

RETHINKING EXISTING DETENTION LAWS AND POLICIES IN NON INTERNATIONAL ARMED CONFLICTS UNDER INTERNATIONAL HUMANITARIAN LAW¹

Abstract

The recent events in humanitarian law have prompted an examination of the legal regimes arising from the international armed and international non armed groups in conflicts against state actors. During the 21st century and contemporary international humanitarian law, it remains uncertain the role of the international human rights in detention during armed conflicts or terrorism. Despite the continued rejection by international community and state party that detention practices has increased by both militants and civilians in non armed conflict which is caused by migration of civilians outside the non conflict zones. It analyses the legal regime for the detention of individuals in non international armed conflicts (NIACs) between state and non- state actors in armed group. Thus, there exist legal regime ranges for the prolonged confinement of individuals in cases of armed conflict and non armed group. It provides an overview of the historical development and recent detention of individuals as an abuse of humanitarian law while finding the gap between human rights violation to rights of states and non-state actors to detain in NIACs. It argues that there should be a transitional justice in detention of individuals in NIACs caused by terrorism using habeas corpus legal system.

Keywords: *International Humanitarian Law, International Human Rights Law, NIACs, Detention and Transitional Justice.*

1. Introduction:

Since the end of World War II, there has been a tremendous growth and globalisation of peace and warfare among international actors in promoting the situation of armed conflicts, which has increased the practice of enforcing detention. Genocide, war crimes, terrorism and crimes against humanity in the contemporary world, the Africa Continent in particular, are often viewed as autonomous and self sustained categories of crime that are always associated with armed conflicts. Numerous killings, deportations, detention and the migration of refugees due to gross violation of human rights against civilians are distinct examples of the connection and overlap between terrorism and crimes against humanity. The regulation of international armed conflicts (IACs) and non armed conflicts within the globe is the concern of Public International Law. However, there are issues posed by the non international armed conflicts (NIACs) or group of violence which represents armed conflicts in the world order. This gives rise to many forms of killings and crimes which suffers from lack of regulations. This also affects the security of both the civilian and military population during armed conflicts. In the light of this, international humanitarian law (IHL) is concerned in providing protection and assistance to the victims during armed conflicts which resulted to the detention of militants and civilian suspected in the act of terrorism.

Presently, there are increases in the detention of suspects and those cut in the act of waging war or conflicts against the law of armed conflicts that are largely ratified by State actors. This is the role of IHL by outlining the nature and legal regime of detention in international non armed conflicts. The legal framework and status of detainees has been the concern of IHL in providing the laws and policies that governs humanitarian law, without violating the rights of the individuals in armed conflicts.

¹* **Leonard C. OPARA, LLB (Lagos), BL, LLM (Ile-Ife), LLD Candidate**, Public Law, Nelson Mandela University, Port Elizabeth, South Camp, Eastern Cape, South Africa. Email: s218189923@mandela.ac.za, +27812175467.chinardslaw@gmail.com., and

* **O. O. OGUNDARE**, Lecturer, Department of Public Law, Faculty of Law, Nigeria Police Academy, Wudil, Kano. Tel: +23408038971981.

There are two types of armed conflict under IHL. The International Armed Conflict and Non International Armed Conflict: The IACs are those conflicts between two or more states². NIACs are conflicts that exist between a state and an armed group or between two states with more armed group.³

From the humanitarian perspective, any person involved or affected by war or terrorism or armed conflict deserves protection and assistance. But from the legal point of view, if any person found guilty of war crime shall be governed by the rule of law - for the detention of those individuals 'give rise to a great concern. They oblige us to discuss the very innovative interpretation of the 'laws of armed conflict', which is also called 'international humanitarian law'.

Furthermore, Article 1, Para 4 Additional Protocol I(1977) which states that ' an international armed conflict includes situations in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self determination...'. That this is the fact that did not amount to conferring any legitimacy on the liberation movements and that its objective was to impose a unilateral burden on the liberation movements was evident from the two caveats added to the provision. The application of humanitarian protection and assistance may not be made subject to reciprocity and insurgents are not 'exempt from criminal prosecution under the domestic law of the state.' Thus, captured or defeated fighters were not be given legal status of prisoners of war but to be considered as common criminals.

