000/15 for East Timor.<sup>1912</sup> The Elements of Crimes for the International Criminal Court extends unlawful confinement to any person, and not just civilians, protected under one of the GCs.<sup>1913</sup> Unlawful confinement is prohibited by law in many States.<sup>1914</sup>

Unlawful confinement is the equivalent of an arbitrary deprivation of liberty under IHRL, and as noted by the ICRC Customary Law Study, in Rule 99, “arbitrary deprivation of liberty is prohibited” in *all* armed conflicts.

As may be concluded, there is no doubt *that* insurgents may be deprived of their liberty. The law of IAC provides clear-cut legal bases with distinct thresholds for the deprivation of liberty of individuals: the principal conventional protective regime’s – GC III, GC IV and AP I – form a compartmentalized system, *each* with their own *status*-based scopes *ratione personae*. Any deprivation of liberty must follow from an individual’s assigned status as POW under GC III, or as a protected person/civilian under GC IV or AP I; there is no intermediate status.

Once it has been determined that an individual falls within the personal scope of authorized deprivation of liberty, the follow-up question is: what requirements dictate the lawfulness of such deprivation of liberty? The following examination aims to identify these requirements within the relevant normative frameworks pertaining to situations of COIN governed by the law of IAC, and to discuss their substantive content. The assumption is that these requirements apply to both OCCUPCOIN and TRANSCOIN. Some requirements, however, are specifically designed to address the Occupying Power and they only apply to the situation of OCCUPCOIN. Where such is the case, this will be indicated.

## 1.2. Requirements Specific to Criminal Detention

A first requirement, applicable to any type of detention, is the need for a sufficient legal basis. As previously established, the counterinsurgent State bound by the law of IAC is authorized to criminally detain individuals. However, it may only lawfully apply this authority when this has been announced in law accessible to the public. In the case of TRANSCOIN, this would imply that the legal basis for criminal detention is to be found in the domestic law of the counterinsurgent State. In the case of OCCUPCOIN, the legal basis is to be found in the domestic law of the occupied State, or in the penal laws enacted by the Occupying Power.<sup>1915</sup> The Occupying Power is under an obligation to publish the penal laws it enacts, and it is not until then that they come into force. The effect of these laws may not be retroactive.<sup>1916</sup>

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<sup>1909</sup> Article 147 GC IV.

<sup>1910</sup> Article 8(2)(a)(vii) ICC Statute.

<sup>1911</sup> Article 2(g), ICTY Statute.

<sup>1912</sup> Section 6(1)(a)(vii) UNTAET Regulation 2000/15.

<sup>1913</sup> Elements of Crimes for the ICC, Definition of unlawful confinement as a war crime (ICC Statute, Article 8(2)(a)(vii)).

<sup>1914</sup> For an overview, see

<sup>1915</sup> Per Article 43, 1907 HIRV and Article 64 GV IV.

<sup>1916</sup> Article 65 GC IV.

As concluded in Chapter V, the law of IAC also provides an extensive treaty-based and customary normative framework of fair trial rights to be afforded to criminal detainees. In terms of normative substance, these rights converge with the fair trial rights to be found in IHRL. In terms of interplay appreciation, IHRL and LOAC here demonstrate to be complementary.

### 1.3. Requirements Specific to Security Detention

#### 1.3.1. The Requirement of a Sufficient Legal Basis

The principle of a sufficient legal basis implies that the counterinsurgent State desiring to make use of its authority to intern insurgents can only do so when it rests on a basis within the law. In the context of TRANSCOIN, this would imply that the counterinsurgent State has adopted a law that provides for the internment of insurgents, even when they are captured and transferred from another State. In the context of OCCUPCOIN, this means that it must adopt a specific law that provides the legal basis for internment within the occupied territory. This follows from Article 78(2) GC IV, which stipulates that “[d]ecisions regarding such assigned residence or internment shall be made according to a regular procedure *to be prescribed* by the Occupying Power in accordance with the provisions of the present Convention.” For example, the Coalition Provisional Authority (CPA) in occupied Iraq adopted its Memorandum No. 3 (revised) of 27 June 2004, which authorized the detention of persons for security reasons or law enforcement reasons and contained the necessary procedural safeguards.<sup>1917</sup> The authority to adopt such laws can be found in Article 64(3) GC IV. However, specific internment-laws may not contain provisions that violate international law, most notably fundamental human rights.<sup>1918</sup> For example, it may not authorize the internment for reasons that are manifestly unlawful, such as an individual’s allegiance to a political party, or intelligence gathering. In addition, it may not violate the procedural safeguards; safeguards pertaining to the treatment of internees or transfer of internees.

#### 1.3.2. The Requirement of Necessity

As discussed above, Articles 42 and 78 GC IV permit the internment of protected persons when “the security of” the counterinsurgent State “makes it absolutely necessary” or for “imperative reasons of security” if the Occupying Power deems this measure “necessary”. As noted by the ICRC Commentary to GC IV, “[i]n occupied territories the interment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict.”<sup>1919</sup> No doubt, the reference to ‘necessity’ reflects the notion of *military necessity* underlying the entire *corpus* of LOAC. Articles 42 and 78 GC IV are examples of *exceptional* military necessity, i.e. they are provisions that authorize a military commander to deviate from otherwise prohibited conduct.

As noted previously, an appeal on exceptional military necessity is lawful upon the compliance with two requirements: (1) the requirement of necessity for the achievement of a

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<sup>1917</sup> Coalition Provisional Authority (2004). While having adopted this CPA Memorandum, the CPA in essence failed to observe its obligations to do so until just a few days before the formal end of the occupation-phase.

<sup>1918</sup> See also Article 27(4) AP I, and the ICRC Commentary, noting that the measure of internment, and arguably the adoption of laws to provide the legal basis to do so, “should not affect the fundamental rights of the persons concerned.” Pictet (1958a), 207.

<sup>1919</sup> Pictet (1958a), 367.

legitimate military purpose, and (2) the requirement that the measure must be otherwise in conformity with LOAC. Both requirements will be addressed in more detail below.

#### (1) The Requirement of Necessity for the Achievement of a Legitimate Military Purpose

This requirement itself consists of three sub-requirements: (a) the purpose for the measure must be a *legitimate military purpose*; (b) the legitimate purpose must be a *military* purpose; and (c) the measure must serve a *necessity*.

