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A/80/284: Best practices to protect human rights while using administrative measures to prevent terrorism: restrictive orders, terrorist listings, security detention and compulsory interventions

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Annex II: Administrative Security Detention in Armed Conflict

Practice 1: Grounds of security detention in armed conflict

1. Terrorism-related detention can occur in international and non-international armed conflicts, although it is controversial whether the ordinary criminal concept of "terrorism" applies in armed conflict.[1] In international conflict, international humanitarian law permits the detention (internment or assigned residence) of civilians if it is "absolutely necessary" for security or for "imperative reasons of security".[2] While humanitarian law does not define "security" and accords States a wide discretion,[3] in practice the concept applies to activities such as subversion, direct assistance to the adversary, membership of armed groups, sabotage and espionage. Given the breadth of the term "security", to enhance respect for legality and avoid abuse, it is good practice to articulate more precisely the legal grounds of detention, particularly since many activities that threaten security would likely already be codified as offences or prohibitions under national law. Where terrorism and terrorist activities (including acts covered by preparatory and organization-based offences) are specified as bases of detention, those categories must be precisely defined and limited to conduct that is genuinely terrorist in the special context of armed conflict, with a focus on intentionally causing death or serious injury to civilians where that is prohibited under humanitarian law.

2. In non-international conflict, common article 3 of the four 1949 Geneva Conventions regulates treatment in detention but does not express the grounds of detention or the procedures governing it. The basis for security detention is controversial, as to whether humanitarian law implicitly authorizes it or national legal authority is required. The International Committee of the Red Cross (ICRC) asserts that humanitarian law contains "an inherent power to detain in non-international armed conflict" but that "additional authority related to the grounds and procedure for deprivation of liberty… must in all cases be provided, in keeping with the principle of legality".[4] The preferable view is that humanitarian law does not authorize detention in non-international conflict, but imposes humanitarian

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[1] Six international counter-terrorism conventions, and the instruments of some regional organizations, exclude the activities of "armed forces" in armed conflict, which includes non-state armed groups that may otherwise be regarded as "terrorist". However, the Security Council has imposed counter-terrorism sanctions on specified groups engaged in armed conflicts (including Al Qaeda, Islamic State in the Levant and their associates) and authorized security detention in counter-terrorism contexts in Iraq.

[2] Fourth Geneva Convention 1949, articles 42 and 78 respectively.

[3] ICRC Commentary (1958) to article 42 of the Fourth Geneva Convention 1949.

[4] ICRC Commentary (2020) to article 3 of the Third Geneva Convention 1949, para. 758. See also ICRC, "Internment in Armed Conflict: Basic Rules and Challenges" (2014) ("Internment").

protections.[5] From a human rights law standpoint, fundamental rights like liberty should not be infringed by implication, but require express authority. There is little evidence from the drafting of common article 3 that States intended to authorize the parties, including non-state armed groups, to detain by implication, particularly since they were reluctant to impose much regulation at all on non-international conflicts considered largely within sovereign domestic jurisdiction. Subsequent State practice is inconsistent and does not clearly support the view that humanitarian law implicitly authorizes detention.

3. Detention must therefore be authorized by domestic law and be consistent with the right to liberty under international human rights law, including that detention is necessary, proportionate and non-discriminatory in pursuit of a legitimate security aim; or that it otherwise complies with the requirements of derogation in a declared public emergency threatening the life of the nation. The ICRC invokes the threshold of "imperative reasons of security" as the minimum legal standard for internment in non-international conflict,[6] mirroring the test in international conflict. Again, the specific grounds should be particularized, including in respect of "terrorism". It is not sufficient to invoke a highly generalized war power "to use all necessary and appropriate force".[7]

4. Security detention must not be used solely for intelligence gathering[8] or to punish (including collectively) or deter, or be imposed on indiscriminate grounds such as bare nationality.[9] Given its exceptional character, detention must only be resorted to if threats cannot be addressed by less invasive means, including criminal justice,[10] surveillance or lawful and non-arbitrary administrative measures. It must end as soon as the reasons for it cease to exist; indefinite "war on terror"-style detention is impermissible, since it is based on unreasonably attenuating the duration of armed conflict. A civilian cannot be automatically held until the end of the conflict. Determining the end of a conflict is a legal question, not a subjective political one.

Practice 2: procedures and safeguards governing detention

5. Humanitarian law regulates the procedures of security detention in international conflict[11] but not in non-international conflict. Minimum procedural protections must apply in both types of conflict, in the case of non-international conflict [12] based on international human rights law in conjunction with the transposition of relevant standards governing international conflict. Detention must:

(a) be authorized according to a regular procedure prescribed by law, applying the high requisite standard of proof ("imperative reasons");

(b) be carefully determined on an individual basis;

(c) involve promptly informing the person in a language they understand of the reasons for it;

(d) ensure a right to challenge the lawfulness of detention, with the least possible delay, before an independent and impartial body, preferably a court, and to receive a prompt decision; in non-international conflict, such body must be a court;

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[5] *Mohammed v Ministry of Defence & Ors* [2014] EWHC 1369 (QB), paras. 228-293.

[6] ICRC Commentary (2020) to article 3 of the Third Geneva Convention, para. 759. See also Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence" (2005) 87 International Review of the Red Cross 375.

