International Commission of Jurists

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UN WORKING GROUP ON ARBITRARY DETENTION
GLOBAL CONSULTATION ON THE RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION

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Panel 6: Exercise of the right by individuals detained in situations of armed conflict, state of emergency or for counterterrorism purposes

Exercise of the right to challenge the lawfulness of detention by individuals detained in the context of an armed conflict

I. APPLICABLE LAWS

The starting point in any discussion concerning the exercise of *habeas corpus* in the context of armed conflict is that both international humanitarian law (IHL) and international human rights law (IHRL) apply, whether we are speaking of an armed conflict between States (an international armed conflict) or between a State(s) and a non-State armed group(s), or between two or more non-State armed groups (a non-international armed conflict). I would in this regard make three points:

1. The very first question to determine is whether or not there is an armed conflict, and therefore whether the rules of IHL are even applicable.
   - This might seem an obvious point, but we regrettably see recent situations of detention that purportedly occur in armed conflict, but in fact fall short of the threshold of armed conflict, e.g. situations where the underlying conduct is an act of terrorism, internal disturbance, riot, criminal act or other situation that is appropriately dealt with under a law enforcement regime, in which case only IHRL, not IHL, is applicable.
   - To determine whether a situation rises to the level of armed conflict, a two-part assessment is called for, involving consideration of the intensity of the conflict and the degree of organization of the parties to the conflict (Common Articles 3 of the Geneva Conventions; see especially the ICRC Commentary on the Fourth Geneva Convention, pp.35-36).
   - As explained by the ICTY, the rules in Common Articles 3 are used to distinguish "an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law" (*Prosecutor v Tadic*, Case No IT-94-1, Judgment of 7 May 1997, §562).

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2. Where an armed conflict does exist, consideration must then be given to the *lex specialis* doctrine.
    - While acknowledging that the nature of *lex specialis* is highly contested, the prevailing view – certainly in human rights discourse – is that of complementarity between IHL and IHRL rather than the displacement of one set of laws in favour of the other (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep, §106; Human Rights Committee General Comment 31, §11; *Mohammed v Ministry of Defence* (2014) ECWH 1369 (QB), §§ 288-290).
    - This means that full effect to both IHL and IHLR must be given in the context of armed conflict. A *lex specialis* construction is only resorted to where there is an irreconcilable conflict between IHL and IHLR.
    - A general observation is that, while such a conflict might apply in the case of the right to life in hostilities, for example, it does not concerning detention.

3. The question of the extraterritorial application of human rights needs also to be addressed.
    - In the case of the right to challenge the lawfulness of detention, and as this pertains to universal instruments concluded at the UN level, we are referring to Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) pertaining to *habeas corpus*, as well as Article 14(1), which requires that the determination of a person's rights and obligations shall be made by a "competent, independent and impartial tribunal established by law".
    - A very small number of States do not accept that their obligations under human rights treaties, including the ICCPR, apply to the conduct of their agents, including their armed forces, when acting beyond the boundaries of the State's territory. The issue here rests with the interpretation of the jurisdictional provisions of the treaties themselves.
    - Under Article 2(1) of the ICCPR, each State party "undertakes to respect and ensure to all individuals <u>within its territory and subject to its jurisdiction</u>" the rights recognized in the ICCPR (emphasis added). Article 2(1) of the Convention against Torture requires States parties to take effective measures to prevent acts of torture "in any territory under its jurisdiction".
    - The Human Rights Committee and Committee against Torture have both clarified that the obligation under Article 2 of each treaty means that the ICCPR/CAT obligations apply to anyone within the "power or effective control" of the State, even in places not situated within the territory of the State (HRC General Comment 31, §10; CAT General Comment 2, §7).
    - The Committee against Torture has recognised that reference to "any territory" in article 2(1) of the CAT includes "all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control… and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control" (CAT General Comment 2, §16).
    - In its General Comment 31, the HRC has similarly clarified that: "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent or a State Party assigned to an international peace-keeping or peace-enforcement action" (§10).
    - Other UN Treaty Bodies have also applied human rights extraterritorially (see 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, (2012) 34 *Human Rights Law Quarterly*, pp. 1084-1169).

