

# National security and the right to liberty in armed conflict: The legality and limits of security detention in international humanitarian law

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## **Abstract**

*This paper examines the legality and limits of security detention in armed conflict situations. It particularly investigates the issues of whether the protection of national security is a legitimate ground to restrict the right to liberty of persons in situations of international or non-international armed conflict, and if so, what are the limits to a State's prerogative to restrict the right to liberty of individuals suspected of threatening its national security. On the basis of a thorough analysis of the relevant extant rules of international law regulating warfare, the paper concludes that security detention is permissible in armed conflict situations regardless of whether the nature of the conflict is international or non-international. However, the prerogative of a State to impose security detention is circumscribed by a plethora of fundamental substantive and procedural safeguards against arbitrariness that are provided in the different rules of international humanitarian law and international*

\* The views expressed in this paper are the author's own and do not necessarily reflect the position of the African Court on Human and Peoples' Rights or any other institution with which the author is affiliated.

*human rights law. These safeguards affirm that the search for absolute security is neither desirable nor attainable and that the mere invocation of security concerns does not grant an absolute power to restrict or suspend the liberty of individuals in armed conflict situations. Whenever it is imposed, security detention should be preventive in nature, and must aim at safeguarding the basic national security interests of a State from serious, future, direct and imminent threats related to the armed conflict situation. Detainees should also be able to challenge its legality before a competent organ at the initial or later stage of the detention through a system of periodic review.*

**Keywords:** detention, security, armed conflict, Geneva Conventions, international humanitarian law, international human rights law.

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## Introduction

Whether it is international or non-international, armed conflict exemplifies the most traditional national security threat.<sup>1</sup> Irrespective of its nature or legitimacy, armed conflict often challenges and threatens a State's basic and common national security interests: the survival of its government, territorial integrity, political sovereignty or the well-being of its population. Accordingly, any measure that a State takes to deal with an armed conflict could in principle be assumed to have been dictated by the need to preserve its national security.<sup>2</sup>

In international law, a State whose national security is under threat is entitled to resort to all legitimate options, including the right to wage war in self-defence.<sup>3</sup> It may also adopt measures that have the effect of restricting the rights and freedoms of individuals.<sup>4</sup> Security detention is one of such measures that a State in a war may take to protect its overall security and continued survival. However, the legality of such measures in international humanitarian law (IHL), particularly in a situation where a State is involved in a non-international armed conflict (NIAC), is far from precise and has been a point of great controversy in both judicial and non-judicial fora. In contexts of international armed conflict (IAC), too, a close review of the rules of IHL on areas of security detention reveals a considerable number of gaps or lack of clarity.

This article builds upon existing literature on issues of detention and attempts to flesh out the legal limits of security detention if and when it is

1 Marco Sassòli, "The Concept of Security in International Law Relating to Armed Conflicts", in Cecilia M. Bailliet (ed.), *Security: A Multidisciplinary Normative Approach*, Martinus Nijhoff, Leiden, 2009, p. 7.

2 *Ibid.*

3 See Article 51 of the Charter of the United Nations (signed on 26 June 1945). See also International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *ICJ Reports 1986*, paras 134–139.

4 See, for example, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 43, 78.

imposed on individuals in armed conflict situations. To this end, it is comprised of two main parts. The first part deals with the legality of security detention in both IACs and NIACs and addresses the perennial question of whether IHL provides a legal basis for (security) detention in armed conflict situations, more specifically in NIACs. Predicated upon an affirmative finding that security detention is indeed permissible in both IACs and NIACs, the second part identifies some substantive and procedural limits to security detention. In IACs, however, the rules of IHL governing security detention vary depending on whether the detention happens in a State's own or occupied territory. The nature of the protected security interest that triggers the measure and the procedural and substantive safeguards against arbitrary detention are also different.<sup>5</sup> For this reason, in the second part of the article, an effort is made to highlight the strictures of the law when security detention occurs in both "own" and "occupied" territories, and the extent to which some limits, in the form of substantive and procedural safeguards, may be invoked or applied in the contexts of NIACs. These limits are derived from the practice of domestic and international judicial institutions, other relevant rules of international law including international human rights law (IHRL) and legal doctrine, and International Committee of the Red Cross (ICRC) legal and policy documents. The article concludes with some remarks that the author considers relevant to assist the development of the law regulating detention, more specifically security detention during armed conflict situations.

At the outset, it should be pointed out that in this paper, the term "detention" is used to refer to all measures depriving individuals of their liberty, irrespective of the reasons for the detention. The terms "internment", "security detention" and "preventive or administrative detention" are also used interchangeably to refer to the detention of individuals that is prompted by security reasons. This excludes other forms of deprivation of liberty, including but not limited to detention for purposes of instituting a criminal charge against a person. The expression "arbitrary detention" generally describes a situation

5 In occupied territories, preventive detention is mainly aimed at safeguarding the safety and security of the military and its administration, while in a State's own territories, the protection of other broader national security interests, which may or may not have a direct link with military operations, may be a legitimate reason to subject individuals to security detention. As the Israeli Supreme Court has affirmed on various occasions, national security is broader than military security and in occupied territories, the occupying power may not invoke its own broad national security interests to take measures restricting the rights of individuals residing in the occupied territory. This same view had also been advanced during the draft discussion of Article 59 of GC IV, where the British delegate mentioned that acts endangering the security of the occupying power include "sabotage, unlawful hostilities by civilians and marauding". He also added that the term "military security" is a much more restrained criterion than national security. See *Jam'iyat Ascan*, cited in Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, Case No. HCJ 2056/04, 2004, para. 27; Supreme Court of Israel, *Kipah Mahmud Ahmed Ajuri et al. v. The Commander of IDF Forces in the West Bank et al.*, Case No. HCJ 7015/02, 2002; Supreme Court of Israel, *Amtassar Muhammed Ahmed Ajuri et al. v. The Commander of IDF Forces in Judeaea and Samaria et al.*, Case No. HCJ 7019/02, 2002, para. 28; Statement of Mr. Sinclair (United Kingdom), *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2(A), 1949, pp. 767, 797.

where detention or deprivation of liberty is not in accordance with grounds and procedures or conditions specified in domestic and international laws.<sup>6</sup>

## Prohibition of arbitrary detention in international law

The right to liberty is one of the most sacrosanct and highly safeguarded rights in international law. IHRL strictly prohibits the arbitrary arrest and detention of individuals.<sup>7</sup> Despite the absence of an explicit treaty provision to that effect, there is also a growing consensus that customary rules of IHL similarly forbid the arbitrary and capricious detention of individuals in armed conflict situations.<sup>8</sup> Furthermore, arbitrary detention is usually viewed as something incompatible with the requirement of humane treatment – a norm that has a solid foundation in the various rules applicable in international and non-international armed conflicts alike.<sup>9</sup> Given that IHRL continues to apply during armed conflict,<sup>10</sup> the relevant rules of human rights law may be considered to give this prohibition an alternative legal basis in treaty law.

In IHRL, whether or not a particular detention is arbitrary depends on the permissibility of its grounds, whether it has a legal basis, and the observance of the available procedures for detention.<sup>11</sup> Although most human rights treaties, with the

6 According to the UN Human Rights Committee (HRC), “the concept of arbitrariness is not to be confined to procedural arbitrariness but extends to the reasonableness of the interference with the person’s rights and its compatibility with the purposes, aims and objectives of the [international human rights instruments]”. HRC, *Jama Warsame v. Canada*, Communication No. 1959/2010, 2011, para. 8.8. See also Yoram Dinstein, “The Israeli Supreme Court and the Law of Belligerent Occupation: Deportation”, *Israel Yearbook on Human Rights*, Vol. 23, 1993, p. 7.

7 The Universal Declaration on Human Rights (UDHR) of 1948 proclaims that “[e]veryone has the right to life, liberty and security of person”, and that “[n]o one shall be subjected to arbitrary arrest, detention or exile” (see UDHR, Arts 3, 9). Under Article 9, the International Covenant on Civil and Political Rights (ICCPR) gives effect to this provision, declaring that “[e]veryone has the right to liberty and security of person” and that “[n]o one shall be subjected to arbitrary arrest or detention”. Similar provisions also exist in regional and other universal human rights conventions. The right to liberty signifies the prohibition of the arbitrary deprivation of liberty, and it applies for all cases of restrictions to liberty, including all sorts of arrest or detention. See HRC, General Comment 8, 1982, para. 1; HRC, *Antti Vuolanne v. Finland*, Communication No. 265/1987, UN Doc. Supp. No. 40 (A/44/40), 1989, para. 9.4 (restriction of liberty in the context of military discipline), European Court of Human Rights (ECtHR), *Guzzardi v. Italy*, Application No. 7367/76, Judgment, 6 November 1980, paras 92–95 (in the context of compulsory residence in a particular area).

8 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 99.

9 See common Art. 3; Geneva Convention III (GC III), Art. 13; Geneva Convention IV (GC IV), Art. 27; Additional Protocol I (AP I), Art. 75(1); Additional Protocol II (AP II), Art. 4(1). Also see ICRC Customary Law Study, above note 8, Rule 87 (civilians and persons *hors de combat* must be treated humanely).

10 See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, paras 24–25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para. 106; HRC, General Comment 31, 2004, para. 11; HRC, Concluding Observations on Israel, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 11; Inter-American Commission on Human Rights (IACHR), *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 42; ECtHR, *Hassan v. The United Kingdom*, App. No. 29750/09, Judgment, 16 September 2014, para. 77 (all acknowledge the applicability of IHRL during armed conflict situations).

11 See Els Debuf, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, Chatham House and ICRC, London, 22–23 September 2008, pp. 2–3.

notable exception of the European Convention on Human Rights (ECHR),<sup>12</sup> do not provide a list of possible grounds of detention, different human rights treaty bodies have identified national security as one of the non-arbitrary, legitimate grounds of detention.<sup>13</sup> It is now well established that in peacetime, IHRL gives States the authority to impose security detention on individuals threatening their security. Nevertheless, the permissibility of security detention is not that straightforward in armed conflict, particularly in the context of NIACs.

## Permissibility of security detention in IACs

The extant rules of IHL envision various forms of restriction to the liberty of persons existing in armed conflict situations, including security detention. The Third Geneva Convention (GC III) allows the detention of combatants as prisoners of war (PoWs) until the end of active hostilities to prevent them from rejoining the military of the State on which they depend or returning to the battlefield.<sup>14</sup> This measure may itself be considered as a national security measure in its wider sense. As rightly pointed out by the ICRC, PoWs

may use force, i.e. target and kill or injure other persons taking a direct part in hostilities and attack military objectives. Because such activity is obviously *prejudicial to the security of the adverse party*, the Third Geneva Convention provides that a detaining State “may subject prisoners of war to internment”.<sup>15</sup>

- 12 Article 5 of the 1950 European Convention on Human Rights (ECHR) contains an exhaustive list of grounds of permissible detention. See ECHR, Art. 5(1)(a–f).
- 13 See HRC, *David Alberto Cámpora Schweizer v. Uruguay*, Communication No. 66/1980, UN Doc. CCPR/C/OP/2, 1990, para. 18.1; HRC, *Mansour Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, 2004, para. 10.2 (explicitly stating that “detention on the basis of a security certification on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1”). See also HRC, General Comment 35, 2014, para. 18; African Charter on Human and Peoples’ Rights, Art. 27. Other human rights bodies have also recognized the legitimacy of security detention in several occasions: see UN Office of the High Commissioner for Human Rights (OHCHR), *Report of the Working Group on Arbitrary Detention*, A/HRC/30/36, 2015; OHCHR, *Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings before Court*, June 2015, para. 9. However, the HRC has repeatedly emphasized that security detention presents a severe risk of arbitrariness. See HRC, Concluding Observations on Jordan, UN Doc. CCPR/C/JOR/CO/4, 2010, para. 11; HRC, Concluding Observations on Colombia, UN Doc. CCPR/C/COL/CO/6, 2010, para. 20; HRC, General Comment 35, 2014, para. 15. The ECtHR has also held that detention for security reasons may be permissible during public emergency and derogation made in accordance with Article 15 of the ECHR to deport someone, pending deportation proceedings. See ECtHR, *Chahal v. United Kingdom*, 23 EHRR 413, 1996, para. 112; ECtHR, *A and others v. United Kingdom*, Judgment (Grand Chamber), 2009 (C.7), para. 169; ECtHR, *Hassan*, above note 10, para. 104.
- 14 See GC III, Arts 21, 118; Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, Art. 11. See also Alec D. Walen, “Crossing a Moral Line: Long-Term Preventive Detention in the War on Terror”, *Philosophy and Public Policy Quarterly*, Vol. 28, No. 3–4; Ashley S. Deeks, “Administrative Detention in Armed Conflict”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 404.
- 15 See ICRC, “Internment in Armed Conflict: Basic Rules and Challenges”, Opinion Paper, November 2014, p. 4 (emphasis added).