[7] United States Congress, Authorization for Use of Military Force, Public Law 107–40, 115 Stat. 224 (2001).

[8] Pejic, above, 380.

[9] ICRC, "Internment", above, 9.

[10] ICRC Commentary (1958) to article 42 of the Fourth Geneva Convention 1949, article 42; Pejic, Procedural Principles, 380.

[11] See especially Fourth Geneva Convention 1949, articles 43 and 78 and Additional Protocol I 1977, article 75.

[12] See ICRC Commentary (2020) to article 3 of the Third Geneva Convention 1949, paras. 761-762; Pejic, above.

(e) provide the person with sufficient disclosure of the evidence against them and the right to obtain further evidence, to enable them to effectively challenge their detention;

(f) ensure a right to legal assistance, subject to security clearance as necessary;

(g) permit the person and their lawyer to attend the hearing personally; and

(h) be periodically reviewed by a court or independent tribunal, at least every six months and preferably every three months.

6. Individuals must be held in recognized places of detention; their family must be notified within a reasonable time and family contact and visits must be facilitated; and consular rights of foreign nationals must be respected. States should allow the ICRC access to detention in non-international conflict, as well as other independent monitors (such as a national human rights commission, ombudsperson, national preventive mechanism, or non-governmental organization). Conditions of detention, including medical care, must meet international standards,[13] including in relation to vulnerable groups. There must be an accessible and independent mechanism to complain about conditions and treatment in detention and effective remedies for breaches.

Practice 3: Prioritise criminal justice detention in armed conflict

7. Since administrative detention must be exceptional in armed conflict, terrorist threats should normally be dealt with by the criminal law, which has more stringent safeguards. Many States have preferred to criminally investigate and prosecute terrorist suspects instead of administratively detaining them in armed conflict, even where the number of detainees is significant and the security environment is precarious. There appears to be a trend in this direction. Examples include the conflicts in Somalia (concerning Al Shabaab and Islamic State in the Levant); Afghanistan (until mid-2021, regarding the Taliban and Al Qaeda); Burkina Faso, Mali, Niger and Benin (various jihadist groups); Colombia (Revolutionary Armed Forces of Colombia and National Liberation Army); Türkiye (the Kurdistan Workers' Party); Russia (Chechen armed groups); the Philippines (the communist New People's Army and armed groups in Mindanao, including Jemaah Islamiyah and Abu Sayyaf); and Peru (Shining Path).

8. Some States use security detention in conflict settings but without basing it directly on humanitarian law (such as India in Jammu and Kashmir and concerning the Naxalites, Nigeria regarding Boko Haram and previously Sri Lanka relating to the Liberation Tigers of Tamil Eelam), while also occasionally prosecuting national terrorism offences (but not international crimes). Yet other States appear to base security detention partly on humanitarian law and partly on other grounds, while also prosecuting national terrorism offences (e.g. Israel in the occupied State of Palestine). In Iraq after 2003, while multinational forces detained people under international humanitarian law, the Iraqi authorities later combined counter-terrorism law security detention with criminal prosecutions.

9. A State may choose a criminal justice approach in order to project a sense of normalcy and State control instead of emergency and loss of control and affirm its commitment to the rule of law and human rights. Some States have, however, modified criminal justice in armed conflict in ways that deviate from international standards, including by allowing military trials of civilians, protracted pre-trial detention, ineffective judicial review, non-disclosure of essential evidence, unfair trials, and allowing the death penalty for crimes that are not "most serious" under international law. A criminal justice approach must fully respect human rights law, including the right to liberty, judicial review of detention, and prompt and fair trial. In addition, States should not criminalize as "terrorism" mere participation in

[13] ICCPR, article 10; United Nations Standard Minimum Rules for the Treatment of Prisoners 2015 (Nelson Mandela Rules).

hostilities or other conduct that is not prohibited by humanitarian law;[14] the focus of any terrorism offences should be on unlawful violence against civilians.

Practice 4: Consider disarmament, demobilization and reintegration

10. Another alternative to security detention is the disarmament, demobilization and reintegration (DDR) of members of armed groups, including those regarded as terrorist. Humanitarian law encourages amnesties at the end of a conflict for those who have not committed international crimes.[15] Conventional DDR is similarly applied in the context of a peace agreement. "Third generation" DDR can apply during conflict, as in Somalia[16] and previously Afghanistan. Preconditions of DDR are voluntariness and that participants must not be detained.[17] The Security Council has encouraged DDR and the terrorism-specific framework of "prosecution, rehabilitation and reintegration" (PRR), also applicable during conflict, to be applied harmoniously, for example in relation to Boko Haram.[18] The African Union likewise envisages complementarity between the doctrines.[19]

[14] See Ben Saul, "From Conflict to Complementarity: Reconciling International Counter-Terrorism Law and International Humanitarian Law" (2022) 103 International Review of the Red Cross 157.

[15] ICRC, Customary International Humanitarian Law, rule 159.

[16] www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/20250521-eom-somalia-sr-terrorism-en.pdf.

[17] UN Inter-Agency Working Group on DDR, Integrated Disarmament, Demobilization and Reintegration Standards, 2.10, 2.11, 4.30 (reintegration).

[18] S/RES/2349 (2017), paras. 29 and 31.

[19] African Union, Operational Guidance Note on DDR and Countering Violent Extremism (2018).