- The International Court of Justice has similarly affirmed the extraterritorial application of human rights treaties (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep, §109; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep, §216). It has also clarified that the decisions and comments of the UN treaty monitoring bodies are authoritative under international law; and has explicitly rejected the argument that the ICCPR is directed only to the protection of human rights in peacetime (*Legality of the Threat or Use of Nuclear Weapons*, §25).
- It thus cannot be genuinely doubted that a State which detains persons in a situation of armed conflict by definition has those persons within it effective control, and thus within its jurisdiction, such that IHRL is applicable. The European Court of Human Rights in the case of *Al-Jeddah v UK* ((2011) ECHR 1092), laid to rest contrary claims, holding that the European Convention of Human Rights (ECHR) was *prima facie* applicable to the situation where British forces had effective control over the operation of a detention facility in Basrah.

II. THE EXERCISE OF *HABEAS CORPUS* IN AN INTERNATIONAL ARMED CONFLICT (IAC)

Under IHL, detention in IACs is regulated by the Third and Fourth Geneva Conventions.

- It is also notable that, concerning the treatment of persons in the power of a party to an IAC, Article 75(6) of Additional Protocol I provides that persons detained or interned for reasons related to an IAC "shall enjoy the protection provided by this Article", which includes the right in Article 75(3) to be released as soon as the circumstances justifying detention or internment have ceased to exist. Article 75 is not subject to the possibility of derogation or suspension.
- Article 72 of Additional Protocol I furthermore makes it clear that the guarantees set out in the Protocol are additional to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict".

When considering the exercise of *habeas corpus* in an IAC, we need here to distinguish between the exercise of the right by those detained as prisoners of war and other detainees.

<u>Prisoners of war</u>

The detention of persons as prisoners of war is governed by the Third Geneva Convention relative to the Treatment of Prisoners of War (GC 3).

- Persons may be held as prisoners of war if they "have fallen into the power of the enemy" and if they fall within one of the categories specified in Article 4, including members of armed forces of a party to the IAC (4(1)), members of other armed forces who profess allegiance to a party to the IAC (4(3)), members of militias fulfilling certain conditions (4(2)), persons who accompany the armed forces, such as civilian contractors and war correspondents (4(4)), etc.
- POWs may be subject to internment in a POW camp, or to close confinement if this is necessary to safeguard their health, and then only so long as the circumstances that make such confinement necessary continue (Article 21). Confinement to a cell or room may otherwise only be permitted in execution of penal or disciplinary sanctions (Part III, Section VI, Chapter III).
- POWs must be released and repatriated without delay after the cessation of active hostilities (Article 118; Additional Protocol I, Article 75(3); and Rule 128(A) of the ICRC's catalogue of rules of customary IHL).

- POWs who are seriously wounded or seriously sick must be sent back to their own country, after having been cared for until fit to travel, unless such repatriation during hostilities is against the will of the POW (Article 109).

Because POWs may be held captive until the cessation of active hostilities, the Inter-American Commission on Human Rights (in its report on *Terrorism and Human Rights*, 2002) concludes that IHL is the *lex specialis* and that "international law should not be considered to provide for any entitlement of detained combatants to be informed of the reasons for their detention, challenge the legality of their detention, or, in the absence of disciplinary or criminal proceedings, to be provided with access to legal counsel" (§142).

- Professor Doswald-Beck nevertheless argues that the right to *habeas corpus* <u>should</u> be respected in the case of POWs for three practical reasons, (*Human Rights in Times of Conflict and Terrorism*, p.279), i.e.

i). To determine whether a person does indeed fall within the category of POW within the meaning of Article 4, noting that the implications of this are very serious for the person concerned given that this can mean a very lengthy period of detention (i.e. until the cessation of active hostilities);

ii). To act as a check to ensure that a seriously injured or seriously sick POW is repatriated or transferred to a neutral State (as required by Article 109); and/or

iii). To act as a check to ensure that POWs are released and repatriated without delay after cessation of active hostilities (as required by Article 118, but which is often not respected).

