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## ADMINISTRATIVE DETENTION IN ARMED CONFLICT

Ashley S. Deeks\*

*Treaties long have recognized that a state may detain without trial not only opposing armed forces, but also civilians and others who pose threats to its security. While the procedural rules for administrative detention in international armed conflict are reasonably robust, only a very limited set of treaty rules apply to administrative detention in non-international armed conflicts.*

*This article examines the treaty rules governing detention procedures in international and non-international conflicts. It then analyzes real-world examples of administrative detention by multi-national forces and individual states. The article concludes that states should, as a matter of policy, apply several key principles drawn from treaties governing international armed conflict to all administrative detentions. These rules impose a high standard for a state to initially detain a person, require the state to immediately review that detention, permit the detainee to appeal the detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased. A state also should inform a detainee why it has detained him.*

*The article argues that these core procedures, drawn from the Fourth Geneva Convention and Article 75 of Additional Protocol I, are battle-tested and that adopting such baseline rules as matter of clearly-stated policy would: ensure that all states strike the proper balance between national security and personal liberty; let states avoid answering hard questions about the type of armed conflicts they are fighting; and might facilitate multi-national operations among allies with different detainee policies.*

### I. INTRODUCTION

When a state is engaged in an armed conflict, one of the most important activities that the state may undertake is detention. The most familiar type of detention during armed conflict is the detention by one state of its opponent's armed forces: when possible, a state's armed forces will detain

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their opponents on the battlefield so as to prevent those fighters from continuing to take up arms. When this kind of detention occurs during armed conflicts between states, the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention) generally provides the rules for such detentions.<sup>1</sup>

However, there are a number of other situations in which states engaged in armed conflict may detain persons without necessarily bringing criminal charges against them.<sup>2</sup> This article refers to this type of detention as “administrative detention.” First, in international armed conflict, a state may detain certain civilians who appear to pose a security threat to that state. The 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) expressly contemplates that states will undertake such detentions of civilians. Second, in non-international armed conflict, the state may detain individuals engaged in hostile acts against it, such as armed rebels and individuals that the state deems a serious threat to security.<sup>3</sup> Third, individuals detained as belligerents in international armed conflict—but who are not entitled to prisoner of war status—may face detention without criminal charge until the end of hostilities.<sup>4</sup>

A limited set of treaty rules prescribes the procedures a state must follow in determining when, how, and for how long it may administratively detain individuals during armed conflict. While the procedural rules for administrative detention contained in the Fourth Geneva Convention—which apply to “protected persons” in international armed conflict—are reasonably robust, only a very limited set of treaty rules applies to administrative detention in non-international armed conflicts.<sup>5</sup> Rather, detention in

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<sup>1</sup> Like the Fourth Geneva Convention, however, the Third Geneva Convention does not provide much guidance about the procedural requirements for detaining an individual; rather, the treaty focuses primarily on how a state must treat individuals it detains as prisoners of war. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 5 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

<sup>2</sup> This article does not take a position on whether or when a state should try to prosecute individuals it has administratively detained. Nor does it take a view on whether the state-specific administrative detention rules discussed herein meet, exceed, or fall short of international human rights obligations a state may have.

<sup>3</sup> Although not the primary focus of this article, there are situations short of armed conflict—such as states of emergency—in which states detain individuals outside of the typical criminal process. See *infra* Part IV (discussing whether common detention guidelines for armed conflict should apply to situations short of armed conflict).

<sup>4</sup> *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“Unlawful combatants are . . . subject to capture and detention . . .”).

<sup>5</sup> See generally Fourth Geneva Convention, *supra* note 1. The Fourth Geneva Convention’s procedural rules on administrative detention technically apply only to “protected per-

non-international armed conflict is governed almost exclusively by a state's domestic law.<sup>6</sup> Given the dearth of rules in non-international armed conflict, a lawyer for the International Committee of the Red Cross (ICRC) has proposed a set of procedural principles that states should apply to all cases of administrative detention, whether that detention occurs during armed conflict (either international or non-international) or outside of armed conflict entirely.<sup>7</sup>

The ICRC paper, which contains some fifteen recommended principles and safeguards, is relatively ambitious in the rules it would have states apply to administrative detention, especially when that detention occurs during an armed conflict. For example, the paper urges that administrative detainees be provided with legal representation, and that detainees and their legal representatives be able to attend review proceedings in person.<sup>8</sup> While this might be desirable, states that detain thousands of individuals at a time on a battlefield would find these requirements very difficult to meet.

This article concludes that the core procedures contained in the Fourth Geneva Convention are battle-tested and serve as an excellent basis for administrative detention during all types of armed conflict. These procedures impose a high standard for a state to initially detain, require the state to immediately review that detention, permit the detainee to appeal the initial detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased. Coupled with a requirement to inform a detainee of the reasons for his detention, this collection of procedures would offer a strong and operationally-sustainable standard for administrative detention. Adopting such baseline rules (as matter of clearly-stated policy, if not legal obligation) would ensure that all states strike the proper balance between national security and personal liberty, would let states avoid answering hard questions about the type of armed conflicts they are fighting, and might

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sons," but that category encompasses virtually all civilians in a state's hands during international armed conflict or occupation, either in occupied territory or the territory of a party to the conflict. *Id.* at art. 4.

<sup>6</sup> This means that a state's international human rights obligations generally will attach to such detention. For instance, a state that is party to the International Covenant on Civil and Political Rights and is conducting administrative detentions in its territory will need to comply with that treaty's baseline requirements for detention without charge, unless it has derogated from those obligations. International Covenant on Civil and Political Rights, arts. 4 and 9(1), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

<sup>7</sup> Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 858 INT'L REV. RED CROSS 375 (2005). While the author produced the article in her personal capacity, the ICRC has adopted this paper as an official ICRC paper.

<sup>8</sup> *Id.* at 388–89.

facilitate multi-national operations among allies with different detainee policies.

Part II of this article describes the treaty rules that govern administrative detention during armed conflict. Part III explores real world examples of administrative detention during armed conflict both by international forces and by individual states, without assessing whether any particular practices have become customary international law. Part IV explains why the core principles of the Fourth Geneva Convention are an appropriate source of rules for administrative detention in all types of armed conflict, and raises certain questions that require further exploration.

## II. TREATY RULES GOVERNING ADMINISTRATIVE DETENTION

### A. *International Armed Conflict*

The most robust set of treaty rules governing administrative detention is found in treaties that apply to international armed conflict. The Fourth Geneva Convention and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) establish rules for administrative detention in international armed conflict for the parties to those treaties.<sup>9</sup> Various articles in the Fourth Geneva Convention establish the standards for administratively detaining and releasing an individual; a requirement for review of and appeal from the initial detention decision; and a mandated periodic reconsideration of the state's decision to detain. Slightly different rules appear in Articles 42 and 43 of the Fourth Convention, which govern detention in the territory of a party to the conflict, and in Article 78, which governs detention in occupied territory. Article 75 of Additional Protocol I adds a requirement that a state advise the detained individual of the reasons for his detention.

1. Fourth Geneva Convention
  - a. Standard for detention

The Fourth Geneva Convention establishes a high standard for detaining a civilian, whether in occupied territory or in the territory of a party

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<sup>9</sup> All states are parties to the Fourth Geneva Convention. See International Committee for the Red Cross, Treaty Database, available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf). In contrast, states such as the United States, Israel, Iraq, India, Sri Lanka, and Pakistan are not parties to Additional Protocol I. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

to the conflict. For aliens in the territory of a party to the conflict, a civilian can be interned or placed in assigned residence “only if the security of the Detaining Power makes it absolutely necessary.”<sup>10</sup> Pictet’s Commentary (Commentary) to Article 42 explains that states parties serve as the arbiters of the type of activity that constitutes a security threat, but the Commentary also offers several examples that would meet that standard. The Commentary states:

It did not seem possible to define the expression “security of the State” in a more concrete fashion. It is thus 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. 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; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they 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 . . . .<sup>11</sup>

The rule is slightly different for occupying powers in occupied territory. In that case, “if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”<sup>12</sup> The Commentary to Article 78 explains that this article sets a higher standard than Article 43 for a state to detain a person: “In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise.”<sup>13</sup>

Embedded in these rules is the unstated requirement that a person must be detained based on the particularities of his situation. For instance, a state may not detain a person for something his neighbor has done, or use a person as a bargaining chip to obtain the release of a detainee held by the opposing state. Nevertheless, the Commentary to Article 42 contemplates that someone may be detained because he is a member of a particular group, regardless of whether he undertakes specific hostile acts that threaten the security of the state.

Both Articles 42 and 78 represent the drafters’ effort to strike the appropriate balance between the need for a state to intern individuals who

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<sup>10</sup> Fourth Geneva Convention, *supra* note 1, at art. 42.

<sup>11</sup> JEAN PICTET, COMMENTARY IV ON THE GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 257–58 (1958).

<sup>12</sup> Fourth Geneva Convention, *supra* note 1, at art. 78.

