

Detention under the law of armed conflict

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Despite recent hard earned experience during international and non-international armed conflicts in places like Afghanistan and Iraq, and in peacekeeping missions around the world,¹ the international community continues to struggle practically and conceptually with detention of belligerents. The struggle includes questions ranging from when individuals may be detained and for how long, to determining the applicable legal regime. While this myriad of issues is vexing, they are neither as new,² nor the applicable law as lacking,³ as has been argued.

This chapter addresses what to some has become a legal Gordian Knot⁴ – detention during armed conflict. Similarly to Alexander's approach of cutting the knot, this chapter takes a pragmatic approach to detention.

This chapter will begin by providing an overview of the traditional law of armed conflict (LOAC) applicable to detention during international armed conflict (IAC). The 1949 Geneva Conventions, supplemented by Additional Protocol I, create a binary detention system in IAC – status-based detention of prisoners of war (POWs) and conduct-based detention or internment of civilians. Next the chapter will provide an overview of the LOAC applicable to

1 Notably MONUSCO, the UN Mission in the Democratic Republic of the Congo. In 2013 the UN Security Council issued a resolution creating an intervention brigade with the mission to take offensive action to 'neutralize' the armed groups threatening stability in eastern DRC. See UNSC Res 1925 (28 May 2010). This has led to the UN conducting offensive operations, which at some point will entail capturing members of the armed groups. Where such detainees would be housed, under whose control, under what conditions and when/how/and to whom they would be released are all unclear.

2 For one of many examples of previous conflicts involving non-state actors, see Thomas Pakenham, *The Boer War* (Abacus 1991) (describing the Second Boer War in South Africa, which featured belligerents who did not wear military uniforms, violations of the laws and customs of war by both sides and, in terms of detention, one of the first concentration camps. British military interned the families of Boer Commandos).

3 See Alberto Gonzales, 'Decision RE Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban' Memorandum for the President (25 January 2002) (referring to the Geneva Convention's limitations on questioning prisoners of war as 'obsolete' and other provisions as 'quaint').

4 See generally Geoffrey Corn and Eric Talbot Jensen, 'Untying the Gordian Knot: A Proposal for Determining the Applicability of the Laws of War to the War on Terror' (2008) 81 *Temple LR* 787. As the title suggests, Corn and Jensen's analysis is at the broader normative level of what law could or should apply.

non-international armed conflicts (NIAC). From there the chapter will explain several of the contemporary challenges to that traditional IAC model. The first of these challenges is the inverse relationship between the prevalence of the types of armed conflict and the amount of law strictly applicable to those conflicts. While almost all of the wartime detention law applies to IAC, the vast majority of contemporary armed conflicts are NIAC for which little law exists. Thus even to the extent that the 1949 Geneva Conventions framework could be useful in guiding contemporary detention operations, the Conventions do not formally apply. The chapter then discusses how, even if the Conventions were to apply, there would still be difficulties: should non-state actors, like members of al-Qaeda, be detained as prisoners of war or civilian internees? What does the answer to that question mean in terms of their treatment and subsequent release?

The chapter concludes by proposing that the 1949 Geneva Conventions and the 1977 Additional Protocols, outmoded and seemingly inapplicable though they may be in some respects, offer the most thorough, humane, realistic and readily available option for determining how to treat and when to release non-state actors detained during a NIAC. This chapter proposes to cut the legal Gordian Knot with a policy sword, intermingling types and applications of the law of armed conflict and conflating treatment standards from Geneva Convention III with the civilian internment and release provisions of Geneva Convention IV.

1 Authority to detain in international armed conflict

The LOAC does not provide positive authority to detain. Indeed the LOAC does not, in and of itself, provide authority for conduct of any kind. Rather the LOAC consists of international rules designed to humanise armed conflict to the extent possible by limiting its effects. That said, detention is considered within the nature of,⁵ or inherent to,⁶ armed conflict, at least during IAC.

The vast majority of the LOAC on detention, notably all four of the 1949 Geneva Conventions and Additional Protocol I, is only triggered by IAC. Given that, reviewing the traditional model of detention in IAC before addressing detention in NIAC is appropriate.

2 IAC model: POWs and civilian internment

The traditional model of detention in armed conflict is based on IAC – state on state warfare with a clear end. This is not surprising given the development of the 1949 Geneva Conventions in the aftermath of the Second World War, which involved global-scale armed conflict between

5 The US Supreme Court confronted the issue of authority to detain in *Hamdi v Rumsfeld*, a case brought by a US citizen detained during hostilities in Afghanistan. While acknowledging that the domestic law authorising 'all necessary and appropriate force' did not refer to detention, the Court stated that 'detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war' a proposition on which the Court claimed 'universal agreement and practice': *Hamdi v Rumsfeld*, 542 US 507, 519 (2004). See *Ex parte Quirin*, 317 US 1, 31 (1942), stating that

[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

6 Jelena Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 *IRRC* 189, 207 (stating that '[i]n the ICRC's view, both treaty and customary IHL contain an inherent power to intern').

the multi-state Axis forces and the multi-state Allies. The ends of the various conflicts were unequivocal, with Italy, Germany and finally Japan signing formal instruments of surrender.

The trigger for the application of this law is found in what is known as Common Article 2, so named because it is the same in each of the four 1949 Geneva Conventions. Common Article 2 states that the Geneva Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.⁷

When there is an IAC, in terms of detention the relevant conventions are Geneva Convention III, devoted to POWs, and Geneva Convention IV, which details regulations for the treatment of internees, civilians detained/interned as security threats.

