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IS THERE A RIGHT TO DETAIN CIVILIANS BY FOREIGN ARMED FORCES DURING A NON-INTERNATIONAL ARMED CONFLICT?

Abstract This article considers whether there is any lawful authority for foreign armed forces assisting a territorial State during a non-international armed conflict to arrest and detain civilians. Taking the backdrop of Iraq and Afghanistan it considers relevant UN Security Council resolutions including Resolution 1546 (2004) relating to Iraq which authorized the multi-national force (MNF) ‘to take all necessary measures’ and provided for the internment, for imperative reasons of security, of civilians. In respect of Afghanistan, a number of resolutions authorized the International Assistance Stabilisation Force (ISAF) to ‘take all necessary measures’. It challenges the notion that the positive rights under international humanitarian law applicable to an international armed conflict apply, *mutatis mutandis*, to a non-international armed conflict, where national law (including human rights law having extra-territorial effect) is of primary (although not of exclusive) significance. It also considers which body of national law, that of the sending or that of the receiving State, applies to determine the lawfulness of detention of foreign civilians. The article recognizes that the arrest and detention of civilians may be necessary during a non-international armed conflict but concludes that the lawful justification for doing so needs to be clearly established.

I. INTRODUCTION

In *The Queen (Application of Maya Evans) v Secretary of State for Defence* (2010)¹ the Divisional Court was called upon to determine whether there was a real risk that Afghan nationals held by British armed forces would suffer torture, inhuman or degrading treatment if transferred to the Afghan national authorities. In giving the judgment of the Court, Richards LJ commented that ‘the law of armed conflict applies to military operations conducted in internal armed conflict.’² No one could quibble with this. The remainder of his proposition is more equivocal when he went on to say that ‘subject to compliance with that law, UK armed forces operating in Afghanistan are authorised... to capture insurgents... the power to capture insurgents extends to a power to detain them temporarily.’

¹ [2010] EWHC 1445 (Admin).

² At para 17 *ibid* Richards LJ went on to say that ‘the Secretary of State takes the view that the UK has no power of indefinite internment.’

The real difficulty lies in the search for the source of this purported authorization to detain. By way of setting the scene this article will consider briefly the nature of the armed conflicts in Iraq and Afghanistan. It will then discuss whether any legal authority exists under international humanitarian law (IHL) for a State to detain foreign civilians in an international armed conflict and whether such a right also exists during the course of a non-international armed conflict which is conducted extra-territorially. If no such right exists under IHL could there be any other base to show an 'authorisation to ... detain temporarily'? Finally, conclusions will be drawn.

In this context the term 'detention'³ could refer to internment, detention for the purpose of holding a person in custody to interrogate him or her, to carry out an investigation with the aim of charging him or her with an offence, or for the purpose of transferring the individual to another State. In addition, a State may impose assigned residence on a protected person. Internment is usually imposed for an indefinite period, subject to review.

II. SETTING THE SCENE

Since 2004⁴ British armed forces have captured and detained⁵ a relatively large number of civilians in the course of armed conflicts both in Iraq and in Afghanistan. Other States have, to a various extent, acted similarly.⁶ The period of detention has been either short or has amounted to internment.⁷ It may also have involved the transfer of individuals to other participating nations⁸ or to the authorities of the respective territorial States.

³ G Solis, *The Law of Armed Conflict* (Cambridge University Press, 2010, 224–5) draws attention to the fact that the term 'detainee' is not defined in any of the IHL treaties nor is it applied consistently.

⁴ The number of detainees held by the Multi-National Force (MNF) in Iraq in June 2005 was reported to be '6,000 ... and despite the release of some detainees, their number continues to grow', *Report of the Secretary-General pursuant to paragraph 30 of Resolution 1546 (2004)*, S/2005/373, para 72. By the time of the House of Commons Select Committee on Defence, *Second Special Report*, session 2007–08, the UK had released all its 'security internees [except for two, who were the applicants in *R (on the Application of Al-Saadoon and Mufdhi) v Secretary of State for Defence* [2009] EWCA Civ 7]', para 26. For the procedure adopted to determine whether a detainee in Iraq should be released see Hansard, House of Commons, vol 485, col 54W (9 December 2008). For the numbers detained by UK armed forces in Afghanistan see Hansard, House of Commons, vol 488, col 394 (26 February 2009). The history of transfers from British to Afghan authorities is set out in *The Queen (on the Application of Maya Evans) v Secretary of State for Defence* (n 1), Richards LJ, para 25. See also Hansard, House of Commons, vol 488, col 396 (26 February 2009).

⁵ For a discussion of the meaning of 'deprivation of liberty' in this context see J Kleffner, 'Operational Detention and the Treatment of Detainees' in T Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010) para 25.01.

⁶ See *Amnesty International v Chief of the Defence Staff for the Canadian Forces*, 2008 FC 336 (an appeal, [2009] FCR 149, dealt with the treatment of detainees during Canadian detention and prior to transfer to the Afghan authorities). It is not proposed to discuss the detention practice of US armed forces in this article.

⁷ A distinction needs to be drawn between arrest for criminal offences and internment for imperative reasons of security. See discussion below; *Al-Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9, para 46.

⁸ See, for example, *R (Application of Hassan) v Secretary of State for Defence* [2009] EWHC 309 (Admin).

By way of contrast, during the course of the ‘troubles’ in Northern Ireland a power to detain civilians for a maximum period of four hours was granted to members of the armed forces on duty. Without this statutory power soldiers would have had no more powers to arrest than those of a civilian, with much wider powers available only to police officers.⁹ No such express statutory power to arrest and to detain civilians was, or has, been given to British armed forces conducting military operations in Iraq or in Afghanistan. In Iraq, however, United Nations Security Council Resolution 1546 (2004) did authorize the Multi-National Force (MNF) to intern civilians for imperative reasons of security.¹⁰ Unlike Resolution 1546 for Iraq, Security Council resolutions referring to Afghanistan authorized States participating in ISAF ‘to take all necessary measures to fulfil its mandate’,¹¹ a term discussed below.