<sup>13</sup> PICTET, *supra* note 11, at 367–68.

pose a threat to the state's security and the seriousness of depriving an individual of liberty without trial. This is, of course, the fundamental balance and constant tension with which states conducting administrative detention must grapple.

b. End of detention

Article 132, which addresses when a state must terminate detention, acts as a mirror image of the rules in Articles 42 and 78 on initiating detention. Article 132 requires that a state release an individual detained for imperative reasons of security once that individual no longer poses a threat to security. Article 132 states: "Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."<sup>14</sup> While this rule seems to contemplate immediate release by the detaining state when the person no longer poses a threat, a state clearly requires some minimal amount of time to out-process the person.

Of course, like the Third Geneva Convention, the Fourth Geneva Convention contemplates that a state will release its detainees as soon as possible after the close of hostilities, if the state has not already done so under Article 132.<sup>15</sup>

c. Initial review of detention

Virtually all detentions take place in the field—during routine military patrols, for instance, or during a raid on a home or business. While in each case the detaining force should only detain those individuals who pose an imperative threat to security, the Fourth Geneva Convention implicitly recognizes that states will make mistakes in the field. Thus, the Fourth Geneva Convention contemplates that, after a state's military or other forces detain an individual for security reasons, that individual has a near-term ability to challenge that detention before a court or an administrative board (at the choice of the state).

For aliens in the territory of a party to the conflict, Article 43 provides that "[a]ny protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose."<sup>16</sup> The Commentary to Article 43 allows the state to choose whether to use a court or an administrative board

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<sup>14</sup> Fourth Geneva Convention, *supra* note 1, at art. 132.

<sup>15</sup> Compare Third Geneva Convention, *supra* note 1, at art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.") with Fourth Geneva Convention, *supra* note 1, at art. 133 ("Internment shall cease as soon as possible after the close of hostilities.").

<sup>16</sup> Fourth Geneva Convention, *supra* note 1, at art. 43.



(consisting of more than one person), but specifies that the review must be independent and impartial. Specifically, the Commentary states:

The State may act either through the courts or through administrative channels. The existence of these alternatives provides sufficient flexibility to take into account the usage in different States. The Article lays down 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.<sup>17</sup>

This initial review decision is not automatic, but once the detainee requests it, the review must be prompt. The Commentary to Article 43 states: "Decisions to intern people or place them in assigned residence are not reconsidered automatically, but only at the request of the person concerned. Once an application has been put forward, the court or administrative board must examine it at the earliest possible moment."<sup>18</sup> There is some inherent flexibility in determining what "as soon as possible" means; for example, the timing might be affected by the need to set up a board in the first instance, or by the board's caseload.

Article 78, governing detention in occupied territory, provides slightly less detail than Article 43, but contains an internal reference to other provisions of the Convention. Article 78 provides: "Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention."<sup>19</sup> The Commentary to Article 78 suggests that "provisions of the present Convention" include Article 43 (even though Article 78 itself contains some duplication of rules in Article 43, such as twice-yearly review):

It is for the Occupying Power to decide on the procedure to be adopted; but it is not entirely free to do as it likes; it must observe the stipulations in Article 43, which contains a precise and detailed statement of the procedure to be followed when a protected person who is in the territory of a Party to the conflict when hostilities break out, is interned or placed in assigned residence.<sup>20</sup>

Although they provide useful, broadly-stated rules regarding initial review of detention, these provisions leave unanswered a number of questions: what kinds of courts are contemplated (military? civilian?), what specific information a court or board should consider in assessing whether the reasons for continued detention remain, whether the detainee has the right to

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<sup>17</sup> PICTET, *supra* note 11, at 260.

<sup>18</sup> *Id.*

<sup>19</sup> Fourth Geneva Convention, *supra* note 1, at art. 78.

<sup>20</sup> PICTET, *supra* note 11, at 368.



appear in person at the review, and what level of confidence the court or board should have in order to uphold the detention. The state party must determine how to answer these specific questions, in a manner appropriately tailored to the situation it faces.

d. Appeal of the initial determination

Article 43 is silent on whether a detainee held in the territory of a party to the conflict has the right to appeal a state's decision to detain him. Under Article 78, the occupying power's initial review process must offer the detainee the right to appeal a decision upholding the detention. Article 78 requires that "[t]his procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay."<sup>21</sup>

Although Article 78 is silent on which entity must perform the appeal, the Commentary to Article 78 assumes that the same type of body that performed the initial review—a court or an administrative board—will perform the appeal. In the words of the Commentary, the drafters left it "to the Occupying Power to entrust the consideration of appeals either to a 'court' or a 'board.' That means that the decision will never be left to one individual. It will be a joint decision, and this offers the protected persons a better guarantee of fair treatment."<sup>22</sup> This may be sensible as a practical matter—states may find it efficient to use the same body for both the initial and appellate reviews, using different reviewers at each level—but the plain language of Article 78 does not require it.

e. Periodic review

If the first and second level reviews of an individual's detention uphold the state's initial decision to detain the person, the state must review the individual's continued detention at least once every six months, whether or not the individual requests the review. The purpose of this requirement is, of course, to ensure that a state does not detain people longer than necessary, whether out of administrative incompetence, laziness, or bad faith.

Article 43 states: "If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit."<sup>23</sup> Article 78's language is less specific about the entity that must review the decision (with no reference to a board or court) and somewhat more flexible on the timing of the review. Additionally, Article 78 excludes the apparent

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<sup>21</sup> Fourth Geneva Convention, *supra* note 1, at art. 78.

<sup>22</sup> PICTET, *supra* note 11, at 369.

<sup>23</sup> Fourth Geneva Convention, *supra* note 1, at art. 43.

outcome preference (namely, release) that Article 43 contains. Article 78 provides that “[i]n the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.”<sup>24</sup> If one agrees with the Commentaries that Article 78’s requirement that a state conduct detention “in accordance with the provisions of the present Convention” includes the rules of Article 43, then Article 78 means that an occupying power must use an appropriate court or administrative board to periodically review these detentions.

It is unclear why Article 78 builds in greater flexibility for review (“if possible every six months”) than Article 43, which mandates review “at least twice yearly.” One explanation might be that the Fourth Geneva Convention’s drafters presumed that a state party generally will be in greater control of its own territory than it will be of occupied territory, and accordingly that a state will be better able to ensure periodic reviews in a timely manner for detainees in its territory during the conflict.

f. Notice to other entities

Finally, although not strictly a rule related to administrative detention procedures, Article 43 requires the detaining state to give notice to the Protecting Power of those protected persons it has interned. Article 43 states:

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned . . . or who have been released from internment . . . . The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.<sup>25</sup>

Article 11 of the Fourth Geneva Convention contemplates that the ICRC may serve the humanitarian functions of the Protecting Power if states cannot agree on such a Power.<sup>26</sup> Additionally, Article 143 establishes that a detaining state must grant the ICRC access to interned protected persons, which presumes that the state will notify the ICRC of the names of such detainees.<sup>27</sup> These provisions serve as an additional check on the detaining state, because both the Protecting Power and the ICRC can monitor the custodial status of a detainee and can encourage the detaining state to comply with the periodic review provisions in the Fourth Geneva Convention.

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<sup>24</sup> *Id.* at art. 78.

<sup>25</sup> *Id.* at art. 43.

<sup>26</sup> *Id.* at art. 11.

<sup>27</sup> *Id.* at art. 143.

2. Additional Protocol I
  - a. Notice of reason for detention

Additional Protocol I adds only one significant element to the processes contained in the Fourth Geneva Convention—notice to the individual detained of the reasons for his detention. Article 75(3) requires that “[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.”<sup>28</sup> Beyond basic fairness, the primary reason to provide an individual with notice of the reasons for his detention is to better enable him to contest his detention if he believes that the state has detained him improperly.

The reasons that the Detaining Power provides to the detainee may be relatively general. The Commentary to Article 75 notes: “Internees will therefore generally be informed of the reason for such measures in broad terms, such as legitimate suspicion, precaution, unpatriotic attitude, nationality, origin, etc. without any specific reasons being given.”<sup>29</sup> One reason that states may have wanted to keep this requirement general is that, in certain cases, issues of classification or intelligence sources may preclude a state from providing specific information about the individual’s situation. A state also has some flexibility regarding how quickly it must provide to the detainee the reasons for his detention. The Commentary suggests that “promptly” is an imprecise term, but anticipates that “ten days would seem the maximum period.”<sup>30</sup>

- b. End of detention

The only other provision of Article 75 that relates to administrative detention discusses how detention comes to an end. Article 75(3) basically recites the provisions of Articles 43 and 132 of the Fourth Geneva Convention on the release of detainees. Article 75(3) states that administrative detainees (other than those arrested for penal offenses) “shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.” Of greater interest is the Commentary to Article 75, which recognizes that a state may detain an individual for extended periods of time and states:

Legal practice in most countries recognizes preventive custody, i.e., a period during which the police or the public prosecutor can detain a person in

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<sup>28</sup> Additional Protocol I, *supra* note 9, at art. 75(3).

<sup>29</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949, at 875 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman, eds., 1987).

