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The internment of protected persons and the Fourth Geneva Convention

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The Fourth Geneva Convention, adopted 75 years ago, was the first humanitarian law convention dedicated to humanitarian protections for civilians during armed conflict. Amongst its numerous protective rules, it provides the main rules of international humanitarian law (IHL) governing the exceptional practice of internment of protected persons – i.e. the detention of such persons for security reasons during international armed conflict.

In this post, and in the lead up to the 75th anniversary of the Geneva Conventions later this year, ICRC Legal Adviser Mikhail Orkin introduces a new series on how the rules governing the grounds and procedures for the internment of protected persons – the primary source for which is the Fourth Convention – have been interpreted, presenting a range of questions and challenges that states have faced in implementing these rules.

***Editor's note:** The forthcoming update of the Commentary on the Fourth Geneva Convention – an ICRC project seeking to provide current interpretations of the Conventions to enhance their understanding, dissemination and faithful application in today's armed conflicts – will consider and address the rules explored in this*

blog series.

In times of armed conflict, the plight of populations caught up in hostilities is always a pressing concern. Some face direct violence, injury and death, some experience displacement, destruction of their homes and local infrastructure, the loss of livelihoods and social networks, while others struggle with widespread food and medical shortages. In addition to these challenges during wartime, people caught in the midst of hostilities can also face the threat of being deprived of their liberty.

The mass detention of populations became increasingly prevalent in the years preceding the adoption of the Fourth Geneva Convention. The internment*[1]* regime decided upon by the drafters of the Fourth Convention specifically set out to put a stop to the devastating and widespread incidents of detention observed during the Second World War and to strictly regulate this practice. In the decades since the drafting of the Fourth Convention, detention *remains an ever present reality in armed conflict*. The potential for arbitrary internment and abuse of this measure remains constant, and international armed conflicts (a type of conflict *which is between states*) continue to rage. The rules found in the Fourth Geneva Convention governing internment in these types of conflicts, therefore, remain relevant.

This post is the first of a new series that delves into the grounds and procedures for internment contained in the Fourth Geneva Convention and which apply during international armed conflict, examining examples of state practice, legal frameworks, and the enduring challenges faced by states implementing these rules. The forthcoming update of the Commentary on the Fourth Geneva Convention – an *ICRC project* seeking to provide current interpretations of the Conventions to enhance their understanding, dissemination and faithful application in today's armed conflicts – will consider and address the rules explored in this series.

Internment in international armed conflict

The Geneva Conventions establish a system of protection based on a distinction between *combatants (a category which includes, first and foremost, members of the armed forces of the adversary) and civilians*. The first three Geneva Conventions mainly protect wounded, sick and shipwrecked combatants, and also those who are captured and become prisoners of war. The Fourth Convention, by contrast, protects *all persons who do not come under the protection of the first three Conventions*. The Fourth Geneva Convention protects civilians, including persons such as spies, saboteurs, most personnel of private military and security companies and fighters who do not meet the criteria for protection under the first three Geneva Conventions.

During an international armed conflict*[2]*, IHL permits the internment of two categories of persons: (i) prisoners of war and (ii) civilians, for imperative security reasons.

Prisoners of war: an inherent threat

As noted, the *category of prisoners of war* includes combatants who are captured by the adversary. In line with the principle of *military necessity*, IHL permits the internment of this category of persons, since *internment of the combat forces of the adversary* prevents them from returning to the battlefield. While allowing for the internment of prisoners of war, IHL also contains numerous rules which: protect the honour and dignity of such persons while they are interned; ensure they are not treated as having committed a crime by merely participating in hostilities; and require their release by the latest at the end of active hostilities. The rules protecting prisoners of war can be found principally in the *Third Geneva Convention of 1949*.

Civilians: internment only as an exception

The internment of persons who do not qualify for POW status but who nevertheless pose a security threat is regulated by GC IV. In contrast to prisoners of war, IHL permits the internment of protected persons (see definition in *Article 4* of the Fourth Convention) only in exceptional circumstances. This is because there is no inherent military necessity to intern protected persons – they are not combatants and so there is no inherent need to intern them to prevent their return to the battlefield. Internment of protected persons is therefore only allowed on an exceptional basis and where, in their particular circumstances, an individual civilian poses a threat which gives rise to the necessity to intern them (examined further below).

As with prisoners of war, IHL rigorously safeguards protected persons, including while they are detained, and it contains specialized rules to protect such persons when they are interned. Part III, Section IV of the Fourth Convention is entirely devoted to the treatment and conditions of detention of internees, with detailed rules governing matters such as medical treatment, family contact, accommodation and hygiene, food and clothing.