2.1 Geneva Convention III: status-based detention of POWs

At a strategic level, capturing members of the opposing force in armed conflict is one of numerous measures employed as part of an overall effort to bring the enemy in the collective sense to submission. At a narrower, tactical or operational level, by capturing and incapacitating members of the opposing force the capturing force ensures it does not face those same members in future engagements.

Capturing a member of the enemy force is based on their status as such, not on an individualised assessment of their threat.⁸ The LOAC presumes that belligerent operatives 'are part of the military potential of the enemy and it is therefore always lawful to attack [and thus to capture] them for the purpose of weakening that potential'.⁹ As the ICRC acknowledges, '[p]risoners of war may be interned ... for no individual reason. The purpose of this internment is not to punish them, but only to hinder their direct participation in hostilities and/or to protect them'.¹⁰

To qualify for POW status under Geneva Convention III, an individual must fall in one of the following categories listed in Article 4(A) of the Convention:

- (1) Members of the armed forces of a party to the conflict as well as members of militia or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

7 See GCIII–IV common art 2. Note the prescient nature of the trigger not to require a declaration of war but link the application of the Geneva Conventions to the existence of armed conflict between states. Indeed since the Second World War while there have been numerous armed conflicts, there have been few declarations of war. Some of the few post-1949 conventions declarations of war include the 1978 war between Somalia and Ethiopia, the 1980 Iran–Iraq War, the 1982 war between the UK and Argentina and the 2005 conflict between Chad and Sudan. In terms of the Geneva Conventions only applying to High Contracting Parties, every state in the world has signed or acceded to the Conventions.

8 See Geoffrey S Corn, Laurie R Blank, Chris Jenks and Eric Talbot Jensen, 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule' (2013) 89 *International Law Studies* 536.

9 Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *IRRC* 599, 606.

10 Marco Sassòli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect in War?* (3rd edn, ICRC 2011) 10.

- (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
 - (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
 - (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
 - (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Notably, only categories (1), (2), (3) and (6) involve combatants, meaning those imbued with the right to directly participate in hostilities.¹¹ As will be discussed later, categories (4) and (5) are civilians who are nonetheless entitled to POW status and treatment, but who lack the right to participate directly in hostilities.

Where there is doubt concerning whether or not a belligerent who has fallen into the hands of the enemy belongs to one of the POW categories, Article 5 of Geneva Convention III provides that 'such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'. Until such an 'Article 5 tribunal' determines otherwise, the default setting or rebuttable presumption is that a captured belligerent is entitled to POW status.

POW status means an individual is entitled to be treated under the terms of Geneva Convention III.¹² The Convention provides robust and detailed protections at all stages. Part III of the Convention is titled 'Captivity' and is broken into sections and corresponding protections. Section I deals with the beginning of captivity and Section II about internment of POWs. Section II is subdivided into chapters which cover issues including quarters, food and clothing

11 Military medical and religious personnel exclusively engaged in the care of the sick and wounded, while members of the armed forces are considered non-combatants as they do not have the right to directly participate in hostilities. When captured, they are not POWs but rather are 'retained personnel'. Essentially a capturing force may retain them to provide spiritual and medical assistance to POWs but must release them as soon as they are not required to provide such assistance. See GCIII art 33. See further James P Benoit, 'Wounded and sick, and medical services' ch 18 in this volume.

12 Returning to those categories of POWs who are combatants and have the right to direct participation, with that right comes the combatant's privilege, meaning that combatants 'cannot be held criminal responsible for lawful belligerent acts [like shooting and killing an enemy soldier] during wartime': Laurie R. Blank and Gregory P Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (Aspen 2013) 243.

of POWs, hygiene and medical attention, religious, intellectual and physical activities, discipline, rank of POWs and transfer of POWs after their arrival in a POW camp. Section III covers POW labour, Section IV deals with POW financial resources, Sections V and VI address POW relations with the exterior and the authorities respectively. The result is a full panoply of protections, including the right to humane treatment, protection from insults and public curiosity, equal treatment, free maintenance and medical care and freedom from reprisals.

Under Geneva Convention III, '[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities'.¹³ Even before the cessation of hostilities, indeed throughout the conflict, state parties 'are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war'.¹⁴

This is yet another demonstration of the alternating over and under breadth of the LOAC. States may detain members of the enemy force based on their status as a member of the force. And the belligerent need not pose a threat at the time of capture. But because the purpose of the POW detention regime is to incapacitate and prevent belligerents from returning to the fight, POW detention lasts only as long as the underlying conflict. The status-based POW detention regime is fundamentally different from when detaining civilians, who may be detained or interned based on their conduct and only for so long as they pose a security threat.

2.2 Geneva Convention IV: conduct-based internment of civilians

Geneva Convention IV addresses the protection of civilians in time of armed conflict.¹⁵ The level and type of protections depends on the location of the civilian and the manner in which the civilian is experiencing the impact of hostilities. All persons who are not taking an active part in the hostilities receive the protections Common Article 3 affords.¹⁶ The elderly, women and children, those in occupied territories, all receive additional protections. But Geneva Convention IV also recognises that under certain circumstances civilians may be detained, not because of *who* they are but for what they are *doing*. So in contrast to the status-based POW detention regime, the detention of civilians is conduct based. Nonetheless, before evaluating what conduct makes a civilian liable for internment, inquiry into who exactly qualifies as a civilian is required.