<sup>30</sup> *Id.* at 876.

custody without having to charge him with a specific accusation; in peacetime this period is no more than two or three days, but sometimes it is longer for particular offenses (acts of terrorism) and in time of armed conflict it is often prolonged.<sup>31</sup>

*B. Non-international Armed Conflict*

As the ICRC paper on procedural rules for administrative detention notes, the law of war rules governing the procedural aspects of administrative detention in non-international armed conflict are extremely sparse. Therefore, states conducting administrative detention in non-international armed conflict will be governed by their domestic laws, which generally include human rights provisions and due process requirements. Most states are parties to the International Covenant on Civil and Political Rights (ICCPR), which requires each state party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” in the ICCPR.<sup>32</sup> Article 9(4) of the ICCPR provides: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” However, “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” a state may derogate from certain articles, including Article 9. There are no international rules or requirements for what procedures may or must replace Article 9 during such a derogation. Therefore, neither the law of war nor human rights law establishes bright-line and immutable rules for detention during non-international armed conflicts.

1. Common Article 3 of the Geneva Conventions

Article 3 of each of the four 1949 Geneva Conventions—referred to as “Common Article 3”—appears in treaties that govern international armed conflict, but the Article contains baseline rules that apply to non-international armed conflict.<sup>33</sup> Common Article 3 contemplates that states (and indeed non-state actors) will detain individuals during non-international armed conflict. While Common Article 3 provides important rules governing the treatment of those detained, it is silent on the procedures that parties to the conflict must follow regarding detention.

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<sup>31</sup> *Id.* at 876–77.

<sup>32</sup> ICCPR, *supra* note 6, at art. 2(1).

<sup>33</sup> *See, e.g.*, Fourth Geneva Convention, *supra* note 1, at art. 3.

## 2. Additional Protocol II

Like Common Article 3, the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), clearly anticipates that states parties, as well as non-state actors who meet the threshold application standards of Additional Protocol II, will detain individuals for reasons related to the conflict. Article 2 states:

At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.<sup>34</sup>

The treaty provides virtually no guidance, however, on the procedural rules governing administrative detention. Articles 4 through 6 address the treatment of those detained for reasons related to the armed conflict, but do not contain rules regarding the detention process.

It is clear that, with regard to the law of war, states are bound by a reasonably robust set of procedural rules when they administratively detain protected persons during international armed conflict, but are bound by virtually no such rules during non-international armed conflict. Part IV, *infra*, will discuss one possible way to address this disparity.

### III. STATE PRACTICE

Beyond treaties, customary international law (CIL) offers another possible source of rules binding on states. For a rule to constitute CIL, two elements must be present: widespread and virtually uniform state practice; and, a belief that such practice is required as a matter of law.<sup>35</sup> Rather than undertake the comprehensive effort required to assess whether any procedural rules governing administrative detention have become CIL in the law

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<sup>34</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

<sup>35</sup> State practice is not found exclusively in the physical and operational actions of states, but also includes verbal and written acts, such as military manuals, national legislation, case law, and pleadings in international tribunals. *See, e.g.*, International Court of Justice decisions taking into account official statements, including the Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 4, 195, 212 (July 25); The Gabčíkovo-Nagymaros Project (Hung./Slov.), 1997 I.C.J. 41, 70 (Sept. 25).

of war, this section simply offers examples of state practice related to administrative detention during armed conflict.<sup>36</sup>

This Part reviews administrative detention laws, rules, and practices by international or coalition operations and by individual states, without focusing on whether those particular administrative detention practices occurred in international or non-international armed conflict. A review of the rules and practices suggests that the real world conduct of administrative detentions follows fewer rules than the ICRC paper on administrative detention argues for.<sup>37</sup> Nevertheless, it is possible to divine certain core procedural elements that virtually all of the examples include.

*A. International or Coalition Administrative Detention Rules*

1. KFOR

The NATO-led Kosovo Force (KFOR) deployed in the wake of a 78-day NATO air campaign that began in March 1999. The campaign was

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<sup>36</sup> The ICRC study on customary international humanitarian law, in a proffered rule prohibiting arbitrary detention, cites practice in this area. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005). Some of that practice, however, appears to reflect a predictable decision by states to incorporate their obligations under Article 75 of Additional Protocol I into their military manuals. In other cases, it is not clear that the practice the ICRC cites occurred in armed conflict. Possibly relevant practice in this study includes: (1) A 1991 Memorandum of Understanding on the application of international humanitarian law between Croatia and the SFRY required that all civilians be treated in accordance with Additional Protocol I, Article 75. There is no indication in the study whether these two states complied with this undertaking. HENCKAERTS & DOSWALD-BECK, § 2695; (2) A 1992 Memorandum of Understanding between parties to the conflict in Bosnia and Herzegovina. Again, there is no indication in the study whether the parties complied with this undertaking. *Id.* § 2696; (3) Canada, New Zealand, Sweden, and Switzerland have incorporated the language of Article 75 on “informed without delay in a language he understands” into their military manuals, but they may have done so simply because those states are parties to Additional Protocol I. *See id.* §§ 2697–701; (4) Spain’s penal code provides for punishment of anyone who, during armed conflict, fails to inform protected persons clearly and without delay of their situation. The use of the term “protected persons” suggests this rule applies only during international armed conflict. *Id.* § 2705; (5) Colombia’s “instructors’ manual” states that “persons in preventive detention shall be brought before a judge in the 36 hours following arrest.” *Id.* § 2728; (6) An Uganda National Resistance Army Statute provides that a person subject to military law who fails to bring a detainee’s case before the proper authority for investigation is subject to punishment. The context in which this rule would operate is not clear. *Id.* § 2731; (7) The Argentine, Canadian, German, New Zealand, United Kingdom, and U.S. military manuals repeat the essence of Article 43 (and, for the United States, Article 78 during occupation). *See id.* § 2755–62; and (8) The U.S. Field Manual (1956) adds that “‘competent bodies’ to review the internment or assigned residence of protected persons may be created with advisory functions only, leaving the final decision to a high official of the Government.” *Id.* § 2762. This calls the requirement of “independence” into question.

<sup>37</sup> Pejic, *Procedural Principles*, *supra* note 7.

intended to halt and reverse the humanitarian catastrophe then unfolding in Kosovo. In June 1999, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 1244, which authorized “member States and relevant international organizations to establish the international security presence in Kosovo . . . with all necessary means to fulfill its responsibilities.”<sup>38</sup> Operative paragraph 9 of the Resolution, which listed KFOR’s responsibilities, did not specifically include detention, but included responsibilities that necessarily would have required detention authority, such as “detering renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return to Kosovo of Federal and Republic military, police, and paramilitary forces” and “ensuring public safety and order.”<sup>39</sup>

NATO has explained its detention authority in Kosovo as follows:

KFOR derives its legal power to detain individuals from UNSCR 1244 and international law, not from the Kosovo Provisional Criminal Procedure Code. UNSCR 1244 authorises KFOR to use all necessary means to maintain a safe and secure environment in Kosovo, to protect itself and to support UNMIK in the maintenance of law and order. One of these necessary means may be the detention of individuals who pose a threat to the safe and secure environment in Kosovo. Such detentions are fully compliant with international law, are used sparingly and will last for only as long as is absolutely necessary.<sup>40</sup>

The Commander of KFOR (COMKFOR) issued directives to govern various activities by the forces under his command. COMKFOR Detention Directive 42, issued on October 9, 2001, establishes the rules for KFOR detentions. The document is not available publicly, so this article draws the following Directive provisions from quotations in Amnesty International reports,<sup>41</sup> a Council of Europe report,<sup>42</sup> and a NATO press release.<sup>43</sup>

<sup>38</sup> S.C. Res. 1244, ¶ 7, U.N. Doc. S/RES/1244 (June 10, 1999).

<sup>39</sup> *Id.* ¶ 9.

<sup>40</sup> Press Release, Kosovo Force [“KFOR”], KFOR Det. Under UNSCR, 04-28 (May 5, 2004), available at <http://www.nato.int/kfor/docu/pr/2004/05/28.htm> [hereinafter KFOR Press Release].

<sup>41</sup> See Amnesty Int’l, *Federal Republic of Yugoslavia (Kosovo): International Officials Flout International Law*, A1 Index EUR 70/008/2002, Aug. 31, 2002, available at [http://www.amnesty.org/en/alfresco\\_asset/c438fdf8-a4b4-11dc-bac9-0158df32ab50/eur700082002en.html](http://www.amnesty.org/en/alfresco_asset/c438fdf8-a4b4-11dc-bac9-0158df32ab50/eur700082002en.html) [hereinafter *Amnesty FRY Report*]; Amnesty Int’l, *Serbia and Montenegro (Kosovo): The Legacy of Past Human Rights Abuses*, A1 Index EUR 70/009/2004, Mar. 31, 2004, available at [http://www.amnesty.org/en/alfresco\\_asset/58cfbfa-a5d1-11dc-bc7d-3fb9ac69fcb/eur700092004en.pdf](http://www.amnesty.org/en/alfresco_asset/58cfbfa-a5d1-11dc-bc7d-3fb9ac69fcb/eur700092004en.pdf) [hereinafter *Amnesty Serbia Report*].

