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The Urgency in Legal Protection Of The Internment in Non-International Armed Conflict Between The Ethiopian Government and The Tigray People’s Liberation Front

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THE URGENCY IN LEGAL PROTECTION OF THE INTERNMENT IN NON-INTERNATIONAL ARMED CONFLICT BETWEEN THE ETHIOPIAN GOVERNMENT AND THE TIGRAY PEOPLE’S LIBERATION FRONT

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Abstract

The issue of a legal vacuum in international humanitarian law related to administrative internment in non-international armed conflicts has been a concern addressed in Article 3 of the Geneva Convention and Articles 5-6 of Additional Protocol II. Due to this deficiency, many countries establish domestic laws. One such example is the non-international armed conflict between the Ethiopian government and a non-state armed group, the Tigray People’s Liberation Front. The issue in this case began with the government’s emergency statement for a six-month period, granting broad authority to arrest individuals based on “impossible judgment” and cooperation with a “terrorist group” without a judicial statement. This research aims to analyze the internment taking place in Ethiopia in accordance with the Proclamation of State of Emergency of Ethiopia Number 5 of 2021. The research employs normative-juridical methods, including statutory, case, and conceptual approaches. The results show that there are legal loopholes regarding internment in the non-international armed conflict, leading to arbitrary internment done by all parties involved in the armed conflict in Ethiopia. Therefore, a new concept is required to regulate the procedure of internment in international armed conflicts, aiming to realize legal protection for the prisoners. This procedure can refer to the existing regulations concerning internment in the case of international armed conflict within the international humanitarian law regime of Geneva Convention IV and the Internment Regulation in the international human rights law regime.

Keywords: legal protection, internment, Tigray war, non-international armed conflict

I. INTRODUCTION

Conflicts or disputes are common in a country. This is due to a variety of differences in physicality, customs, knowledge, and thoughts. A conflict or dispute is a disagreement between people or social groups that exists due to differences in interests, and there is an attempt to achieve the goal by opposing
the opposing party, which is accompanied by threats or violence.\(^1\) When it comes to ending the war or armed conflict, various countries take different approaches. This method is divided into two parts: forced or violent resolution and peaceful resolution.\(^2\)

International Humanitarian Law (IHL) in armed conflict provides for the protection of the parties as well as restrictions on war or those prohibited or required by the 1949 Geneva Conventions and Additional Protocols.\(^3\) IHL provides arrangements based on current problems; one example is internment, which is a specific type of deprivation of liberty.\(^4\) Internment is an exceptional measure used to protect state security or public order in times of armed conflict.\(^5\) In this case, states can detain people without bringing criminal charges, so internment is ordered by the executive branch (not the judiciary).\(^6\)

Internment is classified in IHL according to the type of conflict, namely international armed conflict (IAC) and non-international armed conflict (NIAC), due to the different status of the parties involved, with non-state entities included in NIAC.\(^7\) Many countries are facing serious crisis situations, such as war or other types of severe social upheaval. In such cases, states deem it necessary to restore peace and order, and limit or even suspend the enjoyment of individual rights and freedoms.\(^8\) This demonstrates how a state of emergency can be used to deny everyone’s right to freedom and security.\(^9\)

\(^{1}\) Soerjono Soekanto, *Sosiologi Suatu Pengantar [An Introduction to Sociology]* (Jakarta: Raja Grafindo Persada, 1992), 86.


\(^{7}\) Lawrence Hill-Cawthorne, Detention in Non-International Armed Conflict (Oxford: Oxford University Press, 2016), 230-234.


\(^{9}\) International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
In the latest instance, internment occurred in 2021 due to the armed conflict between the Ethiopian government and a non-state armed group, the Tigray People’s Liberation Front (TPLF), which began in November 2020.\textsuperscript{10} Detentions began on 2 November 2021, when the Ethiopian government declared a state of emergency national law for six months, allowing the government to arrest and detain people without a court order based on reasonable suspicion of cooperation with the terrorist group, in this case, TPLF.\textsuperscript{11} According to data from the Office of the High Commissioner for Human Rights as of 16 November 2021, approximately 1,000 people have been detained by police on suspicion of alleged connections to the TPLF.\textsuperscript{12} During the conflict, several countries including Australia, Canada, Denmark, the Netherlands, the United Kingdom, and the United States, expressed concern about the situation in Ethiopia, specifically the massive detention of Ethiopian citizens (particularly ethnic Tigray) by the Ethiopian government on the basis of their ethnicity, and their detention in inhumane conditions.\textsuperscript{13}

Thus, the detention of internees in Ethiopia’s NIAC violates both IHL and international human rights law provisions concerning the protection of internees. Violations occurred as a result of a lack of regulatory provisions governing the legal protection of internment arrangements. Therefore, the author intends to demonstrate the importance of legal protection against internment in non-international armed conflict in this normative legal research, which employs three approaches: the legal approach, the case approach, and the conceptual approach.