2. What is Detention?

Detention is the unlawful keeping of a person or an individual against his or her consent without a court pronouncement that such person should be detained. Most people detained are vulnerable people who are subject to torture, physical and mental abuse as well as rape. The term 'detention' may be referred to mean 'the deprivation of liberty of a person for reasons related to an armed conflict.'⁴ Detention in armed conflict is the outcome of war which allows the actors to safeguard or detain the life an enemy who is a threat while achieving military actions under the laws of war. However, a state can detain an individual under NIACs who pose a security threat without observing the legal system. According to United Nations-sponsored *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* defines a 'detained person' as 'any person deprived of personal liberty except as a result of conviction for an offence' and 'detention' as the condition of such a person⁵. Thus, there is a distinction between mere restriction of

²Article 2, Geneva 4 Convention of 1949; Article 2 provides that the Convention deals to all cases of declared war or of any other armed conflict which war may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them ; see also Geneva Convention for the Ameliorations of the condition of the wounded and sick in Armed Forces in the field, which came into force on 21 October 1950; see Geneva Convention Relative to the Protection of civilian Persons in time of War 1949; see also Geneva Convention Relative to the Treatment of Prisoners of war, 1950; Protocol Additional to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflicts, Article 1 (3).

³ Article 3 Common to Geneva 4 Convention 1949; Articles 3 applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have universally 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. Article 3 Protocol Additional to the Geneva Convention 1949 and Relating to the Protection of Victims of NIACs, 1978, Additional Protocol II) Furthermore, Customary International law is the law applicable to both IACs and NIACs.

⁴ International Committee on Red Cross (ICRC)

⁵*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UNGAOR, 43rd sess, 76th plenmtg, UN Doc A/RES/43/173 (9 December 1988) annex 1 ('Use of Terms'). With respect to juveniles, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN GAOR, 45th sess, 68th plenmtg, UN Doc A/RES/45/113 (14 December 1990) annex

freedom of movement and actual deprivation of liberty as stated above. Detention takes place in both international and non international armed conflicts. IHL has treated international armed conflict and non international armed conflict separately. Detention may occur to combatants and non combatants or insurgency in armed conflicts. However, under international non armed conflicts the following parties are involved; the non-state actors and non state armed forces/fighters or group. The term ‘non state actors or party’ are referred to non-international armed group while the ‘non-state armed group/fighters’ are referred to the military wing of non-state party.⁶ In view of this, a person may be detained if the individual is causing a threat to the national security of the military operations and for taking part in the hostilities. In some situations if the individual belongs to an organized enemy armed group, for the protection of their selves. Thus, such detainees may also be accused of committing a serious criminal offence.

3. Background of International Humanitarian Law and Detention

Since its founding in 1863, the International Committee of the Red Cross (ICRC) has been endeavouring to protect and assist people affected by armed conflict. It was born of a desire to bring aid without discrimination to the wounded on the battlefield and to prevent or alleviate human suffering. Its purpose is to protect life and health by limiting the effects of conflict⁷. With the ever-changing nature of conflict, today’s actors are no longer confined to soldiers fighting on the battlefield. Irregular armed groups, paramilitary, interior troops, members of police and security forces and even isolated individuals often take part in today’s armed conflicts and other situations of large-scale violence. Ever fewer wars are waged between States, these having given way to conflicts of a low-intensity non-international nature, acts of terrorism and massive civil disobedience⁸. The battlefield has shifted to urban areas, and civilians are increasingly at risk, often the object of direct attacks and unlawful detention. The ICRC is the guardian of IHL: Its mandate is to promote respect for the rules laid down by that law. In addition to promoting knowledge of the law, it strives to assist the victims of armed conflict and non international armed conflict and to ensure that they are protected as the law requires. This is achieved not only by direct field operations, encouraging and taking part in the training of military, police and security forces in the area of humanitarian law and, where appropriate, human rights⁹ violations. Between 1949 and late 1990s, international law regulated internal armed conflict beyond the limitation of insurgency or belligerency and was not limited to the conclusion of bilateral agreement or unilateral declarations. The legal regimes applicable in peacetime and in non international armed conflict are different. In peaceful situations, it is governed by the domestic law and international human rights law (IHRL). While in armed conflicts it is governed by IHL.