<u>Other persons detained in an IAC</u>

Additional to the detention of prisoners of war, we are speaking here of the detention of 'protected persons' (civilians), governed by the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC 4).

- The detention of a civilian – though internment or placing in assigned residence – may arise in two contexts:

i). Alien civilians in the territory of a party to the conflict (Part III, Section II, GC 4)

  - This may be ordered "only if the security of the Detaining Power makes [internment or placing in assigned residence of a civilian] absolutely necessary", or if the civilian voluntarily demands this and his or her situation "renders this steps necessary" (article 42).
  - In this case, Article 43 governs the procedure for review.

ii). Civilians in an occupied territory (Part III, Section III, GC 4)

  - The Occupying Power may, at the most, subject civilians to internment or assigned residence within the frontiers of the occupied country "if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons" (article 78).
  - In which case Article 78 governs the procedure.

- The ICRC Commentary emphasises that both internment and assigned residence are of an exceptional character and represent the most severe measures that a Detaining or Occupying Power may resort to with respect to protected persons (pp.256 and 368).

Alien civilians in the territory of a party to the conflict

- Article 43 entitles a civilian who has been interned or placed in assigned residence "to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose".
- If the internment or 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" (Article 43). This reflects the rationale behind Rule 128(B) of the ICRC's catalogue of rules of customary IHL, which provides that: "Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities".

1. Timing of review
    a) The initial entitlement for reconsideration is to be undertaken "as soon as possible". Since this expression is not defined, guidance should be taken from the jurisprudence of the Human Rights Committee concerning the meaning of the right in Article 9(3) of the ICCPR to be brought promptly before court. The Human Rights Committee has stated that, while the meaning of the term must be determined on a case-by-case basis, delays in bringing a person before the court must not exceed "a few days" (General Comment 8, §2).
    b) Where maintained, the internment or residential assignment must be periodically reviewed, at least twice each year.
2. Nature of the reviewing body
    - Article 43 refers to reconsideration and periodic review undertaken by "an appropriate court or administrative board". The same expression is used in Article 35, concerning the review of any decision refusing to allow a civilian to leave the territory.
    - The ICRC Commentary speaks of the court or administrative board as having to be one that offers "the necessary guarantees of independence and impartiality" (p.260). This approach is consistent with that of the International Court of Justice, i.e. that the meaning of IHL provisions should draw guidance from IHRL, in this case with the requirement in Article 14(1) of the ICCPR that the determination of a person's rights and obligations shall be made by a "competent, independent and impartial tribunal established by law".
    - To that end, and applicable wherever the right to *habeas corpus* applies, the determining authority must satisfy essential requirements of competence, impartiality and independence, and its processes must include and respect fundamental procedural safeguards.[1]

Civilians in an occupied territory

- Article 78 provides that: "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. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay…"
- If a decision to intern or place in assigned residence is upheld, this "…shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power" (Article 78).
- Timing of review
    a) Article 78 requires any appeal against a decision regarding assigned residence or internment to be decided "with the least possible delay".

[1] See for instance: Human Rights Committee, *Vuolanne v Finland*, UN Doc CCPR/C/35/D/265/1987 (7 April 1989), §§ 7.2 and 9.6; European Court of Human Rights (Grand Chamber), *D.N. v Switzerland*, App No 27154/95 (29 March 2001), §42; Inter-American Court of Human Rights, *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Series C No 170 (21 November 2007), §§ 128-130; African Commission on Human and Peoples' Rights, *Constitutional Rights Project v Nigeria*, No 153/96, 13th Activity Report (15 November 1999) §§ 15-18. See also Human Rights Committee, General Comment 32, UN Doc CCPR/C/GC/32 (2007), §§ 19-24; and African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principles A(4) and A(5).