II. REGULATION CONCERNING THE PROTECTION OF INTERNEES BASED ON INTERNATIONAL HUMANITARIAN LAW

A. DETENTION REGULATION BASED ON INTERNATIONAL HUMANITARIAN LAW

IHL provides many provisions for situations that arise during armed conflicts, particularly for the protection of the parties involved. One of the provisions in the IHL relates to the protection of people who are detained or deprived of their liberty both during international armed conflict (IAC) and non-international armed conflict (NIAC). As with other provisions of international law, the IHL also prohibits arbitrary detention.\(^\text{14}\) In terms of long-term detention in armed conflict, IHL provides two options: internment (administrative detention for security reasons)\(^\text{15}\) and detention, or ordinary detention (for the purpose of criminal proceedings). In this case, the provisions are divided into 4 (four) groups, as follows:\(^\text{16}\)

a. Regulation Concerning Prisoners Treatment (in the narrow sense)

The purpose of this regulation is to protect the physical and mental integrity and well-being of people who have been deprived of their liberty. Killing, torture, and other forms of cruel, inhuman, or degrading treatment, acts of mutilation, medical or scientific experimentation, and other forms of violence against life and health are all prohibited.

b. Regulation Concerning Material Conditions of Detention

This regulation aims to ensure that the detention authority provides adequate physical and psychological needs for prisoners, such as food, accommodation, health, hygiene, and others.

c. Regulation Concerning the Rights of Criminal Prisoners

This regulation applies to individuals detained on suspicion of committing a conflict-related crime. Under IAC situation, individuals must be guaranteed the right to a fair trial under Article 75 (4) of


Additional Protocol I. Even if it applied on IAC, the article drafted under the ICCPR, which reflects customary law\(^\text{17}\) and applies in all types of conflict.

d. Regulation Concerning Internees (Non-Criminal Prisoners)

Internment in armed conflict is defined as the non-criminal detention of a person based on the serious threat posed by their activities. The ICCPR and other regional human rights treaties guarantee the right to freedom by stating that anyone detained for any reason has the right to challenge the legality of their detention (\textit{habeas corpus}).\(^\text{18}\)

III. REGULATION CONCERNING THE PROTECTION OF INTERNEES BASED ON INTERNATIONAL HUMANITARIAN LAW

A. THE PROTECTION OF INTERNEES IN INTERNATIONAL ARMED CONFLICT

The internment in the IAC is divided into two categories: the internment of prisoners of war (POWs) and, under certain conditions, of civilians, as explained below:


1) Internment of POWs

In the IAC, POWs are combatants captured by the opposing party.\textsuperscript{19} The term “combatant” refers to a legal status that exists only in the IAC. A combatant is a member of the armed forces of a party to the IAC who has the right to directly participate in hostilities under IHL regulations on hostile conduct.\textsuperscript{20} The detaining State may use the combatants as POWs for the purpose of internment under the Geneva Convention III 1949.\textsuperscript{21} In the event that the arrested person’s right to POW status is in doubt, he or she is protected by the Convention until his or her status is determined by a competent court.\textsuperscript{22} The detention of POWs must end, and POWs must be released without delay after the cessation of active hostilities,\textsuperscript{23} unless they are the subject of criminal proceedings or are serving a criminal sentence.\textsuperscript{24} They may also be released early for medical reasons,\textsuperscript{25} or on parole or promise to contribute to the improvement of their state of health.\textsuperscript{26}


\textsuperscript{22} Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 5(2).

\textsuperscript{23} Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 118(1).

\textsuperscript{24} Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 119(5).

\textsuperscript{25} Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 109(1) and Art. 110.

\textsuperscript{26} Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950),
2) Internment of Civilians

In contemporary warfare, civilians may be detained if intelligence indicates that they pose a security threat. In the case of internment, Geneva Convention IV 1949 establishes a standard for the permissible reasons for internment, namely whether the security of the Detaining Power makes internment of the civilian population absolutely necessary, or whether there is an imperative security reason to take steps to protect persons by subjecting them to assigned residence or to internment. In the territory of the State Party, the process of reviewing the legality of civilian internment shall be carried out by an appropriate court or administrative board, whereas in the occupied territory, it shall refer to the regular procedure administered by the competent body. Any decision concerning this internment must be made as soon as possible by the court or the administrative board. Periodic reviews should also be carried out automatically every 6 months, to determine whether information on civilians detained for threatening state security is justifiable and whether the person’s activities meet the high legal standards that justify the detention and the duration of detention. The Detaining Power shall release each interned person as

Art. 21(2).


soon as the reasons for the internment cease to exist.\textsuperscript{34}

3) The Protection of Internees in Non-International Armed Conflict

There is a legal void within the NIAC regarding the regulation of internment procedures. However, under Common Article 3 of the 1949 Geneva Conventions, which are recognized as reflecting IHL practice, only state that:

“...Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, \textit{detention}, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction...”