13 GCIII art 118.

14 GCIII art 109.

15 The need for this protection stems, at least in part, from the fact that civilians are killed or wounded in almost every armed conflict in far greater numbers than combatants. In a story on the sixtieth anniversary of the 1949 Geneva Conventions the BBC claimed that 'in World War I, the ratio of soldiers to civilians killed was 10 to one. In The Second World War it became 50-50, and today the figures are almost reversed – up to 10 civilians for every one soldier'. Imogen Foulkes, 'Geneva Conventions' Struggle for Respect' *BBC News* (8 August 2009), news.bbc.co.uk/2/hi/europe/8196166.stm. For a more contemporary representation, the number of Afghan civilians killed in 2013 (2,959) considerably exceeds the sum total of all US fatalities in Afghanistan from 2001 through 2013 (2,313). See UNAMA, 'Civilian Casualties in Afghan Conflict Rise by 14 per cent in 2013' Press Release (8 February 2014), unama.unmissions.org/Portals/UNAMA/human%20rights/Feb_8_2014_PoC-report_2013-PR-ENG-final.pdf; iCasualties, 'Operation Enduring Freedom', icasualties.org/oef.

16 Similar to common art 2 discussed above, common art 3 is so named because it is the same in each of the 1949 Geneva Conventions. Common art 3 requires that those not actively participating in the armed conflict be treated humanely and protected from violence, being made a hostage, outrages upon personal dignity and the passing of sentences and the carrying out of executions without a pronouncement by a regularly constituted court. See GCIII-IV art 3.

The definition of civilian is not as straightforward as might be expected. Despite Geneva Convention IV being devoted to civilians, the Convention does not formally define the term.¹⁷ It was not until 1977 and Additional Protocol I that the first treaty definition of civilian emerged. Recognising the difficulty in drafting a comprehensive list of everyone considered a civilian, the drafters of Additional Protocol I chose to adopt a definition of exclusion, or a negative definition. Under Article 50 of Additional Protocol I, a civilian is *anyone* who does not fall under one of the combatant categories of POW from Geneva Convention III.¹⁸

Article 78 of Geneva Convention IV recognises that '[i]f an occupying power considers it necessary, for imperative reasons of security' then it may intern civilians.¹⁹ The civilians in an Article 78 context are citizens and residents of an occupied territory. For example, Iraqis living in Baghdad following the US invasion of Iraq in 2003. Article 78

relates to people who have not been guilty of any infringement of the penal provisions enacted by the Occupying Power, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action.²⁰

Thus Article 78 envisions the need for preventative or security-based detention of civilians during armed conflict. As will be discussed later in the chapter, it is this kind of risk-based detention, albeit in NIAC, not IAC, that generates both discussion and controversy.

Important as detaining a civilian who poses a security risk is, Article 78 doesn't define or quantify the risk. Instead, commentary to a different but related section of Geneva Convention IV sheds some, but not much, light on the predicate requirements of 'imperative reasons of security'. Article 42 of Geneva Convention IV deals with interning civilians of enemy nationality living in the territory of a belligerent. So while Article 78 dealt with an Iraqi living in Baghdad under US occupation of Iraq, Article 42 involves an Iraqi who was living in the US during the armed conflict. If US did not repatriate the Iraqi civilian to Iraq, Article 42 provides a limited basis for the US to detain that Iraqi civilian if the security concerns of the US render such detention absolutely necessary.

17 Instead, GCIV art 4 defines the individuals whom the Convention protects as 'those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict of occupation in the hands or persons a Party to the conflict or Occupying Power of which they are not nationals'.

18 More specifically, API states that

a civilian is any person who does not belong to one of the categories of persons referred to in [GCIII] Article 4(a)(1) [members of the force], (2) [members of militias who meet the required conditions], (3) [members of regular armed forces who profess allegiance to a government of authority not recognised by the detaining power] and (6) [*levée en masse*].

As previously discussed, that leaves two categories of POWs – persons accompanying the force without actually being members thereof (GCIII art 4(a)(4)) and members of merchant marine and civil aircraft crews (GCIII art 4(a)(5)). These individuals are thus civilians but civilians entitled to POW status and treatment.

19 Elsewhere in GCIV the predicate for internment is if it is 'absolutely necessary'. See GCIV art 42. The difference between the two articles is that unlike art 42, art 78

relates to people who have not been guilty of any infringement of the penal provisions enacted by the Occupying Power, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action.

GCIV Commentary 368

Nonetheless, the commentary states that internment must 'observe the stipulations of article 43'. *Ibid.*

20 *GCIV Commentary* 368.

In addressing what is meant by terms like 'security of the State', the Commentary to Article 42 states that the drafters did not believe it was possible to define the term and that it's left 'very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence'.²¹ The Commentary does provide that

the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.²²

Significantly, the Commentary 'stresses the exceptional character of measures of internment' and that only 'absolutely necessity ... and only then if security cannot be safeguarded by other, less severe means'.²³

Status as an internee²⁴ means an individual is entitled to the protections of Section IV of Part II of Geneva Convention IV. This section explains where internment camps may (and may not) be located, how they are to be marked and the protective measures they must provide internees to shield them from the hazards of war. There are separate sections for food and clothing to be provided to internees, religious and physical activities, personal property and financial resources, administration and discipline, relations with the exterior and penal and disciplinary sanctions. These provisions are similar to the POW treatment provisions from Geneva Convention III but somewhat less detailed.