##### (a) A *Legitimate* Military Purpose

The requirement of a legitimate military purpose demands that the purpose for which the measure of internment is taken – i.e. the protection of the security of the counterinsurgent State – must be lawful. This implies *firstly* that the purpose of internment must be lawful as a measure of overall warfare, which it is when limited to attaining the submission or defeat of the enemy. *Secondly*, the *specific* military advantage to be attained – i.e. the protection of the security of the counterinsurgent State – must be lawful under LOAC. As the general normative framework regulating the internment of protected persons under GC IV indicates, the protection of the security of the State is generally perceived to be paramount to ensure that it can fulfill its obligations under the law of IAC (including the law of belligerent occupation). In sum, the aim of guaranteeing the security of the counterinsurgent State is no doubt a lawful aim under LOAC.

##### (b) A Legitimate *Military* Purpose

The security of the counterinsurgent State serves, in essence, a military purpose and the measure of internment may only be adopted in that context. In other words, the measure of internment may not be used if internment serves solely and purely a political, demographic, ideological or economic purpose.<sup>1920</sup> Also excluded from the scope of military necessity are measures taken for individual purposes, such as greed or lust.

##### (c) Necessity

As set out previously, the requirement of necessity entails *three* aspects, all of which must be complied with: (i) qualitative, (ii) quantitative and (iii) temporal necessity.

##### (i) Qualitative Necessity

The *first* aspect is that of *qualitative* necessity, *in casu* pertaining to the question of whether the measure of internment is materially relevant to achieve a military advantage, i.e. there must be a reasonable causal connection between the measure of internment and the desired military advantage. In the context of internment, this is measured by determining whether the security of the counterinsurgent State *cannot* be maintained or guaranteed if the measure of internment in the specific case is not resorted to. Thus, the decision to intern constitutes an unlawful resort to exceptional military necessity if other alternatives to thwart the threat

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<sup>1920</sup> These interests may become particularly manifest in situations of belligerent occupation and measures in support of these interests are often ‘sold’ as militarily necessary.

posed by an individual to the counterinsurgent State's security are feasible.<sup>1921</sup> In other words, internment must be a measure of *last resort*,<sup>1922</sup> and is permitted only if there are "serious and legitimate reasons" to think that the interned persons may seriously prejudice the security of the counterinsurgent State.<sup>1923</sup> The ICRC Commentary to Article 42 GC IV explains why:

The Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions; its object in doing this is to put an end to an abuse which occurred during the Second World War. All too often the mere fact of being an enemy subject was regarded as justifying internment. Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means. All considerations not on this basis are strictly excluded.<sup>1924</sup>

Additional, specific reasons why internment should be viewed this way are, *firstly*, that the decision is taken by an administrative body, not a court; *secondly*, that the decision is often based on classified material, not overt evidence; and *thirdly*, that the internment is not restricted in time, so the measure of internment could be imposed indefinitely.<sup>1925</sup> Clearly, the material relevance of internment to the military advantage is absent if internment is used as an instrument of convenience, for example to bypass more stringent requirements underlying the criminal process.

Examples of alternatives are "the duty of registering with and reporting periodically to the police authorities, the carrying of identity cards or special papers, or a ban on the carrying of arms, to harsher provisions such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement."<sup>1926</sup>

In many instances it is conceivable that a person is a criminal suspect while simultaneously posing a threat to the security of the counterinsurgent State. The primary example is that of an insurgent directly participating in hostilities against the Occupying Power. The question arises whether he may be interned. In view of the ICRC Commentary, "Article 78 relates to people who have *not been guilty of any infringement of the penal provisions enacted by the Occupying Power*, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action."<sup>1927</sup> This implies that the measure of internment does not extend to individuals who, while constituting a threat to the security of the counterinsurgent State, can *also* be considered a suspect of a criminal offence under the penal laws in force in the occupied territory and are held in pre-detention awaiting trial, or have already been convicted and serving a penalty.<sup>1928</sup> This view is shared by Pejic, who argues that the regimes of criminal detention and internment must be regarded as separated in the *first* place because "a person who is suspected of having committed a crimi-

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<sup>1921</sup> Melzer (2008), 165-166.

<sup>1922</sup> Gasser (2008), 319-320.

<sup>1923</sup> (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber).

<sup>1924</sup> Pictet (1958a), 258.

<sup>1925</sup> (1998a), *Al Amla et al. v. IDF Commander of Judea and Samaria et al.*, HCJ 2320/98, Israel Supreme Court.

<sup>1926</sup> Pictet (1958a), 207.

<sup>1927</sup> Pictet (1958a), 368.

<sup>1928</sup> This viewpoint has been corroborated by the Israel Supreme Court (per President Barak) in the L. Salame case. See (2003g), *L. Salame et al. v. IDF Commander of Judea and Samaria*, HCJ 5784/03, Israel Supreme Court, 289. See also the definition used by Pejic, stating that internment of administrative detention constitutes the deprivation of liberty that has been ordered by the executive branch (and not by the judiciary) without criminal charges brought against the internee/administrative detainee. Pejic (2005), 375-376.

nal offence, whether in armed conflict or other situations of violence, has the right to benefit from the additional stringent judicial guarantees provided for in humanitarian and/or human rights law for criminal suspects, which include the right to be tried by a regularly constituted, independent and impartial court” and *secondly*, because “there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country’s legislature and courts. The rights of criminal suspects would thus be gravely undermined.”<sup>1929</sup> Dinstein, however, appears to take the opposite view, stating that “[o]f course, speaking empirically, the two lawful types of detention are not hermetically sealed from each other. Detention may initially be undertaken with penal prosecution in mind, yet – upon further reflection – the military government may switch gears and (instead of either charging the suspect or releasing him) opt to have recourse to internment consistent with Article 78.”<sup>1930</sup> In the view of the Israel Supreme Court, internment is permissible if prosecution would reveal intelligence sources.<sup>1931</sup>

## (ii) Quantitative Necessity

The *second* aspect of the requirement of necessity is *quantitative* necessity. In the context of internment this aspect of necessity implies, *firstly*, that even if qualitatively necessary, the measure of internment may be quantitatively unnecessary if the desired military advantage can be attained by alternative measures which are less harmful.