The article only stated regarding protection for the persons who are under detention. The term “detention” is as an application of Common Article 3 protections. However, there is no clear framework for internment as we could see in IAC.\textsuperscript{35} Article 4 (1) of Additional Protocol II 1977 also includes guarantees for all persons who do not or have ceased to take direct part in hostilities, regardless of whether or not their freedom has been restricted. Article 5 (1) continues Article 4 (1) Additional Protocol II by stating that these people are “interned or detained” as a result” because of an armed conflict.\textsuperscript{36} It can be concluded that those who are fall under article 5, include those who are criminally prosecuted and detained for security reasons (non-criminal).\textsuperscript{37} Furthermore, the Commentary Article 5 states that this article applies to people who are de facto in charge of a camp, prison,
or other places of detention, regardless of recognized legal authority.\textsuperscript{38} The regulation only focuses on what the detaining authority may and cannot do to internees. As can be seen, Common Article 3 and Article 4 and 5 Additional protocol II does not include any reasons or procedural safeguards for people exiled at NIAC, leaving a legal void. Those articles only give recognition regarding Internee and responsibility for the detaining authorities.\textsuperscript{39} With the foregoing explanation, it can be concluded that the legal protection of internment in non-international armed conflict is urgently required due to the legal vacuum regarding the regulation of internment in the NIAC under the IHL regime. IHL does not specify a mechanism for reviewing the legality of internment in the NIAC. The NIAC’s incomprehensible internment rules can weaken the legal framework for the protection of internees. Furthermore, there is a real risk that legal loopholes will be exploited by both state and non-state actors if they are discovered.

IV. THE URGENCY IN LEGAL PROTECTION OF THE INTERNMENT IN NON-INTERNATIONAL ARMED CONFLICT BETWEEN THE ETHIOPIAN GOVERNMENT AND THE TIGRAY PEOPLE’S LIBERATION FRONT

A. NON-INTERNATIONAL ARMED CONFLICT BETWEEN THE ETHIOPIAN GOVERNMENT AND THE TIGRAY PEOPLE’S LIBERATION FRONT

1. CONFLICT CHRONOLOGY

The conflict between the Ethiopian government and the TPLF occurred during Abiy Ahmed’s tenure as Prime Minister, which began on 2 April 2018, when Abiy Ahmed was sworn in by the House of Representatives. In December 2019, one year after taking office, the three constituent parties of the Ethiopian People’s Revolutionary Democratic Front (EPRDF), namely the Oromo Democratic Party (ODP), the Amhara Democratic Party (ADP), and the Southern Ethiopian People’s Democratic Movement (SEPDM), merged to form the Prosperity Party (PP), led by Prime Minister Abiy Ahmed. The TPLF, on the other hand, refused to join the newly formed party.

The National Election Board of Ethiopia (NEBE) announced in March 2020 that the elections scheduled for August 2020 would be canceled due to

\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid., 4565, 4573.
the COVID-19 pandemic.\textsuperscript{40} Several opposition parties, including the TPLF, however, declared the postponement unconstitutional. The Tigray Regional Council continues to hold elections in the Tigray Region as of 9 September 2020.\textsuperscript{41} As a result, on 7 October 2020, the House of Representatives severed ties with the Tigray Regional Council and the regional Cabinet and suspended funding for local governments.\textsuperscript{42}

Tensions are rising as both sides take military and development positions. Civil society and elders’ efforts to reconcile the two sides also failed. As a result, on 3 November 2020, Tigray Special Forces (TSF) and militia launched an attack on the Northern Command of the Ethiopian National Defense Force (ENDF), seizing control of the base and weapons. Abiy Ahmed declared a military or law enforcement operation against the TSF and TPLF on 4 November 2020.\textsuperscript{44} The ENDF, Amhara Special Forces (ASF), Amhara and Fano militia groups, as well as the Eritrean Defence Forces (EDF), launched a military counter-attack against the TPLF in Tigray.\textsuperscript{44}

On the same day, the Federal Council of Ministers declared a 6-month state of emergency in the Tigray Region that would last until May 2021.\textsuperscript{45} Since then, all conflict parties have committed grave violations of human rights and international humanitarian law. Ethiopian and Eritrean government forces and associated militias have committed the most documented violations against Tigray civilians, primarily in the Tigray region.\textsuperscript{46}


\textsuperscript{44} Amnesty International, Ethiopia: Summary Killings,” 7.


According to the OHCHR report in 2022, more than 15,000 people were arbitrarily arrested and detained in connection with the government’s declaration of a state of emergency.\textsuperscript{47} Thousands of Tigray prisoners are held in overcrowded detention facilities in West Tigray. Three former detainees at Bet Hintset prison in Humera were also beaten, humiliated, and denied food and medicine by Amhara regional special police,\textsuperscript{48} resulting in many deaths.\textsuperscript{49} Furthermore, authorities do not inform prisoners’ families of their whereabouts and status. They also do not have access to lawyers and are targeted solely on the basis of ethnicity.\textsuperscript{50} In fact, the state of extermination, which includes deliberate mistreatment of living conditions to cause the destruction of a part of the population, is classified as a crime against humanity.\textsuperscript{51} Ethiopia, as a party to the ICCPR since 1993\textsuperscript{52} and the African Charter on Human and People’s Rights (ACHPR) since 1998,\textsuperscript{53} should respect its citizens’ human rights.

