



ON THE ISSUE OF THE TREATMENT OF DETAINEES IN NON-INTERNATIONAL ARMED CONFLICTS

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ABSTRACT

The article examines two terms “detention” and “detainees” and subsequently concentrates on the issues of the treatment of the detainees during non-international armed conflicts. Since combatant status and prisoner-of-war status of belligerents play a huge role in application of sources of international law, the article analyzes whether the aforementioned statuses exist in non-international conflicts. Ultimately, fundamental guarantees endowed by international law to the detainees of non-international conflicts are scrutinized.

I. Introduction

According to the Glossary provided by the International Committee of the Red Cross, detainees are described as ones who were subject to custodial deprivation of liberty.¹ International humanitarian law (IHL), also referred as the laws of armed conflict, represents a set of legal rules regulating the conduct of war (*jus in bello*), particularly responsibilities of states and non-state armed groups during an armed conflict.² Accordingly, IHL is the law which regulates detention during armed conflicts. The 1949 Geneva Conventions form the cornerstone of contemporary International Humanitarian Law. While there are detailed rules, concerning detention, which can be found in Geneva Convention III (devoted to the treatment of prisoners-of-war), Geneva Convention IV (relative to the protection of civilian persons) as well as in Additional Protocol I (including rules for detainees who do not benefit from protected person status), almost all of them apply in cases of international armed conflicts. There are no exact norms which would regulate grounds and procedures for detention in non-international armed conflicts. There are in total 175 provisions enshrined in four Geneva Conventions which establish rules related to detention. However, almost none of these IHL treaty law rules are applicable in NIAC. As a result, it is necessary for states to rely on customary international humanitarian law, international human rights law and provisions

¹ ICRC Glossary, Detainees, available at <https://casebook.icrc.org/glossary/detainees>

² ICRC Advisory Service on International Humanitarian Law, “What is International Humanitarian Law?”, available at https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf



which are reflective of customary international law while detaining persons in an armed conflict.

II. Difference between International and Non-International Armed Conflicts

Before analyzing and outlining rights and protections of detainees in NIAC, it is necessary to make the distinction between IAC and NIAC.

In the *Tadic case*, the International Criminal Tribunal for the former Yugoslavia (ICTY) provided a general definition of IAC stipulating that international armed conflicts are those in which one or more States resort to the use of armed force against another State or States.³

Common Article 2 to the Geneva Conventions of 1949 holds that:

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".

Apart from regular, inter-state armed conflicts, Additional Protocol I extends the definition of IAC to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).⁴

Common Article 3, being one of the primary sources as to the definition of NIAC under international humanitarian law, applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". Armed conflicts in which one or more non-governmental armed groups are involved have been included to NIAC. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. Since the four Geneva Conventions have globally been ratified now, the requirement that the armed conflict must occur "in the territory of one of the High Contracting Parties" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.⁵

It has been held in *The Prosecutor v. Dusko Tadic* that there are two requirements for an armed conflict to arise to NIAC: (1) there must be hostilities that rise to a minimum level of intensity, e.g., a level where the government is obliged to use military force against the insurgents instead of mere police forces; and (2) the non-State groups involved must possess

³ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70. See also International Humanitarian Law - Handbook for Parliamentarians № 25, Inter-Parliamentary Union (IPU) and International Committee of the Red Cross (ICRC) 2016

⁴ Additional Protocol I, art. 1, para. 4: "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

⁵ ICRC, Opinion paper, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?", March 2008



sufficiently organized armed forces, e.g., they must be under a certain command structure and have the capacity to sustain military operations.⁶

III. Combatant and prisoner-of-war (POW) status

According to Rule 1 of Customary International Humanitarian Law, persons who take a direct part in hostilities in non-international armed conflicts are sometimes labelled “combatants”. For instance, in a resolution on respect for human rights in armed conflict adopted in 1970, the UN General Assembly speaks of “combatants in all armed conflicts”.⁷ Moreover, the term “combatant” was also used in the Cairo Declaration and Cairo Plan of Action for both types of conflicts.⁸ This designation implies that these persons (fighters) do not enjoy the protection against attack. However, this does not mean that they have a right to *combatant status* or *prisoner-of-war status*, as applicable in international armed conflicts. Combatant status, on the other hand, exists only in international armed conflicts. Accordingly, for a belligerent to be afforded POW status under the Third Geneva Convention, they have to have a “combatant” status. Thus, it can be concluded that combatant status and POW status do not exist in NIAC. However, this does not indicate that in case the fighters in NIAC are detained, they do not enjoy any international protection. International human rights law and customary international law grant NIAC detainees protections similar to those contained in Third Geneva Convention and related to POW status.