Unlike in the case of civilian internees, the State is not required to show necessity to detain PoWs. Necessity is presumed, and no judicial review is required.<sup>16</sup> A PoW is normally not closely confined but rather held in a camp under IHL, but if charged with a crime may also be confined while awaiting trial “if it is essential to do so in the interests of national security”.<sup>17</sup> Similarly, the Fourth Geneva Convention (GC IV) permits the internment and placing in assigned residence of protected persons and other civilians both in the territory of a belligerent State and in an occupied territory when doing so is necessitated by security considerations.<sup>18</sup> It is thus evident from both conventions that the law of IAC duly acknowledges the traditional power of States to detain persons endangering their national security.

### Is there a legal basis for security detention in NIACs?

In contrast to the rules governing IAC, the part of IHL regulating NIACs does not explicitly specify national security as a lawful ground for detention. For that matter, there is no explicit legal basis of detention in this law even for other grounds such as criminal charge. This lack of explicit authorization or proscription of detention in the rules governing NIACs has been a source of continuous debate among scholars and practitioners.<sup>19</sup>

Some contend that Article 3 common to the four Geneva Conventions and Articles 5 and 6 of Additional Protocol II (AP II) implicitly recognize the possibility

16 See Marko Milanović, “Norm Conflicts, International Humanitarian Law, and Human Rights Law”, in Orna Ben-Naftali (ed.), *Human Rights and International Humanitarian Law*, Collected Courses of the Academy of European Law, Vol. 19/1, Oxford University Press, Oxford, 2011, p. 27. Note, however, that PoWs may also be detained if they are lawfully prosecuted or have been lawfully convicted of crimes. See GC III, Arts 85, 99, 119, 129.

17 *Ibid.*, Art. 103. Note that Art. 21 of GC III makes it clear that “prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary”.

18 GC IV, Arts 42, 78. See also Supreme Court of Israel, *Iad Ashak Mahmud Marab et al. v. IDF Commander*, 2002, paras 19–24. Note that GC IV uses the term “military security” instead of “national security” when it comes to occupied territories: see GV IV, Art. 5(2). This choice of terminology is important because occupied territories are governed by a military administration.

19 See UK High Court of Justice, *Serdar Mohammed v. Ministry of Defence and Others*, EWHC 1369 (QB), 2 May 2014; Kubo Mačák, “No Legal Basis under IHL for Detention in Non-International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defence”, *EJIL: Talk!*, 5 May 2014, available at: [www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/](http://www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/) (all internet references were accessed in November 2017); Lawrence Hill-Cawthorne and Dapo Akande, “Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?”, *EJIL: Talk!*, 7 May 2014, available at: [www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/](http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/); Peter Rowe, “Is There a Right to Detain Civilians by Foreign Armed Forces during a Non-International Armed Conflict?”, *International and Comparative Law Quarterly*, Vol. 61, No. 3, 2012; Ramin Mahnad, “Beyond Process: The Material Framework for Detention and the Particularities of Non-International Armed Conflict”, *Yearbook of International Humanitarian Law*, Vol. 16, 2013; Daragh Murray, “Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward”, *Leiden Journal of International Law*, Vol. 30, No. 2, 2017.

of security detention during situations of armed conflict.<sup>20</sup> These provisions talk about persons deprived of “liberty for reasons related to the armed conflict, whether they are *interned* or *detained*”, and this specific mentioning of detained or interned persons is deemed to have tacitly envisaged the possibility of detention including for security reasons.<sup>21</sup> However, this line of argument is inherently flawed. The regulation of a particular measure by the law does not certainly imply that the law *authorizes* the recourse to such a measure.<sup>22</sup> Indeed, “it is routine for areas of law to regulate a practice without providing a source of authority for that practice”.<sup>23</sup> For instance, IHL mentions and regulates warfare, but this does not mean that IHL authorizes the conduct of war – the regulation of war lies in a different branch of international law, namely the *jus ad bellum*.<sup>24</sup> Likewise, in NIACs, detention occurs as a fact and is a common practice, and the regulation of the treatment of detainees by IHL does not lead to the conclusion that a belligerent State or a non-State armed group is authorized by the same to take such a measure.<sup>25</sup> If this was the case, the relevant rules would explicitly do

- 20 Jelena Pejić argues that “[i]nternment is ... clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of [AP II], which mentions internment in Articles 5 and 6 respectively”. Jelena Pejić, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 377, available at: [www.icrc.org/en/document/security-detention](http://www.icrc.org/en/document/security-detention). See also Jann K. Kleff, “Operational Detention and the Treatment of Detainees”, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, p. 471; John Bellinger III and Vijay Padmanabhan, “Detention Operations in Contemporary Conflicts”, *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 214; Knut Dörmann, “Detention in Non-International Armed Conflicts”, in Kenneth Watkin and Andrew J. Norris, *Non-International Armed Conflict in the Twenty-First Century*, International Law Studies Series, Vol. 88, US Naval War College, Newport, RI, 2012, p. 348. The Obama Administration has also invoked common Article 3, AP II and, strangely, the right of self-defence under Article 51 of the UN Charter as a legal basis to intern the Guantanamo detainees. See “Legal Adviser Koh’s Speech on the Obama Administration and International Law,” March 2010, available at: [www.state.gov/documents/organization/179305.pdf](http://www.state.gov/documents/organization/179305.pdf).
- 21 AP II, Art. 5(1) (emphasis added); Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), para. 3063. During the draft discussion for GC IV, in the ninth meeting at the conference of plenipotentiaries, Mr Day (United Kingdom) observed that “[i]f a person had committed an offence, he should be punished. Internment was not a punishment; it was a precautionary measure to safeguard the security of the State.” *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, 1949, p. 674.
- 22 L. Hill-Cawthorne and D. Akande, above note 19; Ryan Goodman, “Authorization versus Regulation of Detention in Non-International Armed Conflicts”, *International Law Studies*, Vol. 91, 2015, p. 159. Aurel Sari also shares the general view that regulation cannot be equated with authorization, but he disagrees with the conclusion that “IHL does not authorize *any* of the activities it regulates”. See Aurel Sari, “Sorry Sir, We’re All Non-State Actors Now: A Reply to Hill-Cawthorne and Akande on the Authority to Kill and Detain in NIAC”, *EJIL: Talk!*, 9 May 2014.
- 23 *Ibid.*
- 24 See L. Hill-Cawthorne and D. Akande, above note 19. Marco Sassòli also argues that “in non-international 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.” Marco Sassòli, “Terrorism and War”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, pp. 971–972. Similarly, Gabor Rona highlights the existence of a gap in the law of NIAC and suggests a gap-filling normative development. Gabor Rona, “Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?”, *International Law Studies*, Vol. 91, 2015.
- 25 L. Hill-Cawthorne and D. Akande, above note 19. See also UK High Court of Justice, *Mohammed*, above note 19, para. 243.

so, but neither common Article 3 nor AP II clearly provides “who may be detained, on what grounds, in accordance with what procedures, or for how long”.<sup>26</sup>

A seemingly more persuasive assertion can be found in the seminal work of Professor Ryan Goodman, who argued that

States have accepted more exacting obligations under IHL in international than in non-international armed conflicts. ... [I]f States have authority to engage in particular practices in an international armed conflict [e.g. detention], they *a fortiori* possess the authority to undertake those practices in non-international conflict.<sup>27</sup>

Hence, if IHL permits States to detain civilians on security grounds in IACs, it surely allows them to pursue the same in NIACs.<sup>28</sup> In the same sense, it is also contended that the power to detain may be considered to flow from, and is consistent with, “the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat”.<sup>29</sup> Relatedly, some specifically argue that the authority to detain, including for security reasons, is an implicit and intrinsic aspect of the power to target individuals in armed conflict.<sup>30</sup>

These arguments appear to be convincing but are also not entirely accurate. To begin with the argument that the power to detain is implicit in the power to target, it is true that detention represents a less severe measure compared to targeting, a measure which the rules of both NIACs and IACs permit, when it comes to combatants and civilians directly participating in hostilities (DPH).<sup>31</sup> While it may

26 *Ibid.* See also Peter Rowe, “Is There a Right to Detain Civilians by Foreign Armed Forces during a Non-International Armed Conflict?”, *International and Comparative Law Quarterly*, Vol. 61, No. 3, 2012, pp. 701–706.

27 Ryan Goodman, “The Detention of Civilians in Armed Conflict”, *American Journal of International Law*, Vol. 103, No. 1, 2009, p. 50.

28 Hill-Cawthorne and Akande also convincingly state: “Since IACs concern two or more states, one state or the other is going to be acting on the territory of a foreign state and acting with respect to individuals who are foreign nationals. In these circumstances, only an explicit norm of international law can provide the legal authority for targeting, detention, etc. Without such a rule of international law, these actions would be unlawful as a matter of international law since states do not have authority to take such action on the territory of another state and have obligations to other states with respect to how they treat nationals of those other states.” L. Hill-Cawthorne and D. Akande, above note 19.

29 E. Debuf, above note 11, p. 4. Otherwise, the alternatives would be to either release or kill captured persons.

30 See, for example, Claus Krefß, “Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts”, *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, p. 263, arguing that “an ‘armed conflict model’ for preventive detention in non-international armed conflicts is likely to emerge through “translation” or analogizing principles from the laws of war governing traditional international armed conflicts”. Such a model could include an inherent power to detain as a corollary of the power to target.” See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 301–302.

31 On the notion of DPH, see Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 152; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, ICRC, Geneva, 2001, p. 99; IACHR, *Ellacuria et al. v. Salvador*, 22 December 1990; Supreme Court of Israel, *Public Committee against Torture in Israel v. The State of Israel et al.*, 2005, paras 33–40.



be important to have the ability to target civilians who are DPH during NIACs, DPH itself is not a requirement to detain individuals on security grounds. In other words, to be a security threat is not synonymous with and, in fact, is broader than DPH. A person may be a security threat, and hence be subjected to detention, without directly or even *indirectly* participating in hostilities or engaging in activities that cause material and direct, *actual or potential harm* to a State and without violating the rules of IHL.<sup>32</sup> Precisely put, the two regimes of detention and targeting and the subjects they regulate are distinct and should not be conflated. The contention that the prerogative of States to target some specific individuals also gives them the authority to detain those individuals who may be considered to have threatened State security but have not directly participated in hostilities is thus not watertight. The related argument that, in the absence of a legal basis for detention, States may be encouraged to kill rather than detain individuals is also not that evident. The act of killing individuals in armed conflict does not much depend on a State's ability to detain them.