Because such internment is conduct based, there is a greater temporal limitation on its duration than the 'end of hostilities' of status-based POW detention. The decision to intern a civilian is subject to an initial review 'as soon as possible by an appropriate court or administrative board' designated by the detaining power and at least semi-annual review thereafter.²⁵

Notably judicial review, while permissible, is not required. Recognising that a dangerous and austere battlefield environment may not allow judicial review, the LOAC allows an administrative board to review civilian internment. The key to such a board is that 'where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality'.²⁶ Periodic reviews of internment under the LOAC are automatic and are conducted 'with a view to favourably amending the initial decision if circumstances permit'.²⁷

21 *GCIV Commentary* 257–258. Detention of a civilian who is alleged to have violated a penal provision of the detaining power is governed by art 42. The procedures for art 42 detention are laid out in art 43. While internment under art 78 is different from that under art 42, the Commentary to art 78 states that internment must 'observe the stipulations of article 43'. *GCIV Commentary* 368.

22 *GCIV Commentary* 257–258. The Commentary states that where a state has 'serious and legitimate reason to think that [individuals] are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage' and where 'Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country' internment may be appropriate. But this only restarts the definition inquiry: what constitutes serious and legitimate reason or subversive activity?

23 *GCIV Commentary* 257–258.

24 This chapter does not address another administrative measure an occupying power may impose under GCIV, that of assigning residences to certain civilians.

25 *GCIV* art 43.

26 *GCIV Commentary* 260.

27 *Ibid* 261.

In explaining the periodic review requirement, the Commentary states that 'no protected person should be kept in assigned residence or in an internment camp for a longer time than the security of the Detaining State demands'.²⁸

Thus the LOAC provides significant information for when and how civilians and, as previously discussed, combatants may be detained. There is varying amount of guidance on treatment conditions, more for POWs than for civilians. And for release, there is more information, as there should be, for review and release of conduct-based civilian detention than status-based POW captivity. All in all, the civilian and POW detention regimes extant in IAC have retained their utility. Indeed these systems form the basis for military training, manuals and regulations on detention.²⁹ The challenges arise not so much from detention in IACs but in NIACs. And this threshold question of the quantum of law available is made more difficult by non-state actors and armed conflicts without clear ends.

3 Non-international armed conflict

3.1 Authority to detain

Unlike in an IAC, during NIAC, there is an ongoing debate about whether LOAC provides authority to detain.

One view is that '[i]t is logical that ... since [in a NIAC] there is no conflict between two or more sovereigns, the [law] of non-international armed conflict should be silent, in deference to national law, on questions of detention'.³⁰ That national law tends to be domestic criminal law and procedure, allowing law enforcement to detain individuals only based on their conduct, not based on their status or concerns they pose a security threat.

On the other side of the debate is the claim that even the limited amount of LOAC applicable to NIAC implicitly recognises authority to deprive people of their liberty. Under this argument, LOAC's

reference to 'persons, hors de combat by ... detention' and 'regularly constituted courts' in Common Article 3, and to persons 'interned' in the Second Additional Protocol, Articles 5 and 6, are superfluous if not understood to be accompanied by an authority to detain or intern respectively.³¹

28 Ibid. The Commentary also provides that the review procedures from GCIV are the minimum standard and that in conducting reviews at least twice a year that

the responsible authorities will be bound to take into account the progress of events – which is often rapid – 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.

29 See, among others, US Army Regulation 190–198, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 October 1997).

30 Gabor Rona, 'An Appraisal of US Practice Relating to Enemy Combatants' (2007) 10 *YBIHL* 232, 241; see also Lawrence Hill-Cawthorne and Dapo Akande, 'Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari' *EJIL:Talk!* (2 June 2014), www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari.

31 David Tuck, 'Detention by Armed Groups: Overcoming Challenges to Humanitarian Action' (2011) 93 (883) *IRRC* 765; see also Ezequiel Heffes, 'Detention in NIACs: A Pledge in Favor of the Application of IHL' *Opinio Juris* (16 May 2014), <http://opiniojuris.org/2014/05/16/guest-post-detention-niacs-pledge-favour-application-ihl/>.

This argument reflects the tension, almost a clash, between the law enforcement/human rights paradigm for detention and that of LOAC. Indeed the disagreement on the issue of LOAC authority to detain in NIAC only increased in May 2014, following the High Court of England and Wales' decision in *Mohammed v Ministry of Defence*.³² There, the High Court ruled that at least as applied to the United Kingdom, LOAC does not provide detention authority in NIAC. The Court considered the LOAC applicable to NIAC and stated that

[u]either [the relevant portions of the Geneva Conventions nor Additional Protocol II] contains any express statement that it is lawful to deprive persons of their liberty in an armed conflict to which these provisions apply. All that they do is to set out certain minimum standards of treatment which must be afforded to persons who are detained during such an armed conflict.³³

Underpinning the Court's decision that LOAC does not provide authority to detain in NIAC is that there is such little law from which to draw.

3.2 NIAC model of detention

There is some, albeit not much, in the way of 'black-letter' LOAC concerning detention in NIAC. Common Article 3 of the four 1949 Geneva Conventions, but applying to NIACs, refers to members of the armed forces placed in detention in its categorisation of 'persons taking no active part in hostilities'.³⁴ Common Article 3 provides an important minimum standard of treatment in detention, that those not actively participating in the armed conflict be treated humanely and protected from violence, from being made a hostage, from outrages upon personal dignity and from the passing of sentences and the carrying out of executions without a pronouncement by a regularly constituted court.³⁵

32 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB).