*Secondly*, in the event that internment is both qualitatively necessary and constitutes the least harmful measure feasible to guarantee the security of the counterinsurgent State, it must be applied in a manner that balances the interests of the internee and the interests of the State. In practice, this means that internment must be applied in a manner least harmful to the internee, whilst protecting the security of the counterinsurgent State. In that respect, it must be noted that internment is not a measure that is *a priori* disproportionate, for Article 78 GC IV explicitly sets out that it is a measure which “at the most” may be adopted.<sup>1932</sup> In other words, in order to guarantee its security, as meant in Article 27 GC IV, a State may not go *beyond* the measure of internment. At the same time, it must be established whether the measure of internment, even though it may be resorted to, *is and continues to be* the proper measure to guarantee the security of the counterinsurgent State in the concrete and individual circumstances of the case.<sup>1933</sup> In so far possible,<sup>1934</sup> internment must be justified in each

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<sup>1929</sup> Pejic (2005), 381 (emphasis added); Arai-Takahashi (2010), 492. This viewpoint has been corroborated by the Israel Supreme Court (per President Barak) in the L. Salame case. See (2003g), *L. Salame et al. v. IDF Commander of Judea and Samaria*, HCJ 5784/03, Israel Supreme Court, 289.

<sup>1930</sup> Dinstein (2009c), 174. It remains unclear whether he considers such practice lawful or not.

<sup>1931</sup> (2003g), *L. Salame et al. v. IDF Commander of Judea and Samaria*, HCJ 5784/03, Israel Supreme Court.

<sup>1932</sup> Also: ICRC (2007), 729-730.

<sup>1933</sup> Goodman (2009), 53. See Pictet (1958a), 254; (2004r), *The Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, Judgment of 17 December 2004 (Appeals Chamber) § 72-73; (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber), § 327; (1999), *Third Report on the Situation of Human Rights in Colombia*, LACommHR (26 February 1999).

<sup>1934</sup> As the ICRC Commentary to Article 41 GC IV explains, it was discussed during the Diplomatic Conference at great length whether Article 41 GC IV should include a phrase indicating that the decision of internment or assigned residence “should be taken individually,” but it was decided not to do so because in some situations, such as the threat of an invasion, a government would have to act without delay and it would not be possible to comply with such requirement. The Commentary to Article 78, however, rules out the possibility of taking collective measures of internment in occupied territory, because in intern-



single case, even if multiple persons are detained simultaneously.<sup>1935</sup> As the decision of internment belongs to the discretion of the State, it is its responsibility to demonstrate the initial *and* continuing necessity for each case of internment,<sup>1936</sup> a responsibility that will increase commensurate to the duration of the internment.<sup>1937</sup> The burden of proof to demonstrate a change in circumstances that should lead to his release lies evidently not with the internee.<sup>1938</sup>

### (iii) Temporal Necessity

A *final* aspect of necessity pertains to the temporal necessity to resort to internment. This includes, *firstly*, the question of whether internment may *yet* be resorted to. Internment is unlawful when the threat to the security is merely hypothetical, and not concrete, i.e. based on a current threat, even though it may materialize in the future. Internment is a preventative measure, aimed at the preclusion of *future* dangers to the security. While past activities may be taken into account in the determination of possible future behavior,<sup>1939</sup> the measure of internment may never be invoked as a (punitive) measure for offences that happened in the past, but of which there is no likelihood that they will take place again in the future.<sup>1940</sup> *Secondly*, temporal necessity pertains to the question whether internment may *still* be imposed. Internment may not take place indefinitely. In the view of the ICRC, this is a prohibition of customary nature.<sup>1941</sup> Article 132 GC IV is clear: “[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”<sup>1942</sup> Article 75(3) AP I also stipulates that “[e]xcept in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstance justifying the arrest, detention or internment have ceased to exist.” This implies a positive obligation for the State to regularly update and verify the information upon which threat and necessity assessments are based throughout the duration of internment and in addition, to periodically review the continued necessity for internment as a measure to remove or minimize the threat.<sup>1943</sup> A principal reason necessitating internment in situations of occupation is the occupation itself. Hence, once the occupation ends, the grounds for internment cease to exist, and the internee must either be released,<sup>1944</sup> or be

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ment in those circumstances is to be regarded as even more exceptional than it is to be viewed in territories of parties to the conflict. See Pictet (1958a), 256 (Article 41 GC IV); 367 (Article 78 GC IV).

<sup>1935</sup> (2002f), *Mar'ab et al. v. IDF Commander of Judea and Samaria et al*, HCJ 3239/02, Israel Supreme Court

<sup>1936</sup> (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber), §§ 328-329.

<sup>1937</sup> Arai-Takahashi (2010), 491.

<sup>1938</sup> Dinstein (2009c), 176;

<sup>1939</sup> (2003e), *Federman v. Minister of Defence*, HCJ 8788/03, Israel Supreme Court, 185.

<sup>1940</sup> Dinstein (1978), 125; Arai-Takahashi (2010), 485.

<sup>1941</sup> ICRC (2005a), Rule 128; Pejic (2005), 381-382.

<sup>1942</sup> Article 75(3) AP I. See also (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber), § 581: “the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands.”

<sup>1943</sup> ICRC & Chatham House (2008), 6.

<sup>1944</sup> Article 133(1) GC IV. See also Article 134 GV IV, imposing on the Occupying Power the obligation to ensure the return of all internees to their last place of residence or facilitate their repatriation. In the *Delalic Case*, the ICTY Trial Chamber held that “[t]he fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires” ((1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber), § 581, confirmed by (2001m), *The*

criminally charged.<sup>1945</sup> Internment is unlawful when the threat has subsided to a degree that it no longer poses a threat to the State's security, or when the threat to the security continues, but no longer necessitates the measure of internment. In any case, the necessity for internment is removed after the close of hostilities, and internment must cease.<sup>1946</sup>

(2) The Requirement That the Measure of Internment Be Otherwise in Conformity with LOAC

The *measure* of internment itself must be lawful under LOAC. This requirement is in essence a reflection of the overarching principle of legality, which requires that all State action must be grounded in a legal basis. This requirement demands that the *measure* – i.e. internment – adopted to attain that purpose is (a) by itself permitted under LOAC (*substantive* part of legality), and (b) executed in conformity with LOAC (*procedural* part of legality).