The most severe security measures

Article 27 of the Fourth Convention outlines the rights of protected persons at all times and in all circumstances. Subject to this requirement, the fourth paragraph of Article 27 allows for states to take measures against protected persons for security reasons (in the wording of the treaty, 'measures of control and security'). The Convention does not contain a list of permissible security measures, but they have been understood to cover a range of measures, including requirements to register and report to the police authorities, to carry identification papers or to refrain from carrying arms, among others.

Even though the Fourth Convention contains no list of measures of control and security, it states that internment and assigned residence are the 'most severe' measures of control and security and that a state may resort to these measures only if other measures of control are inadequate (see *Article 41* of the Fourth Convention; *Article 78* similarly indicates that the Occupying Power may resort to internment or assigned residence 'at the most').

Grounds for internment of civilians

Civilians may only be interned if certain grounds are satisfied. In a state's own territory, it may place a protected person in internment 'only if the security of the Detaining Power makes it absolutely necessary'(*Article 42* of the Fourth Convention). In occupied territory, the Convention states that the Occupying Power may place a protected person in internment if it 'considers it necessary for imperative reasons of security' (*Article 78* of the Fourth Convention). Despite the difference in wording, both standards share key elements. For both standards, the protected person in question must pose a threat to the security of the Detaining Power or Occupying Power, and the threat must make the internment or assigned residence of that individual necessary (as we have seen in the section immediately above, the measures must also be necessary insofar as the threat cannot be mitigated by other less severe measures).

A Party to the conflict may also have an urgent need to deprive persons of liberty in very large numbers, prior to individual determinations taking place regarding the persons concerned. With this latter consideration in mind, a proposal to include in Article 42 a requirement that the initial determination be made individually was rejected.*[3]* Even though this language was rejected, the Convention has been interpreted to require the measures of internment and assigned residence to be taken on an individual and case-by-case basis.*[4]* The ICRC endorses this view. Where a state interns a number of protected persons at once, this means that they must ultimately establish the grounds for internment (an imperative security need or absolute necessity to intern) with regards to each person to be interned.

The drafters of the Fourth Convention *did not define or list* in the Fourth Convention what security needs would justify internment, and so states are left with discretion in deciding when the measure is absolutely necessary or is an imperative security need. Even so, the discretion of states in this regard is not unfettered. States in their military manuals, judicial forums (both international and domestic) and scholars have given attention to the scope of this discretion. As follows from the wording of the Convention, a state may only intern if the need to do so is 'absolute' or 'imperative' – which sets a high standard. To quote the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), this standard demands that a state may only intern a civilian if it has '*serious and legitimate* reasons to think that they may seriously prejudice its security by means of such acts as sabotage or espionage' (emphasis in the original; see Judgment, *The Prosecutor v. Zejnil Delalic and Others, IT-96-21-T, para. 578*).

The grounds for civilian internment reflect the fact that civilian internment is exceptional. It is clear that the grounds for internment set forth in Articles 42 and 78 are based on security needs and they do not allow for internment as a measure of punishment, intimidation or to exert political pressure on the adversary. The taking of hostages is *prohibited*. The abuse of this measure and its application not in accordance with the grounds and procedures provided for in the treaty may amount to a grave breach of the Convention. The grave breach applicable to these circumstances would be *unlawful confinement*.

Procedures of review of civilian internment

Whereas prisoners of war may be interned for the duration of an armed conflict (subject to certain exceptions, notably for seriously wounded or sick prisoners), civilians may only be interned so long as the grounds for such internment exist. As provided for in *Article 132* of the Fourth Convention, each interned person 'shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist'.

Where a state has decided to intern a protected person, the Convention requires that state review the validity of this decision, and periodically assess that the internment is still justified. In a state's own territory, the Convention requires that internment review be carried out by an 'appropriate court or administrative board', whereas in occupied territory, the Convention makes reference to a 'regular procedure' before a 'competent body'. In both the state's own territory, and occupied territory, what is essentially required is an initial expeditious reconsideration of the decision to intern, followed by periodic review on a six-monthly basis.

The Fourth Convention does not elaborate upon the characteristics of the court or administrative board which will review internment. It is clear though that to facilitate review of such weighty security decisions, the relevant body must be independent and impartial (as noted in the *1958 ICRC Commentary* when pointing out that special care should be taken to ensure independence and impartiality of administrative boards). The Fourth Convention also does not elaborate upon what procedures should govern internment review proceedings. Although IHL contains detailed procedural rules to ensure a fair trial in penal proceedings, the internment review at hand is not a penal proceeding.