It is also difficult to agree with the assertion that States have a power to detain individuals in NIACs since they have the same power in IACs, where they assume more exacting obligations. The nature of the conflict and the parties involved in IACs and NIACs is completely different. The *raison d'être* behind the rules regulating NIAC and IAC, including those concerning detention, is also not the same. IACs usually occur between two or more States, and recognizing the authority of a belligerent State to detain individuals threatening its security is a natural consequence of the inherent sovereign right of that State to protect its territorial integrity, its political independence and the well-being of its population.

The recognition of the detention power of a State during IACs also has the element of reciprocal benefits for States: it guarantees to warring States that their citizens who might be detained by other belligerent States are treated humanely. In IACs, the basic assumption is that the belligerent States have the capacity and institutional ability to keep individuals in detention humanely and with dignity and have judicial or quasi-judicial mechanisms to redress possible arbitrary incarcerations. In contrast, such assumptions either do not exist or are qualified when it comes to NIACs. NIACs involve conflicts between States and non-State actors or between non-State actors, and the lack of an express authorization of detention is evidently a reflection of States' aversion to any rules that may bestow a degree of recognition on the non-State actors. Of course, this does not necessarily suggest that States had the intention to restrict their own capacity to detain in NIACs.<sup>33</sup> Instead, they are well aware that they have other legal avenues

32 The Geneva Conventions and their Additional Protocols do not require a material harm to transpire from the activities of a protected person. GC IV Article 42 allows the internment of or imposition of assigned residence on an alien "if the security of the Detaining Power makes it absolutely necessary". This provision does not require that a hostile act is actually committed by the alien; the potential to commit such acts suffices. See Robert W. Ghering, "Loss of Civilian Protections", *Military Law Review*, Vol. 90, Autumn 1980, pp. 51–52, 84–85, arguing that "[a] civilian who has committed no hostile acts nor engaged in any prejudicial activity may still be denied a right whose exercise would be prejudicial to the national interests or security of his enemy". See also R. Goodman, above note 27.

33 K. Mačák, above note 19.

that they may use, besides the rules of IHL, to detain individuals threatening their security, including domestic law. Therefore, the assertion that IHL offers the legal basis for detention in the contexts of NIACs needs to rest on an alternative reasoning with some legal scaffolding in treaty or customary law.

One alternative would be to draw a parallel rule from IACs where both treaty and customary IHL contain an inherent power to intern, and then to extrapolate this to NIACs and consider this “inherent power to intern” as a legal basis of internment in NIACs.<sup>34</sup> One can indeed find strong normative foundations for this view in customary international law. States have always engaged in detaining individuals threatening their security, whether in peacetime or in NIACs, and this has generally been accepted as lawful.<sup>35</sup> It may consequently be argued that the necessary elements of customary law – practice and *opinio juris* – exist, and hence there is a customary rule permitting detention in NIACs.

An additional legal source, which is often overlooked in the literature, can be found in Article 3 of AP II, which declares:

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, *by all legitimate means*, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State [emphasis added].

In this provision, the formulation “all legitimate means” is couched in broad terms and encompasses a wide range of measures that States may adopt to protect their security. Although the provision does not mention examples of such measures, undoubtedly one can envisage security detention as forming part of “all legitimate means” necessary to maintain law and order and to safeguard national unity and territorial integrity, which are the traditional national security interests of States.<sup>36</sup>

On these two grounds – namely, customary law and Article 3 of AP II – it may thus be concluded that IHL authorizes detention in NIACs and that, accordingly, States have the authority to detain individuals posing a threat to their security. It should nevertheless be noted that the formation of a rule of customary law is essentially State-centric, and Article 3 of AP II itself makes reference to States as the only entity permitted to use “all legitimate means” to

34 See Jelena Pejić, “The Protective scope of Common Article 3”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 208–209: “It is believed that the ‘imperative reasons of security’ standard strikes a workable balance between the need to protect personal liberty and the detaining authority’s need to protect against activity seriously prejudicial to its security.” See also ICRC, “Strengthening Legal Protection for Persons Deprived of Their Liberty in Relation to Non-International Armed Conflict: Regional Consultations”, Background Paper, 2012, p. 13.

35 See Major Robert E. Barnsby, “Yes We Can: The Authority to Detain as Customary International Law”, *Military Law Review*, Vol. 202, 2009, pp 73–81. See also Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, p. 70; Kubo Mačák, “A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 45, 2015, available at: <https://ssrn.com/abstract=2559220>.

36 The historical genesis of this provision indicates that the rule was included to allay the concern of States with regard to possible interventions from outside forces including humanitarian organizations under the pretext of humanitarian operations. See ICRC Commentary on APs, above note 21, pp. 1361–1363.

maintain national security and public order. The same argument cannot therefore be advanced for the detention power of non-State actors. Indeed, the unwillingness of States to risk giving legitimacy to armed groups has often made States hesitant to acknowledge the detention power of non-State actors.<sup>37</sup> In NIACs, States rarely agree or even acquiesce to the *de facto* power of their adversaries to target or detain individuals. Given this, the validity of the argument that there is a customary rule of IHL granting detention power in NIACs is valid only with regard to States, and not to non-State armed groups. Some authors have attempted to develop a corresponding authority to detain for non-State armed groups on the basis of “equality of arms”, arguing that this would promote the coherent application of IHL for all parties to an armed conflict.<sup>38</sup> However, this lacks a strong normative foundation, at least as far as detention is concerned – in other words, there is a clear normative gap in the law.

### Moving away from the debate on authorization versus regulation

The foregoing analysis and a large part of the scholarly works written on the subject<sup>39</sup> clearly suggest that for the most part the debate on detention revolves around the issue of whether IHL *authorizes* or *regulates* detention in NIACs. As concluded in the preceding section, a close examination of the different arguments reveals that, as far as detention is carried out by *States*, the contention that IHL provides a legal basis for detention in NIACs has a firm ground in customary law and Article 3 of AP II; however, no similar normative rules authorize non-State armed groups to exercise the same power under either treaty or customary rules of international law. Notwithstanding this conclusion, one may still step back and raise two fundamental questions: first, is it even necessary for the protection of individuals in armed conflict situations that IHL provide rules which *explicitly* permit or proscribe detention; and second, if not, what alternative legal avenues are available for parties to NIACs to resort to measures of detention?

It is intuitively true that a clear and explicit rule permitting/proscribing detention in NIACs creates legal certainty. However, the enduring debate on whether IHL does or should expressly offer a legal basis for detention in NIACs is of little practical importance and may even be undesirable in light of the existence of other alternative legal avenues available for States to resort to measures of detention. What is more important for detainees is to focus on the conditions rather than the permissibility of detention.<sup>40</sup> The issue of

37 As Justice Leggatt rightly pointed out in the *Mohammed* case, above note 19, States would not have agreed to establish by treaty a power to detain in a NIAC as it would be “anathema” to accept that a potential rebel group would have the right to exercise a function which is a core aspect of State sovereignty.

38 D. Murray, above note 19.

39 See, for example, K. Mačák, above note 19; L. Hill-Cawthorne and D. Akande, above note 19; R. Goodman, above note 22; A. Sari, above note 22.

40 The only practical relevance of arguing for or against IHL providing specific grounds for detention in NIACs is to determine whether a European country involved in a NIAC could impose security detention without violating Article 5 of the ECHR. This was indeed what happened in the *Mohammed* case, above note 19. See L. Hill-Cawthorne and D. Akande, above note 19.

permissibility of detention should be left to other rules such as the domestic law of States, UN Security Council resolutions, if any, and IHRL.<sup>41</sup> Of course, considering that these rules, particularly domestic laws and IHRL, are traditionally applied only by States and not by non-State actors, it may be apposite to clearly specify in the rules of IHL the basis under which detention may be conducted by non-State armed groups during NIACs. Nevertheless, as stated above, States are often unwilling to accept any rule suggesting that non-State armed groups have equal power to detain individuals. States may view acceptance of the authority to detain for non-State armed groups as sharing sovereign power with these armed groups and limiting their own ability to contain insurrection.<sup>42</sup> States are aware of the possibility of detention by non-State armed groups, but they do not want to give it any legal clout, as this may imply recognition of the legitimacy of those groups. The resistance of States to expressly acknowledging the detention power of non-State armed groups in the law is thus essentially a “framing” issue and not a denial of the occurrence of detention by non-State armed groups. As can clearly be inferred from the limited provisions that common Article 3 and AP II (Articles 4 and 5 in particular) provide, States prefer to bind themselves to rules that enhance respect for humane treatment of detainees, without giving the impression that non-State actors have equal power to detain.

To move in a direction that is palatable to States, the general debate on the issue should thus focus on the extent of material legal protection that IHL should provide for persons detained in NIACs, particularly concerning the procedural and substantive conditions of their detention, treatment during detention, and their transfer and release. The development of the law regulating NIACs should similarly aim at guaranteeing more humane treatment of detainees rather than focusing on *authorizing* or *forbidding* detention. The normative gap-filling effort should move towards developing rules governing NIACs that guarantee, at least, the same procedural and substantive humanitarian standards of treatment available in IHL for those detained in IACs, or in IHRL standards available for those individuals detained in the context of derogation from human rights norms.<sup>43</sup> The legal regime applicable in times of derogation from IHRL obligations is generally meant to regulate situations such as war, and the substantive and procedural guarantees available during derogations are minimum

41 Gabor Rona has stated: “It is logical that ... since there is no conflict between two or more sovereigns [in a NIAC], the IHL of non-international armed conflict should be silent, in deference to national law, on questions of detention.” Gabor Rona, “An Appraisal of US Practice Relating to ‘Enemy Combatants’”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, pp. 232, 241. This is true for most cases of NIAC, but NIACs may also occur across international borders outside the jurisdiction of a particular State, and there is a possibility that the domestic law of one State may not necessarily be adequate. See C. Krefß, above note 30. See also E. Debuf, above note 11, pp. 3–9; Monica Hakimi, “International Standards for Detaining Terrorist Suspects: Moving Beyond the Armed Conflict–Criminal Divide”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, pp. 607–609; M. Sassòli, above note 24, p. 972; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart, Oxford and Portland, OR, 2011, p. 329.

42 See D. Murray, above note 19, p. 451.

43 In this regard, attempts to highlight these procedural and substantive safeguards have already been made by a few scholars. See, for example, K. Dörmann, above note 20, pp. 349–365.

standards that are applicable in all contexts irrespective of the level or nature of crisis, including where a State is involved in a NIAC or IAC. Historically, the main reason why States have incorporated the various derogation provisions in regional and international human rights treaties is to overcome threats of armed conflict.<sup>44</sup>

As far as security detention is concerned, it should be noted that the existing forms of security detention that are contemplated by the pertinent provisions in the various IHL treaties – namely pre-trial confinement, internment and assigned residence – are generally considered to be very serious measures with grave repercussions on the rights of individuals.<sup>45</sup> Hence, no other, more restrictive forms of security detention are allowed, regardless of the nature or degree of the security threat posed by such individuals.<sup>46</sup>

Given its severe implications on the rights of individuals, security detention may be selectively imposed only when it is warranted by the circumstances. This is evidenced by the language of Article 42 of GC IV: “if the security of the Detaining Power makes *it absolutely necessary*”; and, in occupied territory, Article 78: “for *imperative reasons of security*”. These formulations indicate that security detention without trial is an exceptional measure, the imposition of which is acceptable only when circumstances are compelling.<sup>47</sup> The provisions are underpinned by the basic precept that the individual rights and freedoms of individuals should remain unimpaired unless a real threat to security demands restriction.<sup>48</sup>

44 See Giorgio Agamben, “The State of Exception as a Paradigm of Government”, in Giorgio Agamben, *State of Exception*, trans. Kevin Attel, Chicago University Press, Chicago, IL, 2005, pp. 1–31.