*Firstly*, in its substantive part, the principle of legality underlying the notion of military necessity requires that an individual's internment must find a basis in norms that permit that measure. Clearly this basis exists in LOAC, by virtue of the combination of norms set out in Articles 27, 41, 42 and 78 GC IV. *Secondly*, the *execution* of the measure must comply with LOAC (*procedural* part of legality). In other words, the measure of internment must comply with any other conditions set forth in LOAC. It has been acknowledged that the non-compliance with these procedural safeguards constitutes “unlawful confinement,” which is a grave breach under Article 147 GC IV and constitutes a war crime under the statutes of the ICC and the ICTY.<sup>1947</sup>

In sum, the authoritative personal scope in the context of the internment of persons in occupied territory may consist only of those individuals that pose a threat upon the security of the counterinsurgent State that is of such nature that it necessitates the extreme measure of internment. While the counterinsurgent State has certain discretion in determining which threats pose a threat to its security, the decision to internment is limited by the strict requirements underlying the test of military necessity. The failure to demonstrate that the existence of a concrete threat to the security of the counterinsurgent State can only be removed by the measure of internment places the individual in the prohibitive personal scope of deprivation of liberty and implies that his subsequent internment constitutes a measure of unlawful confinement.

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*Prosecutor v. Delalić, Mucić, Delić and Landžo (the Celebici Case), Case No. IT-96-12-A, Appeals Chamber Judgment (20 February 2001), § 322: “an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV”.*

<sup>1945</sup> Articles 132-134 GC IV.

<sup>1946</sup> Article 133 GC IV.

<sup>1947</sup> Article 8(2)(a)(vii), ICC Statute; Article 2(g) ICTY Statute; see also (1998m), *The Prosecutor v. Delalić, Mucić, Delić and Landžo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber), § 583; (2001n), The Prosecutor v. Delalić, Mucić, Delić and Landžo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber), § 322.*

### 1.3.3. Requirements Pertaining to Procedural Safeguards

The Convention contains procedural rules that aim to ensure that States do not abuse the considerable margin of discretion they have in interpreting threats to their security. It is to their normative substance that we will now turn.

#### 1.3.3.1. The Requirement of Prompt Information on the Reasons of Internment

Article 75(3) AP I provides that “[a]ny person arrested, detained or *interned* for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.” In effect, the counterinsurgent State must inform the internee that his conduct poses a threat to its security. According to the ICRC, this rule has customary status and is non-derogable.<sup>1948</sup> From the perspective of the internee, the right to information is intrinsically linked to his right to humane treatment, his right to *habeas corpus* and the right not to be deprived of one’s liberty *incommunicado*. However, “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?”<sup>1949</sup> Clearly, this goes beyond the mere statement that he is detained for imperative reasons of security or poses a threat.<sup>1950</sup> As explained by the ICRC Commentary to Article 75 AP I: “Internees will therefore generally be informed of the reason for such measures in broad terms, such as legitimate suspicion, precaution, unpatriotic attitude, nationality, origin, etc. without any specific reasons being given.”<sup>1951</sup> Experts agree that, subject to an absolute necessity for reasons of security, there is no requirement for the counterinsurgent State to provide detailed information, yet States remain under an obligation to provide an internee with as much information as possible, as soon as possible, to enable him to challenge the legality of their detention. In practice, this means that a State can only withhold information when this cannot reasonably be shared directly with the internee, or his legal representative, without endangering the State’s security. As the obligation to inform the internee of the reasons for his deprivation of liberty, the State carries the burden of demonstrating that the procedure adopted to determine the release of classified information is in conformity with this and its other obligations under international law.<sup>1952</sup>

The requirement of “promptly” is to be viewed as flexible, i.e. there is no absolute requirement to *immediately* inform the internee of the reasons of his internment, as circumstances may preclude the counterinsurgent State to do so, but, as the ICRC Commentary explains, “ten days would seem the maximum period.”<sup>1953</sup>

#### 1.3.3.2. The Requirement of Registration of the Detention in an Officially Recognized Place of Detention

As explained by Pejic, “[t]he entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to

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<sup>1948</sup> ICRC (2005a), 349-350.

<sup>1949</sup> ICRC & Chatham House (2008), 10.

<sup>1950</sup> ICRC & Chatham House (2008), 11.

<sup>1951</sup> Sandoz, Swinarski & Zimmerman (1987), 875.

<sup>1952</sup> ICRC & Chatham House (2008), 10.

<sup>1953</sup> Sandoz, Swinarski & Zimmerman (1987), 876.

the ICRC.”<sup>1954</sup> Elements reflective of this requirement are present in Articles 105, 106, 107, 132, 136, 137 and 138 GC IV. In view of the ICRC, this requirement is part of customary LOAC.<sup>1955</sup> These obligations require the counterinsurgent State to inform the internee’s family, Protecting Power and the Information Bureau and Central Tracing Agency as soon as possible of his internment, the location of the internment and subsequent transfer to other places of internment.

### 1.3.3.3. The Requirement to Grant the Internee the Right to Communicate with the Outside World

Internees are, in principle, permitted to communicate with the outside world. Article 106 GC IV permits them “to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card [...] informing his relatives of his detention, address and state of health.” Article 107 GC IV permits correspondence in the form of letters and cards. Article 116 stipulates that the internee may be allowed “to receive visitors, especially near relatives, at regular intervals and as frequently as possible.” The right to correspondence may be limited under certain conditions. In addition, Article 5 GC IV permits derogation from the right to communication provided there are reasons of “absolute military security” to do so in the case of spies, saboteurs or persons “under definite suspicion of activity hostile to the security of the Occupying Power.”

#### 1.3.3.3.1. The Requirement to Carry out an Initial Review of the Decision of Internment

The counterinsurgent State is under an obligation to afford an interned insurgent the opportunity to have this measure reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.<sup>1956</sup> In imposing this requirement is,

the Fourth Geneva Convention implicitly recognizes that states will make mistakes in the field. Thus, the Fourth Geneva Convention contemplates that, after a state’s military or other forces detain an individual for security reasons, that individual has a near-term ability to challenge that detention before a court or an administrative board (at the choice of the state).<sup>1957</sup>

While there is no obligation for the counterinsurgent State to review the initial decision automatically, it must do so “as soon as possible”.<sup>1958</sup> The phrase “as soon as possible” may be interpreted flexibly, so to take account of the particular circumstances, such as the board’s caseload.”<sup>1959</sup>

#### 1.3.3.4. The Requirement to Afford the Right of Appeal

Articles 43 and Article 78(2) GC IV impose upon the counterinsurgent State the obligation to afford the internee a right to appeal against the decision upon initial review to uphold the internment.<sup>1960</sup>

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<sup>1954</sup> Pejic (2005), 384.