- ➢ The Inter-American Commission on Human Rights, in *Coard et al v United States* (Case 10.951 (1999)), considered the application of Article 78 to the arrest and detention of 17 claimants by US forces during the first days of a military invasion of Grenada in 1983. The petitioners were held in US custody for a total of nine to 12 days after the cessation of hostilities without access to any review of their detention.
- ➢ The Commission referred to the language of Article 78 as reflecting minimum safeguards against arbitrary detention (§54). It found that: "This delay, which is not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention" (§57).

b) Mirroring Article 43 concerning the detention of aliens in the territory of a party to the conflict, Article 78 requires that, where an appeal results in the maintenance of internment or assigned residence, this must be periodically reviewed, if possible every six months.

- Nature of the reviewing body
  - ➢ The right to appeal against a decision regarding residential assignment or internment does not expressly state the nature of the body that is to consider the appeal. The ICRC Commentary explains that it is for the Occupying Power to decide on the procedure to be adopted under Article 78, but notes that it must observe the stipulations in Article 43 (p.368). As mentioned earlier, the Commentary speaks of the Article 43 procedure as requiring decisions by a body that offers the necessary guarantees of independence and impartiality (p.260).
  - ➢ Consistent with this approach is the decision of the IAComHR in *Coard et al v United States*, referred to earlier. The Commission considered that the decision to detain must "not be left to the sole discretion of the state agent(s) responsible for carrying it out" (§§55 and 59). It expressed this requirement to be fundamental and reflecting the rationale of the right to *habeas corpus*, such that it is not capable of being overlooked in any context (§55).
  - ➢ The Commission noted that compliance with this requirement did not have to be through recourse to the Grenadian court system but could have been accomplished through the establishment of an expeditious judicial or quasi-judicial review process (§58). It emphasised that the appeal mechanism must have the authority to order release where warranted (§60).
  - ➢ The approaches of the ICRC and the Inter-American Commission are again consistent with the content of, and jurisprudence concerning, articles 9(4) and 14(1) of the ICCPR.

It should be noted that Article 147 establishes, as a grave breach of GC 4, the "unlawful confinement of a protected person". Grave breaches of the Geneva Conventions constitute war crimes under article 8 of the Rome Statute of the International Criminal Court (and also article 2(g) of the Statute of the International Criminal Tribunal for the former Yugoslavia).

III. THE EXERCISE OF *HABEAS CORPUS* IN A NON-INTERNATIONAL ARMED CONFLICT (NIAC)

IHL relating to NIACs does not address grounds or procedures for administrative or pre-trial detention.

- As discussed earlier, the internment of civilians and POWs – or the placement of civilians in assigned residence – is expressly subject to appeal and/or periodic review in the context of an IAC.

- The Geneva Conventions and their Additional Protocols are silent, however, concerning grounds or procedures for any internment or administrative detention in the context of a NIAC. This has been explicitly recognised by the ICRC, which is currently engaged in a process of discussion about enhancing protection for individuals detained in the context of NIACs.
- The only applicable rule of IHL is to be found in Rule 128(C) of the ICRC's catalogue of rules of customary IHL, which implies that periodic review should take place, stating that: "Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist".

This means that IHRL provisions concerning the right to challenge the lawfulness of detention in the context of a NIAC apply without any contradiction arising from IHL (Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, p.277).

- This in turn means that any restriction imposed on the enjoyment of human rights, including the right to liberty, in the context of a NIAC must be:

i). Confined to the permissible limits set out within the applicable human rights instrument; or

ii). Subject to a lawful derogation, where derogation of the particular right is permissible in the particular circumstances and where the derogating measures taken are necessary and proportionate and indeed temporary

Administrative detention in a NIAC

Several recent examples include practices of administrative/security detention, or internment, in situations of NIACs. Attention has also been drawn to recent examples of administrative detention in the unusual situation of 'internationalised' NIACs, such as by the United Kingdom and the United States of America in Afghanistan and Iraq, although the anomalies in such contexts should not be treated as grounds for the development of laws and practices that pervert applicable human rights law, such as the right to *habeas corpus*, which the Human Rights Committee and Inter-American Court of Human Rights have clarified is non-derogable, as has the Working Group on Arbitrary Detention. It should be reiterated, in this regard, that:

- Such detention may only be permitted in the exceptional circumstance where a public emergency is invoked to justify administrative detention of persons considered to present a threat to State security (e.g. Concluding Observations: Israel, UN Doc CCPR/C/79/Add.93 (1998) §11).
- The State adopting and implementing such measures has a burden of proof to show that:

i). The emergency rises to the level to justify derogation;

ii). The derogating measures of administrative detention are lawfully made;

iii). The administrative detention is necessary, proportionate and non-discriminatory (the burden for which increases with the length of detention); and

iv). The administrative detention of the individual remains necessary and proportionate (accentuated by Rule 128(C) of the ICRC's catalogue of rules of customary IHL).

- In addressing the necessity and proportionality elements, the State must show that the individual being administratively detained poses a threat to State security and that the threat posed by that individual cannot be addressed by alternative measures short of administrative detention (e.g. Concluding Observations: Israel, UN Doc CCPR/C/79/Add.93 (1998) §12; and report of the Special Rapporteur on counter-terrorism, Mission to Israel, UN Doc A/HRC/6/17/Add.4 (2007) §10).
- It would be insufficient for internment to be applied to an individual solely due to her or his status, such as membership in a proscribed organisation.

Review of administrative detention

Consistent with the approach of the Working Group on Arbitrary Detention (e.g. UN Doc A/HRC/22/44 (2012), §47, and UN Doc A/HRC/27/47 (2014), §22), the Human Rights Committee has repeatedly emphasised that, although the guarantee against arbitrary detention is not expressly listed as non-derogable under Article 4(2) of the ICCPR, it is nevertheless a fundamental guarantee that may never be subject to derogation under Article 4 (General Comment 29, §11).

- In the context of *habeas corpus*, the Committee has said that: "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant" (General Comment 29, §16).
- It is therefore encouraging that the US Supreme Court, in *Boumedience v Bush* (553 US 723 (2008)) recognised the extraterritorial application of constitutional *habeas corpus* rights to aliens detained at Guantanamo Bay (as recognised by the Human Rights Committee, UN Doc CCPR/C/USA/CO/4 (2014), §3(b)). That said, the subsequent 2010 decision of the US Court of Appeals, in the District of Columbia, in *Al Maqaleh v Gates* was inconsistent with international law in concluding that the jurisdiction to grant *habeas* relief did not extend to aliens held in Executive detention in the Bagram detention facility in Afghanistan (2012, 605 F.3d 84).
- Since the question of the exercise of *habeas corpus* in states of emergency is addressed by Professor Sardar Ali, I will not elaborate on this further, save to emphasise three points:

i). A person subject to administrative detention in a NIAC always has the right to bring *habeas corpus* proceedings (since this right is non-derogable);
ii). Such proceedings must be before a court (applying the language of Article 9(4)); and
iii). The proceedings must respect all aspects of the right to *habeas corpus* (since any derogating measures allowing for administrative detention must not diminish the right under Article 9(4)).

Equality of arms in review of administrative detention

On the latter point, it has been observed that, in several situations where *habeas* or other review of administrative detention takes place, including in Israel, much of the information pertaining to the reasons for the administrative detention is classified, meaning that the detainee and her or his lawyer may have no access to this information (e.g. report of the Special Rapporteur on counter-terrorism, Mission to Israel, UN Doc A/HRC/6/17/Add.4 (2007) §25).

- In his mission report on Israel, the former Special Rapporteur on counter-terrorism and human rights explained that this goes against the substance of Article 9 of the ICCPR and the general requirement for a fair trial under Article 14 of the ICCPR, namely that:

1. It fails to comply with the requirement that, even in the case of administrative detention for security reasons, information of the reasons for the detention must be given (as confirmed in Human Rights Committee General Comment 8, §4).
    - The rationale behind this requirement goes to the very heart of the prohibition against arbitrary detention.
    - As explained by the Inter-American Court of Human Rights, the duty to inform a detainee of the reasons for the detention "is a mechanism to avoid illegal or arbitrary detentions, from the very moment when a person is deprived of his or her liberty" (*Humberto Sánchez v Honduras*, judgment of 07/06/03, §82).
    - The former Special Rapporteur also took this to contravene the requirement that, even in the case of a derogation from article 9, the derogating measures

must be both necessary and proportionate (§22).