B. LEGAL PROTECTION OF THE INTERNMENT IN NON-INTERNATIONAL ARMED CONFLICT BETWEEN THE ETHIOPIAN GOVERNMENT AND THE TIGRAY PEOPLE’S LIBERATION FRONT

1. DETENTION OF THE INTERNMENT IN NON-INTERNATIONAL ARMED CONFLICT BETWEEN THE ETHIOPIAN GOVERNMENT AND THE TIGRAY PEOPLE’S LIBERATION FRONT

Internment is detention ordered by the Executive, which in this case is closely related to international human rights law, which is considered old regulations or posteriori to challenge the lawfulness of deprivation of liberty


\textsuperscript{52} International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

before a court of law. In the early 1970s, the UN General Assembly affirmed that, “Fundamental human rights, as accepted in international law and established in international instruments, continue to fully apply in situations of armed conflict.” In General Comment on the nature of obligations imposed on States parties to the ICCPR, The UN Human Rights Committee also explains the following:

“...the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”

In this case, IHRL can also apply in an armed conflict where IHL rules can be applied. However, concerning certain rights, the more specific IHL rules are especially relevant for interpreting those rights. It does not rule out the possibility that the two fields of law, IHL, and IHRL, are complementary, not mutually exclusive. This is in harmony with the complementary flow. In times of war, protection arranged in International Covenant on Civil and Political Rights (ICCPR/International Covenant on Civil and Political Rights) will not stop, except with the entry into force of Article 4 of the ICCPR, in which these provisions can be reduced in times of national emergency which threatens the life of the nation. Therefore, even though the UN Human Rights Committee recognizes that more specific IHL rules can act as a particular law, the two areas of law remain “complementary and not mutually exclusive.”

The power of administrative authorities and ministries to order administrative detention is highly controversial. However, this detention is permissible under international law, although several essential safeguards surround it. In the case of administrative detention, the state can detain

56 UN Human Rights Committee (HRC), General Comment no. 31[80], The nature of the general legal obligation imposed on States Parties to the Covenant, Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, 11.
59 UN Human Rights Committee (HRC), General Comment no. 31[80].
people without having to bring criminal charges against them.\footnote{61} Therefore, Internment is a form of deprivation of liberty initiated or ordered by the executive branch (not the judiciary).\footnote{62} In situations of armed conflict, Internment is an unprecedented step taken for security reasons.\footnote{63} Many countries are at some stage faced with a severe crisis, such as a war or serious social upheaval. In such situations, the states consider it necessary to restore peace and order to limit the enjoyment of individual rights and freedoms and even suspend them.\footnote{64}

The administrative detention in the Federal Democratic Republic of Ethiopia was preceded by an announcement made by the Ethiopian government on 4 November 2021, regarding a six-month national emergency.\footnote{65} The six-month state of emergency allows, among other things, for roadblocks to be erected, transportation services to be disrupted, curfews imposed, and the military taking over certain areas. Anyone suspected of links to “terrorist” groups can also be detained without a court order or judicial oversight. At the same time, any citizen who has reached military age can be called up to fight.\footnote{66} More than a week after the regulation issuance, approximately 1,000 people suspected of having links with the TPLF have been detained by the local police.\footnote{67} Many of these actions are likely violations of international law.\footnote{68}

\begin{itemize}
\item Deeks, “Administrative Detention,” 403-404.
\item “Interment in Armed Conflict,” ICRC, 1-2.
\item Pejic, “Procedural Principles,” 378.
\item OHCHR and The International Bar Association, “Human Rights,” 813.
\item “Ethiopia: Returned,” UN OCHA.
\item “Ethiopia: Mass arbitrary,” UN News.
\item “Joint Statement on Detentions,” U.S. Department of State.
\end{itemize}
<table>
<thead>
<tr>
<th>No.</th>
<th>Arbitrary Detention Facts</th>
<th>Legal Basis</th>
</tr>
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<tr>
<td>1.</td>
<td>ENDF holds individuals in secret locations and military camps, including the Northern Command in Mekelle, Camp Awash, and the Martyrs' Memorial Center. In Tigray and other parts of Ethiopia, individuals were arrested by the ENDF and federal police for allegedly being affiliated with the TPLF and unable to communicate for extended periods without formal prosecution or due process.</td>
<td>In NIAC, the right of individuals to communicate with their families is regulated in Article 5(2)(b) of Additional Protocol II; therefore, this violates the legal basis of IHL. Meanwhile, the right to carry out legal proceedings is not regulated in the NIAC; only Article 43 and Article 78 of the Geneva Convention IV for IAC provisions.</td>
</tr>
<tr>
<td>2.</td>
<td>In West Tigray, at the start of the conflict, Tigray forces detained civilians, mainly from Amhara, starting on 9 November 2020 for their support of the federal government and took them to the Shire, Axum, and Mekelle. Many were released or managed to escape, some were killed, and some were missing.</td>
<td>Many civilians were killed, which violated the provisions of Article 13 and Article 32 of the IV Geneva Convention.</td>
</tr>
<tr>
<td>3.</td>
<td>There was mass detention of Tigrayan civilians, including women and children, by Amhara and Fano militias in Maikadra for over a month.</td>
<td>The mass detention of women and children civilians violates the provisions of Article 119 (2) of the IV Geneva Convention, which, in carrying out internees, must take into account the age, sex, and health of internees.</td>
</tr>
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4. In Adashi, Berezba, EDF soldiers kidnapped six people, killed two, and then released the others. Such kidnapping means disrespect for the security of civilians, which violates the provisions of Article 27 of the Geneva Convention IV.