33 *Ibid* ¶ 239 (QB). The Court then took note of the argument of the UK Ministry of Defence that a power to detain is implicit in GCII-IV common art 3 and APII. *Ibid*. The Court went so far as to acknowledge that '[t]his argument has the support of some academic writers and of the International Committee of the Red Cross', mentioning in particular Jelena Pejic, a legal adviser to the ICRC, who has written that '[i]nternment is ... clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of [APII], which mentions internment in Articles 5 and 6 respectively'. *Ibid* ¶ 240, quoting Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence' (2005) 87(858) *IRRC* 375, 377. The Court then rejected this approach: *ibid* ¶¶ 241-246.

34 On its face, common art 3 would seem to only apply to a NIAC, but courts in the US and Europe have ruled that its baseline level of protections apply in all armed conflicts, however characterised. See *Hamdan v Rumsfeld*, 548 US 557 (2006). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14, ¶ 218, stating that

Common Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'.

Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Case no IT-94-1-A, ICTY Appeals Chamber, 2 October 1995) ¶ 98 (holding that common art 3 is customary international law and applicable in both NIAC and IAC).

35 See GCIII-IV art 3.

The only other LOAC potentially applicable to NIAC is Additional Protocol II to the 1949 Geneva Conventions.³⁶ Article 5 of Additional Protocol II provides guidance on ‘persons whose liberty has been restricted’³⁷ while Article 6 discusses ‘penal prosecutions’.³⁸ Yet despite the informative sounding titles of those articles, neither they nor any other part of Additional Protocol II provides details of how detention in NIAC is to be conducted.³⁹

Supplementing this limited body of law however is considerable custom and practice. For example, the ICRC, in its Customary International Law Study, identified a number of detention issues in NIAC for which custom has developed in the form of practice, military manuals and United Nations Documents.⁴⁰ The ICRC is also ‘leading a major consultation process on how to strengthen legal protection for persons deprived of their liberty in relation to NIAC’.⁴¹ The United Nations has issued operating procedures for detention in peace operations, many of which occur during NIAC.⁴² Additionally, Denmark led the recent Copenhagen Process, a multi-year effort involving representatives from other countries, regional and international organisations, and civil society which developed principles designed to guide the conduct of detention in international military operations.⁴³ These approaches are important reminders that in the absence of detailed law, LOAC-based custom, practice and policy offer alternatives to fill the lacuna.

4 Challenges and a proposal

4.1 Quantum of law vs prevalence of conflict

As outlined above, while there are references to detention in the bodies of law governing both IACs and NIACs, there is an unhelpful inverse relationship between the amount of law available and the applicability of that law. In the aftermath of the Second World War, NIACs are far

36 Potentially applicable as not all NIACs trigger APII. For APII to apply, there must be an armed conflict which is not an IAC and

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

APII art 1(1)

37 APII art 5.

38 APII art 6.

39 Pejic (n 33) 377.

40 See CIHL rr 118–128. These rules cover the provision of necessities to persons deprived of their liberty, accommodation for women and children, location of internment and detention centres, pillage of personal belongings, recording and notification of personal details, ICRC access, correspondence, visits, respect for convictions and religious practices, release and return.

41 See ICRC, ‘The ICRC’s Work on Strengthening Legal Protection’ (31 January 2014), www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm.

42 United Nations’ Interim Standard Operating Procedures for Detention in United Nations Peace Operations (25 January 2010).

43 See the Copenhagen Process on the Handling of Detainees in International Military Operations, ‘Principles and Guidelines’ (19 October 2012), um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf.

more prevalent⁴⁴ but for which there is far less law, both in general and as applied to detention.⁴⁵

An armed conflict involving non-state actors, even disparately located in several countries, cannot constitute an IAC. Thus the more extensive law that governs detention in IACs is inapplicable. The lack of law applicable to NIACs poses one, but certainly not the only, challenge.

To apply IAC detention provisions in NIAC could be part of the solution, necessarily grounded in policy not law. Professor Ryan Goodman has articulated a three-part rationale for a policy of applying the law governing IAC to NIACs against non-state actors like al-Qaeda:

The first is a reactive reason; simply put, many commentators and practitioners have applied the law of international armed conflict to the conflict with al-Qaeda by analogy. It's a prevalent practice that's used, for example, in debates about whether or not we can hold fighters until the cessation of hostilities and with or without access to an attorney. The analog or the referent in those discussions is often international armed conflict. And if that's a prevalent mode of discourse or argument, then we at least need to conflict, to evaluate those kinds of claims.

A second reason is an affirmative one. On my view, it's valid to use the law of international armed conflict as an analogy. In fact, if we have to think of an analogy, it's the closest fit or closest approximation – especially the Fourth Geneva Convention – for questions of who may be detained and what types of activities on the part of civilians are subject to detention. That is, the rules contained in the Civilians Convention, are the closest analog that we have and therefore the best reference point for trying to approximate what the law of armed conflict should look like or will look like when it applies in a non international scenario like the conflict with al-Qaeda.