2. The non-disclosure of reasons for the detention also prevents the detainee or her or his counsel to effectively challenge the necessity of the detention, which is a key feature of the exercise of *habeas corpus*.

The right to disclosure of the basis for detention is a matter considered in further detail within the April 2014 submission of the ICJ to the Working Group on Arbitrary Detention.[2]

Administrative detention pursuant to Security Council authority

A final point should be noted concerning the operation of multinational forces in a NIAC pursuant to Security Council (SC) authority. Although not looking at the right to *habeas corpus*, the European Court of Human Rights dealt, in *Al-Jeddah v UK* ((2011) ECHR 1092), with a purported conflict between the ECHR and the UN Charter.

- Following the establishment of the United Nations Assistance Mission for Iraq (UNAMI) in 2003, the Security Council authorised, in its resolution 1511 (2003), a multinational force to "take all necessary measures to contribute to the maintenance of security and stability in Iraq".
- Subsequent to the request of the Interim Government of Iraq for the continued presence in Iraq of the multinational force, the Security Council – in its resolution 1546 (2004) – reiterated its authorisation to take all necessary measures to contribute to the maintenance of security and stability "in accordance with the letters annexed to this resolution… including by preventing and deterring terrorism".
- Pursuant to this broad authority, and the annexed letter of US Secretary of State Colin Powell in which he outlined the duties of the multinational force to include "internment where this is necessary for imperative reasons of security", British forces held Hilal Al-Jedda in internment at the Sha'aibah Detention Facility in Basrah from October 2004 until December 2007.
- Al-Jeddah brought a claim to the ECtHR alleging that the UK had violated his right to liberty by making him subject to prolonged and effectively indefinite detention without trial.

One of the arguments put forward by the United Kingdom was that Al-Jeddah was barred from invoking the ECHR because his detention was pursuant to authorisation under SC Resolution 1546. In such circumstances, said the UK, article 103 of the UN Charter meant that the UK's obligations under Resolution 1546 prevailed over its obligations under Article 5 of the ECHR (which includes, in paragraph (4), the right to *habeas corpus*).

- The approach of the European Court was to ask whether there was indeed a conflict between the ECHR and the UNC.
- A three-stage logic was applied by the Court:
    1. Article 24(2) of the UNC requires the SC to discharge its duties "in accordance with the purposes and principles of the United Nations";
    2. Those purposes and principles include not only the maintenance of international peace and security, but also the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms; such that
    3. The combination of the former elements called for an interpretation of SC resolutions in a way that was most in harmony with the provisions of the ECHR.

[2] International Commission of Jurists, *Additional Submissions on Basic Principles and Guidelines on Remedies for Arbitrary or Unlawful Detention and the Right to Challenge the Lawfulness of Deprivation of Liberty Before a Court*, 3 April 2014, URL: <http://www.icj.org/un-the-right-to-challenge-the-lawfulness-of-detention-before-a-court/>, pp.6-10.

- The Court concluded that – although the letter from Colin Powell identified internment as one of the duties of the multinational force – there was no explicit or implied authority from the Security Council to undertake internment by means of indefinite or prolonged internment without trial.

By logical extension of this approach, one would also have to conclude that any internment regime authorised by the Security Council must be interpreted to allow full compliance with the right to *habeas corpus*.