<sup>1955</sup> ICRC (2005a), Rule 123.

<sup>1956</sup> Articles 43 and 78 GC IV.

<sup>1957</sup> Deeks (2009), 408.

<sup>1958</sup> Pictet (1958a), 260.

<sup>1959</sup> Deeks (2009), 409.

<sup>1960</sup> According to the ICRC Commentary to Article 78 GC IV (Pictet (1958a), 368) “[i]t is for the Occupying Power to decide on the procedure to be adopted; but it is not entirely free to do as it likes; it must observe the stipulations in Article 43, which contains a precise and detailed statement of the procedure to

While not stating it with so many words, the right of appeal reflects the right of *habeas corpus*; a right recognized by the ICRC to be of customary nature, even though it remains unclear whether it forms part of the customary law of LOAC, or of the customary law applicable in armed conflict (i.e. that it is in fact a rule of IHRL applicable in armed conflict).

The authority that took the initial decision of internment and the body authorized to carry out the review on appeal may not be the same.<sup>1961</sup> According to the ICTY, the body of appeal must have “the necessary power to decide finally on the release of prisoners whose detention could not be considered justified for any serious reason.”<sup>1962</sup> In addition, it is “upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view.”<sup>1963</sup>

An additional requirement of the right to appeal is that the decision on appeal must be taken in the minimum time necessary (“with the least possible delay”).<sup>1964</sup> It remains unclear, and subject of debate, whether the right to appeal includes the right of the internee to assistance of a lawyer. It is clear that neither Article 78 GC IV nor Article 43 GC IV specifically address this issue. Neither does the ICRC Commentary.

#### 1.3.3.5. The Requirement of a Periodic Review

Articles 43 and 78(2) GC IV require the counterinsurgent State to carry out a *periodic* review of the lawfulness of the internment. This is to take place “at least twice yearly” or “if possible six months”. This periodic review must take place on the own initiative of the Occupying Power, or upon request of the internee.<sup>1965</sup> While the text of Article 78 GC IV explicitly links the “competent body” to the “periodical review” in the “event of a decision being upheld” it may be concluded from the fact that it concerns a “review”, as well as from the ICRC Commentary to Article 43 GC IV, that the “competent body” may be the same body that decided upon the appeal challenging the lawfulness of the internment.<sup>1966</sup>

Of significance is that Article 78(2) GC IV does not require that the review is to take place in the presence of the internee. As such, it is lawful to carry out the review *ex parte*.

While the latter provision suggests that a single review per year violates LOAC, Article 78 GC IV seems not to sanction the failure to carry out a review once per six months (“if

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be followed when a protected person who is in the territory of a Party to the conflict when hostilities break out, is interned or placed in assigned residence.”

<sup>1961</sup> Pejić (2005), 386.

<sup>1962</sup> (2001n), *The Prosecutor v. Delalić, Mucić, Delić and Landžo (the Celebici Case)*, Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber), § 328.

<sup>1963</sup> (2001m), *The Prosecutor v. Delalić, Mucić, Delić and Landžo (the Celebici Case)*, Case No. IT-96-12-A, Appeals Chamber Judgment (20 February 2001), § 328, 329.

<sup>1964</sup> Dörmann (2004), 14. In interpreting the similar requirement under Article 43 AP I, the ICRC has held that “[...] the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk has any objective foundation such that it would found a “definite suspicion” of the nature referred to in Article 5 of Geneva Convention IV.” (2001n), *The Prosecutor v. Delalić, Mucić, Delić and Landžo (the Celebici Case)*, Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber), § 328.

<sup>1965</sup> Here, Article 78 GC IV seems to deviate from Article 43 GC IV, which permits the internment of civilians in enemy territory, and requires judicial review “at least twice yearly.” Arai-Takahashi (2010), 497.

<sup>1966</sup> This may also be concluded from the ICRC Commentary to Article 43 GC IV, which in relation to appeals being rejected notes that “[t]he court or administrative board mentioned in the preceding sentence [which refers to the right of appeal by an appropriate court or administrative body] must reconsider their cases periodically, and at least twice a year, with a view to favourably amending the initial decision if circumstances permit.” Pictet (1958a), 260.

possible”). This difference, however, finds explanation in the *travaux préparatoires*, which explain that the drafters agreed it impossible “[...] to push the analogy between the situation of internees on the territory of a belligerent and that of internees in occupied territory any further. The two situations were so entirely different that no argument by analogy was possible.”<sup>1967</sup>

### 1.3.3.6. The Requirement of a Review by an *Independent* and *Impartial* Body

The “appropriate court or administrative board designated by the Detaining Power for that purpose” (Article 43 GC IV) or the “competent body set up” (Article 78 GC IV) by the Occupying Power must qualify as independent and impartial bodies. At first sight, Article 78 GC IV does not seem to require that the body of review is impartial or independent, or that it must be independent from the authority that took the initial decision of internment.<sup>1968</sup> However, by stipulating that “[d]ecisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention,” Article 78 GC IV opens the door for reference to other provisions in GC IV, such as Article 43. According to the ICRC Commentary to Article 43 GC IV, “where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality.”<sup>1969</sup> According to experts, for a review body to be independent and impartial it should: have direct decision-making power with respect to the continued internment or decision to release an internee “without that decision being subject to further confirmation by operational command”; have access to all available information; have members appointed from outside the chain of command “or at least be effectively independent from the latter’s influence”; have permanent members whose only task is to review internment-cases; have at least one qualified lawyer.<sup>1970</sup>

Thus, Article 78 GC IV authorizes the Occupying Power to make a choice with respect to reviews of detention, which takes account of the “usage in different States”.<sup>1971</sup> As stated in the expert report of the ICRC/Chatham House:

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.<sup>1972</sup>

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<sup>1967</sup> United Nations (1949), Committee II, 47<sup>th</sup> Meeting (on draft Article 68), Statement of Mr. Haksar (India).

<sup>1968</sup> Arai-Takahashi (2010), 496; UCIHL (2004), 17.

<sup>1969</sup> Pictet (1958a), 260.

<sup>1970</sup> ICRC & Chatham House (2008), 17.