IHL gives right to hostilities or states to detain for different reasons during armed conflicts or violence conflicts. The legal bases for detention shall read in conjunction with international human rights law. The rules of detention depend on the type of armed conflict, if it is prisoner of war (POW). It is important to state POW does not exist in NIACs.¹⁰ The prisoners of war are the combatants who are protected under the third Geneva Convention if they are in the hands of the enemy. However, the civilians are protected by the fourth Geneva Convention if they are in the enemy hands.

In recent decades, there have been constant increases in the practice of protection of IHL during conflicts. In customary international law practice in NIACs, the following Conventions such as Additional Protocol I

1 art 11(b) states as follows: The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

⁶ Crawford, *The Treatment of Combatants and Insurgents under the law of Armed conflict*, OUP, Oxford, 210, 1.

⁷ ICRC, *what is International Humanitarian Law?* (Advisory Service Document on International Law, 2004), 1-2.

⁸ ICRC (n10) 62.

⁹ Ibid.

¹⁰ See Pejic, ‘Status of Armed Conflict’ in Elizabeth Wilmshurst and Susan Breau (eds), *Perspective on ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 77

and II of Geneva convention provides for the prohibition of attacks on civilians, the obligation of state party to respect and protect medical and religious personnel, medical units and transport. IHL tends to regulate the detention in non international armed conflicts, due to the fact that states will perceive armed actions by organised armed groups fighting against them to be inherently contrary to their own domestic law. However, there are distinct and important fundamental guarantees that protect those held in detention.

Furthermore, both the third and fourth Geneva Convention deals with protection of individuals held in detention in situation of international armed conflict. The third Geneva Convention highlights the rules of protection for the prisoners of war. The Fourth Geneva Convention provides the conditions and rules when a civilian may be detained. The majority of today's armed conflicts are NIACs involving states and organized armed groups, a trend that has been highlighted since 1st edition of the war report back in 2012. In 2017, a total of 38 NIACs occurred in the territory of 21 states. For example, Afghanistan, Colombia, the DRC, Egypt, India, Iraq, Libya, Mali, Mexico, Myanmar, Nigeria, Pakistan, the Philippines, Somalia, South Sudan, Sudan, Syria, Thailand, Turkey, Ukraine and Yemen.

In armed conflicts, transitional justice refers to the methods State actors emerging from situations of conflicts and repression address the volume of human rights violations and how normal justice will not be able to provide the needed adequate response. Thus, it deals with the redress of victim of detention and recognises their dignity as human beings or individuals. Sometimes, a country may be in confusion of transition or not and an opportunity may arise in peace processes seeking to end an internal armed conflicts. State parties to negotiations and other non state actors involved in the negotiations may seek to incorporate justice issues as part of the agreements to end the conflict. For example, South Sudan, Nepal, DRC Congo, Philippines and others where armed conflicts have taken place alongside the violations of detainees by State actors.

The conflicts between Al-Qaeda and the Israeli conflict with Hezbollah affected the challenge that NIAC are internal conflicts. According to San Remo, NIACs are armed confrontations occurring within the territory of a single state and in which the armed forces group of no other state are engaged against the central government. In terrorism attacks by non state actors and response of states to it involves intelligence gathering and security services or mercenaries' to destabilize another state.¹¹ Furthermore, in accordance with UN Charter stressing that states must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measure in accordance with international law, in particular the IHRL, refugee law and humanitarian law.