IV. RECOMMENDATIONS

Against the background of the above discussion, the ICJ recommends that – in its elaboration of draft Basic Principles and Guidelines on Remedies for Arbitrary or Unlawful Detention and the Right to Challenge the Lawfulness of Deprivation of Liberty Before a Court – the Working Group on Arbitrary Detention:

1. Include reference to the following generally-applicable laws and principles concerning the application of *habeas corpus* in the context of armed conflict:

    a) Both international humanitarian law (IHL) and international human rights law (IHRL) apply to situations of armed conflict.
    b) A State which detains persons in a situation of armed conflict by definition has those persons within its effective control, and thus within its jurisdiction, such that IHRL is applicable extraterritorially.
    c) IHRL prohibition of arbitrary detention and concerning *habeas corpus* and applicable procedural guarantees applies in parallel with the rules of IHL.

2. Include reference to the following concerning the application of *habeas corpus* to civilians detained in the context of an international armed conflict (IAC):

    a) Reconsideration of a decision to intern or place a civilian in assigned residence under Article 43 of the Fourth Geneva Convention, or appeal in the case of internment or assigned residence under Article 78, must be undertaken "as soon as possible" (Article 43) or "with the least possible delay" (Article 78). While the meaning of these expressions must be determined on a case-by-case basis, delays in bringing a person before the court must not exceed a few days and must be proportional in the particular context.
    b) Although the particular procedures for reconsideration or appeal are for determination by the Detaining or Occupying Power, such proceedings must always be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and its processes must include and respect fundamental procedural safeguards.
    c) Where decisions to intern or place a civilian in assigned residence are maintained following the latter proceedings, internment or residential assignment must be periodically reviewed, at least twice each year.
    d) The latter periodic review must also be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and whose processes include and respect fundamental procedural safeguards.
    e) Non-compliance with paragraphs (a) – (d) may give rise to an unlawful confinement of a protected person under the Fourth Geneva Convention, amounting to a grave breach of the Convention.

3. Take a progressive approach to the application of *habeas corpus* to prisoners of war (POW) detained in the context of an IAC, namely by calling for States to give full effect to *habeas corpus* in the following situations:

    a) Where a POW disputes her or his status as a prisoner of war;
    b) Where a POW claims that, as a seriously injured or seriously sick POW, she or he is entitled to repatriation or transfer to a neutral State; and
    c) Following the cessation of active hostilities, where a POW claims not to have been released or repatriated without delay.

4. Include reference to the following concerning the application of *habeas corpus* in the context of a non-international armed conflict (NIAC):

    a) IHRL provisions concerning the right to challenge the lawfulness of detention before a court in the context of a NIAC apply without any contradiction arising from IHL.
    b) Any restriction on the right to liberty or the right to a fair trial must therefore be confined to permissible limits set out within applicable human rights provisions.
    c) Administrative detention or internment may only be permitted in the exceptional circumstance where a public emergency is invoked to justify such detention. In such cases, the detaining State must show that:
        i). The emergency rises to the level to justify derogation;
        ii). The administrative detention is on basis of grounds and procedures prescribed by law of the state in which the detention occurs and consistent with international law;
        iii). The administrative detention of each person is necessary, proportionate and non-discriminatory, and the threat posed by that individual cannot be addressed by alternative measures short of administrative detention; and
        iv). The administrative detention of the individual remains necessary and proportionate.
    d) A person subject to administrative detention in a NIAC has the right to bring *habeas corpus* proceedings before a court that offers the necessary guarantees of independence and impartiality, and whose processes include and respect fundamental procedural safeguards, including disclosure of the reasons for the detention and the right to defend oneself including through counsel.
    e) Any resolution of the Security Council authorising multinational forces to establish an internment regime must be interpreted consistently with IHRL to allow full compliance with the right to *habeas corpus*.

5. Engage proactively in the consultation process of the ICRC in its discussions concerning protection of individuals detained in the context of NIACs, including to emphasise that:

    a) International human rights law (IHRL) is applicable in situations of NIACs;
    b) IHRL fills existing 'gaps' in IHL concerning the grounds and procedures for detention and the right to challenge before a court the lawfulness of detention by individuals detained in the context of a NIAC; and
    c) Any standards or guidance developed by the ICRC must not fall below the currently applicable law under IHRL (as outlined in Part IV of this presentation).