It is generally accepted that an armed conflict is one where ‘there is . . . protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.’¹² In Afghanistan there are a number of different arrangements between groups of States and the Government of Afghanistan designed to assist that Government.¹³ There are also a number of groups, of one form or another, antagonistic to the government itself or to the rule of law. These include the ‘Taliban, Al-Qaida, illegally armed groups, criminals and those involved in the narcotics trade’.¹⁴

There can be little doubt that currently a non-international armed conflict exists within the whole territory of Afghanistan, even though actual combat is taking place in

⁹ The Northern Ireland (Emergency Provisions) Act 1973, s 12. The power to search a dwelling house was given by s 13. The United Kingdom government never recognized the situation in Northern Ireland as an ‘armed conflict’, although it did issue a derogation notice to the Council of Europe in relation to art 5 of the European Convention on Human Rights. It might be argued that the issue of a derogation notice (and certainly one approved by the European Court of Human Rights) would indicate a state of emergency having the same quality as recognition of an armed conflict. See generally, B Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, 2010) 98–102. For the approval of a derogation notice see *Brannigan v United Kingdom* (1994) 17 EHRR 539, para 66 and for comment on whether it could apply extraterritorially, *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 57, Lord Bingham, para 38. Compare the position argued below (n 79).

¹⁰ Operative paragraph 11 and letter from Colin Powell, the US Secretary of State, attached to the Resolution. The European Court of Human Rights has interpreted this authorization to States as being subject to their human rights obligations, *Al-Jedda v United Kingdom*, App no 27021/08, Judgment, Grand Chamber, 7 July 2011, para 105.

¹¹ Resolution 1890 (2009) para 2. For an earlier resolution see 1386 (2001).

¹² *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para 70. See also *Prosecutor v Haradinaj*, IT-04-84-T (3 April 2008) para 37; *Prosecutor v Boskoski*, IT-04-82A (19 May 2010) para 23. See generally, A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010) 117ff. For the view that the conflict in Afghanistan in the 1980s was a non-international armed conflict see *Hesam v Public Prosecutor, Supreme Court*, 8 July 2008, LJN no BC7418 discussed at (2009) 60 NYBIL 443.

¹³ See UN Security Council Resolution 1917 (2010) para 17; Resolution 1386 (2002) which referred to ‘all necessary measures to fulfil the mandate’; Resolution 1659 (2006) which recognized that NATO was leading ISAF (International Stabilisation Assistance Force) and welcomed its continued expansion across Afghanistan; Resolution 1707 (2006) which required ISAF to work in close consultation with OEF (Operation Enduring Freedom) and called upon ISAF ‘to work in close consultation with the Government of Afghanistan . . . in the implementation of the force mandate’. The force mandate can be found in Resolution 1386 (2001) and in its expanded form in Resolution 1510 (2003).

¹⁴ Resolution 1917 (2010) para 17.

defined areas only.¹⁵ A crucial question is who are the parties to that conflict? Clearly, the governmental authorities of Afghanistan, represented by the Afghan National Army will be a party. The Afghan police will also, for the purposes of IHL applicable in a non-international armed conflict, represent the governmental authorities. Whilst Protocol II¹⁶ refers to an armed conflict in the territory of a State 'between its armed forces and . . . organised armed groups, Common Article 3 of the Geneva Conventions 1949 is more equivocal.¹⁷

The Taliban and Al-Qaida are likely to, and (possibly) illegally armed groups will, come within the generic term 'organised armed groups'.¹⁸ Criminals and those involved in the narcotics trade will not.¹⁹ The fact that there are different groups which may come into contact with ISAF, some of whom will be parties to the conflict whilst others will not clouds the power (if any exists) to arrest and detain Afghan nationals.

What is the legal status of those States assisting the Government of Afghanistan? A literal interpretation of Article 1 of Protocol II and Common Article 3 suggests that only the territorial State can be a party to a non-international armed conflict occurring on its territory. This is probably what was intended when these Article were being drafted. A purposive interpretation of each would, however, suggest that States assisting the territorial State at its request would be bound equally providing such States were party to each.²⁰ Should this interpretation not be accepted participating States have both an obligation to ensure respect for the Geneva Conventions in all circumstances²¹ and to comply with relevant customary international law.²²

¹⁵ The definition of an armed conflict in *Tadic* (n 12) stresses that it will exist over the whole of the territory of the State 'whether or not actual combat' is occurring in only part of it. The nature of the International Stabilisation Assistance Force (ISAF) also leads to this conclusion. It is suggested that categorizing the conflict as 'internationalised', due to the participation of ISAF, merely provides a factual rather than a relevant legal distinction.

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to Victims of Non-International Armed Conflicts (1977).

¹⁷ Protocol II, art 1; Common art 3 refers to 'each Party to the conflict'. Although Common art 3 also refers to 'armed forces' it cannot be referring only to armed forces of the State. The role of a police force is envisaged in IHL as to apply *national* law. Since they would be an organ of a 'party to the conflict' (the State) they would also be required to avoid the proscriptions imposed by IHL during a non-international armed conflict. Compare the position if the National Police take their orders from the Afghan National Army, see J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) Rule 139.

¹⁸ The factual indicia for the status of such a group can be seen in *Prosecutor v Haradinaj*, (n 12) para 50ff (re-trial ordered on appeal); *Prosecutor v Boskoski*, (n 12) para 23.

¹⁹ The definition of armed conflict (n 12) 'serves to distinguish non-international armed conflict from banditry, riots isolated acts of terrorism, or other similar situations', *Prosecutor v Haradinaj*, (n 12) para 38.

²⁰ See the Vienna Convention on the Law of Treaties, 1969, art 31(1). All States are party to the Geneva Conventions 1949. In Afghanistan, some participating States are not party to Protocol II. They would, of course, be bound by those obligations contained in the treaty which represented customary international law.