Source: Secondary Data and Primary Data, processed, 2022

From the table above, it can be concluded that the violations related to the detention of internees in non-international armed conflicts between the Ethiopian Government and the TPLF and all related parties were due to the absence of rules regarding detention procedures in the NIAC. Therefore, further rules are needed as limitations. In addition to the reports listed in the table above, OHCHR also reports that in 2022 more than 15,000 people were arbitrarily arrested and detained in connection with a state of emergency established by the Government.69 Thousands of Tigray detainees are held in overcrowded detention centers in West Tigray. Three former detainees held at Bet Hintset prison in Humera, one of several detention centers in the city, described appalling conditions with frequent beatings, torture, humiliation, and denial of food and medicine by the Amhara regional special police.70 While the authorities did not inform the families about the whereabouts and status of all the detainees, and they did not have access to lawyers, many of them were targeted on purely ethnic grounds.71

Parties to a conflict detain individuals based on their perceived support for and affiliation with the opposing power, which is often based on the individual’s ethnicity. Fundamentally, deprivation of liberty may not be carried out arbitrarily and must be done by respecting the rule of law.72 An arrest that

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69 “Oral Update,” UN OHCHR.
has no legal basis is, of course, arbitrary.\textsuperscript{73} ‘Arbitrary’ includes elements of ‘unlawful’ and elements of impropriety, injustice, lack of predictability, and due process, as well as elements of fairness, necessity, and proportionality.\textsuperscript{74}

The prohibition of arbitrary deprivation of liberty is customary international law’s norm in international and non-international armed conflicts. Arbitrary deprivation of liberty is inconsistent with the requirements of Common Article 3 of the Geneva Conventions\textsuperscript{75} and Additional Protocols I & II, which require all civilians and all persons out of combat to be treated humanely. In this regard, IHRL aims to prevent arbitrary detention by establishing reasons for detention, providing conditions and procedures to prevent disappearances, and monitoring the need for continued detention. While permissible detention, which complies with IHL, is not arbitrary in principle,\textsuperscript{76} it must be carried out based on substantive reasons and appropriate procedures established by law.

2. PRACTICES OF THE STATES REGARDING OF DETENTION OF THE INTERNMENT

a) SRI LANKA

Non-international armed conflict between the central government of Sri Lanka Liberation Tigers of Tamil Eelam (LTTE), which lasted three decades, ended in May 2009.\textsuperscript{77} In August 2011, the government lifted the twenty-eight-year state of emergency.\textsuperscript{78} Despite this, people suspected of being affiliated with the LTTE continued to be detained under the 1979 Prevention of Terrorism Act (PTA/Prevention of Terrorism Act 1979). In general, thousands of people continue to be detained in connection with the previous armed conflict in temporary and permanent places of detention across the country, and arrests continue.\textsuperscript{79}

The ICRC reported that those detained as part of the conflict included “security detainees” and “former LTTE fighters who had surrendered to

\begin{footnotesize}
\begin{enumerate}
\item International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 9(1).
\item UN Human Rights Committee (HRC), General Comment No. 35 on Article 9, Liberty and security of person, UN Doc CCPR/C/GC/35, 16 December 2014.
\item UN Human Rights Committee (HRC), General Comment No. 35, 64.
\item Ibid., 248.
\end{enumerate}
\end{footnotesize}
security forces”.

Regarding the legal basis for the detention, the ICRC confirmed that the LTTE fighters were allegedly detained under the emergency order and the PTA. The emergency regulations adopted several years before the conflict ended specified that “anyone who acts in any way prejudicial to national security or the maintenance of public order, or the maintenance of essential services can be detained for up to eighteen months.” While such persons are supposed to be brought before a judge within thirty days, the court needs the authority to order release, and power is left to the executive.

In PTA Section 9(1), Sri Lanka also allows administrative detention, explaining that “The Minister has reason to believe or suspect any person associated with or related to unlawful activities.” The person can be detained for a maximum of eighteen months (PTA Section 9(1)). PTA Section 13(2) exempts courts from reviewing restraining orders. Instead, an advisory board, constituted by the President and consisting of at least three members, will then make deliberations (PTA Section 13(2) and (3)). In this case, the detainee must be notified of the ‘unlawful activity in connection in addition to that’ when the detention order is made (PTA Section 13(2)). The Council cannot order releases but only advise the Minister on such considerations (PTA Section 13(3)).