<sup>42</sup> Comm’r for Human Rights, Council of Eur., *Kosovo: The Human Rights Situation and the Fate of Persons Displaced from Their Homes*, CommDH(2002)11 (Oct. 16, 2002) (prepared by Alvaro Gil-Robles), available at <http://www.reliefweb.int/library/documents/2002/coe-kos-16oct.pdf>.



a. Standard for detention and notice of reasons

Detention Directive 42 states that an individual may be detained under the authority of COMKFOR if he constitutes a threat to KFOR or to a safe and secure environment in Kosovo, if the civilian authorities in Kosovo are unable or unwilling to take responsibility for the matter, and if the person's detention is necessary because the threat cannot reasonably be addressed by lesser means. When those criteria are met, "COMKFOR authority to detain will only be used as a last resort."<sup>44</sup> Additionally, Directive 42 provides: "[COMKFOR] will continue to use the authority to detain but only in cases where it is absolutely necessary. It must be noted that this authority to detain is a military decision, not a judicial one."<sup>45</sup> The Directive adds: "The fact that a person may have information of intelligence value by itself is not a basis for detention."<sup>46</sup> The reference to detention as a "last resort" and the requirement that detention be based on security needs and be performed "only where it is absolutely necessary" seems consistent with the standards in the Fourth Geneva Convention, Articles 42 and 78. Additionally, detainees have the right to be informed of the reasons for their detention in writing, and to be notified in writing of subsequent decisions about their detention.<sup>47</sup>

b. Initial review of detention

The Directive allows KFOR on-site commanders to order detention for up to eighteen hours, and "allows MNB [Multi-National Brigade] commanders to detain people for up to 72 hours on their own authority . . ."<sup>48</sup> The COMKFOR must approve continued detention beyond 72 hours. COMKFOR can order detention for up to 30 days, subject to extension without an outside limit. Once COMKFOR orders someone detained, "no one may release that person during the ordered detention period without the written approval of COMKFOR."<sup>49</sup> These rules provide greater operational detail than any rules in the Fourth Geneva Convention. Of note, they require a high-level commander to authorize continued detention beyond 72 hours—generally a shorter time than one might expect for individuals detained during a conflict.

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<sup>43</sup> KFOR Press Release, *supra* note 40.

<sup>44</sup> *Amnesty FRY Report*, *supra* note 41, at 12.

<sup>45</sup> *Amnesty Serbia Report*, *supra* note 41, at 8.

<sup>46</sup> *Amnesty FRY Report*, *supra* note 41, at 13.

<sup>47</sup> See KFOR Press Release, *supra* note 40.

<sup>48</sup> *Amnesty Serbia Report*, *supra* note 41, at 8.

<sup>49</sup> *Id.*

In making detention decisions, COMKFOR may consult a Detention Review Panel chaired by the KFOR legal advisor and whose members are designated by COMKFOR. The panel reviews requests for detention and makes recommendations to COMKFOR. The legal advisor makes independent recommendations apart from the panel recommendation. It appears that COMKFOR may adopt or reject these recommendations.<sup>50</sup> Detainees may submit petitions to COMKFOR regarding their detention, and individuals making detention decisions shall consider such submissions.

c. Additional procedures related to detention

Although the Directive does not appear to provide for a formal appeal process or periodic review of extended detention, NATO press releases state that detainees may notify family members of their detention and may access legal advisors at their own expense.<sup>51</sup> Additionally, KFOR makes the names of detainees available to the ICRC.

d. Public criticism

Several NGOs and international bodies, including Amnesty International, the Organization on Security and Cooperation in Europe, and the Council of Europe, have criticized the KFOR detention procedures. For example, Amnesty objected to the fact that Directive 42 allowed COMKFOR to authorize detentions for long periods without judicial authorization or review. Then-NATO Secretary General Lord Robertson wrote in response:

[I am] content that we are maintaining an acceptable balance between a Force Commander's necessary powers to detain and the essential rights of those detained. On the specific issue of the legality of detention operations carried out by KFOR, I have nothing to add further to my previous correspondence . . . . The relevant procedures remain in place for the exercise of KFOR's powers with regard to detention, including through Directive 42, which places the correct emphasis upon the need for correct treatment, whilst ensuring that detentions are lawful and fully respectful of international law.<sup>52</sup>

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<sup>50</sup> See KFOR Press Release, *supra* note 40.

<sup>51</sup> *Id.*

<sup>52</sup> Amnesty Int'l, Kosovo and Bosnia-Herzegovina: The Apparent Lack of Accountability of International Peace-Keeping Forces in Kosovo and Bosnia-Herzegovina, A1 Index EUR 05/002/2004, at 2, Mar. 31, 2004, available at <http://web.amnesty.org/library/index/engEUR050022004>; See also *Amnesty Serbia Report*, *supra* note 41, at 8 (quoting NATO Secretary General's memorandum).

## 2. INTERFET

In U.N. Security Council Resolution 1264 (1999), the Security Council authorized a multinational force under unified command—the International Force for East Timor (INTERFET)—to restore peace and security to East Timor and authorized “all necessary measures” to fulfill the mandate.<sup>53</sup> INTERFET found itself forced to maintain law and order in East Timor, which required INTERFET to conduct detentions under a Detainee Ordinance issued by the Australian INTERFET Commander (COMINTERFET).<sup>54</sup> INTERFET detained some individuals on suspicion of committing crimes and others as security risks, and created a Detention Management Unit to review cases.

### a. Standard for detention, initial review of detention, and notice of reasons

The Ordinance permitted INTERFET to detain several categories of individuals, including those who posed a “security risk.”<sup>55</sup> According to Australian Defense Force officer Michael Kelly, “security detainees were subject to a ‘show cause’ procedure that was regulated and managed by INTERFET . . . . If a security detainee was held for more than 96 hours COMINTERFET or his delegate was required to certify that the risk posed by the detainee warranted that the detainee be held for a longer period.”<sup>56</sup> The “show cause” procedure provided the detainee with the grounds for his or her detention and constituted the material that COMINTERFET considered when deciding whether to continue the detention. It is not clear what happened if the materials contained classified information. Before

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<sup>53</sup> S.C. Res. 1264, ¶ 3, U.N. Doc. S/RES/1264 (Sept. 15, 1999). Most believe that the situation in East Timor in 1999 rose to the level of an armed conflict, though INTERFET was not in an armed conflict with either the Government of Indonesia or militias in East Timor. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999), for instance, refers to concerns about violations of international humanitarian law, which violations only can occur during armed conflict. On the other hand, the Australian Defense Forces took the view that no armed conflict was taking place on the territory of East Timor when INTERFET deployed there. See Michael J. Kelly et al., *Legal Aspects of Australia's Involvement in the International Force for East Timor*, 841 INT'L REV. RED CROSS, 101 (2001), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList182/FEC1B40BA2DF7C5FC1256B66005F9DDF> (recognizing that others, including the ICRC, believed that an armed conflict was taking place between INTERFET and the militias). The example of East Timor, then, arguably represents administrative detention in armed conflict, though perhaps not detention by an opposing force.

<sup>54</sup> The Ordinance is not available publicly.

<sup>55</sup> Michael Kelly, *INTERFET Detainee Management Unit in East Timor* (2000), available at [http://jsmp.minihub.org/Resources/2000/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20\(e\).pdf](http://jsmp.minihub.org/Resources/2000/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20(e).pdf).

<sup>56</sup> *Id.* See also Kelly et al., *Legal Aspects*, *supra* note 53.

COMINTERFET made a decision, “and within 144 hours of being detained, COMINTERFET informed the detainee in writing of the grounds on which the certificate was to be issued.”<sup>57</sup>

b. Ability to contest detention

After the detainee was notified of the grounds of the forthcoming certificate, INTERFET gave the detainee up to seven days, or such longer time as COMINTERFET considered reasonable, to show cause why a certificate should not be issued. If the detainee asked for assistance, the Defending Officer of the INTERFET Detainee Management Unit was available to assist the detainee in responding to the “show cause” document. In some cases, the Officer succeeded in establishing that there was insufficient evidence against the detainee. The Ordinance did not provide for a separate appeal process or for judicial review.

c. Notice to ICRC

INTERFET gave notice to the ICRC of any individual it detained for more than 96 hours. Indeed, the relevant provisions of the Fourth Geneva Convention generally governed the administrative detention regime.<sup>58</sup>

3. Multi-National Force—Iraq (MNF-I)

The activities of the Multi-National Force—Iraq (MNF-I) currently are governed by a U.N. Security Council Resolution (UNSCR) issued under Chapter VII of the U.N. Charter. Under UNSCR 1546 (2004), MNF-I is authorized “to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters [from then-U.S. Secretary of State Powell and then-Prime Minister of Iraq Ayad Allawi] annexed to this resolution.”<sup>59</sup> The annexed letters describe a broad range of tasks that MNF-I may undertake to counter “ongoing security threats,” including “internment where this is necessary for imperative reasons of security.”<sup>60</sup> The letter from then-Secretary Powell states 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.”<sup>61</sup> Domestic Iraqi law (in the form of Coalition Provisional Authority Memorandum No. 3, which applies to MNF-I) provides

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<sup>57</sup> Kelly, *INTERFET Detainee Management*, *supra* note 55.