<sup>1971</sup> Pictet (1958a), 260.

<sup>1972</sup> ICRC & Chatham House (2008), 16.

Experts have argued that, in general, a challenge of the lawfulness of one's detention should be dealt with by a body that is independent and impartial, thereby stressing the *characteristics* of the body towards the facts rather than its *nature*. Nonetheless, by most experts, judicial review is preferred over administrative review,<sup>1973</sup> although Gasser stresses that review by an administrative board is all that is required by the law.<sup>1974</sup>

#### 1.4. General Requirements Pertaining to *All* Protected Persons

##### 1.4.1. Requirements Pertaining to the Treatment of Protected Persons

The requirements pertaining to the treatment of protected persons can be split into two categories: (1) treatment in the narrow sense (*stricto sensu*) and (2) treatment in terms of material conditions. Both will be separately discussed below.

###### 1.4.1.1. Treatment in the Narrow Sense

LOAC also imposes on the counterinsurgent State requirements pertaining to the treatment of all protected persons. The general rule can be found in Article 27 GC IV, which states that:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

The final sentence of Article 27 GC IV stipulates that “the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.” These measures, however, may not derogate from the fundamental human rights of protected persons deprived of their liberty.<sup>1975</sup>

The general obligation of the counterinsurgent State vis-à-vis civilians it detains, whether they are law enforcement detainees or internees, is that they “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”<sup>1976</sup> Thus, in relation to spies and saboteurs put on trial, Article 5 GC IV stipulates that:

[...] In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

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<sup>1973</sup> UCIHL (2004), 17; Arai-Takahashi (2010), 499.

<sup>1974</sup> Gasser (2008), 320.

<sup>1975</sup> Pictet (1958a), 207.

<sup>1976</sup> CA 3.

Similarly, Article 37 GC IV imposes upon a State party to GC IV to treat “[p]rotected persons who are confined pending proceedings or serving a sentence involving loss of liberty” humanely during their confinement.

More specific to the treatment of civilians deprived of their liberty, Article 32 forbids the counterinsurgent State “from taking any measure of such a character as to cause the physical suffering or extermination of protected persons [...]” It implies the prohibition of “murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person” and of “any other measures of brutality whether applied by civilian or military agents.” As the ICRC Commentary stresses, the words “of such a character as to cause” denote that “it is not necessary that an act should be intentional for the person committing it to be answerable for it.”<sup>1977</sup>

Turning to Article 75 AP I, it offers fundamental guarantees to all civilians deprived of their liberty and stipulates that they “shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article in a non-discriminatory manner. More in particular, it prohibits “at any time and in any place whatsoever, whether committed by civilian or by military agents” violence to life, health, or physical or mental well-being or persons – such as murder; torture of all kinds, whether physical or mental; corporal punishment; and mutilation – outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; the taking of hostages; collective punishments; and threats to commit any of the foregoing acts.”<sup>1978</sup> These protections shall be afforded to detainees “until their final release, repatriation or re-establishment, even after the end of the armed conflict.”<sup>1979</sup> Finally, in the case of protections available under international law that are more favorable to those provided in Article 75 AP I, their restriction or limitation by the rules embodied in Article 75 AP I is prohibited.<sup>1980</sup> Thus, provisions of IHRL offering more protection than those provided in Article 75(3) AP I must be preferred.

Finally, there is no doubt whatsoever as to the customary status under LOAC of the requirement of humane treatment and the prohibitions on all of the acts enumerated in Article 75(3) AP I.<sup>1981</sup> Many of these requirements and prohibitions were already recognized in pre-Geneva law of war documents,<sup>1982</sup> or stipulated as war crimes in the statute of the Nuremberg War Crimes tribunals.<sup>1983</sup>

#### 1.4.1.2. Treatment in Terms of Material Conditions

The law of IAC also provides norms pertaining to material conditions of treatment. Article 76 GC IV provides a rudimentary list of norms in regard of the treatment of criminal detainees in occupied territory and stipulates that they shall:

- be detained in the occupied territory, and if convicted they shall serve their sentences therein;

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<sup>1977</sup> Pictet (1958a), 222.

<sup>1978</sup> Article 75(3) AP I.

<sup>1979</sup> Article 75(6) AP I.

<sup>1980</sup> Article 75(8) AP I.

<sup>1981</sup> ICRC (2005a), Rules 87-98.

<sup>1982</sup> On the prohibition of inhumane treatment, see for example Article 76 Lieber Code, Article 76; Article 23(3), 1874 Brussels Declaration; Article 63, Oxford Manual; Article 4(2), 1907 HVR.

<sup>1983</sup> See for example Article 6(b) IMT Charter (Nuremberg).



- if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country;
- receive the medical attention required by their state of health;
- have the right to receive any spiritual assistance which they may require;
- be confined in separate quarters and shall be under the direct supervision of women;
- be paid to the special treatment due to minors;
- have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143 and
- have the right to receive at least one relief parcel monthly.

The list of material conditions to be provided to interned persons is far more extensive and concerns an entire section (Section IV) of GC IV (i.e. Articles 79-135). These rules are quite similar to those pertaining to POWs, although they do take account of the civilian character of the internees.<sup>1984</sup> Following the headings of the chapters, requirements for authorized deprivation of liberty pertain to a wide range of subjects, to include the places of internment; food and clothing; hygiene and medical attention; religious, intellectual and physical activities; personal property and financial resources; administration and discipline; relations with the exterior; penal and disciplinary sanctions; transfer of internees; deaths; and release, repatriation and accommodation in neutral countries.

In addition to these treaty-based rules, the material conditions of treatment have also been secured in customary law and can be found in chapter 37 of the CLS.

#### 1.4.2. Requirements Pertaining to the Transfer of Protected Persons

The transfer of protected persons (in general) is subject to the norms set out in Article 45 GC IV. It permits the transfer of protected persons, also for reasons of extradition for offences against ordinary criminal law, in pursuance of extradition treaties concluded before the outbreak of hostilities, to another, accepting State, provided that (1) the accepting State is a party to GC IV; (2) “the Detaining Power has satisfied itself of the willingness and ability of such transferee Power [accepting State] to apply the present Convention;” (3) the transferring State has satisfied itself that the protected person has no reason “to fear persecution for his or her political opinions or religious beliefs” in the accepting State.