²¹ Common art 1 to the Geneva Conventions 1949, which would apply to Common art 3 and to Protocol II. As to the attitude of States to their art 1 obligations see L Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 249.

²² See J-M Henckaerts and L Doswald-Beck (n 17) Rule 139, which refers to 'each party to the conflict'.

III. THE POWER UNDER IHL TO DETAIN FOREIGN CIVILIANS DURING AN
INTERNATIONAL ARMED CONFLICT

There is little doubt that a Party to an international armed conflict is permitted to impose assigned residence, internment or imprisonment on protected persons.²³ The latter form of detention assumes that the occupying power has established its own courts in the occupied territory. This has not been the general practice during short periods of occupation in recent times.²⁴ If it does, however, do so it will be able to detain the protected person prior to trial.²⁵ Unlawful confinement is a grave breach of Geneva Convention IV and could, if of a sufficient scale, amount to a crime against humanity.²⁶

IV. IS THERE A POWER UNDER IHL TO DETAIN FOREIGN CIVILIANS DURING A NON-INTERNATIONAL
ARMED CONFLICT OCCURRING EXTRA-TERRITORIALY?

It appears axiomatic that those who claim IHL grants them a power to do something should be able to point specifically to the source of that power.²⁷ During an international armed conflict there are a number of specific examples where such express powers are given. Thus, combatants (as defined) have the right to participate directly in hostilities.²⁸ They may target military objectives,²⁹ detain prisoners of war,³⁰ 'take such measures of control and security in regard to protected persons as may be necessary as a result of the war'³¹ and enact a limited range of penal provisions if in occupation of territory.³²

In the course of a non-international armed conflict, where the national law³³ of the territorial state will also apply, the terminology of IHL takes a different format. This is

²³ Geneva Convention IV 1949, arts 41, 42, 43, which refer to aliens in the territory of a party to the conflict. For the position under occupation see arts 68, 71, 78, 79. Where a protected person is charged by the occupying State with an offence for which the sentence could be two years or more the protecting power must be notified, art 71. Some civilians (ie not members of armed forces of a State) may qualify for prisoner of war status under Geneva Convention III, art 5. Those protected by Geneva Conventions I, II and III are not considered further.

²⁴ Compare where the period of occupation has been extensive, eg in the territories occupied by Israel since 1967; Y Dinstein, *The International Law of Belligerent Occupation* (Oxford University Press, 2009), chap 6.

²⁵ Geneva Convention IV, arts 69, 76.
²⁶ Geneva Convention IV, art 147; Rome Statute of the International Criminal Court 1998, art 7 (1)(e). See J Kleffner, in T Gill and D Fleck (eds) (n 5) para 25.03.

²⁷ The same argument can be made in respect of Security Council resolutions. In dealing with the rights of civilians implied powers, such as those which are argued to follow from an obligation to 'take all necessary measures' in a particular resolution, are hardly satisfactory as a *lawful* basis for action. For examples of purported implied powers see R McLoughlin, 'The Legal Regime Applicable to Use of Force When Operating under a United Nations Security Council Mandate Authorising "All Necessary Measures"' (2007) 12 JC&SL 403 (to arrest) and 410–11; D. Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 ICLQ 159. Compare *Behrami v France; Seramati v France, Germany, Norway*, [2007] 45 EHRR SE 10, para 124, 'Having regard to ... UNSC Resolution 1244 [1999] (para 9 as well as para 4 of Annex 2 to the Resolution) ... the Court considers it evident that KFOR's security mandate included issuing detention orders.' It also appears unsatisfactory to rely on an implied power under IHL to arrest and detain. Compare J Kleffner (n 5).

²⁸ Protocol I, art 52(2) and, in effect, kill a proportionate number of civilians, art 51(5)(b).

²⁹ Geneva Convention III, 1949, art 5 and be subjected to the law of the detaining power, art 82.

³⁰ Geneva Convention IV 1949, art 27.

³¹ Geneva Convention IV 1949, art 27.
³² Geneva Convention IV arts 64–7.
³³ This could be its normal criminal law with, or without, the addition of any particular emergency law. In addition, it might be supplemented by the implementation of specific war crimes applicable during a non-international armed conflict. This is the effect of a State implementing

due to the overlapping role of national law. Here IHL is generally stated in negative, rather than in positive, terms. It prohibits acts, such as attacking those who do not take a direct part in hostilities or who have ceased to do so.³⁴ It does not, of itself, give a legal power to attack those who do take a direct part in hostilities.³⁵ Although IHL recognizes that some form of detention related to the conflict is likely to take place during a non-international armed conflict it does not give a specific legal power to arrest and detain civilians.³⁶

It may be thought that this argument is merely theoretical and is based upon sophistry. Law can be drafted in either a positive or negative format but have the same effect.³⁷ On the other hand a positive formulation, which gives a right to act in a particular way under IHL, may be inconsistent with the national law of a State taking part in a non-international armed conflict outside its territory.³⁸

It should not be forgotten that national law *must* play a part in any non-international armed conflict. This is not only to prevent the armed forces of the State from acting as if they are fighting in an international armed conflict during which they would be entitled to attack 'combatants' and, within limits, military objectives with heavy weaponry. It is also an important source of law (although not the only one) to hold to account individual members of the armed forces and civilians who have taken an active part in hostilities. The desire to eradicate impunity for actions during a non-international armed conflict should be as strong at the national as it is at the international level. National law will determine when civilians can be attacked by security forces, be arrested, detained and so

art 8(2)(c) and (e) of the Rome Statute 1998 to give effect to its complementarity provisions. See generally, Y Sandoz et al (eds), *Commentary on the Additional Protocols* (Geneva, 1987) para 4599. It could also be 'rebel law', see (n 43).

³⁴ Common art 3; Protocol II, arts 4, 13(2), 14–17.

³⁵ Even if by implication it does confer such a power this does not determine that IHL applies in place of national law, although it is recognized that it has given rise to debate as to whether the appropriate model is one of law enforcement or of IHL. See, for example, the articles contained in (2008) 90 IRRC 501–750.