<sup>58</sup> Kelly et al., *Legal Aspects*, *supra* note 53.

<sup>59</sup> S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

<sup>60</sup> *Id.* at Annex.

<sup>61</sup> *Id.*

detailed requirements for the conditions and procedures for security internment.<sup>62</sup>

In UNSCR 1546, the Security Council decided to review the MNF-I mandate within twelve months. Subsequent UNSCRs have extended temporarily the authority in UNSCR 1546—most recently in UNSCR 1790, which extended the UNSCR 1546 mandate until December 31, 2008.<sup>63</sup>

a. Standard for detention, initial review of detention, and notice of reasons

Pursuant to UNSCR 1546, MNF-I may detain individuals for “imperative reasons of security.” This standard is drawn directly from Article 78 of the Fourth Geneva Convention, and was included to indicate that the same basis for detention that coalition forces applied before June 28, 2004 would continue to apply after governing authority transferred to the sovereign government of Iraq. Initial review of the detention decision must occur within seven days of detention.<sup>64</sup> A specially appointed judge advocate conducts such review, and decides whether to refer the individual to the Central Criminal Court of Iraq for prosecution, to continue to detain the individual, or to recommend to the Deputy Commanding General of Detainee Operations that MNF-I release the individual. If MNF-I decides to continue to detain the person, MNF-I advises the detainee of the reasons for his detention.

b. Appeal of the initial determination

Detainees may request an appeal of their detention in writing, and may include a written statement of their reasons for appealing. A Combined Review and Release Board (CRRB), a seven-officer, majority-Iraqi board, reviews the appeal; the detainees do not appear.<sup>65</sup> The CRRB makes a recommendation on each appeal to the Deputy Commanding General for Detainee Affairs, who makes the final detention decision.

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<sup>62</sup> Memorandum, Coalition Provisional Authority No. 3 (Revised) Criminal Procedures, CPA/MEM/27 § 6 (June 3, 2004), available at <http://cpa-iraq.org/regulations/> (follow Mem. 3 “Criminal Procedures (Revised)” hyperlink) [hereinafter CPA Memorandum No. 3].

<sup>63</sup> S.C. Res. 1790, ¶ 1, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

<sup>64</sup> CPA Memorandum No. 3, *supra* note 62, at § 6.2.

<sup>65</sup> Email from Army lawyer to Ashley Deeks (Aug. 30, 2007 15:01:03) (on file with author). The United Kingdom similarly uses a board comprised of U.K. and Iraqi members. See Memorandum from the U.K. Ministry of Def. to Select Comm. on Def. (Feb. 1, 2007), available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfa/209/7011108.htm>.

c. Periodic review of detention and ICRC access

Detainees in Iraq receive review of their detention every six months. These periodic reviews occur in the form of a Multi-National Force Review Committee (MNFRC), a three-officer board that assesses the threat posed by each detainee. The MNFRC reads the case summary to the detainee at the review. The detainee may make an oral statement to the Committee, may present evidence, and may ask questions of witnesses. The Committee informs the detainee of the final decision within 45 days of the review.

Under Iraqi law, MNF-I must release individuals from security internment or transfer them to the Iraqi criminal justice system no later than 18 months from the date of detention, unless a Joint Detention Committee, which is staffed by ambassadorial and ministerial level U.S., UK, and Iraqi officials, approves further detention.<sup>66</sup> Finally, CPA Memorandum No. 3 guarantees the ICRC access to internees.<sup>67</sup>

B. *State Practice of Administrative Detention in Armed Conflict*

Many states have enacted administrative detention laws, but it often is difficult to determine whether a state's domestic laws contemplating administrative detention apply to (or have been used in) situations of armed conflict. This section focuses on four examples of security laws or procedures that either were crafted specifically for armed conflict or that appear to have been used in situations that constituted armed conflict.

1. Israel

Israel has two laws that authorize it to conduct security detentions—an emergency powers law and an “incarceration of illegal combatants” law. Under both laws, a detainee may have his detention reviewed by a court. The Government of Israel views itself as being in an ongoing armed conflict with Palestinian terrorist organizations operating from Judea and Samaria and the Gaza Strip, a view that the Israeli Supreme Court recently upheld in *Public Committee Against Torture in Israel v. Israel*.<sup>68</sup> Israel has used the illegal combatants law several times during armed conflict.<sup>69</sup>

<sup>66</sup> CPA Memorandum No. 3, *supra* note 62, §§ 6.5–6.6.

<sup>67</sup> *Id.* at § 6.8.

<sup>68</sup> HCJ 769/02 *Public Committee Against Torture in Israel v. Israel* [2006] (not yet published), available at [elyon1/court/gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1/court/gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf).

<sup>69</sup> Dvorak Chen, *Prosecuting Terrorists: A Look at the American and Israeli Experiences*, WASH. INST. FOR NEAR EAST POL'Y, NOV. 14, 2006, available at <http://www.washingtoninstitute.org/templateC05.php?CID=2531> (“Israel has used [the Unlawful Combatants] law only a few times, against high-profile terrorists from abroad. Most recently, Israel used it to detain Hizballah fighters during the summer war.”).

a. Emergency Powers Law

Under Israel's emergency powers law, the Ministry of Defense (MOD) may detain a person during a "state of emergency" when the Minister has "reasonable cause to believe that reasons of state security or public security require."<sup>70</sup> The MOD can detain individuals for up to six months.<sup>71</sup> The detention order is subject to judicial review by the President of the District Court within forty-eight hours of a person's detention and can be set aside if the court finds that it is not based on reasons of state security or was made in bad faith. The detainee may appeal his detention to the Israeli Supreme Court. If the court or courts uphold the initial detention, the District Court will review the order every three months. The proceedings are not public, and may depart from the regular rules of evidence.<sup>72</sup>

b. Incarceration of Illegal Combatants Law

i. Standard for detention and notice of reasons

The Chief of Staff of the Israeli Defense Forces (IDF) may designate and detain an individual as an "illegal combatant"—a term defined in the Incarceration of Illegal Combatants Law as "a person who takes part in hostile activity against the State of Israel, but who does not meet the conditions for granting the status of prisoner of war under international humanitarian law, as detailed in article 4 of the Third Geneva Convention."<sup>73</sup> The IDF must inform the individual of the detention order, which includes the grounds for detention, as soon as possible.<sup>74</sup>

ii. Initial review of detention

The detainee may submit to the Chief of General Staff's delegate arguments opposing the order.<sup>75</sup> That officer must evaluate the detainee's arguments and bring them before the Chief of General Staff, who must review the arguments and, if he finds no reasonable cause to believe that the detainee is an illegal combatant, must quash the detention order.<sup>76</sup> Further, if

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<sup>70</sup> Fania Domb, *Judicial Decisions*, 30 ISR. Y.B. ON HUM. RTS. 305, 341 (2000).

<sup>71</sup> *Administrative Detention*, B'TSELEM, [http://www.btselem.org/english/Administrative\\_Detention/Israeli\\_Law.asp](http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp) (last visited Feb. March 14, 2008).

<sup>72</sup> *Emergency Powers and Administrative Detention*, HUMAN RIGHTS WATCH, <http://hrw.org/reports/1997/israelwo/Israelwo-05.htm> (last visited March 15, 2008).

<sup>73</sup> Incarceration of Unlawful Combatants Law, 5762-2002, art. 2 (Isr.), available at <http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf>.

<sup>74</sup> *Id.* at art. 3(c).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



the Chief, any time after he grants the order, decides that there is no longer reasonable cause to believe that the detainee is an illegal combatant, or there are special grounds to justify his release, he must quash the order.<sup>77</sup>

iii. Periodic review of detention and access to counsel

If the Chief of General Staff upholds the detention, the IDF must bring the detainee before a District Court judge within fourteen days of the order and once every six months thereafter.<sup>78</sup> The court will order him released if it will not harm state security or if there are special grounds justifying his release.<sup>79</sup> The detainee can appeal decisions to the Supreme Court.<sup>80</sup> There is no outer limit on the time for which the IDF may detain the person.

The detainee is entitled to counsel no later than seven days before being brought before the District Court judge.<sup>81</sup> The Israeli Minister of Justice may limit the pool of lawyers to those people authorized to serve as defense counsel in military courts.<sup>82</sup>

Regarding classified evidence, a legal brief in the U.S. Supreme Court case of *Boumediene v. Bush* describes Israeli practice as follows:

At several stages of a detention proceeding, Israel's need to protect classified information can conflict with the detainee's need to confront such information in order to challenge the State's evidence effectively. Classified information is protected whenever its disclosure could harm State security; but the decision to limit a detainee's access to such information must be made by the judge. Thus, detainees have the right to know the reason for their detention unless a judge finds that the information would jeopardize security.