Administrative detention regimes under emergency regulations and the PTA do not appear to comply with IHRL provisions, particularly in the absence of a judicial review of the legality of detention. The PTA appears closer to the internment regime provided for in Geneva Convention IV, applicable in international armed conflicts, which uses an administrative body to review detentions. However, the regulation application still does not meet the requirements of Geneva Convention IV because the review body does not have the power to order releases, as interpreted by International Criminal Tribunal for the Former Yugoslavia (ICTY).

81 Ibid., 228.
b) NEPAL

The non-international armed conflict in Nepal spans a decade between the government and the Communist Party of Nepal-Maoist (CPN-M/Communist Party of Nepal-Maoist) began in February 1996 when the CPN-M launched a ‘people’s war to overthrow the existing government.84 In May 2006, the CPN-M declared a general ceasefire, with a comprehensive peace plan signed by both sides in November of that year.85 The parties to the conflict and external observers recognized that this was a non-international armed attack where applicable Common Article 3.86

Two routes under Nepalese law permit internment: Soon after the fighting started, the government reactivated the 1991 Public Security Act (PSA/Public Safety Act 1991) 2nd Amendment allowing for preventive detention of up to twelve months on the grounds of ‘commoner interests’.87 The law is intended to exclude judicial review of detention orders. However, a constitutional warrant habeas corpus which cannot be contested is presumed victorious over the Act, which allows the order to be challenged.88

Second, 2002Terrorist and Disruptive Activities Act (Control and Punishment) (TDA/The Terrorist and Nuisance Activities [Control and Punishment] Act 2002) provides for, among other things, preventive detention of up to ninety days on reasonable grounds to believe that a person should be stopped from doing anything that could lead to a terrorist or disruptive act.89 The TDA was later superseded by the 2004Terrorist and Disruptive Activities Ordinance (Control and Punishment) (TADO/Terrorist and Disruptive Activities [Control and Punishment] Ordinance 2004), which extends the period of lawful preventive detention to one year, to be authorized by civil authorities, usually chief District Officer (CDO/District Chief Officer).

85 Ibid.
86 Ibid.
87 Ibid.
However, credible reports indicate that the CDO signed the restraining order under TADO without seriously considering the necessity of detention. Like the PSA, TADO seeks to exclude detention review.\(^{90}\)

The legality of arrest under TADO has often been challenged before the Supreme Court and the Court of Appeal. On adopting the cease-fire agreement in 2006, most people detained under the PSA and TADO were released. The courts of Nepal responded to this by asserting their jurisdiction to adjudicate claim habeas corpus, where the possible reasons for detention under PSA and TADO are too vague to meet IHRL standards. Nepal is considering applying the ICCPR to these detentions regardless of the conflict. In doing so, Nepal deviated from specific provisions of the ICCPR, indicating its belief that the treaty continued in force throughout the conflict.\(^{91}\)

c) DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

The practice of detaining parties to conflicts in DRC over the last two decades reflects the need for more legal clarity. In contrast to previous examples of country practice, this section demonstrates that no detention regimes were developed in the DRC during this conflict. Instead, individuals are arbitrarily detained even without procedural protection. However, it will also be pointed out that DRC practice implies the assumption that the IHRL rules on detention are fully applied, and there is no suggestion that the existence of a non-international conflict can override those rules.

Referring to Louise Arimatsu’s study, she divided the character of the conflict into four different periods, namely the period before the outbreak of the First Congo War (Spring 1993 to Summer 1996), First Congo War (July 1996 to Summer 1998), Second Congo War (August 1998 to July 2003) and the period since the end of the Second Congo War and the establishment of a transitional government.\(^{92}\) During each period, various multi-stakeholder conflicts occurred in the DRC, including non-international conflicts between governments and non-state armed groups.\(^{93}\) Regarding detentions carried out by the government and non-state armed groups, Arimatsu noted the following.\(^{94}\)

\(^{90}\) Ibid.

\(^{91}\) Hill-Cawthorne, Detention in Non-International, 169.


\(^{93}\) Ibid.

\(^{94}\) Ibid., 199–200.
“During the conflict, State authorities, under Mobutu and Kabila, claimed detention powers on the basis of ‘security reasons’ with little concern for integrating procedural guarantees or for adhering to minimum standards on conditions of detention. The right to detain was also asserted by insurgent groups during the Second Congo War in clear contravention of domestic law and human rights law as neither governs the right of non-state actors to detain.”

During the Second Congo War, UN Special Rapporteur on the DRC (UN Special Rapporteur on DRC) noted that there are several different armed conflicts of varying character, in the DRC territory, including non-international conflicts between the DRC government on the one hand and rebel groups Congolese Rally for Democracy (RCD) and National Movement for the Liberation of Congo (MLC) on the other hand. The Reports of arbitrary detentions by the DRC government during this period are standard.