³⁶ Common art 3(1)(d) to the Geneva Conventions 1949; Protocol II, art 5. See G Rona, 'An Appraisal of US Practice Relating to "Enemy Combatants"' (2007) 10 YBIHL 240; M Hakimi, 'International Standards for Detaining Terrorist Suspects: Moving Beyond the Armed Conflict Divide' (2008) 33 YJIntL 382. Common art 3 and Protocol II do, however, direct attention as to how detained civilians are to be treated. See generally, C Brannagan, 'The Copenhagen Process on the Handling of Detainees in International Military Operations: A Canadian Perspective on the Challenges and Goals of Humane Warfare' (2010) 15 JC&SL 501.

³⁷ There are many examples in that part of IHL which applies to an international armed conflict, where a form of negative or positive drafting of the treaty provisions can be said to show no practical difference. Thus, Geneva Convention III, art 13 requires that 'prisoners of war must at all times be humanely treated.' It would make no practical difference if this requirement was stated negatively, to the effect that it is prohibited to treat prisoners of war inhumanely.

³⁸ The Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009) 90 IRRC 991 treats a civilian having a 'continuous combat function' as someone who takes a direct part in hostilities. In consequence, he can be attacked. By itself this does not give the armed forces of a State, operating in the course of a non-international armed conflict, any lawful power under *national* law to attack such an individual merely because of this functional position he holds. In *The Queen (on the Application of Maya Evans) v Secretary of State for Defence* (n 1) para 17, Richards LJ stated that 'the law of armed conflict applies to military operations conducted in internal armed conflict.' He went on to say that 'subject to compliance with that law, UK armed forces operating in Afghanistan are authorised to kill . . . insurgents.' *Quaere* whether this statement is correct in the general way in which it is stated.

on. It was this law, irrespective of whether the UK had accepted that an armed conflict was taking place, which determined whether British soldiers could arrest civilians during the troubles in Northern Ireland as discussed above.

National law may have incorporated within it the human rights obligations of the State and a power to derogate from some of these obligations in just such a situation. Where this is the case international human rights law is not merely another branch of international law to set alongside IHL in determining which of them is the *lex specialis*. Its status as national law achieves that, although subject to one important caveat. If IHL is not implemented in, or does not form a part of, national law it will act as a legal backstop (albeit a very important backstop), at the international level, providing limits to the conduct of members of the armed forces or of organized armed groups during a non-international armed conflict.

If, contrary to the position being argued, IHL does establish a power to detain during a non-international armed conflict and it replaces national law on this issue for the duration of a non-international armed conflict, it would have serious consequences. First, if the applicable law (national law or IHL) were to vary upon such an assessment of whether an armed conflict of this type was taking place unacceptable uncertainty would exist in the absence of such a declaration by the territorial State or by an international court before which the issue is brought for decision.³⁹ Secondly, the power (in limited circumstances) of States to derogate from one or more human rights treaties to which they are party would be rendered otiose simply if a State could allege that its national law (on which a power to derogate will bite) has been 'replaced' by IHL for the duration of the conflict.⁴⁰ Thirdly, it may disturb the normal rules within that State concerning the relationship between national and international law. Fourthly, a practical way of looking at this issue is to determine by which law a soldier, who acts inappropriately during the course of a non-international armed conflict, is to be judged. This is very likely to be his national law rather than any branch of international law.⁴¹

³⁹ See generally, L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002) 13; G Nolte, 'The Different Functions of the Security Council with respect to Humanitarian Law' in V Lowe et al (eds), *The United Nations Security Council and War* (Oxford University Press, 2008) 529. The *Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, A/HRC/17/44, para 40 (1 June 2011) determined that a non-international armed conflict existed in Libya by late February 2011.

⁴⁰ For the limitations on the power to derogate see the International Covenant on Civil and Political Rights 1966, art 4; European Convention on Human Rights art 15. It is generally accepted that IHL can apply alongside human rights treaties where it is relevant. This is quite different from arguing that IHL replaces national law in its entirety during a non-international armed conflict.

⁴¹ He will, of course, be liable to both systems but his liability under international law cannot preclude his liability under national law unless this is specifically provided. His national law is likely to take into account the particular circumstances (the armed conflict) and the rules of engagement (ROE) issued to him in determining whether his actions were lawful under national law. In relation to art 5 the European Court of Human Rights has drawn attention to the principle that 'any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of *national law* (emphasis added) but must equally be in keeping with the very purpose of art 5 [and] ... to ensure the accountability of the authorities to account for individuals under their control', *Bazorkina v Russia*, App no 69481/01, Judgment 27 July 2006, para 146; *Gelayevy v Russia* Judgment, 15 July 2010, para 155. Where he is alleged to have committed an offence under the Rome Statute 1998, art 8.2(c) or (e) the complementarity provisions provide the primary jurisdiction to be trial before a national court.

Fifthly, the ICRC Interpretive Guidance on the notion of civilians taking a direct part in hostilities⁴² suggests that those who undertake a continuous combat function could be attacked at any time (rather than being arrested and detained). Given that the State's armed forces would be unable to determine whether an erstwhile civilian falls into this category or not (unlike a person entitled to prisoner of war status during an international armed conflict) the possibility of a shoot-to-kill policy adopted by the State would become a real possibility. This may be inconsistent with the national law. It is considered very unlikely that the State would consider captured fighters as if they were entitled to be treated prisoners of war and thus be immune from the national law for acts committed consistent with IHL. The current principle, by which they can deal with captured fighters under their own national law, suits States very well.⁴³

Finally, it is clear that IHL itself recognizes that national law will continue to apply during a non-international armed conflict.⁴⁴ It is, however, a feature of the legal regime applicable in this type of armed conflict much neglected in the literature.⁴⁵

Despite much greater attention being paid to the rules of customary international law and whether they are applicable to a non-international armed conflict, the legal norms applying to this type of conflict are not identical to those applicable during an international armed conflict.⁴⁶ Not the least of these differences is the role that national

⁴² See n 38.