4. International Humanitarian Law

The law applicable to situation of international armed conflicts and non international armed conflicts creates the binary difference between members of the armed group and civilians during hostilities. In IHL, it is the treaty and customary international law that forms the sources of humanitarian law¹². Customary international law regulates the behaviours in NIACs¹³. The rule of customary international law if acted upon shows that the state actors believe that such practice is legally binding.¹⁴ All IHL provisions that are satisfied to be customary international law are applicable to all actors in armed conflicts.¹⁵ In addition, any armed conflict

¹¹See Kiplin, Rudyard, 'The White Man's Burden; The United States and the Philippines Island', Poem, 1899. See also Akinyemi, *New Development in International Law and Diplomacy: One Step Forward, Two Steps Backwards?* Nigeria Institute of Advanced legal Studies, NIALS Press, Abuja, 2011, 1-33.

¹²Kolb, 'The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions', *International Review of the Red Cross*, (1998), 15,(3) 352-419.

¹³ Ibid.

¹⁴Article 38 (1) b of the Statutes of the ICJ; See also Kolb and Hyde, *An Introduction to the international law of armed conflicts*, (2008) Oxford, UK, Hart Publishing.

¹⁵ Bring, Mahmoudi & Wrangé, *Sverigeochfolkkratten*, (2011) Stockholm: Norstedtsjuridik.

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. The two requirements necessary for such situations are

- (i) The hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.
- (ii) Non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.

From the above principles, it means that IHL has two distinct methods of civilians and combatants in hostilities. However, the Additional Protocol II only applies to NIACs by virtue of customary international law.¹⁶ It is the duty of IHL to make sure that security is provided for those who are not engaged in the hostilities. It is the duty of the UN and state practice to intervene where there is conflict for human intervention.

5. Applicability of International Humanitarian Law and International Human Rights Law to Detention Victims

International Human Rights Law and International Humanitarian Law are two important areas of international law. They aim at protecting lives, health and dignity but with different scopes of application. International Human Rights Law (IHRL) applies at all times and is binding on states in their relationship to the individuals living in their territory. Human Rights are legal entitlements possessed by each individual human being.¹⁷ IHL which is a body of law that seeks to limit the effects of armed conflict for purely humanitarian purposes applies in armed conflict and violent situation. The International Humanitarian Law rules are found mainly in the Four Geneva Conventions of 1949 and their Additional Protocols of 1977. However, IHRL tries to overlap in IHL regarding detention where IHRL requires a person detained to be brought before a court for adjudication as his or her fundamental right to fair hearing. The IHL is a law that seeks to regulate these forms of encounters. The international instruments of IHL and IHRL set out the specific circumstances when it may be justified for the protections and assistance given to those in detention. The armed non state actors have no legal ground for detention. The states involved in a NIAC can bridge the gap by applying domestic law and IHRL, which regulate the matter of detention in an extremely detailed method. The Geneva Convention Four stipulates the circumstances in which an individual can be detained during international armed conflict. It went further to state that protected civilians may because of security reasons and absolute necessity in internment or assigned residence be detained. There are periodical reviews of such internment if granted.¹⁸

6. Detention in Non-International Armed Conflict

In situations of non international armed conflicts, issues of detentions and encounters must also be regulated by law to prevent emotional outbursts that may be calamitous in the end. In any state, where an individual is committing a penal offence such person may be prosecuted and possible imprisonment if found guilty subject to the IHRL protections. However, in situation of NIACs where an armed group is fighting a state, if arrested, will therefore face prosecution. IHL does not provide protection and legal basis for the detention of armed groups but it recommends strongly that at the end of the conflicts the detainees who did not participate in the hostilities should be granted amnesty. In view of this, it's the opinion of the researcher that

¹⁶ It is not universally ratified because AP II has only 168 state actors who have signed it. It is of note that states like Israel, India, US, Iran have not signed nor ratified the additional protocol to date. AP II applies to certain conflicts of NIACs which oppose state armed forces against non-state armed groups, and the non-state actors must exercise territorial control to a degree that allows it to carry out and maintained military operations for the sustainability of AP II.