45 Jean Pictet states that “internment and the placing of a person in assigned residence are the severest measures of control that a belligerent may apply to protected persons”. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (ICRC Commentary on GC IV), p. 258. Also see Supreme Court of Israel, *Marab*, above note 18, para. 20. In terms of degree of severity, internment is more severe than assigned residence “as it generally implies an obligation to live in a camp with other internees”. See ICRC Commentary on GC IV, above, p. 256. See also Supreme Court of Israel, *Ajuri*, above note 5, para. 26.

46 Article 41 of GC IV ordains that “[s]hould the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it *may not have recourse to any other measure of control more severe* than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43” (emphasis added). Article 78 similarly declares that the occupying power “may, *at the most*, subject them [protected persons] to assigned residence or to internment” (emphasis added).

47 See ICRC Commentary on GC IV, above note 45, p. 258; Supreme Court of Israel, *Ajuri*, above note 5, para. 24 (“these measures may be adopted only in extreme and exceptional cases”). In *Al-Jedda v. The United Kingdom*, the ECtHR noted that internment is “a measure of last resort”: ECtHR, *Al-Jedda v. The United Kingdom*, 2011, para. 107. Also see Hans-Peter Gasser, “Protection of the Civilian Population”, in Dieter Fleck and Michael Bothe (eds), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 288.

48 Supreme Court of Israel, *Marab*, above note 18. The Court stated that “it must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty. Detention is the exception. The general rule is one of freedom. Confinement is an exception.” Pejic also argues that “internment is an exceptional measure ... based on the general principle that personal liberty is the rule, and on the assumption that the criminal justice system is able to deal with persons suspected of representing a danger to State security”. J. Pejic, above note 20, p. 380. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Zejnil Delalić et al.*, 1998, para. 565.

For the purposes of this article, the author will treat the rules of IHL applicable in IAC as customary rules applying also in NIAC unless otherwise stated. Furthermore, as there is no combatant status in IAC, the author will consider detainees in NIAC to be akin to “civilian internees” rather than PoWs. In the following section, an attempt is made to highlight some minimum conditions for security detention in IACs. In NIAC, similar rules are derived from treaty and customary rules of IHL, IHRL and the practice of domestic courts and international judicial institutions. It is significant to note that any future proposal to develop the law of NIACs governing security detention should be mindful of the “framing effect” of the rules and its possible impact on the response of States.

## Conditions and limits of lawful security detention

While recognizing the power of a State in armed conflict to impose security detention on persons posing a threat to security, the law of war does not allow the general suspension of the right to liberty of victims of armed conflict for any alleged security threat. It only allows the restriction of liberty in very narrowly defined circumstances, and upon the fulfilment of certain conditions. These conditions place effective limits on the power of States to have recourse to security detention in times of war and could, as States deem fit, be applied to security detention occurring in both IACs and NIACs.

### Nexus with the armed conflict

The first important condition for security detention in IHL is the requirement of nexus with the armed conflict. A State can impose security detention in accordance with IHL only when the security threat dictating such a measure is related to an armed conflict. A State cannot rely on IHL to subject individuals to security detention in order to deal with a threat that is not linked with the armed conflict, regardless of the impact of the threat on its security. This is simply because the material domain of application of IHL is restricted to armed conflict situations. Accordingly, someone may be interned only if his present or projected activities can be considered as part of or related to the war. This is the case if a civilian shoots a passing enemy soldier, plants a bomb in an enemy encampment, destroys communication facilities, attempts to liberate PoWs, intentionally misleads troops or performs other intelligence functions on behalf of the enemy. Generally, all “[s]ubversive activit[ies] carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power ... threaten the security of a country”.<sup>49</sup>

49 ICRC Commentary on GC IV, above note 45, p. 258.

## The seriousness of the threat and the existence of a reasonable suspicion

The seriousness of the threat is generally an important prerequisite to invoking the national security exceptions recognized by the IHL treaties. A security threat that serves as a basis for the detention of individuals in the context of armed conflict has to satisfy some minimum threshold of gravity; it should be of serious nature and the invocation of its existence should be adequately substantiated.<sup>50</sup> The detaining power should always demonstrate that there are “serious and legitimate reasons” to consider that the detainees may prejudice its security.<sup>51</sup> This was well articulated by Justice Barak, former president of the Israeli Supreme Court, in *Ajuri v. IDF Commander*. While examining the legality of assigned residence that the Israeli military commander imposed on some Palestinians in the occupied Palestinian territories for security reasons, Justice Barak stated:

What is the level of danger that justifies assigning a person’s place of residence, and what is the likelihood thereof? The answer is that any degree of danger is insufficient. In view of the special nature of this measure, it may usually only be exercised if there exists administrative evidence that – even if inadmissible in a court of law – shows *clearly* and *convincingly* that if the measure of assigned residence is not adopted, there is reasonable possibility that he will present *a real danger* of harm to the security of the territory.<sup>52</sup>

Security detention based on a mere suspicion or a non-existent threat, or even an insignificant contribution made to a credible threat, cannot therefore be justified.<sup>53</sup> Furthermore, in order to subject someone to preventive detention, it is, for instance, insufficient to show the existence of a tenuous connection of a detainee with a “terrorist” organization. Rather, a specific and individualized determination of the threat should be made on the basis of an individual’s “connection and contribution to the organization ... expressed in other ways that

50 See ICRC Commentary on GC IV, above note 45, p. 258 (where Pictet mentions serious threats to security such as espionage and sabotage). Article 75 of GC IV, albeit in relation to suspension of execution of death penalty in occupied territories, talks about “grave emergency involving an organized threat to the security of the Occupying Power or its forces”. In the *Schweizer* case, the HRC also emphasized that “[a]lthough administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances” (emphasis added). HRC, *Schweizer*, above note 13, para. 18.1.

51 See S. Sivakumaran, above note 30, p. 303: “Preventive detention without evidence and on a mere suspicion is prohibited even if its stated purpose is to ensure the security of the State.” In its 1999 report on Colombia, the IACHR also observed that “preventive detention is a special measure which should only be applied in cases where *reasonable suspicion*, and not mere presumption, exists that the defendant may flee from justice or destroy evidence”. IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999, para. 21; see also IACHR, *Report on Terrorism and Human Rights*, 2002 (IACHR Terrorism Report), para. 123.

52 Supreme Court of Israel, *Ajuri*, above note 5, para. 25 (emphasis added). See also Supreme Court of Israel, *A v. State of Israel*, CrimA 6659/06, 5 March 2007, para. 23, available at: [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf) (“clear and convincing evidence”). A similar standard of proof, “highly likely” or “certain”, is also suggested by some experts. See E. Debuf, above note 11, p. 5.

53 Supreme Court of Israel, *Ajuri*, above note 5, para. 39.

suffice to include him in the cycle of hostilities in its broad sense, such that his detention will be justified under the law”.<sup>54</sup> This requires that the threat which is the basis of his detention should be posed by the detainee himself.<sup>55</sup> As such, a security detention cannot be ordered, for instance, to deter others, for purposes of convenience to the detaining power, or to use an individual as a “bargaining chip” with the enemy, even if it might be thought that this would enhance national security.<sup>56</sup> Similarly, the internment of individuals cannot be carried out for the sole purpose of gathering intelligence information in a circumstance where a detainee himself poses no security threat.<sup>57</sup>

### The preventive nature of the measure

Security detention is inherently preventive in nature. The main purpose of security detention is only to address a present or prospective danger rather than to punish a previous unlawful act.<sup>58</sup> Security detention cannot be ordered to penalize a person for his/her past criminal deeds.<sup>59</sup> This clearly implies that even if an individual did

54 Supreme Court of Israel, *A v. State of Israel*, above note 5, para. 21. According to the Israeli Supreme Court, “in order to intern a person it is not sufficient that he made a remote, negligible or marginal contribution to the hostilities against the State of Israel. ... [T]he State must prove that he contributed to the perpetration of hostile acts against the State, either directly or indirectly, in a manner that is likely to indicate his personal dangerousness.” *Ibid.* See also R. Goodman, above note 27, p. 55.

55 See ICRC Commentary on GC IV, above note 45, p. 258

56 “An essential condition for being able to assign the place of residence of a person under art. 78 of the Fourth Geneva Convention is that the person himself constitutes a danger, and that assigning his place of residence will aid in averting that danger. It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others.” Supreme Court of Israel, *Ajuri*, above note 5, paras 24, 27. See also Supreme Court of Israel, *John Does (A) v. Ministry of Defense*, HCJ 1 CrimFH 7048/97, 12 April 2000, paras 15–19, available at: [www.hamoked.org/files/2012/230\\_eng.pdf](http://www.hamoked.org/files/2012/230_eng.pdf). The Court again confirmed this position in *Batya Arad v. The Knesset*, Case No. HCJ 2967/00, PD 54 (2) 188, 2000, and in *A. and B. v. State of Israel*, CrimA 6659/06, CrimA 1757/07, CrimA 8228/07, CrimA 3261/08, 11 June 2008, paras 18–19. See also E. Debuf, above note 11, p. 5; HRC, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/79/Add.38, 1994, para. 8.

57 See R. Goodman, above note 27, p. 55 (citing US Supreme Court, *Hamdi v. Rumsfeld*, 542 US 507, 2004); J. Pejic, above note 34, p. 21; M. Hakimi, above note 41, p. 644. See also ICRC Commentary on GC IV, above note 45, p. 343.

58 ICTY, *Delalić*, above note 48, para. 577; Supreme Court of Israel, *A v. State of Israel*, above note 52, para. 22.

59 *Ibid.*, para. 22. Dinstein has also written that “administrative detention must have a preventive nature, that is, must be resorted to not as a penalty for an offence committed in the past but as a measure denying the suspect the possibility of committing an offence in the future. When a person is suspected of having already committed an offence, he should be prosecuted by a competent court. True, it happens that administrative detentions are inflicted on persons who are suspected of having committed offences in the past, when there is not sufficient evidence to bring about their conviction by a court of law, or where proof of their guilt beyond reasonable doubt requires the disclosure of intelligence sources (especially the exposure of secret agents whom the occupant does not wish to endanger or whose clandestine operation he is unwilling to discontinue). Yet, even in such instances, the reason for the internment (at least in theory) is not punishment (without due process of law) for the offence committed in the past, but apprehension lest similar acts be committed in the future.” Yoram Dinstein, “The International Law of Belligerent Occupation and Human Rights”, *Israel Yearbook on Human Rights*, Vol. 8, 1978, pp. 125–126.



in fact carry out acts which harmed the security of a State, he cannot be subjected to assigned residence or internment unless there is a real possibility that he will repeat such or similar acts.<sup>60</sup> It is plausibly argued that this is essentially because the need for security detention “stems, *inter alia*, from the difficulty in finding a response within criminal law to certain threats to national security”.<sup>61</sup> If the danger is a past event, the criminal justice system, rather than preventive detention, becomes the most apt means to deal with it.<sup>62</sup> For preventive detention to be sustained, there must therefore be a continuing threat.<sup>63</sup> Also, if a person has already been preventively detained, interned or subjected to assigned residence without a criminal charge, he should be released “as soon as the reasons which necessitated his internment no longer exist”<sup>64</sup> and in any case “as soon as possible after the close of hostilities”.<sup>65</sup> The only exception is if the detainee is accused or convicted of crimes or has violated disciplinary rules.<sup>66</sup>

## The requirements of absolute necessity and imperativeness

The standards of *absolute necessity* and *imperativeness* in Articles 42 and 78 of GC IV also constitute important safeguards.<sup>67</sup> In order to legitimately impose security detention, States should demonstrate that there is a material and temporal

60 *Ibid.* However, as Dinstein has indicated (*ibid.*), this does not mean that the individual cannot be subjected to other measures. Indeed, if he is a civilian, he may be subjected to criminal proceedings and punishment upon conviction for participating in hostilities. See, for example, GC IV, Art. 68.