Once accepted, the accepting State assumes responsibility for the protected person. This does not imply that the transferring State is availed of all obligations under the GC IV vis-à-vis the transferred protected person, for if the accepting State “fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.”

Article 49 GC IV, more specific to situations of belligerent occupation, forbids the forcible transfer or deportation, on whatever grounds, of protected persons from the occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not. However, if the security of the population or imperative military reasons so demand, the Occupying Power is permitted to evacuate, in total or partially, a given area, provided that such evacuation does not take the protected persons outside the boundaries of the occupied territory, unless this is, for material reasons, unavoidable. Nevertheless, imme-

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<sup>1984</sup> Gasser (2008), 320.

diately after the cessation of the hostilities in the evacuated area, the protected persons are to be transferred back to their homes.

Additional to Articles 45 and 49 GC IV, Articles 127 and 128 GC IV specifically concern the conditions and method of transfer of *internees*. Thus, the Occupying Power is, *inter alia*, under an obligation to take into account the interests of the internees when deciding upon transfer, and to treat internees transferred humanely, and to supply them with drinking water and food “in quantity, quality and variety to maintain them in good health,” as well as with the necessary clothing, shelter and medical attention. Also, it must take precautionary measures to ensure the safety of the internees, both prior and during their transfer. In addition, the Occupying Power must notify the internee of his departure, and new postal address, so they can collect their belongings and inform their next of kin.

## 2. Normative Substance of the Valid Normative Framework Relative to Operational Detention in the Context of NIAC

### 2.1. The Principle of Distinction

#### 2.1.1. Regime Admissibility

The law of NIAC does not expressly stipulate who may be deprived of their liberty and on what basis. While drafting CA 3, States preferred to regulate the consequences of direct participation in the hostilities in internal armed conflicts not at the horizontal State-to-State level, but rather through their *domestic* laws, at the vertical State-to-individual level, in their own fashion.<sup>1985</sup>

As a result, the law of NIAC does recognize a status-based categorization between combatants *de iure* and civilians, as found in GC III and GC IV.<sup>1986</sup>

The only concession that States were willing to make was to adopt rules and provisions solely concerned with the guarantees of fair trial and treatment afforded in the case *that* individuals are deprived of their liberty. In doing so, CA 3 addresses one generic group of individuals: “persons taking no active part in the hostilities.” While it specifically mentions, as part of the generic group, “members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause,” CA 3 “naturally applies first and foremost to civilians.”<sup>1987</sup> Similarly, the scope *ratione personae* of AP II

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<sup>1985</sup> For a summary of the State arguments opposing the idea of such extension, see Pictet (1958a), 31 ff.

<sup>1986</sup> The principal objection is that, in the context of NIAC, affording combatant-status to civilians would undermine the system underlying the principle of distinction. An essential purpose of the combatant-status is to authorize the participation in hostilities and to render lawful the performance of belligerent acts otherwise unlawful in times of peace, provided they are carried out in accordance with LOAC. This combatant privilege and immunity also ensures that combat is waged between combatants (and their military objects), and not against those protected from the consequences of hostilities. The absence of combatant-privilege and immunity with civilians functions as a logical barrier against direct attack, as they are not supposed to pose a threat to those who are privileged to fight, i.e. combatants. Gill & Van Sliedregt (2005), 32. Other objections are that extending the combatant-status to internal armed conflicts would give insurgents the status of belligerents, and a degree of legal recognition; imply a risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming combatant immunity; introduce a legal basis to ask for the assistance and intervention of a Protecting Power; and force a State to release captured rebels, now POWs, at the end of the hostilities, whereas they have also violated domestic penal laws. See also Pictet (1958a), 31.

<sup>1987</sup> Pictet (1958a), 40.

extends to “*all* persons affected by an armed conflict as defined in Article 1 [i.e. AP II-type NIAC]” on a non-discriminatory basis.<sup>1988</sup> Thus, CA 3 and AP II both accommodate captured or arrested insurgents, whether they are peaceful civilians, civilians captured while directly participating in the hostilities, or CCF-members of the armed forces of the insurgency movement.

### 2.1.2. Legal Bases

The above also explains why CA 3 and AP II remain silent on the exact thresholds informative of whether operational detention – be it for criminal or security reasons – may actually take place. Nonetheless, both CA 3 and AP II undoubtedly *contemplate* the deprivation of liberty.<sup>1989</sup>

This can, *firstly*, be concluded from the relevant texts. The authority for *criminal detention* follows from the mere use of the word “detention” in CA 3. In fact, the ICRC Commentary to CA 3 emphasizes that CA 3 “does not protect an insurgent who falls into the hands of the opposing side from prosecution in accordance with the law, even if he has committed no crime except that of carrying arms and fighting loyally.” Article 5 AP II, relates to persons *interned or detained* for reasons related to the armed conflict, to include criminal detention.<sup>1990</sup> In turn, Article 6 AP II is more specific to criminal detention, as it explicitly “applies to the prosecution and punishment of criminal offences related to the armed conflict.”<sup>1991</sup>

As for *security detention*, additional to the more generic references to internment and detention in CA 3 and AP II, Kleffner explains that security detention

[...] logically follows from the fact that members of the armed forces may be directly attacked and that civilians directly participating in hostilities lose their protection from direct attack. Since such direct attacks allow for the use of potentially deadly force, the lesser means of putting such person *hors de combat* by detention is equally lawful.<sup>1992</sup>

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<sup>1988</sup> Article 2 AP II.

<sup>1989</sup> Olson (2009), 440.

<sup>1990</sup> According to the ICRC Commentary, the phrase “for reasons related to the armed conflict” in Article 5 AP II includes both law enforcement detainees and security detainees (in so far the latter are not prosecuted under penal law). See Sandoz, Swinarski & Zimmerman (1987), 1386, § 4568.

<sup>1991</sup> The ICRC Commentary explains: “[...], there must be a link between the situation of conflict and the deprivation of liberty; consequently prisoners held under normal rules of criminal law are not covered by this provision.” Sandoz, Swinarski & Zimmerman (1987), § 4568.