⁴³ There is an argument to the effect that during a non-international armed conflict members of organized armed groups should, upon capture, be treated more favourably than other categories of fighters in order to try to ensure reciprocity of treatment. This is not currently reflected in IHL. Were it to do so it would give the armed forces of the State and members of organized armed groups a more equal status under international law assuming that the organized armed group considered itself bound by IHL and was able to implement the appropriate obligations. See generally, S Sivarakumaran, 'Binding Opposition Groups' (2006) 55 ICLQ 369; J. Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 89 IRRC 655. For codes of conduct adopted by organized armed groups see A-M La Rosa and C Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) 90 IRRC 333. Relevant UN Security Council resolutions often purport to remind all parties to a non-international armed conflict of their obligations under IHL and human rights law. See, for example, Resolutions 1325 (2000) para 10; 1564 (2004) para 10; 1894 (2009) para 10.

⁴⁴ Arts 5 and 6 of Protocol II clearly recognize this. Art 5 of Protocol II 'covers both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law', Y Sandoz et al (eds), (n 33) para 4568. The latter group must refer to those who, under national law, are deprived of their liberty by way of some form of internment without being prosecuted under penal law. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004), para 15.40.2 and art 6(5) relating to national amnesty.

⁴⁵ It is hardly mentioned (other than to show that rebels are not entitled to prisoner of war status) in leading works such as L Moir, *The Law of Internal Armed Conflict* (n 21); L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002); D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, 2008), although see para 1202. Compare the UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (n 44) para 15.40.2; G Solis, (n 3) 154; P Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006), 176–80.

⁴⁶ It is difficult to accept the argument that 'IHL is uniformly less restrictive in internal armed conflicts than in non-international [sic] armed conflict [and that] whatever is permitted in international armed conflict is permitted in non-international [sic] armed conflict,' R Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL 50. Compare *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* IT-84-1-AR72, Judgment, 2 October 1995, para 126.

law plays in intra-State armed conflicts within the human rights context. Thus, in the conflict in Chechnya the European Court of Human Rights has stressed the need to apply national law in a way consistent with the Convention.⁴⁷ It is, therefore, misleading to assume that 'combat operations' take on the same form if an international armed conflict becomes a non-international one.⁴⁸

Should a civilian be detained who is not a member of an organized armed group but who is, in the terms of the UN Security Council resolutions relating to Afghanistan, a member of an 'illegally armed group', a 'criminal' or a person 'involved in the narcotics trade', he would not be a person to whom IHL is addressed. Moreover, there is not, unlike the position in international armed conflict, a mechanism provided by IHL to determine the status of an individual.⁴⁹ For such a person national law will play the most significant role in determining the legality of his detention.

If IHL does not give a power to detain civilians it seems unlikely that NATO, which conducts ISAF operations, should possess such a power. Its 'agreed detention policy for ISAF' which it claims to be 'consistent with international law' should be categorized as a statement of policy rather than a reference to lawful justification.⁵⁰

⁴⁷ *Bazorkina v Russia*, Judgment 27 July 2006, para 146; It is unlikely that the ECtHR is accepting in this case that a State can choose between pursuing the combat or the law enforcement options against insurgents. See generally, J Bellinger, 'Legal Issues in the War on Terrorism' <<http://www.state.gov/s/l/2006/98861.htm>> accessed 12 June 2012. See also also *McCann v United Kingdom* (1996) 21 EHRR 97, para 154; *Nachova v Bulgaria* (2006) 42 EHRR 43, paras 99–100; *Ramsahai v The Netherlands* (2008) 46 EHRR 43, para 321.

⁴⁸ It is argued that the following phrase appearing in the letter from Colin Powell, attached to UN Security Council Resolution 1546 (2004) is misleading. This stated that 'combat operations against members of [defined] groups [will take place after Iraq regained its sovereignty and] that the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.' This statement does not appear to draw a distinction, as IHL does, between the two types of armed conflict. It may, however, reflect policy (rather than a legal analysis) on the part of US armed forces, referred to in Fleck (ed) (n 45) 629. Compare G Solis (n 3) 153. The wording in the letter by the Secretary of State for the USA annexed to Resolution 1790 (2007) refers to the law of armed conflict but without any reference to the Geneva Conventions. See also the *Joint Declaration of the United States-Afghanistan Strategic Partnership*, 23 May 2005, <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050523-2.html>> (accessed 12 June 2012) 'US and Coalition forces are to continue to have the freedom of action required to conduct appropriate military operations based on consultation and pre-agreed procedures.' It is assumed that this 'freedom of action' encompasses the limitations of IHL applicable in a non-international armed conflict but *quaere* whether it is, in reality, an assumption of exclusive jurisdiction for its armed forces in Iraq. For the background to a purely non-international armed conflict in Sri Lanka see 'War and Peace in Sri Lanka', House of Commons Research Paper 09/51, 5 June 2009.

⁴⁹ Compare Geneva Convention III, 1945, art 5; Protocol I, 1977, art 45 API, which supply a mechanism to determine the status of a captured fighter during the course of an international armed conflict. A State may, however, enter a special agreement with an organized armed group to apply Geneva Convention III, common art 3(2). In the alternative a detaining State may undertake to treat detainees as if they were prisoners of war, *Amnesty International Canada v Chief of the Defence Staff for the Canadian Forces* (n 6), para 180.

⁵⁰ NATO Ministerial Meeting of North Atlantic Council held at NATO Headquarters, Brussels, 8 November 2005. This is referred to by Ministers in the UK Parliament as 'NATO Guidelines', see Hansard, House of Commons vol 499, col 5WS (9 November 2009).