The third reason is the strongest, and it's an affirmative argument not just by way of analogy. The argument here is that the law in international armed conflict establishes an outer boundary of permissive action. The idea is fairly simple, which is that the law of armed conflict uniformly involves more exacting, more restrictive obligations on parties in international armed conflict than in non international armed conflict. We could even state this point as a maxim: if states have authority to engage in particular practices in an international armed conflict, they a fortiori possess the authority to undertake the same practices in non international armed conflict, or simply put, whatever is permitted in international armed conflict is permitted in non international armed conflict. Therefore, if the law of armed conflict permits a state to detain civilians in international armed conflict, the law of armed conflict surely permits states to detain civilians in a non international armed conflict. The same logic does not apply to prohibitions or proscriptive rules: it does not follow that

44 For example, according to NATO, in 2000 there were 25 armed conflicts around the world. NATO, 'Statistics on Armed Conflicts around the World', nato.gov.si/eng/topic/threats-to-security/statistics. Of those, only one, the conflict between India and Pakistan, was of an international nature. See also Armed Conflict Database, acd.uiss.org.

45 The ICRC asserts that there are four key areas in which LOAC governing detention in NIAC 'falls short': (i) conditions of detention, (ii) protection for especially vulnerable groups of detainees, (iii) grounds and procedures for internment and (iv) transfers of detainees from one authority to another. ICRC, 'Detention in Non-international Armed Conflict: The ICRC's Work on Strengthening Legal Protection' (31 January 2014), www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm.

if the law of armed conflict forbids states from engaging in a practice in international armed conflict that the law would also forbid states from engaging in that practice in non-international armed conflict.⁴⁶

Professor Goodman's approach ameliorates, but does not fully solve, the problem. Applying the robust IAC law to NIAC still results in difficulties. The first of these is the inability for status-based detention based on Geneva Convention III because non-state actors do not qualify as POWs.

4.2 Challenge posed by non-state actors

The problem is not that the Geneva Conventions make no provision for non-state actors, they do. In IAC, members of militias or volunteer corps who make up the armed forces of a party to the conflict qualify for POW status and treatment.⁴⁷ Even militias or volunteer corps which do not directly comprise the armed forces of a party may qualify for POW status and treatment.⁴⁸ And, interestingly, there is not a geographic limitation: the provisions of Geneva Convention III apply to militias operating 'in or outside their territory'.⁴⁹

Nonetheless, even if Geneva Convention III applied to NIAC, its provisions would not apply to most non-state actors involved in current or recent armed conflicts. That's because the non-state actors do not make up the military of a party to the conflict or comply with the conditions for free-standing militias or volunteer corps.⁵⁰

Consider the armed conflict in Afghanistan following the September 11 attacks. At the outset the conflict was an IAC, a war between two high contracting parties to the Geneva Conventions, the US and Afghanistan. Status as an IAC triggered at least the potential for the application of Geneva Convention III governing POWs.

Members of al-Qaeda could potentially qualify for POW status and treatment as members of a militia. But there does not seem to be a credible argument that al-Qaeda complies with the predicate requirements of a command structure, fixed distinctive sign, carrying their arms openly and following the LOAC.

The assessment of the Taliban, then representing the government of Afghanistan, is more difficult. In denying the Taliban POW status, the US claimed that even if the Taliban constituted the armed forces of Afghanistan they would still need to meet with the four-part test. This argument was criticised as not being supported by a plain reading of the text of Geneva

46 Ryan Goodman, 'The Second Annual Solf-Warren Lecture in International and Operational Law' (2009) 201 *Military LR* 237. For persuasive arguments for applying the law of international armed conflict to non-international armed conflict, particularly in the area of detention, see Sassóli and Olson (n 9).

47 GCIII art 4.

48 See s 2.1 above.

49 GCIII art 4.

50 Following the 9/11 attacks, the US considered the status under international humanitarian law both of the Taliban, which constituted the government of Afghanistan at the time, and of al Qaeda, which based its terrorist organisation in Afghanistan with Taliban consent. George W Bush, 'Humane Treatment of Taliban and al Qaeda Detainees' Memorandum (7 February 2002), www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf; Jay S Bybee, 'Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949' Memorandum Opinion for the Counsel to the President (7 February 2002), www.fas.org/irp/agency/doj/olc/taliban.pdf (Status of Taliban Forces Memorandum Opinion).

Convention III;⁵¹ yet the argument finds support from the ICRC and is persuasive at a normative level. In terms of the ICRC support, the commentary to Geneva Convention III, in explaining another category of persons who qualify for POW status, refers to the attributes of armed forces as 'they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war'.⁵²

More broadly, if the armed forces of a party to the conflict do not have to meet the four conditions a perverse result follows whereby members of regular armed forces would be governed by lower standards than those applicable to militia and volunteer forces.⁵³

The answer, and its not a new one, is again rooted in policy – treat unprivileged belligerents as POWs. It is somewhat surprising that the US wrestled with the question of whether to classify the Taliban and al-Qaeda as POWs. In previous conflicts the US detained individuals and treated them under the terms of a status to which they did not qualify as a matter of law. During the Korean conflict, the US did not recognise the legitimacy of Chinese intervention. Regardless of the accuracy of that view, the significance is that the US did not believe that members of the Chinese Army qualified as POWs as a matter of law, but treated them as such as a matter of policy.

Similarly, during the Vietnam War, the US, along with its allies,⁵⁴ joined South Vietnam in fighting an array of enemies associated with North Vietnam. Some, like the North Vietnamese Army (NVA), were clearly entitled to POW status and treatment. With respect to other forces, notably the Viet Cong, the US nonetheless held Article 5 tribunals⁵⁵ and determined they were not POWs. Nonetheless, the US then treated the Viet Cong as POWs as a matter of policy, and housed them in camps adjacent to the POW camps for captured NVA.⁵⁶ Key to the US approach

51 See Silvia Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"' (2005) 87 *IRRC* 39.

52 *GCIII Commentary* 63.