Detainees have the right to be present in court for all legal proceedings unless a judge finds that State security requires otherwise. Where security concerns warrant, judges can withhold evidence from a detainee and elect to review it *in camera* and *ex parte* instead. . . . [I]f the court concludes that evidence was improperly classified, or that portions of it need not be withheld, the court will order the State to reveal such evidence. In such a case, the State still can refuse to disclose the evidence, but only if it is willing instead to free the detainee.<sup>83</sup>

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<sup>77</sup> *Id.* at art. 4.

<sup>78</sup> *Id.* at arts. 5(a), 5(c).

<sup>79</sup> *Id.* at art. 5(c).

<sup>80</sup> *Id.* at art. 5(d).

<sup>81</sup> *Id.* at art. 6(a).

<sup>82</sup> *Id.* at art. 6(b).

<sup>83</sup> Brief for Specialists in Israeli Military Law and Constitutional Law in Support of Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), available at [http://www.wilmerhale.com/files/upload/Boumediene\\_SpecialistsIsraeliMilitary](http://www.wilmerhale.com/files/upload/Boumediene_SpecialistsIsraeliMilitary)

## 2. Sri Lanka

Although neither the Sri Lankan government nor the Liberation Tigers of Tamil Eelam (LTTE) has officially renounced the ceasefire that the two parties concluded in February 2002, the ICRC's delegate-general for Asia and the Pacific said in January 2006 that the situation on the ground was clearly a non-international armed conflict.<sup>84</sup>

Sri Lanka's Prevention of Terrorism Act of 1979 (PTA) specifically permits administrative detention. The Sri Lankan government appears to have suspended the use of the PTA since the 2002 ceasefire.<sup>85</sup> However, the PTA remains of interest as a historical matter, and because it remains on the books for potential future use.

According to the State Department's Human Rights Report for Sri Lanka in 1999, a year in which the PTA remained in use, the Government of Sri Lanka

detained more than 1,970 persons under the [Emergency Regulations] and the PTA during the year, a slightly higher number than in 1998. Many of these detainees were arrested during operations against the LTTE. The majority of those arrested were released after periods lasting several days to several months; however, the total number of prisoners held under the ER and the PTA was consistently close to 2,000. Hundreds of Tamils who were arrested under the PTA were being held without bail awaiting trial; some of these persons have been held for up to 5 years.<sup>86</sup>

### a. Standard for detention and notice of reasons

The PTA creates very broad administrative detention rules and sets an easily-met standard for the state to detain individuals. The PTA states:

Where the Minister [originally of Internal Security; now of Defense] has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, . . . and any such order may be extended from time to time for a period not ex-

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Lawamicus.pdf (citations omitted).

<sup>84</sup> Press Briefing, Int'l Comm. of the Red Cross, Sri Lanka, ICRC Extremely Concerned About the Human Cost of Conflict (Jan. 9, 2006), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/sri-lanka-press-briefing-010906?opendocument>.

<sup>85</sup> See Human Rights Watch, *Return to War: Human Rights Under Siege*, 71 n. 136 (2007), available at <http://www.hrw.org/reports/2007/srilanka0807/srilanka0807web.pdf>.

<sup>86</sup> Dept. of State, *1999 Country Reports on Human Rights Practices: Sri Lanka*, Feb. 25, 2000, available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/srilanka.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/srilanka.html).

ceeding three months at a time: Provided, however, that the aggregate period of such detention shall not exceed . . . eighteen months.<sup>87</sup>

Any person detained under such an order shall be informed of the “unlawful activity in connection with which such order has been made.”<sup>88</sup>

b. Initial review

The PTA establishes an Advisory Board of not less than three people. The detainee (or any person acting on his behalf) may make representations to the Board, which advises the Minister “in respect of such representations.” The Board’s recommendations do not appear to be binding on the Minister. Nor does the detainee have recourse to a separate tribunal; the PTA states that the Minister’s detention order is not subject to challenge in court.<sup>89</sup>

3. India

India’s constitution expressly contemplates administrative detention, and since 1949, India has enacted a series of security detention laws that supplement the constitutional rules. The current administrative detention law, the National Security Act of 1980 (NSA), applies to all of India except Jammu and Kashmir, and permits the government to issue detention orders for up to one year.<sup>90</sup> The 1978 Jammu and Kashmir Public Safety Act (PSA), which applies only to Jammu and Kashmir, permits the state to detain individuals without trial for a period of up to two years who act in a manner prejudicial to the security of the State.<sup>91</sup> The tension between India and Pakistan over Jammu and Kashmir at times has risen to the level of an armed conflict, and at least one NGO recently asserted that India is grappling with non-international armed conflicts in the majority of its states.<sup>92</sup>

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<sup>87</sup> Prevention of Terrorism (Temporary Provisions) Act No. 48, art. 9, § 1 (1979), available at [http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention\\_of\\_terrorism.html](http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention_of_terrorism.html).

<sup>88</sup> *Id.* at art. 13(2).

<sup>89</sup> *Id.* at art. 10.

<sup>90</sup> The National Security Act, art. 7(3), 1980, No. 65, Acts of Parliament, 1980.

<sup>91</sup> Jammu and Kashmir Public Safety Act, 1978, No. 6, Acts of Parliament, 1978, § 18, available at <http://www.unhcr.org/home/RSDLEGAL/3ae6b52014.html>.

<sup>92</sup> See *ACHR Review*, Asian Center for Human Rights (2006), available at <http://www.achrweb.org/Review/2006/124-06.htm> (asserting that 19 of 28 states in India faced internal armed conflict). See also Human Rights Watch, *The Origins of Impunity* (2006), available at <http://hrw.org/reports/2006/india0906/5.htm> (describing the situation in Jammu as an armed conflict). Without stating its views on the nature of the situation, the International Commission of Jurists noted in 1995 that “India has treated the situation of Jammu and Kashmir as a state of emergency but has avoided classifying it as such in interna-

Although recent figures appear to be unavailable, the Indian Government reported that it held 1,163 persons under the NSA at the end of 1997, although it is not clear what portion of this group the Government detained during and as a result of armed conflict.<sup>93</sup> According to the Office of Director General of Jammu and Kashmir Police, the Government of India arrested 473 persons in 2005 and 420 during 2006 under the PSA.<sup>94</sup> The following discussion focuses on the NSA.

a. Standard for detention and notice of reasons

Under the NSA, the Indian government may issue a detention order for any person “with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India” or “in any manner prejudicial to the maintenance of Public order.”<sup>95</sup> The government must inform the detainee of the basis for the detention order, generally within five days (and not later than ten days), but may withhold information that, if disclosed, would be against the public interest.<sup>96</sup> It is not clear what, if anything, the state would have to reveal to the detainee if it believed that the disclosure of any and all information related to the person’s detention would compromise the public interest.

b. Initial review of detention

The executive alone can order detention for up to three months.<sup>97</sup> The detainee may contest the order to the executive at the “earliest opportunity,” but does not have the right to counsel.<sup>98</sup> An Advisory Board, comprised of three judges from a federal or state High Court acting in a quasi-judicial role, reviews the detention for “sufficient cause.” The executive must place each detention order before a Board within three weeks from the date the person is detained under the order. If the Advisory Board affirms

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tional terms, thereby obstructing the call for accountability and transparency inherent in the comments of the Human Rights Committee. India has been reluctant to classify the conflict in Jammu and Kashmir as a non-international armed conflict under the Geneva Conventions for fear of internationalising the Kashmir issue.” *International Commission of Jurists’ Report*, Pakistan Ministry of Foreign Affairs (1995), available at <http://www.mofa.gov.pk/Pages/InternationalCommission.htm>.

<sup>93</sup> See Dept. of State, *India: Country Reports on Human Rights Practices—2000*, Feb. 23, 2001, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/sa/717.htm>.

<sup>94</sup> Dept. of State, *India: Country Reports on Human Rights Practices—2006*, Mar. 6, 2001, <http://www.state.gov/g/drl/rls/hrrpt/2006/78871.htm>.

<sup>95</sup> National Security Act, *supra* note 90, at art. 3.

<sup>96</sup> *Id.* at art. 8.

<sup>97</sup> *Id.* at art. 3(3).

<sup>98</sup> *Id.* at arts. 8, 11(4).

that sufficient cause for detention exists, the individual may be detained for a maximum period of one year (two years in Jammu and Kashmir).<sup>99</sup> The Board must confirm or reject the detention order within seven weeks.<sup>100</sup> If the Board rejects the detention, the executive must release the person “forthwith.” The Board does not make factual findings and is not bound by rules of evidence.

c. Judicial review

A court may intervene when the individual who ordered the detention lacked or exceeded his legal authority to do so. Indian courts will not look at the facts behind the detention, but can review on habeas whether the detention is *prima facie* legal. The Indian Supreme Court has held that the state must notify detainees of their right to contest the order and give detainees the right to examine witnesses before the Advisory Board and to present evidence in rebuttal.<sup>101</sup>

4. United States

In addition to participating in the MNF-I detentions in Iraq discussed above, the United States currently is administratively detaining individuals in two other conflicts: the conflict with al Qaeda and the conflict in Afghanistan. The sets of procedures associated with detention in Guantanamo Bay, Iraq, and Afghanistan are each slightly different, largely because different parts of the U.S. government developed the procedures at different times, to address different situations.

a. Guantanamo Bay

i. Standard for detention and notice of reasons

The United States may detain at Guantanamo only those who qualify as “enemy combatants.” For these purposes, an “enemy combatant” is defined as:

an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belli-

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<sup>99</sup> *Id.* at art. 13; Jammu and Kashmir Public Safety Act, *supra* note 91, § 18.