ICRC procedural principles and safeguards for internment

The ICRC has proposed institutional guidelines entitled 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (the 'Guidelines', see *here*, and *here*). The Guidelines are based on law and policy and are meant to be implemented in a manner that takes into account the specific circumstances at hand. The Guidelines are relied upon by the ICRC in its operational dialogue with states, international and regional forces, and other actors.

For the present purposes, it is worth noting that the Guidelines rely on 'imperative security reasons' as the minimum legal standard that should inform internment decisions in all situations of violence including non-international armed conflicts (the Guidelines *do not* cover internment of Prisoners of War). The Guidelines also include specific procedures to be followed with regards to internment decisions and review. In general, it can be said that the recommended procedures seek to facilitate an effective challenge by the internee of the reasons for their internment, by insisting on matters such as prompt notification of the reasons of internment, assistance by legal counsel, access to information on the nature of the proceedings in a language understood by the internee, amongst other rules.

Questions for the forthcoming series

In this forthcoming series, our contributors will explore selected questions of practical relevance in applying the grounds and procedures for civilian internment in the Fourth Convention in international armed conflict. These questions include, for example, how the decision to intern should be taken in

situations where multiple civilian persons are interned at once and quickly? How can this decision be taken in such urgent circumstances on an individual and case-by-case basis? Relatedly, what happens if no determination is made as to the status of a detainee and a civilian is held in the absence of an initial decision to detain them. Specifically, what are the implications for internment regulation in such a case?

We will also tackle a practical perspective on internment review, examining questions such as: which characteristics are necessary to ensure that a body reviewing internment be independent and impartial?

The pronouncements of international tribunals such as the ICTY have given useful guidance on how to interpret the grounds and procedures for internment in the Fourth Convention. The series will include a post taking a further look at these instructive pronouncements. In addition to these questions, contributions will focus on other contexts, such as practical examples of internment by multinational forces in non-international armed conflicts in Africa.

We hope that this series will generate discussion and contribute to the understanding of how IHL governing grounds and procedures for civilian internment are implemented in practice. We also invite you to continue the discussion started here by sharing your comments, or by writing a post of your own.

[1] "Internment" is here used to meant the non-criminal detention of a person based on the serious threat that they pose to the security of the detaining authority in relation to an armed conflict. This is a definition used by the ICRC, for example *here*. Internment is known by other names, such as "administrative detention", "security detention" and "preventive detention", among others.)

[2] IHL applicable in non-international armed conflicts (NIAC) contains protections for all persons detained and more specifically for internees. However, there are far fewer such provisions than exist in IHL applicable in international armed conflict. Importantly for the present purposes, IHL treaty law in NIAC is silent on the grounds and procedures for internment in non-international armed conflict. The paucity of regulation of detention and internment in NIAC has been a protection concern for the ICRC which launched an initiative to strengthen IHL in this area. Internment in NIAC, its grounds and procedures and questions surrounding its regulation have been the subject of much debate and have also been the focus of other state-led initiatives.

[3] Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 256, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, p. 126; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 756.

[4] See, e.g., the ICTY, *Delalić Trial Judgment*, para. 578. The individual case-by-case basis of orders is also reflected in certain military manuals, for example, Denmark, Military Manual, 2016, para. 5.2.1.1; Belgium, Military Manual, 2009, p. 22 and Norway, Military Manual, 2013, Rule 6.88.

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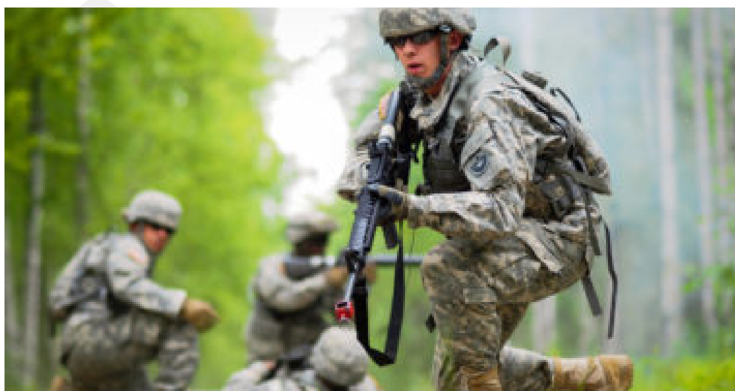

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