V. OTHER POSSIBLE LEGAL BASES FOR A POWER TO DETAIN DURING A NON-INTERNATIONAL ARMED CONFLICT CONDUCTED EXTRA-TERRITORIALLY

Unlike the effect of Security Council Resolution 1546 the resolutions relating to Afghanistan do not give a direct power to intern. They do, however, give a power to 'take all necessary measures'. Is this form of words sufficient to justify detention by ISAF?

In relation to the UK it might be expected that the Secretary of State in *The Queen (Maya Evans) v Secretary of State for Defence* would have taken the view that there was a power to intern those who were a security risk and that such a measure would have been encompassed within the direction of the Security Council to ISAF to take 'all necessary measures'. Yet he did not do so and is reported as having taken the view that the UK had no power to intern indefinitely in Afghanistan, although he claimed a power to detain for short periods.⁵¹

The alternative interpretation of the Secretary of State's view would be that a Security Council resolution which did not refer to a specific power of internment could not grant one, although it could give a power to detain for a short period. If this were to be the case at least three questions arise. First, what length of time would distinguish detention from internment? Secondly, would it mean that detention rather than internment requires the State to have an intention to question an individual for a short period, to charge or to transfer him or her? Finally, should it be acceptable that a power to detain (which is likely to breach the normal principles adopted in relation to deprivation of liberty in various human rights treaties) be *implied* from a Security Council resolution authorizing 'all necessary measures'? In any event, the essential requirement to comply with human rights obligations is that the detention of an individual must be 'lawful'.⁵² The lawfulness of the detention can be judged only by national law in the absence of a justification based on international law.⁵³

A UN Security Council resolution cannot, however, give a power to arrest and detain civilians and thus alter *national* law, unless that national law permits it.⁵⁴ What IHL can do, through Articles 5 and 6 of Protocol II read together, is to ensure that, at the international level, a certain minimum standard of treatment is given to individuals who are detained.⁵⁵

The applicable national law in Afghanistan could not be English law since the territorial State has not consented to the national law of the sending state applying on its

⁵¹ See (n 1), Richards LJ, para 17.

⁵² See art 5(1)(c) and (3) of the European Convention on Human Rights 1950; art 9, International Covenant on Civil and Political Rights 1966.

⁵³ J-M Henckaerts and L Doswald-Beck (n 17), Rule 99 and 347, which assumes that national law is in place to prevent arbitrary deprivation of liberty since it refers to a person arrested on a criminal charge. Thus, the procedural safeguards referred to in Rule 99 include the obligation to inform the person of the grounds for arrest and to bring him promptly before a judge. Strictly, a deprivation of liberty should be lawful under national law and under the State's international human rights obligations, *A v Australia*, (1997) CCPR/C/59/D/560/1993, para 9.5.

⁵⁴ This is certainly the case for those States which require international law to be implemented into national law to have any effect on that law. In the UK the United Nations Act 1946 is concerned only with UN Security Council resolutions passed under art 41 and it requires the relevant parts of such resolutions to be implemented into English law by an Order in Council.

⁵⁵ Y Sandoz et al, (n 33) para 4573. The State's international human rights obligations will also be of significance.

territory in respect of suspected insurgents⁵⁶ nor has the UK attempted to apply detention powers under English law to the territory of Afghanistan. English law has not been altered by Protocol II since the United Kingdom has not implemented it as such.⁵⁷ It cannot, therefore, as a treaty commitment, be part of English law.

There are 'detailed standard operating instructions on how to detain individuals, look after them in detention and, where appropriate, manage their onward transfer to the Afghan authorities',⁵⁸ in the form of a policy statement, which may, or may not, reflect English law. It determines the rights of internees in relation to treatment and transfer but it does not give an express power to detain individuals. Unless, however, the legal source of the power to issue such an order to detain is clear its legitimacy under English law cannot rest alone on the fact that the order was promulgated as a policy statement. Whilst it may be argued that this is a technicality it should not be overlooked that in some States the detention of civilians by a military authority for a period of up to 96 hours (as is the practice in Afghanistan) is an interference with the liberty of individuals who are not subject to military law. It would clearly be contrary to English law if were to be carried out within the UK.⁵⁹

Should the practice of detention form part of the rules of engagement issued to British soldiers in Afghanistan this would not give it any legitimacy, as such, under English law. It is well established that the rules of engagement are not, in themselves, a source of lawful authority.⁶⁰ Any suggestion that an order to detain civilians has been issued, like Queen's Regulations, under the royal prerogative can be defeated by uncertainty as to whether the prerogative could apply to permit the detention of foreign nationals in foreign territory.⁶¹ In similar vein it is unlikely to amount to an act of State.⁶² Unless

⁵⁶ See Mactavish J, *Amnesty International Canada v Chief of the Defence Staff for the Canadian Forces* (n 6), para 182 (referring to the law of Canada). Indeed, 'Task Force Afghanistan's *Theatre Standing Order 321A* recognizes international law as the appropriate standard governing the treatment of detainees,' *ibid*, para 180.

⁵⁷ Although specific criminal offences which can be committed during a non-international armed conflict are established as part of English law by the International Criminal Court Act 2001. Other States may take the view that customary international law is a direct part of their national law even where it creates new criminal offences.

⁵⁸ *The Queen (Application of Maya Evans) v Secretary of State for Defence* (n 1), Richards LJ, para 20. Selected passages from these standard operating instructions are quoted at para 21.

⁵⁹ The Armed Forces Act 2006 permits detention of a person subject to service law without charge for up to 96 hours but only if authorized by a judge advocate, s 101(4). In addition, the crime under English law, of false imprisonment can apply whatever the length of the period of detention if there is no lawful justification for the detention.