¹⁷International Committee of Red Cross (ICRC), International Rules for Standard Policing a Reference doc.2014.

¹⁸ See Article 79-135 provides the detailed treatment of any internee will be given.

for justice to be upheld, both the militants and those who did merely participate (civilian hostages) should be taken to a court to determine their detention. The denial of access to justice and fair hearing is breach of fundamental right principles of Universal Declaration of Human Rights (UDHR). For instance, IHL did not cover all the individuals held in Guantanamo by the US government. It is the claim of US Government that those held by them are 'unlawful combatants' but not civilians nor combatants. The internal (domestic) law of state actor does not offer a legal basis for the detention of individuals who participated in hostilities. Rather others may benefit from the fundamental guarantees of IHL of non international armed conflicts. Also the persons arrested in Afghanistan were protected by IHL international armed conflicts. They may be termed 'protected persons'.¹⁹ There are good reasons to consider the captured Taliban as prisoners of war. As for the al Qaeda members captured in Afghanistan, it may be justified to deny them prisoner of war status, on a number of legal grounds. However, as protected civilians, they may not be deported to Guantánamo, but may be detained in Afghanistan for the prosecution and punishment of criminal offences (including for having directly participated in hostilities); or they may be interned for imperative security reasons, upon individual decision made in a regular procedure which must include a right of appeal.

7. Non International Armed Conflict Laws

NIACs may be a terrorism war or conflict situations with armed violence occurring within a state with a single territory between government armed forces and dissident or militant armed forces or any other organized armed opposition groups. A NIACs situation may enter a neighbouring state, and to armed conflict situation in which international forces may intervene on the side of a host government against any organized armed opposition groups or armed fighters. IHL in non-international armed conflicts foresees no combatant or prisoner of war status, and contains no other rules on the status of persons detained in relation with the conflict, or on reasons justifying detention of civilians. The question as to whether unlawful combatants' are combatants or civilians does not arise. In non-international armed conflicts, IHL cannot possibly be seen as a sufficient legal basis for detaining anyone. It simply provides for guarantees of humane treatment and, in case of prosecution for criminal offences, for judicial guarantees. Possible reasons for arrest, detention or internment are entirely governed by domestic legislation, human rights law requiring that no one be deprived of his or her liberty except based on the law. In state practice, too, governments confronted with non-international armed conflicts based any arrest, detention or internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They never invoked the 'law of war'. However, domestic legislation does not apply or allow non-state armed groups (NSAGs) to detain members of the state's armed forces or civilians in the first instance. Thus, IHRL does not provide a legal basis explicitly for detention by NSAGs. In *Hassan v United Kingdom*²⁰ where States parties must not arbitrarily or unlawfully arrest or detain individuals outside their territory applies to states that are party to European Convention rules. From the decision of Hassan's case, state actors may detain non combatants or group fighters for that security detention, both in terms of internment of prisoners of war and internment of protected persons as a security measure, once it is deemed not arbitrary, provided the basic principles of IHL is observed.

8. Judicial and Fundamental Guarantees of Transitional Justice to Detention

It is essential to state that any individual or person detained during international non armed conflict is entitled to protection and the basic guarantees irrespective of the time and the reason for the detention. They are prohibited against arbitrary denial of liberty, torture and violence to life and person. For example, murder, cruel treatment and rape. The fundamental right to dignity and degrading treatment by humiliating the

¹⁹Both third and fourth Geneva Convention provides for combatants who are prisoners of war if they are in enemy territory while the civilians are also protected if captured by the enemy. It is of note that an individual cannot be classified into prisoners of war and civilian at the same time and be protected by neither of the two Conventions stated above. See Article 4 (a) 1 and Article 4 (a) 2.

²⁰ (2014) ECtHR, the judgement of Grand Chamber.

individual is strongly prohibited by state and non state actors during armed conflicts. There are questions relating to the right of states and non-state actors to detain in NIACs, and the relationship between IHL and human rights norms regulating detention. Does state actors in their domestic law has the right to detain where there is a conflict in IHL and IHRL which they are party to and has ratified these conventions. Under customary international law, the state and non state actors are obliged to obey and upheld the instrument even though they are sovereign nations. The violations of rights of detainees by both state and non state actors are against principles of UDHR and public international law.