53 See Status of Taliban Forces Memorandum Opinion (n 50) 5. As the US Department of Justice indicated (emphasis in original),

[t]here is no evidence that any of the GPW's drafters or ratifiers believed that members of the regular armed forces ought to be governed by *lower standards* in their conduct of warfare than those applicable to militia and volunteer forces.

54 Notably Australia, New Zealand, the Republic of Korea and Thailand.

55 In Vietnam, the US conduct of art 5 tribunals was little more than bringing the captured individual before an US Army officer who inquired about the circumstances of capture and afforded the individual the opportunity to provide input. See also Geoffrey Corn, Eric Talbot Jensen and Sean Watts, 'Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher' (2007) 116 *Yale Law Journal Pocket Part* 327 (describing how the US identified, as a matter of policy, groups qualifying for POW status, including Viet Cong Main Forces, Viet Cong Local Forces, North Vietnamese Army Units and Organised Forces of Irregular Guerillas and Self-Defence Forces who had not engaged in terrorism, sabotage or spying. US Military Assistance Command, Vietnam, Directive No 381-346, Military Intelligence: Combined Screening of Detainees (27 December 1967), reprinted in Howard Levie, *Documents on Prisoners of War* (US Naval War College 1979) 748).

56 Blank and Noone (n 12) 2330-2334 (quoting the former Military Assistance Command Vietnam (MACV) Staff Judge Advocate George Prugh on detention operations during the Vietnam War):

[v]irtually none of [the] classic [IAC] conditions existed. . . . It was certainly arguable that many Viet Cong did not meet the criteria of guerillas entitled to prisoner of war status under Article 4, [GCIII]. However, civil incarceration and criminal trial of the great number of Viet Cong was too much for the civil resources at hand.

Blank and Noone then provide a copy of the MACV policy directive which required that members of the Viet Cong would be classified and treated as POWs.

was that the policy application of Geneva Convention III to the Viet Cong was nearly identical to the legal application of the Convention to the NVA. The ICRC, in reviewing the treatment conditions of both the NVA and Viet Cong, labelled the US instruction to apply Geneva Convention III as a matter of policy:

a brilliant expression of a liberal and realistic attitude. . . . This text could very well be a most important one in the history of the humanitarian law, for it is the first time . . . that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces.⁵⁷

Treating unprivileged belligerents in NIAC as POWs means the detainees receive the benefits of the treatment provision of Geneva Convention III but they are still not entitled to the combatant's privilege.⁵⁸ Thus the capturing force may still prosecute them for their violations of the LOAC.⁵⁹

But even this second policy act does not fully address the problem because status-based POW detention does not require review of detention and assumes a clear end point, which in many NIACs does not exist.

4.3 *Reviewing and ending status-based detention*

Regardless of whether one reaches the conclusion that the Taliban and al-Qaeda were entitled to POW treatment as matter of law or of policy, a practical concern with the application of Geneva Convention III remains. The concern flows not from what Geneva Convention III provides, but in what it does not. The application of Geneva Convention III yields a robust guide on POW treatment conditions, from quarters, food, clothing, hygiene, medical attention, to religious, intellectual and physical activities. What it doesn't do is provide much in the way of guidance on release. That is not a criticism of the Convention but a statement of its inherent limitations given that the detention regime is status based.

57 United States Army Center of Military History, 'The US Army in Vietnam, Prisoners of War and War Crimes', www.history.army.mil/books/Vietnam/Law-War/law-04.htm. During Vietnam, the US provided an example of how applying LOAC as a matter of policy can yield tangible, meaningful results. More recently the US provided an example of how unexplained, unverifiable policy actions yield little. In 2006 the US Department of Defense issued a directive claiming as a matter of policy, the US military would comply with the more robust IAC law 'during all armed conflicts, however characterized': Department of Defense Directive 2311.01E, Law of War Program (9 May 2006) ¶ 4.1, www.dtic.mil/whs/directives/corres/pdf/231101e.pdf. Yet as of this writing, some eight years later, what exactly that policy decision means remains unclear. With which conventions or parts of conventions governing the conduct of hostilities is the US complying? Without knowing that, how would the ICRC or international community know if and how well the US is doing as it says it is?

58 But, see Geoff Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (2011) 22 *Stanford LPR* 253 (discussing affording non-state actors POW status and combatant immunity).

59 Even here there is potential for helpful conflation between IAC and NIAC law and GCIII and GCIV. API contains a list of fundamental guarantees on the treatment of persons in the power of a party to a conflict recognised as customary international law. In particular, API art 75 provides process rights akin to those from the ICCPR. The vast majority of the world, some 174 states, are party to API. But for those states that are not, portions of API, including art 75, are binding as customary international law, a point even the US acknowledges. White House, 'New Actions on Guantanamo and Detainee Policy' Fact Sheet (7 March 2011), www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.

Geneva Convention III applies 'from the time [a qualifying person] fall[s] into the power of the enemy and until their final release and repatriation'.⁶⁰ As previously discussed, in terms of timing of release, the Convention states only that 'prisoners of war shall be released and repatriated without delay after the cessation of hostilities'.⁶¹

Geneva Convention III presupposes status as an immutable quality, once a belligerent qualifies for POW treatment their status remains as a POW for the duration of the conflict.⁶² If during the war in the Falklands, the British detained a uniformed member of the Argentine Army, that individual's status remains constant, a member of the armed forces of a party to the conflict.

