



International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

in co-operation with



INTERNATIONAL COMMITTEE OF THE RED CROSS
COMITÉ INTERNATIONAL DE LA CROIX-ROUGE
COMITATO INTERNAZIONALE DELLA CROCE ROSSA

***4th ROUND TABLE ON CURRENT ISSUES
OF INTERNATIONAL HUMANITARIAN LAW***

***“DEPRIVATION OF LIBERTY AND ARMED CONFLICTS:
EXPLORING REALITIES AND REMEDIES”***

SANREMO, 6-8 SEPTEMBER 2018

DRAFT PROGRAMME

as of 12 July 2018

Wednesday 5 September

16.00 – 17.45 REGISTRATION
18.00 – 19.00 WELCOME COCKTAIL

Thursday 6 September

08.30 – 09.00 REGISTRATION
09.00 – 10.45 OPENING SESSION

WELCOME ADDRESS

- Alberto Biancheri, Mayor of Sanremo

INTRODUCTORY REMARKS

- Fausto Pocar, President, International Institute of Humanitarian Law (IIHL)
- Helen Durham, Director of Law and Policy, International Committee of the Red Cross (ICRC)
- Representative of the Italian Ministry of Foreign Affairs and Italian Cooperation

CONFERENCE HIGHLIGHTS

Video message by Peter Maurer, President of the ICRC

KEYNOTE ADDRESS

Between international humanitarian law, human rights law and standards: challenges in conducting detention operations in non-international armed conflicts

- Steven Hill, Legal Adviser and Director of the Office of Legal Affairs at NATO

SESSION I
11.15 – 12.45

SETTING THE SCENE: THE HUMANITARIAN AND LEGAL CHALLENGES

Background and objective

Deprivation of liberty, in particular in relation to armed conflicts, poses various humanitarian and legal challenges. In many parts of the world, persons deprived of their liberty face dire conditions of detention and ill-treatment, caused by structural shortcomings in justice and prison systems or violations of elementary detainee protections. Such situations are often aggravated in times of armed conflicts, in which State or other actors face resource restraints and high numbers of detainees. While the humanitarian consequences of torture and other forms of ill-treatment, inadequate conditions of detention, or arbitrary detention are generally known, the legal regime regulating deprivation of liberty in relation to non-international armed conflict – which is the most common form of conflicts today – is rather limited if compared to IHL of international armed conflict.

The opening panel aims to set the scene for the round table by first presenting the humanitarian challenges relating to detention more generally and the consequences of detention for individuals in particular. After setting the ‘humanitarian scene’, the panel will also set the ‘legal scene’, contrasting the limited number of IHL rules protecting persons deprived of their liberty in relation to NIAC to the wealth of norms applicable in IAC.

Chair: Benoît D’Aboville, Vice-President, Foundation for Strategic Research and Policy; former Permanent Representative of France to NATO; Council Member, IIHL

Discussion panel (15 minutes per speaker)

- *The human cost of detention, in particular, in States affected by armed conflict: the physical, psychological and societal consequences of deprivation of liberty*
Ana Racu, Human Rights expert; former Member of the Committee for the Prevention of Torture
- *Humanitarian challenges in contemporary armed conflicts: an operational overview*
Laurent Saugy, ICRC (TBC)
- *Contemporary challenges when applying IHL and IHRL to protect persons deprived of their liberty in relation to armed conflict, in particular NIAC*
Blaise Cathcart, former Judge Advocate General, Canadian Armed Forces

SESSION II
14.00 – 15.30

***THE LEGAL BASIS FOR DEPRIVATION OF LIBERTY
IN TIMES OF ARMED CONFLICT***

Background and objective

The question of whether or not IHL provides a legal basis for deprivation of liberty has been the subject of much debate over the past years. While especially States but also scholars argue that IHL of NIAC authorizes detention during these types of conflicts, others raise doubts on whether IHL provides a legal basis for detention in times of NIAC (see, for instance, the Serdar Mohammed case). The second session of the round table shall present the audience with two opposing views on the subject, one arguing that IHL does, and one arguing that IHL does not provide a legal basis for detention. With only two panellists presenting, this session shall encourage debate between panellists and provide ample opportunity for the audience to participate in the discussion.