61 Supreme Court of Israel, *John Does*, above note 56, para. 16.

62 See M. Hakimi, above note 41, pp. 610–614.

63 *Ibid.* See also Supreme Court of Israel, *Ajuri*, above note 5, para. 24.

64 GC IV, Art. 132.

65 *Ibid.*, Art. 133. This is a long-standing position of the ICRC. According to Jelena Pejic, “[o]ne of the most important principles governing internment/administrative detention is that this form of deprivation of liberty must cease as soon as the individual ceases to pose a real threat to State security, meaning that deprivation of liberty on such grounds cannot be indefinite. In view of the rapid progression of events in armed conflict, a person considered to be a threat today might not pose the same threat after a change of circumstances on the ground. In other words, the longer internment lasts, the greater the onus on a detaining authority to prove that the reasons for it remain valid. The rationale of the principle is, thus, to facilitate the release of a person as soon as the reasons justifying the curtailment of liberty no longer exist.” J. Pejic, above note 20, p. 382. See also AP I, Art. 75(3). This is considered to be a rule of customary international law applicable for both IAC and NIAC. See ICRC Customary Law Study, above note 8, Rule 128(c); M. Hakimi, above note 41, p. 607; K. Dörmann, above note 20, pp. 352–353. See also A. Bianchi and Y. Naqvi, above note 41, p. 370; H.-P. Gasser, above note 47, pp. 322–323.

66 GC IV, Art. 133(2). See Y. Dinstein, above note 59, p. 126.

67 Pictet has written that GC IV “stresses the exceptional character 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 upon 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.” ICRC Commentary on GC IV, above note 45, p. 258; ICTY, *Delalić*, above note 48, para. 581 (“The judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security. Thus, if these measures were inspired by other considerations, the reviewing body would be bound to vacate them”). See also H.-P. Gasser, above note 47, p. 320.

necessity that demands the detention of individuals without trial. It also has to be shown that there is a rational connection (“rational means test”) between the security detention and the danger which is sought to be averted; that security detention is the least restrictive means available to deal with such danger (“least injurious means test”); and that the protection of the national security interest at stake is worthy of its cost – i.e., the deprivation of liberty resulting from the security detention (“proportionality in the narrower sense”).<sup>68</sup> In this vein, it is rightly contended that the institution of security detention is only

designed to prevent and frustrate a security danger that arises from the acts that [a detainee] may perpetrate and which may not reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences (for the purpose of reaching conclusions from past acts with regard to future danger).<sup>69</sup>

It should further be mentioned that the mere fact that armed hostilities exist for a prolonged period of time “cannot justify the extended detention or internment of civilians; their detention is only justified as long as security concerns strictly require it”.<sup>70</sup>

### *A higher threshold of necessity and a stricter standard of proportionality for internment and assigned residence in human rights law*

As implied in the terms “absolute” and “imperative” under Articles 42 and 78 of GC IV, the serious nature of internment and assigned residence requires a higher degree of necessity and proportionality than ordinary cases of necessity recognized in IHRL or the *essentiality* standard under Article 103 of GC III for pretrial confinement of PoWs.<sup>71</sup> Although a precise threshold of necessity is difficult to draw, and is likely to depend on the circumstances, security detention in armed conflict presupposes the existence of a more exacting standard of necessity than in peacetime.

68 A good illustration of these tests can be found in the decision of the Israeli Supreme Court in the *Beit Sourik* case, above note 5, para. 41. See also R. Goodman, above note 27, p. 55. Gasser has further observed that “[i]nternment should be ordered only if other control measures are not sufficient”: H.-P. Gasser, above note 47, p. 288. See also IACHR, *Coard et al. v. United States*, 1999, para. 52; IACHR Terrorism Report, above note 51, para. 143.

69 Supreme Court of Israel, *Sejadia v. Minister of Defence*, Case No. HCJ 253/88, IsrSC 43(3) 801, 1988, cited in Supreme Court of Israel, *Ajuri*, above note 5, para. 25.

70 IACHR Terrorism Report, above note 51, para. 143.

71 In IHRL, the term “necessary” is considered to be not synonymous with “indispensable”, nor has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. See the decisions of the ECtHR in *Handyside v. United Kingdom*, 1976, para. 48. see also ECtHR, *The Observer and the Guardian v. The United Kingdom*, Judgment, 26 November 1991, para. 59; ECtHR, *Gillow v. United Kingdom*, Judgment, 24 November 1986, para. 55. The ICJ in the *Nicaragua* case also held that those measures designed to protect national security interests must be “not merely useful but ‘necessary’”: ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports* 1986, p. 117, para. 224.

Given that armed conflict is the gravest security threat that might require States to adopt more exceptional and severe measures in contrast to any other security threat in peacetime, this interpretation may appear illogical, the reason being that the State should have more flexibility during war than in peacetime. Yet there is also a greater potential for abuse in armed conflict than in a peacetime situation. It is thus plausible and desirable to place a stricter standard of necessity in contexts of armed conflict.

Note, however, that even if there is no such explicit requirement under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee (HRC) has adopted the same standard of “absolute necessity” for security detention in a peacetime context.<sup>72</sup> If this is taken as the prevailing norm, there is therefore no difference in the required threshold of necessity between armed conflict situations and peacetime, and security detention shall be imposed only to the extent that it remains absolutely necessary.

### *Occupied territories: A particularly compelling standard of necessity*

It is argued that the standard of necessity which is required to subject individuals to measures of assigned residence or internment becomes even more strict in occupied territories. According to Pictet:

In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately. ... [The] exceptional character [of internment and assigned residence] must be preserved.<sup>73</sup>

This more restrictive approach towards the authority of the occupying power to detain in occupied territories for security reasons is warranted by the nature of occupation itself. Military occupation is presumed to be a temporary phenomenon, and military administration is normally thought to be an unavoidable outcome of military necessity rather than a system designed to fulfil a zeal for annexation of the territory of the enemy, or to have full political control over persons found therein.<sup>74</sup> Because of this lack of sovereign power over both the territory and the people, the military must demonstrate a truly compelling necessity to intern

72 HRC, General Comment 35, 2014, para. 15.

73 ICRC Commentary on GC IV, above note 45, pp. 367–368.

74 Supreme Court of Israel, *Beit Sourik*, above note 5, paras 27–28 (asserting that the security barrier wall was meant to address security concerns emanating from terrorists and not as a political measure to define a boundary). See also Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 21; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 247; Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 673; Y. Dinstein, above note 59, pp. 109–110.

civilians in an occupied territory, more than would be required of a detaining power in its own territory. As will be illustrated below, the occupying power is also required to institute a regular procedure to determine whether someone should be interned or assigned to a particular area of residence.

### Prohibition of security detention as a collective measure

IHRL does not allow the imposition of security detention in the absence of an individual evaluation of a person's particular level of security threat.<sup>75</sup> The same rule applies to security detainees during an armed conflict. This is a direct and logical consequence of the rule that was stated earlier – i.e., that individuals shall be the subject of security detention only when they *personally* pose a security threat. A belligerent State cannot lawfully intern or place in assigned residence protected persons *en masse*, without thoroughly examining the case of each and every internee. Preventive detention, whether in occupied or a State's own territory, shall not be used as a collective punishment applicable indiscriminately to all individuals without consideration of the nature or level of threat that each detainee has posed.<sup>76</sup> Obviously, in order to conduct such an evaluation, detainees need to have the rights and procedural guarantees that enable them to contest the legality of their detention. This directly leads us to the next section, which discusses the procedural guarantees that international law provides for persons subjected to security detention.

### Procedural safeguards against arbitrary detention

The relevant rules of IHRL provide various procedural and substantive guarantees against arbitrary detention, including the right of *habeas corpus*, the right to be promptly informed of the reasons of detention, access to a lawyer, and the right to periodic review of the necessity for continued detention, in cases of security detention.<sup>77</sup> As IHRL continues to apply during armed conflict situations, these guarantees should in principle apply as well. However, because IHRL allows derogation from, or at least the modification of, some of these guarantees during

75 See HRC, Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93, 1998, para. 21. See also HRC, Concluding Observations on India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para. 24.

76 "This does not mean that a detaining authority cannot intern a large number of persons, but that both the initial decision on internment and any subsequent decision to maintain it, including the reasons for internment, must be taken with respect to each individual involved." J. Pejic, above note 20, pp. 381–382.

77 See ICCPR, Art. 9(4); ECHR, Art. 5(4); Inter-American Convention on Human Rights, Art. 7(6). See also Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearance; Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 14 of the Convention on the Rights of Persons with Disabilities; and Principle 4 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res. 43/173, 9 December 1988 (UN Body of Principles). See also HRC, General Comment 35, 2014, paras 15, 40, 46; HRC, *Schweizer*, above note 13, para. 18.1; IACHR Terrorism Report, above note 51, paras 128, 139; OHCHR, General Comment 8, UN Doc. HRI/GEN/1/Rev.1, 1994, para. 4.

emergency situations (the most typical example of which being armed conflict), States have been invoking this derogation regime in order to deprive detainees of the necessary procedural guarantees.<sup>78</sup> There is therefore a need to determine whether these safeguards are derogable in armed conflict situations or continue to apply despite the fact that derogations may have been made in accordance with the applicable rules of IHRL.

The relevant rules of IHL expressly ordain that detainees who are subjected to internment or assigned residence shall be accorded some of the most important procedural safeguards against arbitrary detention.<sup>79</sup> What makes this prescription, as opposed to the same rule in IHRL, different is that States cannot derogate from it.<sup>80</sup> IHL provides minimum humanitarian guarantees already taking into consideration both military necessity and the associated emergency that States normally face during armed conflicts.<sup>81</sup> Therefore, no reason of national security or emergency justifies the suspension of these safeguards except in the manner provided by the same law itself.<sup>82</sup> Below are some other procedural safeguards against arbitrary detentions applicable in situations of armed conflict which security detainees may also benefit from.

### The requirement of a “regular procedure”

In occupied territories, Article 78 of GC IV provides that the decision to intern or assign residence “shall be made according to a regular procedure to be prescribed by the Occupying Power”. This refers to the *initial* decision to detain and is distinct from the examination of the legality of the detention at a later stage. There is no explanation in the Convention as to what the requirement of “regular procedure”

78 For example, the US Constitution even allows the suspension of the right of *habeas corpus* “in Cases of Rebellion or Invasion [as] the public Safety may require it.” Constitution of the United States, Art. 1, Sec. 9, para. 2. In the first couple of years following the 9/11 terrorist attacks, for instance, the government of the United States consistently claimed that those detainees held in Guantanamo should not benefit from the right of *habeas corpus*. See Jonathan Hafetz, “A Different View of the Law: *Habeas Corpus* during the Lincoln and Bush Presidencies”, *Chapman Law Review*, Vol. 12, 2009, p. 441.