<sup>100</sup> National Security Act, *supra* note 90, at art. 11(1).

<sup>101</sup> *Wasi Uddin Ahmed v. Aligarh District Magistrate*, A.I.R. 1981 S.C. 2166, 2173-74 (holding that the government must inform the detainee of his or her rights under the NSA); *see also* PREVENTIVE DETENTION AND SECURITY LAW 66-70 (Andrew Harding & John Hatfield eds., 1992) (noting that the Indian Supreme Court has concluded that detainees have the right to examine witnesses and present rebuttal evidence).

gerent act or who has directly supported hostilities in aid of enemy armed forces.<sup>102</sup>

Additionally, the United States must notify the detainee of the opportunity to contest his status, to be represented by a personal representative, and to appeal the determination to a U.S. federal court.<sup>103</sup>

ii. Initial review of detention

By the time an individual arrives at Guantanamo, the U.S. Government repeatedly has evaluated that individual's status. Upon arrival, he receives a Combatant Status Review Tribunal (CSRT), a process by which the United States confirms whether he is, by a preponderance of the evidence, an enemy combatant.<sup>104</sup>

The CSRT consists of three neutral commissioned officers of the U.S. Armed Forces. Each detainee may be present at the hearing (except for deliberation, voting, and where classified evidence is used), may receive the assistance of a non-lawyer personal representative, may present evidence to the tribunal (including relevant testimony of witnesses who are reasonably available and personal oral testimony), and may examine the unclassified evidence against him. A detainee may appeal his CSRT determination to a federal civilian court—the D.C. Circuit—and may hire an attorney to represent him there. The D.C. Circuit's standard of review is whether the CSRT's conclusion was supported by a preponderance of the evidence.<sup>105</sup>

In 2007, the D.C. Circuit in *Bismullah v. Gates* concluded that, in order to conduct a meaningful review of the CSRT determination, the court must have access to all of the information the CSRT obtained and considered.<sup>106</sup> Further, the court held that the detainee's counsel must see all of the classified evidence introduced against his client, except for "certain highly sensitive information," which the Government must nevertheless show the court.<sup>107</sup> The Supreme Court subsequently vacated the D.C. Circuit's judgment in light of its decision in *Boumediene v. Bush*, so the D.C. Circuit may revisit these conclusions.<sup>108</sup>

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<sup>102</sup> A full description of the CSRT procedures is available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Detainee Treatment Act, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2680, 2742 (2005).

<sup>106</sup> *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007).

<sup>107</sup> *Id.*

<sup>108</sup> *Gates v. Bismullah*, 128 S. Ct. 2960 (2008) (vacating and remanding to D.C. Circuit in light of *Boumediene*).

*Boumediene v. Bush* opened another avenue by which detainees may seek initial review of their detention: habeas corpus petitions.<sup>109</sup> The Court concluded that the review process set up by the Detainee Treatment Act (DTA) was an insufficient substitute for habeas corpus review, but the Court's decision did not alter the CSRT and DTA processes themselves.<sup>110</sup> The Court's decision therefore allows detainees to utilize both avenues simultaneously. At the time of this writing, legislation is pending that would terminate the DTA review process in the D.C. Circuit and provide habeas proceedings as the exclusive way in which detainees may seek judicial review of the legality of their detention.<sup>111</sup>

iii. Periodic review of detention

A Department of Defense Directive requires that detainees under Department of Defense control who do not enjoy prisoner of war protections under the law of war shall have the basis for their detention reviewed periodically by a competent authority.<sup>112</sup> For a detainee at Guantanamo, if a CSRT upholds his status as an enemy combatant and the United States does not intend to prosecute him in a military commission, the detainee receives an annual review by an Administrative Review Board (ARB), which assesses whether he continues to pose a serious security threat to the United States.<sup>113</sup> ARBs consider all relevant and reasonably available information to determine whether the detainee represents a continuing threat to the U.S. Government or its allies in the ongoing conflict against al Qaeda and the Taliban, and whether there are other factors that could form the basis for continued detention. The ARB, which consists of a panel of three military officers, results in a recommendation to release, transfer, or continue to detain each combatant. The Designated Civilian Officer (currently the Deputy Secretary of Defense) makes the final decision about the detainee's status.

Prior to his ARB, the U.S. Government must give the detainee notice that the Board is convening, and give the detainee a written, unclassified summary sufficiently in advance to permit him to prepare his ARB presentation. The summary must contain primary factors favoring continued detention and those favoring release. The Defense Department assigns the

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<sup>109</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

<sup>110</sup> *Id.* at 2275.

<sup>111</sup> Enemy Combatant Detention Review Act, S. 3401, 110th Cong. (2008), available at <http://thomas.loc.gov> (search by bill number for S. 3401); Enemy Combatant Detention Review Act, H.R. 6705, 110th Cong. (2008), available at <http://thomas.loc.gov> (search by bill number for H.R. 6705).

<sup>112</sup> Department of Defense Directive 2310.01E, Department of Defense Detainee Program, § 4.8 (September 5, 2006).

<sup>113</sup> A full description of the ARB procedures is available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.



detainee an Assisting Military Officer to help him review the summary and prepare and present information to the ARB. The detainee must be given a meaningful opportunity to be heard and may present evidence to the ARB in person.

b. Afghanistan

To ensure that the United States in Operation Enduring Freedom is detaining only those people who pose a security threat, the U.S. Government has established a status review process in Afghanistan.

The standard for detention is not public. The initial review takes place at the time of capture, to determine if the person being detained is an enemy combatant. The second review occurs usually within 75 days, and in no event more than 90 days, of the individual coming into DOD custody, and is based on all reasonably available and relevant information. A detainee's status determination may be subject to further review if additional information comes to light. The combatant commander may interview witnesses and/or convene a panel of commissioned officers to make a recommendation to him. The detainee will receive a periodic review of his detention, as the commander must review the detainee's status on an annual basis. This review, however, has tended to take place every six months.<sup>114</sup>

C. *Themes in State Practice*

The above discussion should make clear that situations often arise in which the Fourth Geneva Convention—the gold standard of procedural administrative detention rules during armed conflict—does not apply as a legal matter, leaving states to develop or adapt procedural rules to fit their specific operational situations. Although each of the examples discussed above offers different solutions to the difficult question of how to balance a state's security with individual deprivations of liberty without trial, a few themes emerge.

The requirement that internment be used as an exceptional measure is almost impossible to test without field study. States may establish high standards for detention in their laws and manuals, but it is very difficult to know whether, in practice, a state's forces take great care to ensure that they are only detaining individuals who meet that high standard.

Each system appears structured to ensure that detention ends when the reasons for the detention cease, though some systems seem more tightly crafted than others. The longer the time between periodic reviews, of course, the longer it will be before a state revisits its most recent determina-

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<sup>114</sup> Declaration of Col. James W. Gray at 5, *Fadi Al Maqaleh v. Gates*, No. 06-1669 (D.D.C. Jul. 18, 2007).

tion that someone continues to warrant detention. However, very frequent reviews, which would avoid that problem, generally will be untenable for a state, which has limited personnel and resources, especially when engaged in heavy fighting.

Virtually every procedural process discussed above requires the detainee to be informed of the reasons for his detention. The level of detail of information that a detainee receives presumably varies widely in practice. Despite the ICRC paper's support for a rule that requires detainees to be held in recognized places of internment, very few processes prescribe that individuals be held in such places, or even require the detention authority to inform a detainee's country of nationality about his detention. However, several processes include notice to the ICRC, which then informs the country of nationality and the detainee's family as a matter of practice.

Almost all of the processes give the detainee some ability to contest his detention, though not all provide for an appeal, and not all give the reviewer the ability to mandate release. The nature of "independent" review varies widely: in some cases, both administrative and judicial review happens. In other cases, the senior military commander is the only person to review the detention.<sup>115</sup> Periodic review periods are diverse: thirty days (KFOR), three months (Israel's emergency law, Sri Lanka), six months (Israel's illegal combatants law, MNF-I), one year (India, Guantanamo, United States in Afghanistan), and none (INTERFET). Practice seems evenly divided on whether the detainee may have legal or administrative assistance in contesting his detention.