In accordance, when applying IHL to detention, Common Article 3 affirms the passing of sentences and the carrying out of executions without previous judgement by a constituted court allowing the judicial guarantees which is recognised by a civilian prohibited with respect to protected persons.²¹ The fact that both Article 3 and AP II did not mention internment or state the grounds of detention has given a different legal position for internment under NIACs. The international bodies have prohibited such actions in matters other than when it is important during conflicts. For example, the Inter-American commission disagrees with the detentions carried out by the Colombian armed organised groups(AOGs) that IHL prohibits the detention or internment of civilian unless for security reasons which is germane. The UNCHR resolution 1995/77 appealed to armed organized groups (AOGs) to refrain from unnecessary detention of civilians. In *Serdar Mohammed v Ministry of Defence & Others*²², the High Court of England and Wales held that the United Kingdom lacks the right to detain under international humanitarian law with respect to individuals it captures in the course of non international armed conflict in Afghanistan²³. There is a protection gap between detainees held by armed organised group (AGOs) during NIACs, if IHL and IHRL do not apply to them, then AGOs are able to operate within the legal 'black hole'. It then means that they can detain with impunity from the international law perspective. According to Somer, those detained by non state actors have less protection than those detained by the state actors which does arise in the context of an armed conflict but this does not exist in IHL because its principles are based on equality of the parties.

9. Outside Armed Conflicts

IHL applies only to both international and internal armed conflicts. It can offer protection and assistance to those held in connection with hostilities components of the 'war crimes on terrorism' that do not meet the basic principles of a non-international armed conflict. It is obvious that IHL can provide even little or less a legal framework for detaining such persons in Guantanamo or elsewhere. Rather, they have to appeal on humanitarian basis to their conscience as human beings.

In Guantanamo, the US claimed that the detention policy of their state during litigation was derived from the law of armed conflict²⁴. In Law, Geneva Convention 3 and 4 does not apply to the NIAC in Afghanistan. But the US will not be able to claim any nexus between its detention policy and the law of armed conflict if it has continued the armed conflict based detention while claiming its involvement in that war that has ended. At the end of the conflict in 2014, the US has no right under the law except to transfer the Taliban to the remaining party to Afghanistan or releasing the members of the Taliban group detained at Guantanamo.

²¹See Article 5 of AP II which compliments this by including several standards based on the more rigorous provisions of Geneva Convention 3 and 4 of 1949.

²²[2014] EWHC 1369 QB, see also [2017] UKSC 2, 17 January 2017.

²³See Article 5 of ECHR which is applicable to UK provides that everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:'

²⁴United States District Court for the District of Columbia, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay', Misc. No. -442 (TFH).

10. Legal Regime to Detention in NIAC

In IHL, we shall examine if there is a legal basis for detention or the deprivation of liberty to be supported by law. It will determine whether the military, police or actors has the right or obligation to detain an individual and under what circumstance is the detention order being carried out. IHL has the inherent power to detain in NIACs²⁵. However, it does not give the grounds and procedures needed in order for detention not to be arbitrary²⁶. Its main legal basis is Common Article 3 which represents NIACs. The Geneva Convention is the legal regime for detention under humanitarian law. The IACs internment provides reasons for detention if an actor or individual holds a specific status such as a combatant and non combatant being held as prisoners of war.²⁷ An individual or civilians who are parties to the conflict may be taken into detention as a measure of security control for assigned residence and internment.²⁸ There is no specific ground for detention under IHL but from the human rights perspective. However, IHL will promote parties to a conflict that may be captured for an intern if such individual he or she poses security threat. It is important to state that IHL does not provide any legal basis for security detention in NIACs but it leaves it for domestic legislation. Furthermore, Article 8(2) (f) of the Rome Statute is Akin to Common Article 3 of the Geneva Convention which allows for extra territorial forces to be applied in criminal proceedings.