79 GC IV, Arts 5(3), 71–78, 123(2), 126.

80 Dinstein has noted that the rules of IHL “are in force, in their full vigor, in wartime (as well as in hostilities short of war), in as much as they are directly engendered and shaped by the special demands of the armed conflict. Derogation from [these rights] is possible in extreme instances, but limited to specific persons or situations and no others. In this crucial respect, [the rights in IHL] are utterly different from ordinary (peacetime) human rights. Ordinary (peacetime) human rights are frequently subject to restrictions, which can be placed on their exercise ‘in the interests of national security or public safety’. Even more significantly, the application of ordinary (peacetime) human rights – whether or not restricted – can usually be derogated from in time of an international armed conflict.” Y. Dinstein, above note 31, p. 22. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Roslyn Higgins, Advisory Opinion, 2004, para. 14; Louise Doswald-Beck and Sylvain Vite, “International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, Vol. 33, No. 293, 1993, p. 98; IACHR Terrorism Report, above note 51, para. 78; ICRC Commentary on APs, above note 21, p. 303; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2003, p. 250.

81 ICTY, *Delalić*, above note 48, para. 581. See also ICRC Commentary on GC IV, above note 45, p. 261 (stating that “the procedures established in Geneva Convention IV itself are a minimum”).

82 For example, see GC IV, Art. 5.

signifies. It has been asserted that this requirement suggests that the internee should have a chance to be heard and that, for this purpose, the State is also obliged “to establish procedures permitting the examination of the internment measures”.<sup>83</sup>

There is no corresponding requirement in a State’s own territory,<sup>84</sup> or in common Article 3 or the provisions of AP II applicable to situations of NIAC. Thus, the nature and manner of the decision to detain in a State’s own territory during IACs and NIACs likely depends on domestic legislation and the circumstances of the capture. The commonly accepted principle existing in the domestic laws of many countries is that detention (particularly where it extends more than forty-eight hours) should be authorized by a judge, unless this is not possible due to the circumstances prevailing at the time the decision is made.<sup>85</sup> In times of war, whether IAC or NIAC, it may not be possible to secure an arrest warrant using the usual judicial procedure. Nevertheless, the power which issues the preventive detention order, whether judicial or administrative, should have procedures to verify the existence of a good cause – notably, the existence of a direct, imperative and imminent security threat – that necessitates immediate arrest and detention.<sup>86</sup>

### The right of *habeas corpus*

In addition to the requirement of “regular procedure” for the initial detention order, Article 78 of GC IV further demands that there shall be an appellate procedure to which detainees may have recourse to challenge the validity of the decision to detain them. This reflects the right of *habeas corpus*, which is also recognized under Article 43 of GC IV, applied in a State’s own territory. The provision proclaims that “[a]ny protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose”. In the recent War on Terror, although it has been consistently contested that such a right is not applicable for so-called “unlawful combatants”, it seems now beyond contention that the right of *habeas*

83 See H.-P. Gasser, above note 47, p. 289. Similarly, the IACHR stated that the requirement of a “regular procedure” includes “the right of the detainee to be heard and to appeal the decision, and any continuation of the detention must be subject to regular review”: IACHR Terrorism Report, above note 51, para. 143.

84 The relevant GC IV provision in a State’s own territory, Article 43, only talks about the requirement of administrative or judicial *review* of the decision to intern. However, Pictet asserts that the nature of the *regular procedure* under Article 78 to make the *original* decision to detain should mirror the stipulations in Article 43. ICRC Commentary on GC IV, above note 45, p. 368. The explicit stipulation of a regular procedural requirement only in relation to occupied territories may be viewed as a reinforcement of the exceptional nature of security detention in occupied territory, as opposed to a State’s own territory.

85 See Supreme Court of Israel, *Marab*, above note 18, para. 32. The procedures specified under Article 78 are also available in the military manuals of many countries, and the practice of many countries reveals the applicability of the principle of judicial detention. See ICRC Customary Law Study, above note 8, p. 345 and Vol. 2: *Practice*, pp. 2240–2250.

86 See HRC, General Comment 35, 2014, para. 15.

*corpus* applies to all civilian internees, whether they are designated as unlawful or enemy combatants or whether they find themselves in their own or occupied territories.<sup>87</sup> In view of this, persons detained in armed conflicts on security grounds, like all persons detained for any reason, enjoy the right to have their detention considered as soon as possible by a judicial or quasi-judicial organ.<sup>88</sup> This organ shall employ a due process that properly balances the right to liberty of the detainee and the security interests of the detaining power, taking into account the possibility of erroneous assessments of the detainee's level of risk in the uncertain and challenging moments of armed conflict.<sup>89</sup>

It should be noted that the right of *habeas corpus* is not expressly provided in the rules of IHL regulating NIACs. However, the rule is found in the domestic law of most States in the world,<sup>90</sup> and except the African Charter, all other regional human rights treaties and numerous conventions have given it explicit recognition.<sup>91</sup> Even in the African system, the African Commission on Human and Peoples' Rights (ACHPR) has found such a right to exist through a combined reading of Articles 6 and 7 of its Charter.<sup>92</sup> On various occasions, the ACHPR has noted that "judicial bodies shall *at all times* hear and act upon petitions for *habeas corpus* ... or similar procedures. *No circumstances whatever* must be invoked as a justification for denying the right to *habeas corpus*."<sup>93</sup> The ACHPR does not as such accept any reasons, including security justifications or invocation of armed conflict, to deny or unreasonably delay a detainee from exercising his right to *habeas corpus*.<sup>94</sup> Similarly, its American counterpart, the

87 See US Supreme Court, *Zadvydas v. Davis*, [2001] 533 US 678, 2001; US Supreme Court, *Hamdi v. Rumsfeld*, 542 US 507, 2004; US Supreme Court, *Rasul v. Bush*, 542 US 466, 2004; US Supreme Court, *Boumediene v. Bush*, 553 US 723, 2008. See also Jennifer K. Elsea and Michael John Garcia, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, CRS Report for Congress, 3 February 2010; Supreme Court of Israel, *Marab*, above note 18, para. 26. See also *A v. State of Israel*, 6659/06 HCJ, 5 March 2007, para. 41.

88 Article 43, article 78 GC IV ("with the least possible delay"). Unlike IHRL, there is not a specific time provided for judicial intervention in IHL. So it depends on the circumstances and the test of proportionality shall come into play when intervention is delayed for some time. The Israeli Supreme Court in *Marab* case has found that 18 days' time to be brought before a judicial authority in occupied territories is unacceptable while in *A v. State of Israel*, it found 14 days delay not disproportionate. Supreme Court of Israel, *Marab*, above note 18, para. 32; Supreme Court of Israel, *A v. State of Israel*, above note 52."

89 See US Supreme Court, *Hamdi*, above note 87, p. 532.

90 ICRC Customary Law Study, above note 8, p. 351.

91 ICCPR, Art. 9(4); ECHR, Art. 5(4); Inter-American Convention on Human Rights, Art. 7(6). See also Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearance, Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 14 of the Convention on the Rights of Persons with Disabilities; and Principle 4 of the UN Body of Principles, above note 77.

92 ACHPR, *Achuthan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Comm. Nos 64/92, 68/92, 78/92, 1995, paras 8–9; ACHPR, *Abdel Hadi, Ali Radi and Others v. Republic of Sudan*, Communication No. 368/09, 4 June 2014, para. 87; ACHPR, *Purohit and Moore v. The Gambia*, Communication No. 241/01, 2003, para. 70.

93 Emphasis added. ACHPR, *Hadi*, above note 92, para. 87. See also, e.g., ACHPR, *Purohit*, above note 92, para. 72; ACHPR, *Good v. Botswana*, 2011; ACHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle 5(e).

94 See ACHPR, *Hadi*, above note 92, para. 88; ACHPR, *Good*, above note 93, para. 175.

Inter-American Commission on Human Rights (IACHR), has repeatedly affirmed that the writ of *habeas corpus* is a *non-derogable* norm and that even a state of emergency or the severest form of national security threat, including armed conflict, cannot justify its suspension or render it ineffective.<sup>95</sup> The European Court of Human Rights, on the other hand, has consistently stressed that the existence of national security threats such as terrorism does not provide States with *carte blanche* “to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions”.<sup>96</sup> Correspondingly, the UN HRC has observed that the fact that an individual is detained as part of a security measure does not deprive him of his right to challenge the lawfulness of his detention, and that any law which denies the right to *habeas corpus* for security detainees violates Article 9(4) of the ICCPR.<sup>97</sup> It can therefore be concluded that, as a non-derogable norm, the right of *habeas corpus* applies not only in IACs but also to those persons detained for security reasons in situations of NIAC.

## Initial review

In contrast to the rule of *habeas corpus* in IHRL that requires detention to be examined by an appropriate judicial body,<sup>98</sup> Article 43 of GC IV allows review by not only a court but also an administrative board. In occupied territories, Article 78 of GC IV contemplates that the review could be made by “a competent body set up by the [Occupying] Power”. Given that occupation is enforced by military administration, it is understandable that the occupying power is given the chance to set up a competent body rather than a formal court. It is argued that the purpose of providing two alternatives under IHL is to allow warring States to have some flexibility.<sup>99</sup>

95 IACHR Terrorism Report, above note 51, paras 126–127. See also Inter-American Court of Human Rights (IACtHR), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, Ser. A, No. 8, 30 January 1987. The Arab Charter also takes the same position on the non-derogability of the right of *habeas corpus*. Although Article 4 of the ICCPR does not explicitly list it among the catalogue of non-derogable rights, the HRC has observed that “[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant”: HRC, General Comment 29, 2001, para. 16. See also the HRC’s Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93, 1998, para. 21 (in the context of preventive detention, the HRC observed that despite Israel’s derogation from Article 9, Israel “may not depart from the requirement of effective judicial review of detention”). The statements of the Committee clearly imply that the right of *habeas corpus* is of peremptory nature, at least when it is invoked in relation to non-derogable rights. See A. Bianchi and Y. Naqvi, above note 41, p. 304.

96 See ECtHR, *Sakik and Others v. Turkey*, Judgment, 26 November 1997, para. 44.

97 HRC, *Luis Touron v. Uruguay*, Communication No. R.7/32, UN Doc. Supp. No. 40 (A/36/40), 1981, paras 2.1, 2.3, 12.

98 Article 9(4) of the ICCPR specifies that the body must be a court, while Article 5(3) of ECHR, Article 14(5) of ACHPR and Article 7(5) of the IACHR require the body to be a “judge or other officer authorized by law to exercise judicial power”.

99 Article 43 is modelled on the provision in Article 35(2) of GC IV. See ICRC Commentary on GC IV, above note 45, p. 261.



Accordingly, IHL clearly but partially departs from IHRL as regards the nature of the review body. This difference highlights that “the two bodies of law have distinct presumptions about the context of detention”; one assumes peacetime, wherein the ordinary judiciary is presumably well-functioning, and the other is concerned with an armed conflict context in which an administrative board may be better suited to cope with the emergency pressure engendered by the conflict or to substitute for a deficient or non-functioning judiciary.<sup>100</sup> Yet, it is convincingly asserted that the review board in a State’s own territory or the “competent body” in an occupied territory should ensure at least the appropriate guarantees that a formal court would offer, including the necessary safeguards of independence and impartiality.<sup>101</sup> Such a body must also have the power to order the release of detainees whose detention is found to be “inspired by other considerations than those of security”.<sup>102</sup> The fact that Article 43 of GC IV uses the disjunctive term “or” to place an administrative board as an alternative option and on an equal footing with a court strengthens the construction that the board or the competent authority should exhibit some basic attributes of a formal court.