Moderated Debate (5-10 minutes of introduction, 20 minutes per speaker)

Chair: Marie Jacobsson, Ambassador, Principal Legal Adviser on international law, Ministry of Foreign Affairs of Sweden; Council Member, IIHL

- *Argument in favour of IHL providing a legal authority for deprivation of liberty in relation to NIAC*
John Swords, Head of Operational and International Humanitarian Law Division, Ministry of Defence of the United Kingdom

- *Argument against IHL providing a legal authority for deprivation of liberty in relation to NIAC*
Lawrence Hill-Cawthorne, Associate Professor of international law, University of Reading

SESSION III
16.00 – 18.00

***PREVENTING ARBITRARY DETENTION: GROUNDS AND PROCEDURES
FOR DEPRIVATION OF LIBERTY IN TIMES OF ARMED CONFLICT***

Background and objective

In order to ensure that deprivation of liberty is not arbitrary, grounds and procedures need to be defined. While IHL of IAC defines grounds and basic procedures for internment of prisoners of war and civilians, IHL of NIAC does not provide similar rules. However, customary IHL prohibits arbitrary deprivation of liberty in broad terms, and human rights law – which continues to apply in times of armed conflict – may offer further guidance on the subject. Still, the question of which grounds and procedures parties to armed conflict have to provide for persons deprived of their liberty in times of NIAC remains subject to debate, in particular, when States operate extraterritorially.

The present panel aims to provide an overview of how the subject is regulated in IHL applicable in IACs and provide space for discussions of the issue in times of NIAC, looking at legal and operational concerns. This panel should also include a discussion on ways in which the law regulates a concrete operational challenge, for instance, deprivation of liberty of a large number of persons during ‘screening operations’. In recent armed conflicts, and in particular when closing down on certain areas or cities, parties to armed conflicts have systematically screened persons fleeing an area or city in order

to identify adversaries. On some occasions, this has resulted in deprivation of liberty for several weeks in make-shift places of detention and without appropriate procedural safeguards, conditions of detention, or protection against ill-treatment. For the affected individuals and their families, screening operations can have important humanitarian consequences, as they may result in fundamental rights violations, such as ill-treatment or arbitrary detention. The objective of the case study would be to examine how international law, in particular rules relating to grounds and procedures, regulate deprivation of liberty of large numbers of persons during ‘screening operations’.

Chair: Stephan Weber, Director, Leadership Development and Civil Education Centre; Council Member, IIHL (TBC)

Discussion panel (15 minutes per speaker)

- *Grounds and procedures for deprivation of liberty in times of IAC and in NIAC – existing law and policy proposals*
Jelena Pejić, Legal Adviser, ICRC; Member, IIHL
- *Protecting individuals from arbitrary detention in ‘anti-terrorism’-operations: a State experience*
Abdoulaye Kaka, General of the Police and Head of the Central Counterterrorism Agency in Niger (TBC)
- *Analysis of a practical case: the legal framework for deprivation of liberty in the context of screening operations in times of NIAC*
Chris Jenks, Director of the Criminal Clinic and Associate Professor of Law, SMU Dedman School of Law; Member, IIHL

Friday 7 September

SESSION IV
09.00 – 10:30

ENSURING HUMANE TREATMENT AND CONDITIONS OF DETENTION

Background and objective

Ensuring humane treatment and conditions of detention for persons deprived of their liberty in relation to armed conflicts is a fundamentally important humanitarian concern. Indeed, preventing torture and other forms of ill-treatment and improving conditions of detention is a common theme of most of the ICRC’s major detention operations. International law unequivocally prohibits torture and all forms of ill-treatment, including sexual violence. Moreover, IHL of IAC regulates conditions of detention rather comprehensively. Under IHL of NIAC, article 3 common to the four Geneva Conventions does not explicitly set out minimum conditions of detention. However, Additional Protocol II (where applicable) and customary IHL do, and human rights law – which continues to apply in times of armed conflict – may offer further guidance on the subject.

In practice, a key challenge is how to address ramping levels of ill-treatment in various armed conflicts. Legal and operational challenges relating to ensuring humane conditions of detention include whether and to what extent human rights standards can and should inform detention frameworks in times of NIAC, or what minimum protections have to be ensured in operationally complex circumstances such as short-term detention or detention close to the battlefield. Moreover, a transversal issue is how to ensure that the particular needs of certain vulnerable groups are taken into account.