11. Habeas Corpus Right

In NIACs, the deprivation of liberty to detention without stating the reasons and grounds why a person is detained is unlawful. The detaining authority must inform the detainees in NIACs.²⁹ The detainees also have the right to challenge his or her detention decision.³⁰ The right of an individual or a detainee to challenge the lawful arrest or detention in a court is termed the right of habeas corpus³¹. Under the European Convention, for a person to have a right under habeas corpus, the individual must have been denied of their liberty or freedom for the fact that they committed an offence under Article 5.1(1) of the European Union Convention. In security detention under the Geneva Convention 3 and 4, the European Convention on Human Rights (ECHR) provides that it is the court that considers who is to be detained under the provisions of Article 5 paragraph 1 (c). It is important to state that criminal charges on detention in NIACs can be used to bring a criminal prosecution on a rebel group or armed fighters instead of using domestic law on those militants or insurgency group who are against the state actors or government authority. The detainee has a right of judicial review when the person is challenging the derogation of his detention as a security risk under Article 15. All security detention is subject to a review in NIACs because it is the goal of IHL to have a human face whether it is legal for them to be kept in prison.

In analyzing the decision of the court in *Hassan v UK*, the judge of the Grand Chamber did not admit that the extent of Article 5(1) (c)—the lawful arrest or detention of a person effected for the purpose of bringing him before the competent court on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence—extended to situations of security internment in an international armed conflict³². The Court noted that it was not the tradition of contracting

²⁵See Article 5 of the 1977 Additional Protocol II to the Four Geneva Conventions of 1949.

²⁶Arbitrary detention is prohibited in Rule 99 of the International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law from 2005.

²⁷Articles 4, 5 and 21 Geneva Convention 3.

²⁸Articles 4 and 27 Geneva Convention 4; see also Articles 41, 42 and 78 Geneva Convention 4 respectively..

²⁹Article 5.2 of ECHR provides the right of information to the detainee and a due diligence in given the information adequately why the person was detained.

³⁰Article 5.4 of ECHR; See the court decisions in *Van der Leer v the Netherlands* (21 February 1990) application no.16064/85; *Fox, Campbell and Hartely v the UK* (30 August 1990), application no.12244/86, 12245/86 and 12383/86.

³¹ Schabas, *The European Convention on Human Rights: A Commentary*, (2015) Oxford, Oxford University Press.

³² *Supra*.

states to the ECHR to derogate from their obligations under Article 5 in order to detain persons on the basis of the Geneva Conventions 3 and 4 during international armed conflicts³³.