Articles 43 and 78 of GC IV apply only to situations of IACs, and the question as to the nature of the review body in NIACs inevitably arises. One alternative would be to adopt the standard from IHRL that the review body should be judicial. In NIACs, however, availing a judicial body for all security detainees may not be possible in some situations – for example, if because of a protracted conflict, the ordinary courts of a country are dysfunctional in some or all parts of the country, or if the conflict takes place overseas with a non-State armed group and establishing a judicial body is not practically feasible. The same flexibility that States require to be able to decide on the nature of the review body in IACs is also needed during NIACs, and therefore, the same possibility of instituting an “appropriate court or administrative board” should be available in the context of NIACs to allow security detainees to challenge the legality of their detention.

## Periodic review

Both Article 43 and Article 78 of GC IV require that the decision on internment or assigned residence shall, in addition to the initial review made by a court, administrative board or competent authority, be controlled by a periodic review. The same safeguard is also recognized in IHRL, and the regular review helps to monitor that the continued detention is not arbitrary and remains necessary

100 J. Bellinger III and V. Padmanabhan, above note 20, p. 210.

101 In the case of *Hassen v. UK*, the ECtHR noted that “Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent “court” in the sense generally required by Article 5 § 4 . . . , nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the ‘competent body’ should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness”: ECtHR, *Hassan*, above note 10, para. 106. See also ICRC Commentary on GC IV, above note 45, p. 260.

102 *Ibid.*, p. 261.

under the changing circumstances.<sup>103</sup> Periodic review obliges and enables “the responsible authorities ... to take into account the progress of events ... and changes as a result of which it may be found that the continuing internment or assigned residence of the person concerned are no longer justified”.<sup>104</sup> This helps to ensure compliance with “the fundamental consideration 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>105</sup>

However, distinct from IHRL, which simply requires “sufficiently frequent and reasonable” review,<sup>106</sup> Article 43 of GC IV specifies a clear time for the frequency of the review. The court or administrative board should examine the validity of the internment or the assigned residence *at least twice a year*. In occupied territory, by contrast, the occupying power is only required to provide a periodic review “*if possible every six months*”. The six-month limit is aspirational and, thus, review may be carried out within a reasonable interval even longer than six months depending on the circumstances.

It shall further be emphasized that “unlike the procedure for the initial appeal” described above, “which only takes place at the request of the person concerned, the periodical reconsiderations [under Articles 43 and 78 of GC IV] will be automatic once a protected person has made his first application to the responsible authority”.<sup>107</sup> In the opinion of the Israeli Supreme Court:

Judicial review is not “external” to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not “appeal” his detention before a judge. Appearing before a judge is an “internal” part of the detention process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.<sup>108</sup>

103 HRC, General Comment 35, 2014, paras 15, 18. In *A v. Australia*, the Committee observed that “every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.” HRC, *A v. Australia*, 1997, para. 9.4.

104 ICRC Commentary on GC IV, above note 45, p. 261.

105 *Ibid.*; ICTY, *Delalić*, above note 48, para. 58. Similarly, the Israeli Supreme Court held that “[t]he extreme means of detention ... places a special duty both on the competent authority and on the court in making the judicial review to carefully examine, from time to time, the extent of justification for the continuation of detention, while exercising restraint in use of the detention means and limiting it to situations in which real security needs require it.” See also *Khaled Ali Salem Said v. State of Israel*, CrimA 7446/08, Judgment, 7 November 2008, para. 43.

106 See, for example, ECtHR, *Lebedev v. Russia*, Judgment, 25 October 2007, paras 78–79. The HRC also did not specify the length of time between each review; it simply stated that there shall be “sufficiently frequent review”.

107 ICRC Commentary on GC IV, above note 45, p. 261.

108 Supreme Court of Israel, *Marab*, above note 18, para. 32.

As such, the detaining or occupying power is, *ex proprio motu*, bound to automatically review the decision to detain after the first petition for reconsideration is made by the detainee.<sup>109</sup>

## Intervention by the protecting power

Article 43 of GC IV also provides an additional safeguard against arbitrary security detention. Save in cases where the detainees object, the detaining power is obliged to communicate to the protecting power, *as rapidly as possible*, the names of all detainees who are subjected to internment or assigned residence, including those who are released. In addition, the outcome of the initial or subsequent review of the detention by the courts or boards should be relayed to the same as rapidly as possible.<sup>110</sup> This enables the home authorities on whom the detainees depend “to form an exact picture of the position of the majority of their nationals who have remained in the territory of the adverse Party and to inform their families”.<sup>111</sup> It is, thus, a mechanism to ensure that detainees have contact with the outside world.<sup>112</sup>

It should further be appreciated that Article 143 of GC IV also establishes for protecting powers a right to visit places of detention and internment. The provision requires that protecting powers, as well as the delegates of the ICRC, shall be given “access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter”. This access may only be exceptionally and temporarily restricted (postponed, but never entirely denied) for imperative military necessity.<sup>113</sup> Once access is permitted, the duration or frequency of the visit should not be subject to any hindrance.<sup>114</sup> This should be considered as another safeguard against arbitrary detention.

## Additional safeguards

In addition to the aforementioned procedural guarantees, IHL provides for other safeguards against arbitrary security detention during armed conflict. These include the right of internees to be promptly informed of the reasons of their detention,<sup>115</sup> the right of access to a lawyer (subject to security arrangements)

109 H.-P. Gasser, above note 47, p. 322.

110 There is no similar requirement in occupied territory under Article 78 of GC IV.

111 ICRC Commentary on GC IV, above note 45, p. 262.

112 Note that Article 43 of GC IV (unlike Article 35) does not specify that there should be a request from the protecting power. So, the detaining power should act on its own motion. *Ibid.*

113 *Ibid.*, pp. 574, 577.

114 *Ibid.*

115 Article 75 of AP I, for example, states that “any 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”.

and the right to be visited by international supervisory institutions, particularly the ICRC.<sup>116</sup> Further, security detainees must always be humanely treated and may in no circumstances be subject to inhuman and degrading treatment, torture or violence to their life, health, or physical or mental well-being, or be taken as hostages or subjected to public curiosity.<sup>117</sup> Detention conditions must not compromise the dignity and health of detainees. The detaining or occupying power is obliged to fulfil the “minimum needs of the ordinary individual”<sup>118</sup> such as food and clothing,<sup>119</sup> hygiene and medical care,<sup>120</sup> and an opportunity to perform religious and physical activities.<sup>121</sup> As was elaborated by the Israeli Supreme Court in *HaMoked et al. v. Commander of the Israel Defence Force*, where the applicants (security detainees) alleged that they were deprived of food and beds for security reasons:

while certain fundamental rights are balanced by conflicting interests, there is a bottom line that cannot be crossed, at which the rights become absolute, or almost absolute. This is the line that we reach regarding minimum detention conditions, in which the detainee is denied his humanity if they are not met. But not only the humanity of the detainee is denied; the keeper also loses it. ... Therefore, the detaining authority is not allowed – under any conditions – to infringe these rights, and they are given to the detainee absolutely.

... [I]t is inconceivable that reasons depending on security considerations ... will justify, for example, provision of food that is extremely poor in quantity and quality, or the failure to supply a bed ... to sleep on at night; or justify use of physical violence and humiliation against the detainees, and so forth. Security-based grounds have their place, but, in all due respect, they cannot justify such grave infringement of such fundamental and elementary rights belonging to detainees and prisoners.<sup>122</sup>

116 This right is not explicitly mentioned in IHL treaties for security detainees, but the Israeli Supreme Court derived this right from Articles 27 and 113 of GC IV and observed that the right to access a lawyer “stems from every person’s right to personal liberty”. All the same, the Court noted that the right, depending on the circumstances, may be qualified for reasons of security provided that any prevention of access to a lawyer is reasonable and proportional. The detainee cannot use this right “as a pretext for the giving of information for subversive purposes”. Supreme Court of Israel, *Marab*, above note 18, paras 42–45. See also *HaMoked et al. v. Commander of the Israel Defense Force in the West Bank*, Case No. HCJ 3278/02, 2002, paras 54–57 available at: [www.hamoked.org/items/1030\\_eng.pdf](http://www.hamoked.org/items/1030_eng.pdf) (unofficial translation).

117 GC IV, Arts 27, 37; AP I, Art. 75; common Article 3; AP II, Arts 4, 5. See also ICRC Commentary on GC IV, above note 45, p. 39 (on taking of hostages).

118 Supreme Court of Israel, *HaMoked*, above note 116, para. 29.

119 GC IV, Arts 89, 90.

120 *Ibid.*, Arts 90, 91.

121 *Ibid.*, Arts 93, 94.

122 Supreme Court of Israel, *HaMoked*, above note 116, paras 33–39.

Although IHL does not explicitly proscribe indefinite, *incommunicado* or secret detentions (so long as the protecting power is informed), both IHRL and the judgments of some domestic courts clearly suggest that no exceptional circumstances whatsoever justify an indefinite, secret or prolonged detention of individuals, including in the context of armed conflict.<sup>123</sup> These forms of detention are also likely to contravene the foregoing guarantees, particularly the prohibition against inhuman and degrading treatment or torture.<sup>124</sup>

### Prohibition of *refoulement*, mass expulsion and transfer

Article 45 of GC IV encapsulates the principle of *non-refoulement* by proclaiming, “*In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs*” (emphasis added). This applies for all protected persons whether they are in detention or not.<sup>125</sup> In comparison to the same rule in IHRL,<sup>126</sup> the prohibition against removal is absolute under Article 45 of GC IV.<sup>127</sup> The prohibition applies

123 See HRC, CCPR General Comment No. 29, “Article 4: Derogations during a State of Emergency”, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para.13(b); HRC, General Comment 20, 1992, para. 11. See also UN Body of Principles, above note 77, Principle 12; HRC, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, UN Doc. A/HRC/13/42, 19 February 2010, pp. 1–5; US Supreme Court, *Hamdi*, above note 87.

124 Indeed, in several cases that involved the detention of individuals for security reasons, the different human rights treaty bodies uniformly noted that prolonged incommunicado detention/solitary confinement may be contrary to the prohibition against torture and inhuman or degrading treatment. HRC, *Medjnoune v. Algeria*, Communication No. 1297/2004, UN Doc. CCPR/C/87/D/1297/2004, 2006, para. 8.4; IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, Judgment, 30 May 1999, paras 195, 198; IACtHR, *Velasquez Rodriguez v. Honduras*, Judgment, Ser. C, No. 4, 29 July 1988, para. 156; ACHPR, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, Communication No. 250/02, 20 November 2003, para. 55, ECtHR, *Ramirez Sanchez v. France*, Judgment, 4 July 2006.

125 See Vincent Chetail, “The Transfer and Deportation of Civilians”, in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 1201.

126 See Article 3 of the UN Convention against Torture; Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture; Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 19(2) of the 2000 Charter of Fundamental Human Rights of the European Union; and Article 22(8) of the Inter-American Convention on Human Rights. See also HRC, *Chitat Ng v. Canada*, UN Doc. CCPR/C/49/D/469/1991, 7 January 1994; HRC, *A. J. R. v. Australia*, UN Doc. CCPR/C/60/D/692/1996, 11 August 1997. See also HRC, General Comment 20, 1992, para. 9.