IV. Treatment of NIAC detainees under international law

Common Article 3 in Geneva Conventions is a standard of treatment of NIAC detainees. Furthermore, Article 45(3) of Additional Protocol I, which is reflective of customary international law, provides NIAC belligerents with freedom from discrimination, murder, torture, and other forms of violence.

Article 7 of the International Covenant on Civil and Political Rights grants every person a right to freedom from inhuman or degrading treatment or punishment. Regarding international humanitarian law, state practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The Charter of the International Military Tribunal at Nuremberg included “ill-treatment” of civilians and prisoners of war as a war crime.⁹ Common Article 3 of the Geneva Conventions prohibits “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment” of civilians and persons hors de combat.¹⁰ Torture and cruel treatment are also prohibited by specific provisions of the four Geneva Conventions.¹¹

⁶ ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997, para. 561-568; see also ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 84.

⁷ UN General Assembly, Res. 2676 (XXV), 9 December 1970, preamble and § 5.

⁸ Cairo Declaration, Sections 68–69, and Cairo Plan of Action, Section 82, both adopted at the Africa-Europe Summit held under the Aegis of the Organization of African Unity and the European Union, 3–4 April 2000

⁹ IMT Charter (Nuremberg), Article 6(b)

¹⁰ Geneva Conventions, common Article 3

¹¹ First Geneva Convention, Article 12, second paragraph (“torture”); Second Geneva Convention, Article 12, second paragraph (“torture”); Third Geneva Convention, Article 17, fourth paragraph (“physical or mental torture”), Article 87, third paragraph (“torture or cruelty”) and Article 89 (“inhuman, brutal or dangerous” disciplinary punishment); Fourth Geneva Convention, Article 32 (“torture” and “other measures of brutality”)



In addition, the obligation to treat detainees humanely was already recognized in the Lieber Code, the Brussels Declaration and the Oxford Manual and was codified in The Hague Regulations¹² and it also constitutes a norm of customary international law.

Corporal punishment is prohibited under customary international law and human rights law. It constitutes a war crime in non-international armed conflicts under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.¹³ International human rights treaties do not contain explicit prohibition of corporal punishment. Nevertheless, human rights case-law has held that corporal punishment is prohibited when it amounts to inhuman or degrading treatment or punishment.¹⁴ In its General Comment on Article 7 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that the prohibition of torture and cruel, inhuman or degrading treatment or punishment “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”.¹⁵ No derogation is permitted to the prohibition of inhuman and degrading treatment under human rights law.

V. Conclusion

International humanitarian law applies in situations of armed conflict by offering two systems of protection: one for international armed conflict and another for non-international armed conflict. Although both of the types of armed conflicts propose their own distinct conditions of existence, they do not leave detained persons without protection. Rights and freedoms in each of the cases may differ, but the basic human rights are still respected and protected. Even though NIAC rules does not involve POW status, which would a combatant immunity and a right to repatriation under Additional Protocol I, they are still centered on life, health and dignity of detainees.

¹² Lieber Code, Article 76; Brussels Declaration, Article 23, third paragraph; Oxford Manual, Article 63; Hague Regulations, Article 4, second paragraph

¹³ ICTR Statute, Article 4(a); Statute of the Special Court for Sierra Leone, Article 3(1)(a)

¹⁴ See, e.g., European Court of Human Rights, Tyrer case and A. v. UK case

¹⁵ UN Human Rights Committee, General Comment No. 20 (Article 7 of the International Covenant on Civil and Political Rights)