The Court ruled that ‘even in situations of international armed conflict, the safeguards under the ECHR continue to apply, albeit interpreted against the background of the provisions of IHL. Because of the co-existence of the safeguards provided by IHL and by the ECHR in time of armed conflict, “the grounds of permitted deprivation of liberty set out in Article 5(1) should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Geneva Conventions 3 and 4.’ Thus, public international law applies to IACs. However, in *Al-Waheed v Ministry of Defence*³⁴ the Supreme Court held that the British forces had power to take and detain prisoners for periods exceeding 96 hours if this was necessary for imperative reasons of security, but its method of doing it did not follow Article 5 (4) of ECHR which did not allow or afford the prisoners the right to effectively challenge their detention. However, there was a dissenting opinion of two jurist who uphold the detention because there was authority to detain prisoners exceeding 96 hours only in circumstances filing the specified grounds of Article 5 (1) of ECHR which covered the first and third periods of detention but not the second detention. From the above decision, IHL should be rethinking the application of customary international law in NIACs during detention because the court did not deem it fit to say that customary international law is applicable to the detention of combatants in a non international armed conflict. There is no such rule under customary international law according to Lord Reed. The court by majority rule (7 to 2) agrees that the UN Security Council Resolution (UNSCR) gives authority to capture and detain enemy combatants for imperative security reasons. For example UNSCR 1546(2004) allowed US in Iraq and UNSCR 1386 (2001) in respect of Afghanistan to both Britain and US respectively while carrying out peace keeping and peace enforcement of UN. The majority of the court (except Lord Mance) who stated that the individual states participating in the International Security Assistance Force (“ISAF”) in Afghanistan were not limited by ISAF’s policy of restricting detention to 96 hours, so that the UK was entitled to adopt its own detention policy. Lord Mance dissenting view considers that the resolutions conferred authority to detain on ISAF, not the contributing states, but arrives at the same conclusion as the majority regarding the legitimacy of the UK’s detention policy on the ground that ISAF tacitly accepted of the UK’s adoption of this policy. Furthermore, in analysing Article 5 (1) ECHR which its object was in detention of peace time and not during armed conflict is to “protect the individual from arbitrariness”³⁵. This object was achieved if there was a legal basis for detention and the power to detain was not exercisable on grounds which were unduly broad, opaque or discretionary .The procedure governing military arrest in Afghanistan was suitably clear and precise to meet the standards of article 5(1). It is to be noted that Article 5(1) did not therefore prevent a state actor from acting under the authority conferred by a UN Security Council resolution. A detainee has the right of fairness which is required that Serdar Mohammed be given an effective means of challenging his detention. They should not be hiding under the clock of imperative security to detain persons unless under the scope of authority granted by United Nations Security Council Resolution (UNSCR) 1890.

12. Conclusion and Recommendations

IHL is the branch of international law that provides protection and assistance to victims or those affected by or involved in international and internal armed conflicts. IHL has become, according to the US administration, a justification for denying such people and others any protection by human rights law and domestic legislation. In addition, while the US thus invokes IHL, it is not ready to provide them with the full benefit of this law. Any individual in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the

³³ Ibid.

³⁴(2017) UKSC 2

³⁵ See Article 5(4), the minimum standard of protection from arbitrariness equates to that imposed by articles 43 and 78 of the Fourth Geneva Convention: an impartial body carrying out initial and regular reviews in accordance with a fair procedure.

Fourth Geneva Convention³⁶, or again, a member of the medical personnel of the armed forces who is covered by the First Geneva Convention during armed conflicts. There is no 'temporary intermediate status; nobody in enemy hands can be outside the law. We are of the opinion that transitional justice will be a satisfactory solution -- not only satisfying to the rule of law, but also, from the humanitarian point of view in making sure that detentions are justifiable. In IHL, every facet of the 'war on terrorism', every condition in which persons held in Guantanamo, for example or in other forms of hostilities who were involved and every individual detained, there shall be liberty for the detainees to challenge the lawfulness of their detention legally in a court system. Thus, they may seek compensation for false detention or imprisonment as prisoners of war. The principles of NIACs will apply to any state actor involved in detention and throughout its territory where there is conflict and IHL will control an individual or state party, whether or not actual hostilities took place there. It is pertinent to conclude that IHL will not allow security detention on 'mere' posing threats unless approved by UN Security Council resolutions as legal authorizing security detention in NIACs.

In order to strengthen the existing law where the implementation is too strong and the development of the policies which does not meet the aspirations of those victims of armed conflict, IHL is the only recognised legal status for NIACs which is based on humanitarian services but needs to improve on the sanctions or violation of rights of those detainees for security imperatives where their liberty and freedom of movement are highly denied to recommend adequate compensation in form of damages to be awarded by a court. The award of damages to the victims against their host state should also have a time frame within which to pay the award pronounced by the court, which will also reduce the tendency of arbitrary detention without habeas corpus proceedings. They are various international institutional human rights courts in which the IHL and ICRC can oblige subject to jurisdiction and forum connivance. Lastly, the ICRC should incorporate a monitoring group as a form of early warning to NIACs for the protection and assistance of victims of detainees, displacements and natural environmental disaster that occur in conflict situation whether armed or otherwise once there is violence.

³⁶ i.e. not in the case of a NIAC, to which the Geneva Conventions have only limited application.