This panel should include a discussion on ways in which the law can respond to a concrete challenge, for instance, overcrowding. Overcrowding is a serious humanitarian concern in many States, also in times of armed conflict. From a practical and legal perspective, pertinent issues to discuss include the reasons and humanitarian consequences of overcrowding, how to legally evaluate such situations, and how existing international law, such as procedural safeguards for detainees, may contribute to resolving such situations.

Chair: Nils Melzer, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Member, IHL

Discussion panel (15 minutes per speaker)

- *Adequate conditions of detention and the protection of vulnerable groups, during armed conflicts*
Jes Rynkeby Knudsen, Chief Legal Adviser of the Defence Command, Danish Ministry of Defence
- *Which steps does it take to ensure humane treatment and provide humane conditions of detention in the early stage of detention? A State's experience*
Javier Alberto Ayala Amaya, Head of the Legal Department, Colombian Armed Forces
- *Humanitarian consequences of overcrowding and legal responses in times of armed conflict*
Piera Barzanò, Senior Interregional Adviser, United Nations Office on Drugs and Crime (UNODC)

SESSION V
11.00- 12.30

***SPECIFIC CHALLENGES I:
DETENTION AND DETAINEE TRANSFERS IN MULTINATIONAL OPERATIONS***

Background and objective

In contemporary armed conflicts, States increasingly operate in coalitions. Moreover, peace missions under the auspices of international/regional organizations are often conducted in the territory of States affected by armed conflicts. Deprivation of liberty is a salient feature during multinational operations and has posed particular challenges, also with regard to possible transfers of detainees among coalition/multinational forces or to host State authorities. Challenges include:

- Legal framework of detainee transfers. IHL of IAC explicitly prohibits detainee transfers to States that are unwilling or unable to implement applicable IHL. The principle of *non-refoulement* is also found in human rights law, and it is implicit in common Article 3. While many accept that this principle applies to all detainee transfers irrespective of where they take place, procedural and practical issues remain subject to debate, such as pre-transfer obligations, post-transfer responsibilities, or the question of what to do with detainees who cannot be lawfully transferred.
- Detention and detainee transfers in partnered operations. When States operate in coalitions/partnered operations, practical challenges include establishing a legal framework for detention, attributing responsibility for detainees during joint capture operations, and ways to reconcile the different legal obligations of partnering forces when it comes to detention and transfers. Moreover, multinational forces have found themselves in a 'dilemma' when they are unable to

transfer detainees to host nation authorities but are not willing or able to detain an individual themselves. This has also led to States deciding not to detain.

- UN peacekeeping forces. During UN peacekeeping operations, a frequent question is how to implement the applicable legal framework in light of complex operational challenges. In fact, peacekeeping missions have developed rich practice in this respect (e.g. MONUSCO, MINUSMA, UNMISS).

Chair: Giorgio Battisti, Lt. General (ret.), former Commanding General of the Italian Army Training and Doctrine Command; Council Member, IIHL

Discussion panel (15 minutes per speaker)

- *Deprivation of liberty and detainee transfers in joint military operations: operational challenges*
Pascale Tetu, Legal Adviser, Ministry of Defence, France
- *Implementing the legal framework relating to the deprivation of liberty by peacekeeping forces: a practical example*
Stéphane Wohlfahrt, United Nations Office of Legal Affairs (UNOLA)
- *Detainee transfers under IHL of IAC and under IHL of NIAC*
Tilman Rodenhäuser, Legal Adviser, ICRC

SESSION VI

14.00 – 15.30

SPECIFIC CHALLENGES II: DETENTION BY NON-STATE ARMED GROUPS

Background and objective

During non-international armed conflicts, not only States but also non-State armed groups deprive persons of their liberty. While many armed groups have captured and detained members of their adversary's armed forces, various armed groups have also arrested and detained individuals as a matter of 'law enforcement' in territory under their control. Legally speaking, pertinent issues include whether or not armed groups have a right or legal basis to detain, what grounds and procedures apply to deprivation of liberty by non-State armed groups, or how international law regulates the treatment and condition in which detainees are held. More practically, it is frequently asked to what extent armed groups can reasonably be expected to follow the same rules as States, or to what extent the scope of armed groups' obligations depends on their capacities?