But the conclusion of NIACs involving non-state actors who increasingly operate from more than one state and are aligned to varying degrees with other organised armed groups is not so straightforward.⁶³ Returning to the Falklands example, there are not gradients of being a member of the armed forces of Argentina, either one is or is not. But there are degrees of membership in groups like al-Qaeda as well as questions about the effect is one were to renounce their membership.

Geneva Convention IV security detention review mechanisms could bridge the gaps created by status in NIAC not lending itself to the binary IAC detention regime and by the uncertainty of when NIACs end.

This would mean semi-annual reviews of whether the detainee still poses an imperative security threat. Consistent with Geneva Convention IV these reviews would be held automatically and occur with a rebuttable presumption that the detainee no longer poses a security threat. An administrative board could conduct the reviews so long as there are sufficient indicia of independence and impartiality. The board could still comprise members of the capturing party's armed forces. But the board members would need to be under a separate chain of command.⁶⁴ Whatever decisions the board recommends could be subject to review but the only permissible modification would be those in the detainee's favour. This means that where the board recommends continued detention, a higher level of the capturing party's government could reverse that detention and direct release. But where the board recommends release, the review could not reverse that decision.⁶⁵

60 GCIII art 5.

61 GCIII art 118.

62 And under GCIII art 7, 'prisoner of war may in no circumstances renounce in part or in entirety the rights secured to them' under the Convention.

63 Consider the dynamic relationship between al-Qaeda groups, in Pakistan and Afghanistan but previously in Iraq and in the Arabian peninsula and al-Qaeda in the Maghreb. See 'Letter to al-Zarqai from al-Zawahri' *MSNBC* (11 October 2005), www.nbcnews.com/id/9666242/ns/world_news-terrorism/t/letter-al-zarqawi-al-zawahri (describing communication between the head of al-Qaeda in Pakistan and the head of al-Qaeda in Iraq); Helen Collis and Hayley Peterson, 'Head of al Qaeda in Pakistan Ayman al-Zawahri communicated with Nasser al-Wuhayshi, the Head of al Qaeda in the Arabian Peninsula' *Daily Mail* (4 August 2013) (describing communication between the head of al-Qaeda in Pakistan and his counterpart in Yemen).

64 While this seems counter-intuitive, it can and is done. For example, in the US, military defence counsel, military judges and those serving as inspector generals are placed in a separate chain of command and are only subject to that command's orders and evaluation.

65 This is similar to how the US conducts administrative boards to determine whether or not to discharge service members. Whatever decision the board makes is reviewed and can be modified, but only to the service member's benefit. See US Army Regulation 635-200, Active Duty Enlisted Administrative (6 June 2005).

5 Conclusion

Geneva Conventions III and IV provide a solid detention framework for IAC. Geneva Convention III recognises broad, status-based detention. It provides considerable guidance on treatment, but is of limited use in terms of release. Geneva Convention IV applies a higher, conduct-based threshold for detention. The treatment provisions of Geneva Convention IV are less robust than for Geneva Convention III, but unlike status-based POW detention, civilian conduct-based detention provides for a review process.

A hybrid application of Geneva Conventions III and IV could thus form the basis of a NIAC detention regime – apply the Geneva Conventions as a matter of policy to NIACs, to allow for status-based detention of non-state actors but treatment as a POW. Such detention would then be subject to the review process from Geneva Convention IV.

Allowing status-based detention of non-state actors would result in over breadth, more individuals being detained than would the case if the detaining entity were forced to identify specific threat-based actions warranting detention. But there are some implicit checks on how such detention would occur. Were a military to believe an individual a member of al-Qaeda and ordered his detention, and it turned out the individual while sympathetic to al-Qaeda was not a member as such or conducting any activities at al-Qaeda's behest, the individual would be released no later than following the first six month review. And while six months of unnecessary detention is problematic, it's a finite problem. And in a counter-insurgency environment, status-based detention of non-state actors would in some ways be self-regulating. A military commander who detains too many people on the basis of status who do not in fact pose a security threat will undermine their relationship with the local populace and their perceptions of legitimacy.

There will inevitably be over- or under-breadth in any detention system and indeed any law or legal system. The question is who should incur the risks or pay the costs. Between members of an armed force who comply with the LOAC, the civilian population and non-state actors, non-state actors should bear the risk of inevitable over-breadth from a status-based detention regime.

This approach is vulnerable to criticism. But much of the criticism, while legally correct, is practically unhelpful.⁶⁶ This chapter operates on the assumption that following a 'successful' deconstruction of this proposal, critics must shift to positivism and a proposed solution. And any solution would seem, by definition, to look a lot like some combination of Geneva Conventions III and IV. Moreover, there are considerable advantages, practically and in establishing legitimacy, of tethering a detention regime to the world's most ratified treaty and which has formed the basis for how militaries around the world train to conduct detention operations.

⁶⁶ In a similar vein, this chapter ignores the discussion of whether there are only two categories of individuals, prisoners of war or civilian, or if there is some alternate category involving unprivileged belligerents. The majority view is that under API's negative definition of civilian – a civilian is any person who does not belong to a POW qualifying category – the universe is binary: if someone is not a POW then they are a civilian. See API art 50(1). The ICRC *Commentary* however notes that 'things are not always so straightforward' and that an individual who did not qualify as a matter of law as a POW would still be treated as such. *AP Commentary* ¶¶ 1761, 1736. But the debate of whether there are two or more categories of actors on the battlefield does not meaningfully advance the debate of detention treatment and release of non-state actors.