One cannot generalize that international regimes necessarily provide more robust review than individual state regimes: compare INTERFET

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<sup>115</sup> Some critics have argued that existing U.S., NATO, and coalition military boards and appeals to commanding officers lack independence. See Press Release, United Nations Office at Geneva, Preliminary Findings by Special Rapporteur on Human Rights and Counterterrorism (May 29, 2007), [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/50C0462CBA023716C12572EA00489271?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/50C0462CBA023716C12572EA00489271?OpenDocument). The counter-argument is that administrative board composition and procedures, when coupled with the convening authority's appellate review (in a quasi-judicial role, a role familiar to military justice practitioners), afford the independence contemplated by the Commentary to the Fourth Convention. See *S. Comm. on the Judiciary Hearing on Detainees*, 109th Cong. (2005) (testimony of Rear Admiral James M. McGarrah, Director of Administrative Review of the Detention of Enemy Combatants, June 15, 2005), available at [http://judiciary.senate.gov/testimony.cfm?id=1542&wit\\_id=4358](http://judiciary.senate.gov/testimony.cfm?id=1542&wit_id=4358). This often is the level of review provided by the detaining state to its own soldiers in similar proceedings, and it avoids the burden of carrying along a separate judicial infrastructure. See Press Release, Ambassador Robert D. McCallum, Jr., Detainees and the Rule of Law (Feb. 14, 2007), available at <http://canberra.usembassy.gov/opa/media/2007/02/14/Op-Ed.pdf>. Similar criticisms are leveled against the use of the "magistrate approach," but military magistrates are independent of the command and are supervised by military judges. See Major Joseph B. Topinka, *Expanding Subpoena Power in the Military*, ARMY LAW. 15, 28 (Sept. 2003).

(less robust) with Israel (more robust) and MNF-I (more robust) with Sri Lanka (less robust). It would be useful to conduct a comprehensive study of state laws authorizing administrative detentions (as implemented in and out of armed conflict), and to examine how states have handled administrative detention under the Fourth Geneva Convention in the traditional, international armed conflicts for which the treaty was drafted.

#### IV. EXPANDING AND ELABORATING PROTECTIONS DURING ADMINISTRATIVE DETENTION

##### A. *Applying Fourth Geneva Convention Principles to Non-International Armed Conflict*

Part II of this article considered the treaty rules that currently govern the procedures by which a state conducts administrative detention. It is clear that, as a matter of international law, states are bound by a reasonable and well-balanced set of rules for administrative detention of protected persons during international armed conflict, but are bound by virtually no law of war-based procedural rules for detentions during non-international armed conflict. Part III considered the practice of states, alone or in coalitions, as they have undertaken administrative detention in real-world situations. Several of the examples in Part III lack one or two core elements that seem important to the fairness of the process. Sri Lanka's law, for instance, lacks an appeal mechanism. India's standard for detention is very low—any act prejudicial to the national security of India. KFOR's procedures do not appear to provide for periodic review.

The Fourth Geneva Convention establishes four core procedural elements that seem critical to any administrative detention during armed conflict, regardless of which entity is conducting the detention: (1) a high triggering standard for detention; (2) an initial review of the detention by an independent court or board; (3) a right to appeal; and (4) periodic reviews of that detention. Additionally, Article 75's requirement to notify the detainee of the reasons for his detention is an important way to ensure that the detainee can take advantage of his ability to contest his detention. These requirements address the entire lifespan of a detention, and are readily applicable in any type of armed conflict, because they were drafted to reflect the inherent limits of the military to perform certain acts while fighting a war.

The requirement that a state only detain an individual for "imperative reasons of security" creates a standard that is both high and sufficiently flexible to permit a state to detain individuals who pose different types of threats to it. A requirement that the state provide the detainee with the reasons for his detention ensures that the state has done its homework, helps catch administrative mistakes, and ensures that the detainee has some modicum of understanding of the basis on which to contest his detention. The requirement that an independent board or court review the detention further

ensures that the state is able to make its case on reasons for detention, in an atmosphere that is more conducive to careful review than the battlefield itself. Finally, a semi-annual review prevents a detainee from languishing in detention even though the external situation or the detainee's specific circumstances may have changed.

Although not required as a legal matter, all states should consider incorporating these five principles (from the Fourth Geneva Convention and Article 75) into any and every administrative detention process they establish or conduct during armed conflict. To make this requirement legally binding as an international law matter, states would need to negotiate a new treaty—a process that seems unlikely in the short term. But much can be achieved through commitments short of treaty obligations. A state might, for example, incorporate these five rules into its military manuals and its domestic law. Alternatively, it could declare that it (and its various police, military, and intelligence agencies) will adhere to these five rules as a matter of official government policy.

Undertaking this step has several advantages. First, an across-the-board determination to apply these five rules permits a state to avoid difficult questions about the type of conflict it is fighting. For instance, it is not clear whether the conflict in Afghanistan is an international or non-international armed conflict; applying the five rules to any administrative detention would avoid this hard question, while facilitating a state's compliance with its Fourth Geneva Convention obligations if it were in fact an international armed conflict. Second, when a state's detention processes are seen as fair, a state fighting an insurgency may have greater success with its counter-insurgency measures, and may avoid losing people to the insurgents' side. Third, a common set of baseline rules might facilitate multinational detention operations by ensuring that allies start from the same procedural propositions.

One important question is whether it is appropriate and advantageous to elaborate the same set of rules for situations of armed conflict and situations other than armed conflict, as the ICRC paper urges. Several advantages flow from applying these five rules to all types of administrative detention. First, the lines between armed conflict and situations short of armed conflict often are blurred. Second, the same set of individuals may be conducting the detentions in and out of armed conflict (e.g., security services). One set of rules offers easier implementation and avoids the need to apply variable procedures to a person's detention over time, as the situation shifts into or out of armed conflict. One disadvantage to uniform rules is that a state's need for detention arguably is greater in armed conflict than during "states of emergency." Uniform rules might inadvertently increase a state's ability and willingness to conduct administrative detention outside of armed conflict, even though a state is generally better able to use standard

law enforcement tools (which may help surmount the need for particular security detentions) in those situations.

On balance, it likely makes sense for a state to adopt the five rules described above across the range of armed conflict and situations short of armed conflict. The ease of applicability and the familiarity that the state's officials will gain with a uniform set of procedures overcomes the marginal incentive to rely too heavily on administrative detention, rather than pursuing criminal investigations and prosecutions in non-conflict periods. Further, a conscientious court or board could and should take into account whether the state was detaining during or outside armed conflict in evaluating whether the state had made an adequate case for a particular detention.

*B. Unanswered Questions*

Even if states adopted the use of the five rules for all administrative detention, those rules do not provide detailed guidance on many questions that arise during the detention process. The examples in Part III show how a limited set of states have added layers of detail to some or all of the five rules, to greater or lesser degrees. Among the open questions are issues related to the level of detail a state must provide a person about the reasons for his detention, as well as the level of confidence that a board member, court, or appellate reviewer must have that the detainee poses a security threat. Related questions arise when some or all of the information that a state has about that security threat come from classified sources, or from means and methods that the state does not feel that it can disclose to the detainee.

A separate basket of questions relates to the detainee's role in contesting or appealing his detention. A detainee should, at a minimum, be permitted to submit an appeal in writing and, where possible, should be permitted to present his case in person. It often will not be feasible for a state during armed conflict to produce attorneys (or even personal representatives) to represent these detainees, especially where the state has detained hundreds or thousands of individuals. In some cases, however, using a personal representative could actually make the detention review process more efficient, because the representative could assemble the detainee's arguments in a more coherent fashion that he might be able to on his own.

Even in the absence of an attorney or personal representative, permitting a detainee to seriously contest his detention might mean that the state must help the detainee access factual information and witnesses. But what kind of evidence or witnesses should the detainee be able to request? Should the responsibility of the state to give the detainee these tools be on a sliding scale, as the length of detention increases? Arguably the answer to this last question is yes, though many states would balk at such a requirement.

Finally, there are unanswered questions about outer limits on detention periods. Both the Third and Fourth Geneva Conventions (and Article 75 of Additional Protocol I) envision potentially extended periods of detention, as long as the armed conflict continues. But should there be a notional outer limit on detention periods, beyond which a state must take added measures or permit judicial review to give further oversight to the detentions? Intelligence gets stale and individuals lose their connections with former associates or rebel groups. Should that line be located in different places for different types of conflict? Sri Lankan law has an outer limit of 18 months, while Iraqi law requires MNF-I to release detainees after 18 months unless a high-level panel reviews and authorizes extended detention. It would seem that the burden on a state to illustrate why it must continue to detain beyond 18 months or two years should be heightened in comparison to the more modest burden a state faces early in someone's detention.

#### V. CONCLUSION

Although detention may not be a popular concept right now, it is a critical incident to fighting armed conflict, and treaties long have recognized that a state may detain without trial not only official armed forces of its opponent, but also civilians and others who pose threats to its security. Given the limited set of treaty rules that govern the process that states must use when conducting such detentions, this Article argues that states should, as a matter of policy, apply the Fourth Geneva Convention's four core principles related to administrative detention to all such detentions during armed conflict, including non-international armed conflict. States also should apply Article 75's principle that a detainee is entitled to know why a state has detained him. While these five rules do not address all operational questions that arise during detainee operations, they serve as a multi-legged stool on which to begin to balance the inherent tensions contained in the concept of administrative detention.