The UN Special Rapporteur noted that political leaders, activists, trade union leaders, journalists, soldiers, students, traditional chiefs, priests, lawyers acting professionally, and refugees are constantly arrested for no apparent reason. Although often no justification was given for the detention, the reason most often cited was because of links to insurgents. The Special Rapporteur examined the legality of this detention against IHRL standards, criticizing, for example, the government’s failure to promptly bring all detainees before judges to determine the legality of their detention. The Human Rights Court criticized the practice of long detentions without warrants or trials and arbitrary detention by government security forces.

d) STANDARD OF LEGAL PROTECTION REGARDING INTERNMENT DETENTION IN NON-INTERNATIONAL ARMED CONFLICT

Regarding the urgency of legal protection for internment in non-international armed conflicts between the Government of Ethiopia and the Tigray People’s Liberation Front, in which legal protection is applied to the

95 Ibid., 167–185.
96 Ibid., 172.
99 Ibid.
100 UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations, Democratic Republic of the Congo, CCPR/C/COD/CO/3, 26 April 2006.
101 Ibid.
detailed drafting of administrative or internee detention procedures. In the case of administrative or internment detention, the IHL prohibits ‘unnecessary’ internment detention as a result of war, while the IHRL prohibits unlawful or arbitrary detention more generally. This difference between IHL and IHRL is explained by the fact that IHL norms apply only to armed conflicts and the associated deprivation of liberty. In contrast, IHRL always applies, mainly governing ‘everyday’ situations. Therefore, IHRL can also be applied in armed conflicts, specifically non-international armed conflicts.

LC Green emphasized how human rights law can be used to fill the legal vacuum resulting from the non-applicability of protocols in all situations of armed conflict:

“Although the protocol does not apply in an insurrectionary situation, the parties involved in such a conflict would remain bound by the minimum conditions laid down in Article 3 Common to The Geneva Conventions as well as any human rights agreements to which had hardened into jus cogens or customary law which is the position under the statutes of the ad hoc tribunals.”

Under LC Green’s, IHRL can be used as a reference to fill in the gaps in IHL. In the following sub-chapters, the author will discuss the protection procedures given to people deprived of their liberty, internee, or administrative detention based on IHL and IHRL. These procedures can be divided into the categories of standard detention (when detention is permitted), the right to know the reasons for a person’s detention and the right to initial and periodic legal reviews of detention (habeas corpus) and conditions of release in which the reasons justifying the detention cease.

i. CONTAINMENT STANDARDS

In the 1949 Geneva Convention IV, the standard for detaining a civilian either in the occupied territory or in the territory of a party to the conflict must refer to the reasons for the state’s security which is absolutely necessary. Commentary Article 42 of the Geneva Convention 4 explains the definition of state security as follows:

“It seems impossible to define the expression “security of the State” in a more concrete way. It is thus largely left to the Government to decide the measure of activity detrimental to the internal or external security of the State that justifies the detention or placement assigned to it. Subversive activities carried out within the territory of a Party to the conflict or actions constituting direct assistance to an enemy Power, both of which threaten national security; belligerents may detain persons or place them in designated residences if they have serious and valid reasons to think that they are members of an organization whose purpose is to cause disturbance, or that they may seriously undermine its security by other means, such as sabotage or espionage.”

The provisions of Article 42 differ from Article 78, which refers to the occupying power in the occupied territory when necessary for urgent security reasons and to take measures for the safety of protected persons. Both Articles 42 and 78 represent an attempt by the drafters to strike the right balance between the need for states to detain individuals who threaten state security and the seriousness of depriving individuals of liberty without trial. This is the fundamental balance and constant tension that states that apply administrative detention have to deal with.

The rules in IHL can be complemented by two basic procedural rules regarding detention IHRL “everyone has the right to freedom”, and no one may be arbitrarily arrested or detained. Thus, it is clear that the right to

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freedom is not absolute but can be limited in certain circumstances. The two basic rules show the standard of detention in the IHRL that no one may be deprived of his liberty except on the grounds and in accordance with the procedures stipulated by law. The detention standard under IHRL has two requirements: lawfulness (according to law) and arbitrariness (not arbitrary).

Further, the UN Working Group on Arbitrary Detention explain the interpretation regarding the first related main requirement ‘lawfulness’ as follows:

“The legal requirement is that national legislation must specify all permissible limitations and conditions. Therefore, the word ‘law’ must be understood in the strict sense of an act of parliament, or the equivalent unwritten common law norm accessible to all individuals subject to relevant jurisdiction.”

While the second requirement is related to non-arbitrariness, explained further by Human Rights Court that based on Article 9, paragraph 1 of the ICCPR, the word ‘arbitrary’ does not have to be equated with ‘unlawful’ but can be interpreted more broadly to include elements inappropriateness (inaccuracy), injustice, and lack of predictability. This means that detention must correspond to lawful and reasonable arrest in all circumstances.

Internees in the armed conflict between the Ethiopian government and the TPLF, based on a state of emergency for six months, in which detention is directed by persons who collaborate with terrorist groups, by which case the TPLF is meant. The existence of these rules fulfills the provisions in the IHL, as well as the related IHRL provision’s lawfulness. However, in terms of related IHRL provisions-arbitrariness still needs to be fulfilled. This is because the detention continues even though the state of emergency has exceeded six months (the specified time), and the detention is aimed at most ethnic groups.