⁶⁰ See, for example, *R v Clegg* [1995] 1 AC 491, Lord Lloyd. This must also be the position if British soldiers rely directly upon the NATO or ISAF Rules of Engagement. Compare, however, the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* (Cabinet Office, 10 July 2010), 'individuals may be detained and questioned by UK forces overseas in accordance with the rules of engagement for the specific operation', para 29, referred to in the judgment of Sir Anthony May, *Equality, Human Rights Commission v The Prime Minister and others* [2011] EWHC 2401, para 26. If soldiers rely on standing orders the same principle as stated in *R v Clegg* (above) will apply. Compare Mactavish J in *Amnesty International Canada v Chief of the Defence Staff of the Canadian Forces* (n 6), para 55 (who does not challenge the source of *Theatre Standing Order 321A*, issued by the Canadian Forces in relation to Afghanistan).

⁶¹ See *Attorney General v Nissan* [1970] AC 179, Lord Reid at 213.

⁶² See *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, Elias LJ, para 213.

ministers have a lawful power to authorize detention for a period longer than 96 hours it is difficult to see how their intervention could legitimize detention under English law (and international law) for these periods.⁶³

The remaining possibility is that in relation to the legal cover for the detention of civilians even for a short period by ISAF in Afghanistan the law of the territorial State is the relevant national law. Is the government of Afghanistan permitted by its law to authorize ISAF armed forces to arrest and to detain Afghan nationals?⁶⁴ Even if it is the grounds of arrest identical to any which may be included within the rules of engagement issued to ISAF soldiers?⁶⁵

The practice⁶⁶ in Afghanistan is for British forces to transfer detainees before the expiry of 96 hours from capture. Is this a period selected in order to comply with Afghanistan's obligations under its constitution,⁶⁷ the International Covenant on Civil and Political Rights 1966⁶⁸ or has it been chosen by the British military authorities? It seems clear that the national law of both the sending and receiving States can apply during this type of armed conflict but for different purposes. Military law normally travels with the members of armed forces to govern their actions. The law of the receiving State will continue to apply to govern the actions of anyone on its territory (whether insurgents or not).⁶⁹ This means that the criminal law to be applied against nationals of the receiving State will be that of their own State.

The power to arrest, given to members of an MNF contingent in Iraq, was stated to be the Iraqi law in force.⁷⁰ It is not clear whether this alleged Iraqi law, by itself, would impose any obligations on MNF soldiers for a number of reasons. Even if it was valid

⁶³ Hansard, House of Commons vol 499, col 5WS (9 November 2009). During the 'troubles' in Northern Ireland the Secretary of State was given power to extend the period of detention by statute, the Prevention of Terrorism (Temporary Provisions) Act 1984, s 12(4).

⁶⁴ The authorization by the Government of Cambodia to the French Navy to arrest the crew of a Cambodian registered merchant ship was not sufficient to provide a 'legal basis of the requisite quality to satisfy the general principle of legal certainty for the deprivation of liberty' of the crew, *Medvedyev v France*, (2010) 51 EHRR 39, para 102.

⁶⁵ *The Queen (Application of Maya Evans) v Secretary of State for Defence* (n 1), Richards LJ, para 20.

⁶⁶ *Ibid* para 19, based upon ISAF standard operating procedures.

⁶⁷ See *Arbitrary Detention in Afghanistan, a Call for Action*, UNAMA/OHCHR, January 2009, vol 1, 'Arbitrary detention violates the constitution of Afghanistan and international human rights standards to which Afghanistan has committed.'

⁶⁸ See Human Rights Committee, General Comment 8, para 2.

⁶⁹ In *Al-Saadoon and Mufdhi v United Kingdom*, (n 4) there was no doubt, on the part of either the British or the Iraqi authorities, that the two applicants, Iraqi nationals, were subject to the jurisdiction of the Iraqi courts for the alleged killing of two British soldiers, who were at the time prisoners of war. At the time their alleged crimes were committed they would not have been subject to the jurisdiction of the courts in England under the International Criminal Court Act 2001, s. 51 (2)(b) or under any other provision of the national law of the United Kingdom. As civilians they would not be entitled to prisoner of war status. The applicants in that case had been transferred to Iraq in 2008, prior to the amendment made to the 2001 Act by the Coroners and Justice Act 2009, s 70. It is usual in these circumstances for a status of forces agreement between the sending and receiving States to ensure that members of the armed forces are subject exclusively to the law of the sending State. For further details see below (ns 74, 75).

⁷⁰ *R (Application of Al-Saadoon) v Secretary of State for Defence* (n 4), Laws LJ, para 33 (for the period prior to 31 December 2008 the UK armed forces were acting as agent for the Iraqi court). There was, however, a purported power of arrest given by CPA Memorandum no 3 (revised), as to which see *Al-Saadoon and Mufdhi v United Kingdom* (n 7) para 20. In Resolution 1790 (2007) the Government of Iraq declared that it would be responsible for 'arrest, detention and imprisonment tasks'. It recognized that these functions could be carried out by the MNF but with 'maximum

Iraqi law how did it apply to MNF soldiers giving them direct legal authority to arrest and detain Iraqi nationals after the occupation came to an end at which time they were engaged in a non-international armed conflict? Was it through the mechanism of the status of forces agreement⁷¹ whereby members of the MNF were obliged to respect Iraqi law?⁷² If so, as discussed above, a treaty or any other form of agreement between or among States cannot impose legal obligations, by itself, on British soldiers. Was it through the orders given to soldiers by their commanders, whether in the form of their rules of engagement (ROE) or not? If so, it might be asked how commanders can give a lawful power on the part of soldiers to arrest and to detain foreign nationals. Similar arguments could be made, *mutatis mutandis* in relation to Afghanistan.⁷³

Members of the MNF in Iraq were, and ISAF are, immune from territorial legal process and subject to the exclusive jurisdiction of their own State.⁷⁴ Their legal status in this regard is irrelevant to the applicability of the respective national law operating within those States.⁷⁵ In essence, if the local national law permitted a member of the MNF or ISAF to arrest and detain civilians but their own national law did not the liability of the individual soldier for doing so would have to be based on the latter.