<sup>1992</sup> Kleffner (2010c), 471. See also ICRC & Chatham House (2008), 3-4: “There was prevailing agreement that any party to a NIAC has an inherent power or “qualified right” to intern persons captured.” While reaching the same result, Goodman argues that “[...], IHL in international armed conflict – and the Fourth Geneva Convention in particular – is directly relevant because it establishes an outer boundary of permissive action. States have accepted more exacting obligations under IHL in international than in noninternational armed conflicts. That is, IHL is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if states have authority to engage in particular practices in an international armed conflict [...], they *a fortiori* possess the authority to undertake those practices in noninternational armed conflict. *Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict.* Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain. [...] *Interpretations of IHL that contravene [this general postulate] should be considered suspect or implausible.*” See Goodman (2009), 50, 57 (emphasis added).

### 2.1.3. The Resulting Authoritative and Prohibited Personal Scopes of Operational Detention

In sum, it follows from the above that the *authoritative* personal scope of operational detention under the law of NIAC consists of those insurgents prosecuted for crimes for reasons related to the armed conflict, as well as insurgents detained for reasons of security.

In turn, the *prohibitive* personal scope of deprivation of liberty under the law of NIAC consists of all individuals whose deprivation of liberty is not demanded for criminal purposes or security reasons.

## 2.2. Normative Substance of Authorized Operational Detention

The next issue is: in view of the authoritative scope of operational detention, what is the normative substance of the requirements that can be distilled from the normative framework under the law of NIAC governing operational detention. As previously noted, in both qualitative and quantitative terms, the treaty-based law of NIAC is very limited. Three categories of requirements can be identified.

A *first* category of requirements concerns the fair trial guarantees to be afforded to criminal detainees. As previously noted in Chapter V, the law of NIAC provides a rather comprehensive set of treaty-based and customary norms on fair trial guarantees. In terms of normative substance, these guarantees do not differ from those protected under IHRL, and in that sense, fully converge.

A *second* category concerns requirements specific to procedural safeguards in security detention. As concluded, the treaty-based NIAC does not provide any norms on security detention, but customary law imposes two obligations: (1) the “obligation to inform a person who is arrested of the reasons for arrest;” and (2) an “obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention” (*habeas corpus*).

In terms of normative substance, these requirements do not differ from those protected under IHRL. However, as we have seen, the law of IAC contains similar requirements, and these somewhat differ from those under IHRL, to the extent that they are more sensitive to the specific environment of armed conflict in which they need to be applied. Given the context of armed conflict, it would logically follow that these customary-based requirements follow the line adopted in the law of IAC. As regards the simultaneous applicability of both IHRL and LOAC, here a potential area of norm conflict is identified that deserves further examination in Chapter X.

Since the law of IAC contains a more comprehensive body of procedural safeguards, another issue that arises is whether this gap can be filled by IHRL. This, too, is an issue of interplay.

A *third* category of requirements concerns the treatment of criminal and security detainees. In sum, the law of NIAC provides norms that aim to protect the human dignity of detainees and imposes obligations in respect of the material conditions of treatment. In terms of normative substance, these norms converge with those found in the law of IAC and customary law. Here too, to a large degree, these conditions converge with similar conditions imposed under IHRL.

### 3. Observations

In the present chapter we examined the normative substance of the valid norms pertaining to operational detention in the law of IAC and the law of NIAC, with a view to the permissible scope for criminal and security detention.

Overall, both the law of IAC and NIAC contemplate the continued applicability of and necessity for criminal detention, notwithstanding the fact that it may be imposed in the context of an armed conflict. At the same time, it must be noted that the valid norms pertaining to criminal detention found in the law of IAC are largely embedded in the law of belligerent occupation, which indicates that even though these norms apply in armed conflict, they can only be effectively complied with when a certain degree of effective control over territory is exercised that permits the judiciary to function in a fashion to enable it to speak justice in conformity with the normative substance of these norms. Here, LOAC demonstrates its ability to differentiate between the different levels of control that may occur in an area of armed conflict, and thus demonstrating its flexibility to allow the rule of law to do its job and to punish individuals for their criminal conduct.

Nonetheless, LOAC shows that it is prepared to deal with threats to the security that commonly arise in situations of armed conflict – by permitting fighters or civilians to be detained on a preventive basis. This is most strongly and detailed regulated in the law of IAC. The most lenient framework is provided in GC III, which permits the internment of those qualifying as POWs for the duration of the conflict without periodic reviews, yet this body of law does not apply, as previously concluded, to insurgents as understood in the present study. However, commanders or other administrative authorities still are afforded a considerable degree of latitude in GC IV to determine whether an individual poses an imperative threat to the security thus necessitating their security detention. At the same time, this measure is to be considered an exceptional measure and for that reason is subjected to a range of substantive and procedural requirements that demonstrate considerable, but not necessarily complete, overlap with IHRL-norms.

In terms of permissibility as well as clarity of the applicable norms, the law of IAC is most convenient, yet the applicability of this body of law to operational detentions in counterinsurgency operations is arguably very limited as some situational contexts of counterinsurgency clearly constitute NIACs (NATCOIN, SUPPCOIN and consensual TRANSCOIN), whereas others (OCCUPCOIN and non-consensual TRANSCOIN) are only exceptionally regulated by the law of IAC, unless one adheres to the view that this is always the case. In any case, the density and clarity of norms governing security detention in the law of IAC functions as an argument to bolster the argument that in these situations the law of IAC applies. This is not to say that all problems are solved, for the valid norms on security detention in the law of IAC differ in some respects from similar valid norms under IHRL, thus triggering the question of their interplay – the outcome of which may impact the lawfulness of this type of detention.

Far more problematic is the situation in the law of NIAC, in view of the absence of valid norms governing security detention. The law of NIAC does not recognize a category of POWs that, similar to GC III, may be interned until the end of the conflict without a periodic review of the reasons for their internment. Neither does it offer a framework such as provided in GC IV and Article 75 AP I. Nonetheless, there appears to be agreement that security detention under the law of NIAC is not prohibited – to the contrary: it is already contemplated in some parts of the treaty law. Thus, the question of permissibility is not likely to arise in the area of legal basis. Most concern is directed at the issue of whether, and

if so, what procedural safeguards are to be afforded. Here, the question of gap-filling arises. As concluded previously, CA 3 encourages parties to the conflict to agree upon the application of the law of IAC, the immediate downside of which is of course that is consent-reliant. Also, GC III and/or GC IV maybe applied as a matter of policy, yet this is non-binding and thus lacks the strength of certainty that is so much needed. It is here that IHRL may fill the gap. After all, this is expressly foreseen in CA 3 and AP II. It is to the appreciation of the interplay that we will now turn.