Chair: Yoram Dinstein, Emeritus Professor, University of Tel Aviv; President of the United Nations Association of Israel; Council Member, IIHL

Discussion panel (15 minutes per speaker)

- *Deprivation of liberty by non-State armed groups in practice*
Hichem Khadhraoui, Head of Operations, Geneva Call
- *Which legal framework applies to deprivation of liberty by non-State armed groups and do they address the particular challenges when detention is conducted by non-State armed groups?*
Katherine Fortin, Assistant Professor, University of Utrecht

- *Ways to address legal and implementation challenges when armed groups detain*
Sandesh Sivakumaran, Professor of Public International Law, University of Nottingham

SESSION VII

16.00 – 17:30

LEGAL BOUNDARIES OF MIGRATION-RELATED DETENTION

Background and objective

Migration is a growing global phenomenon and a number of States endeavour to control and contain irregular migration by adopting restrictive migration policies. This has resulted in the use of coercive measures, including an increasing and systematic resort to detention, either administrative or criminal (also by criminalizing undocumented border crossings). Administrative detention for the purposes of migration control is sometimes used as a deterrent or as punishment. In addition to humanitarian consequences that deprivation of liberty may have in general, migration-related detention further risks stigmatizing irregular migrants as a group and may hinder detained migrants' access to specialized services. Legally, relevant questions include what measures amount to migration-related detention, what grounds and procedures have to be observed, and whether migration-related detention is ever proportionate and lawful, in particular, if used against certain vulnerable groups, including children or torture victims.

This panel aims to bring the humanitarian and legal challenges of migration-related detention to the attention of participants. This could be done by first setting the scene through an overview of the present humanitarian situation and the general legal framework. In light of the important developments in human rights jurisprudence and expert views over the past years, a second presentation could shed light on developments in IHRL. Third, given the on-going debate around the detention of children, a third presentation could examine the particular effects that migration-related detention may have on vulnerable migrants, including children but also victims of torture, trafficking, or LGBTI (lesbian, gay, bisexual, transgender, and intersex).

Chair: Johan Rautenbach, Legal Counsel and Director of the Office of Legal Affairs, International Organization for Migration; Council Member, IIHL (TBC)

Discussion panel (15 minutes per speaker)

- *Humanitarian consequences of migration-related detention*
Caroline Dulin Brass, Senior Legal Officer from the Protection Policy and Legal Advice Section, UN High Commissioner for Refugees
- *The applicable legal framework and recent developments in the jurisprudence of human rights bodies and tribunals*
Marcello Di Filippo, Professor of International Law, University of Pisa; Coordinator of the Observatory of EU Migration Law; Member, IIHL
- *Migration detention of vulnerable migrants: particular needs and recent legal developments*
Renate Winter, Chair, UN Committee on the Rights of the Child

Saturday 8 September

SESSION VIII

09.00 – 11.00

STRENGTHENING DETAINEE PROTECTION

Background and objective

In light of the important humanitarian, legal and practical challenges posed by detention in times of armed conflicts, the final session should focus on the ‘way forward’, meaning what avenues could and should be taken to strengthen detainee protection. This panel should consider the role of law or standards as well as the contribution of specific training and other possible ways to enhance compliance with existing law.

Chair: Valérie Michel, Head of International Humanitarian Law and International Criminal Justice Section, Directorate of International Law, Swiss Federal Department of Foreign Affairs (TBC)

Panellists (15 minutes per discussant)

- *Strengthening the legal framework protection of detainees: what role for standard-setting?*
Frederik Harhoff, Professor of International Law, University of Southern Denmark

- *What makes parties to armed conflicts comply with applicable law? The ICRC’s Rules of Restraint Study*
Fiona Terry, Head of the Centre for Operational Research and Experience, ICRC (TBC)

- *Strengthening specific knowledge of and compliance with applicable international law by armed forces: which role for training?*
Representative from the UK Army Legal Service

CLOSING WORDS

11.00 -11.30

- Helen Durham, Director of Law and Policy, International Committee of the Red Cross
- Fausto Pocar, President, International Institute of Humanitarian Law

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