VI. CAN DETAINEES BE TRANSFERRED TO THE TERRITORIAL STATE?

A State Party to the European Convention on Human Rights or the Torture Convention 1984 will owe a duty of non-refoulement to those whom it detains where there is a real risk that, if transferred, such an individual would suffer torture, degrading or humiliating treatment. Indeed, the Divisional Court in the *Maya Evans* case explored in considerable detail the possible transfer locations and concluded that transfer could be made to some, but not to one possible Afghan detention facility.⁷⁶ On the issue of the safety of the

levels of co-ordination ... with the Government of Iraq', letter annexed to the Resolution by the Prime Minister of Iraq.

⁷¹ The Memorandum of Understanding (MoU) of 8 November 2004 between the UK and the relevant government ministries in Iraq drew a distinction between internment, which derived its authority from UNSCR 1546 (2004) and arrest and detention for suspected criminal acts. The MoU dealt with the latter case. See *Al-Saadoon and Mufdhi v United Kingdom* (n 7) para 25.

⁷² The CPA Order no 17 (Revised), 27 June 2004, para 2(2). See generally, R Batstone, 'Respect for the Law of the Receiving State' in D Fleck (ed), *The Handbook of the Law of Visiting Forces* (Oxford University Press, 2001) 69, who concludes that a failure to respect the law of the receiving State could amount to a breach of the treaty itself.

⁷³ See, for example, *Amnesty International Canada v Chief of the Defence Staff of the Canadian Forces* (n 6).

⁷⁴ For Iraq see the CPA Order no 17 (Revised), 27 June 2004, paras 2(1), 2(3). For Afghanistan see the Military Technical Agreement between ISAF and the Interim Administration of Afghanistan, 4 January 2002, Annex A, para 3. This Agreement between the 'ISAF Commander and the Afghan Transitional Authority provides additional guidance for ISAF operations', <<http://www.aco.nato.int/page20844847.aspx>> accessed 11 June 2012. The Convention on Privileges and Immunities of the United Nations 1946, art VI is to apply *mutatis mutandis* to ISAF forces as experts on mission, *ibid*, para 1. As to their accountability as such for the commission of a crime in the territory of the receiving State see *Criminal Accountability of United Nations Officials and Experts on Mission*, A/62/329, 11 September 2007, para 63.

⁷⁵ Both status of forces agreements permit a waiver of jurisdiction in favour of the Receiving State if approved by the Sending State in any particular case, see paras 5 (Iraq) and 4 (Afghanistan, which relates to transfer to an international tribunal or another State).

⁷⁶ See (n 1) para 325.

transfer, time is not on the side of the transferring State since the UK practice has been to detain Afghan nationals for no longer than 96 hours. This requires almost continuous knowledge of the conditions at each transfer location, along with some form of monitoring of the transferees.

It is not unrealistic to foresee a situation where no transfer could take place or could do so only after a more extended period of detention. In this situation the lawful justification for the detention becomes crucial if the detaining State wishes to show that its actions have a sound legal base.

VII. CONCLUSIONS

It appears necessary, reasonable and proportionate for States cooperating with the territorial State during the course of a non-international armed conflict to be able to detain for a short period those whom it suspects of acts prejudicial to the safety of its armed forces or who would harm the civilian population.⁷⁷ Transferring those individuals to the judicial authorities of the territorial State is normally preferable to undertaking an internment role for some indefinite period. In so far as this was the policy of ISAF in Afghanistan it appears to be an entirely reasonable position to take.

Transferring detainees to the territorial State may, however, not be possible due to the need to ensure they will not be subjected to torture, inhuman or degrading treatment, or other possible breaches of a human rights treaty once transferred. This is a specific issue which not only may be faced on the ground but it will also need to be considered by a State before it agrees to assist another State during a non-international armed conflict.

In order to avoid arbitrary detention it is essential to ensure that this short-term detention has a clearly defined legal base. At the international level the detention may, or may not, be justified through the medium of a UN Security Council resolution, whether it is one giving a power of internment or one which permits a State to take 'all necessary measures'. It is not, however, clear that in these circumstances IHL will give States a sound legal basis for even short-term detention.

At the national level the position is much more equivocal. For a State like the UK, which has implemented the European Convention on Human Rights into its national law, a breach of that Convention may be unlawful under national law.⁷⁸ In short, if the detention does not comply with Article 5 of that Convention the UK will have to issue a derogation notice to avoid it acting unlawfully.⁷⁹ By itself this will not, however, create

⁷⁷ See M Sassoli, 'The International Legal Framework for Stability Operations. When May International Forces Attack or Detain Someone in Afghanistan' (2009) 39 *IYBHR* 177, 210 who draws attention to the importance of ensuring that the law remains realistic, otherwise potential detainees could become 'disguised battlefield casualties'.

⁷⁸ It is in the UK, Human Rights Act 1998, s 6.

⁷⁹ This is the effect of *Al-Jedda v United Kingdom*, App no 27021/08, Judgment, Grand Chamber, 7 July 2011, para 99. It is likely that the European Court of Human Rights will have to accept that its interpretation of art 1 of the Convention in *Al-Skeini v United Kingdom*, App no 55721/07, Judgment of the Grand Chamber, 7 July 2011 will lead to the conclusion that art 15 of the Convention can apply to a non-international armed conflict occurring outside the territory of the State party. Following the *Al-Jedda* case it is considered unlikely that the UN Security Council would frame a resolution in such a way as to produce an express conflict with a human rights treaty and thus cause the United Nations Charter, art 103 to be invoked.

a legal power for armed forces to detain civilians when taking part in a non-international armed conflict abroad.

A State carrying out military operations in support of another during a non-international armed conflict will have to ensure that it does have power under its national law to detain foreign civilians.⁸⁰ Even if the sending State is granted clear lawful authority from the territorial State to detain its citizens it will have to bear in mind its IHL and its own human rights obligations owed to those whom it detains.

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⁸⁰ The relevant law in the USA is the Authorization to use Military Force passed by the US Congress on 18 September 2001. See its relevance in *Rahmatullah v Secretary of State for Defence* [2011] EWHC 2008 (Admin).

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