127 Unfortunately, unlike Article 49, Article 45 does not mention the term “deportation”, and this gave rise to misinterpretation of the provision that it allows expulsion of individuals for national security reasons. For example, the ICRC Commentary states that “[i]n the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action”: ICRC Commentary on GC IV, above note 45, p. 266. This is an incorrect interpretation, and it is “even dangerous and counterproductive”, for it allows a State to shirk its obligation by expelling protected persons to States where transfer is prohibited under Article 45. V. Chetail, above note 125, pp. 1197.

to any form of removal of detainees to all places, whether or not they risk being subjected to torture and ill-treatment.<sup>128</sup>

Note also that IHL further prohibits “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not ..., regardless of their motive”.<sup>129</sup> This provision is an additional safeguard for security detainees in occupied territories. The fact that individuals are detained for national security reasons is irrelevant and thus, forcible transfers remain illegal even when an occupying power may invoke reasons of security.<sup>130</sup> This is accentuated by the terms of Article 78 of GC IV itself, which categorically states that assigned residence and internment are measures that an occupying power may “at most” take for imperative reasons of security.

Even though Article 49 of GC IV recognizes a narrow exception when “the security of the population or imperative military reasons so demand”, this exception refers only to emergency evacuations<sup>131</sup> and as such should not be more broadly applied to include a wider national security exception.<sup>132</sup> In this sense, the ACHPR, in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions*

128 The only exception under Article 45 is extradition “in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law”. The inevitable question is, which law shall prevail, say, for a refugee in an armed conflict who is detained or interned for security reasons? One possible solution is to apply the most favourable rule to the detainee. For example, as far as the *non-refoulement* of a refugee to places of persecution on “political opinions or religious” is concerned, IHL shall prevail over both international refugee law and IHRL. As has been indicated, the absolute proscription of Article 45 protects the refugee detainee not only from being sent back to a country where he or she fears persecution for reasons of national security (under Article 33 of the 1951 Refugee Convention), but also from being sent to other places whether there is a risk of torture or ill-treatment, as is required by IHRL. If, however, the risk of persecution is based on other grounds such as race, nationality, membership of a particular social group or colour, either international refugee law or IHRL shall apply, whichever is found to be more favourable on the basis of a context-specific analysis. For a general overview of the “most favourable rule”, see Vincent Chetail, “Armed Conflict and Forced Migration”, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 701–703; Björn Arp (ed.), *International Norms and Standards for the Protection of National Minorities: Bilateral and Multilateral Treaties with Commentary*, Martinus Nijhoff, Leiden, 2008, p. 67. Also see, e.g., IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85, 1985, para. 4; IACtHR, *In the Matter of Viviana Gallardo et al.*, Advisory Opinion G 101/81, 13 November 1981, para. 16.

129 GC IV, Art. 49 (emphasis added). See also AP II, Art. 17; Y. Dinstein, above note 59, p. 123.

130 Both individual and collective transfers are prohibited. It has been further argued that the prohibition applies to both within or outside the occupied territories. See V. Chetail, above note 125, pp. 1187–1188. See also Y. Dinstein, above note 6, pp. 14–15, 19; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden and Boston, MA, 2009, pp. 330–331. See, however, the much criticized decision of the Israeli Supreme Court in which the Court held that individual deportations are outside the purview of Article 49: Supreme Court of Israel, *Association of Civil Rights in Israel et al. v. The Minister of Defence et al.*, HC 5973192 etc., 47(1) Piskei Din 267, *Israel Yearbook on Human Rights*, Vol. 23, 1993, p. 356.

131 The Trial Chamber of the ICTY confirmed that “[e]vacuation is by definition a temporary and provisional measure”: ICTY, *The Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgment (Trial Chamber), 17 October 2003, para. 597. See also V. Chetail, above note 125, p. 1192.

132 The phrase “security of the population” refers to the safety of the population of the occupied territory, not the safety or national security of the occupying power. See H.-P. Gasser, above note 47, p. 253.

(*COHRE*) v. *Sudan*, observed that the evictions of the population from Darfur villages during the Darfur war could not be justified by “collective security”, a term used in Article 27(2) of the African Charter on Human and Peoples’ Rights and interpreted to encompass the notion of national security.<sup>133</sup> According to the ACHPR, “[f]or such reasons to be justifiable, the Darfurian population should have benefited from the collective security envisage[d] under Article 27.2” of the African Charter.<sup>134</sup> Although the ACHPR did not make reference to Article 49 of GC IV, it clearly – and rightly – suggested that the collective security justification cannot be invoked to license forced evictions. The “security of the population” exception under Article 49 of GC IV should accordingly be interpreted to allow temporary evacuation from the occupied territory if and only if this is important to the safety of the population, including security detainees.<sup>135</sup> In any event, individuals who are considered to have threatened security in the occupied territory should not be interned or assigned residence outside the occupied territory.<sup>136</sup>

## Conclusions

Armed conflict symbolizes one of the most traditional threats to national security. During armed conflict, international law allows States to take a plethora of measures, ranging from the right to wage war in self-defence to restrictions on the rights and freedoms of individuals. Security or preventive detention of individuals is among such lawful measures that States may use during armed conflicts to protect themselves from activities prejudicial to their security. While the legality of such measures remains uncontested during IACs, the absence of an explicit rule permitting or authorizing (security) detention in NIACs has been a source of continuous debate among practitioners and scholars. In this paper, on the basis of customary international law and Article 3 of AP II, it is argued that IHL in fact offers a legal basis for security detention in NIACs, when it is carried out by States. However, nowhere in the rules of IHL can be found a similar legal support for the detention power of non-State armed groups, and to this extent there is still a clear normative gap in the law.

Besides, it has also been observed that the rules of IHL regulating detention during NIACs and, even partly, during IACs are not robust in the sense that the safeguards against arbitrariness are either incomplete or not detailed. In order to fill this normative gap, it is suggested that specifically for NIACs, efforts aimed at the development of the law should move away from the mere issue of *authorization* versus *prohibition* of detention. Rather, the focus should be on promoting and expanding the substantive legal protection of detainees. This resolves the “framing

133 ACHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication No. 279/03-296/05, 27 May 2009, para. 165.

134 *Ibid.*

135 ICRC Commentary on GC IV, above note 45, p. 280. See also V. Chetail, above note 125, p. 1191.

136 See Supreme Court of Israel, *Ajuri*, above note 5, paras 20–22. See also ICRC Commentary on GC IV, above note 45, p. 368.

problem” impeding States, and allows them to avoid accepting rules that clearly acknowledge the detention power of non-State armed groups, which they may perceive as a compromise to their sovereignty.

In this paper, it is further noted that the prerogative of States in armed conflicts to subject individuals to security detention is circumscribed both by substantive and procedural safeguards against arbitrariness. These safeguards are derived from both the customary and treaty rules of IHL, IHRL, the practice of international and domestic courts and the legal positions of the ICRC. Accordingly, appropriate considerations should be paid to these safeguards in developing the law of NIACs and expanding the existing rules regulating detention in IACs. Among those substantive and procedural limitations identified in this paper are the standards of necessity and proportionality, which require that security detention be warranted by the circumstances throughout its duration and be proportional to the security interest sought to be achieved. The requirement of temporality also demands that security detention cannot be enforced indefinitely.

Security detention is inherently preventive and, accordingly, cannot be imposed to punish past criminal activities; it may only be imposed to deal with present or future imminent and serious threats jeopardizing the critical interests of a State or one of its components (its territory, sovereignty, government and democratic institutions, or population as a whole).

Furthermore, individuals can be a subject of preventive detention only on the basis of the level of the security threat that they personally pose to the critical interests of the State. In armed conflict situations, security detention should not be ordered on, e.g., *all* enemy aliens or simply to deter other persons regardless of the security threat caused by the detainees individually. It should always be established that security detainees have personally engendered the security threat by their conduct, such as spying, sabotage or any other act that diminishes the fighting capacity of the detaining State in the war.

IHL also strictly prohibits the *refoulement* of protected persons to places where they may risk persecution on the basis of their political opinions or religious beliefs. Further, mass transfer of protected persons is proscribed in times of occupation. These prohibitive norms are absolute and cannot be derogated in the name of protecting national security. Consequently, security detainees should not be *refouled* to areas where they face persecution, and may only be transferred *en masse* from occupied territories to another territory if this is to protect their personal safety or security and the transfer is made temporarily.

Both IHL and IHRL also forbid torture and inhuman or degrading treatment. The preservation of national security may not be used to justify torture of detainees or subjecting them to treatment that may be inhuman or degrading, irrespective of the seriousness of the danger they pose. In order for security detention to remain lawful, detainees should further be able to enjoy procedural rights, such as the right of *habeas corpus*. Their detention must be reviewed periodically, and protecting powers, as well as the ICRC, should have access to places of internment.

The principles of good faith and strict interpretation put additional constraints on the prerogative of States to invoke or enforce national security



exceptions in order to engage in security detention. In this regard, during the draft discussions of the 1949 Geneva Conventions, various delegates noted that the effectiveness of the rules of IHL will depend on the will of the contracting parties and, as such, the security exceptions shall be interpreted and applied in good faith.<sup>137</sup> It is also a general rule of interpretation that exceptions shall be construed and enforced narrowly.<sup>138</sup> The exception must be interpreted and applied restrictively.<sup>139</sup> The principle of restrictive interpretation is very important, not only because national security exceptions are amenable for expansive interpretation, but also because these exceptions are not intended to guarantee complete security in its abstract sense. Security is not an absolute, but a relative degree of safety.<sup>140</sup> In the context of armed conflicts, it is inconceivable to ensure absolute security.<sup>141</sup> There is always some insecurity that States assume during war – for that matter, even in time of peace, States cannot guarantee absolute security. Emerson has eloquently stated that true national security

cannot be a search for total security. That is only achievable in a police State, and then only temporarily. National security in a democratic society involves taking some risks and allowing some flexibility. It entails faith that an open community is better prepared to adjust to changing conditions than a closed one. It is based upon the proposition that the creation of economic, political, and social institutions that respond to the needs of the people is a better protection than implacable enforcement of sedition laws, loyalty programs, and regulations classifying information as secret.<sup>142</sup>

Indeed, it is also the unattainability of absolute security that prevents security from being the usual “prime value”, and this is why it ought not *always* and “necessarily trump other values such as [individual] liberty”.<sup>143</sup> Accordingly, security detention is not and should not be meant to allay all concerns of insecurity, but only those grave ones threatening the critical existential elements of a State. The exceptions permitting security detention should, thus, be applied to address only those serious threats mounted against the most important national interests of a State.

137 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2(A), p. 796, and Vol. 2(B), p. 526. See also Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 (ICRC Commentary on GC III), p. 596.

138 Chris Ingelse, *United Nations Committee Against Torture: An Assessment*, Kluwer Law International, Boston, MA, 2001, p. 216.

139 They should be applied exceptionally. M. Sassòli, above note 1, p. 17. Also see ICRC Commentary on GC III, above note 137, p. 492; ICRC Commentary on GC IV, above note 45, p. 218, 367.

140 “Security is a relative rather than an absolute term. National and international security need to be viewed as matters of degree.” UNGA Res. 38/188, 20 December 1983, submitted by the UN Secretary-General as *Study on Concepts of Security*, Report A/40/553, 26 August 1985, p. 45, para. 206.

141 See M. Sassòli, above note 1, p. 19.

142 Thomas I. Emerson, “National Security and Civil Liberties”, *Yale Journal of International Law*, Vol. 9, No. 1, 1982, p. 82.

143 Jennifer A. Chandler, “Personal Privacy versus National Security: Clarifying and Reframing the Trade-Off”, in Ian Kerr, Carole Lucock and Valerie Steeves (eds), *On the Identity Trail: Anonymity, Privacy and Identity in a Networked Society*, Oxford University Press, Oxford, 2009, p. 126.