107 UN Human Rights Committee (HRC), General Comment No. 35, at 10.
110 UN Human Rights Committee (HRC), General Comment No. 35, at 12.
from Tigray without following up on whether the person cooperates with the TPLF or not, and this is an act of discrimination.

ii. REASONS FOR DETENTION

When referring to the provisions of IHL relating to the reasons for internment detention in international armed conflicts, it is explained that the detaining authority is obliged to notify them of the reasons for their detention, which is regulated in Article 75(3) of Additional Protocol I. This is a condition not to conduct initial (and periodic) reviews, as required by Geneva Convention IV. However, in non-international armed conflicts, it is clear that there is no IHL treaty provision in this regard. IHRL also regulates the same things as IHL rules in international armed conflicts.

The IHRL requires that any person arrested must be informed, at the time of arrest, of the reasons for his arrest and must be promptly informed of any charges against him. Apart from references to ‘arrest’ and ‘charges against him’, this provision applies to all forms of detention, criminal or otherwise.

iii. PRELIMINARY REVIEW OF DETENTION (HABEAS CORPUS)

In Article 43 of the Geneva Convention IV, the review is explained only to the extent of the powers of a reviewing body, such as an appropriate court or an administrative body appointed by the Detaining Power, which according to commentary, must be independent (self) and impartial (unbiased), to do a preliminary review. Commentary Article 43 also explains that a review must be done at the earliest or as soon as possible. In contrast to the IHL, the procedural rules of detention under IHRL, which deal with review and require that every person who is detained be given the right of access areas corpus described in detail as follows:

“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.”

It explained that every person deprived of his liberty by arrest or detention has the right to take proceedings before a court so that the court can decide without delay on the lawfulness of his detention and order his release if the detention is illegal.

This review aims to re-examine the initial determination that internment is necessary given changing circumstances, thus helping to enforce the requirement that no person is exiled for a more extended period than the security of the Detaining Power requires. In the provisions of IHL in Article 43 of the IV Geneva Convention, periodic reviews are given a stipulation of time, namely, at least twice a year. Article 78 also provides terms of time but flexibility; namely, it is done every six months.

Jurisprudence has confirmed that the IHRL also requires periodic reviews at reasonable intervals in certain circumstances, for example, where the original grounds for detention may no longer apply. However, IHRL does not provide a specific timeframe as in IHL provisions for IAC situations. Human Rights Court, for example, states that any decision to keep someone in custody must be open to periodic review so that the reasons justifying detention can be assessed. In any case, detention may not continue beyond the period the State can provide an appropriate justification.

iv. TERMINATION OF DETENTION

IHL provisions in international armed conflict make it clear with cessation of detention that civilian internees must be released after the reasons justifying their detention cease and, if not before, at the cessation of hostilities. The same

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117 UN Human Rights Committee (HRC), General Comment No. 35, at 12.
118 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts. 132(1) and 133(1).
obligation to disengage should also apply in non-international conflicts. The Human Rights Court argues that detention should not continue beyond the period in which the State Party can provide appropriate justification to avoid arbitrary behavior. This is also related to proportionality. Thus, in making detention, it is essential to provide the duration. In the armed conflict between the Ethiopian government and the TPLF, detentions were carried out even after the duration of detention violated this provision.

V. CONCLUSION

The internment regulation in IHL are divided into two categories, namely the Internment under IAC and under NIAC. In the IAC situation, the internment of POWs rules explain the status of internment and the conditions for POWs’ release. The internment of civilians rules in the IAC situation are also explained in detail, beginning with the standard of detention, prisoners’ right to be informed of the reasons for their detention, initial and periodic reviews of their release. In the NIAC, internment is mentioned only in Common Article 3 of the 1949 Geneva Conventions, Article 4 (1) and Article 5 of Additional Protocol II. However, these the two rules do not include any justifications or procedural safeguards for NIAC internees. Yet, these conditions will follow the lack of habeas corpus right protection, since there are countries that regulate its domestic internment based on its domestic law.

However, it is vital to end the unnecessary arrest conducted by the government, including the TPLF, with the help of the United Nations, African Union and all party states of the Convention advocating for the cessation of arrests that goes beyond the six-month emergency period in Ethiopia.

The legal vacuum of internment in the NIAC creates a real risk that both state and non-state actors will abuse legal loopholes. This is clearly evident in the case that occurred in Ethiopia. As a result, there were violations such as discrimination, violations of the protection of the civilian population, violations of the right to habeas corpus, and more. Therefore, it is necessary to provide developing a new concept related to internment at NIAC, since there is absence on the regulation of internment. For this purpose, the regulation of IHL in Geneva Convention IV and IAC includes also IHRL needs to use as reference to regulates the procedure of internment.

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120 UN Human Rights Committee (HRC), General Comment No. 35, at 15.
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