

Andrea Harrison
Yale Law School
2016



**Detention, Internment and Deprivation of Liberty
in Armed Conflict**

ICRC Activities in Detention



- Visit PoWs and civilian detainees and internees
- Monitor conditions and determine applicable standards
- Operate Central Tracing Agency and maintain family contacts

Right to detain in armed conflict

Question: Why should there be a right to detain in armed conflict?

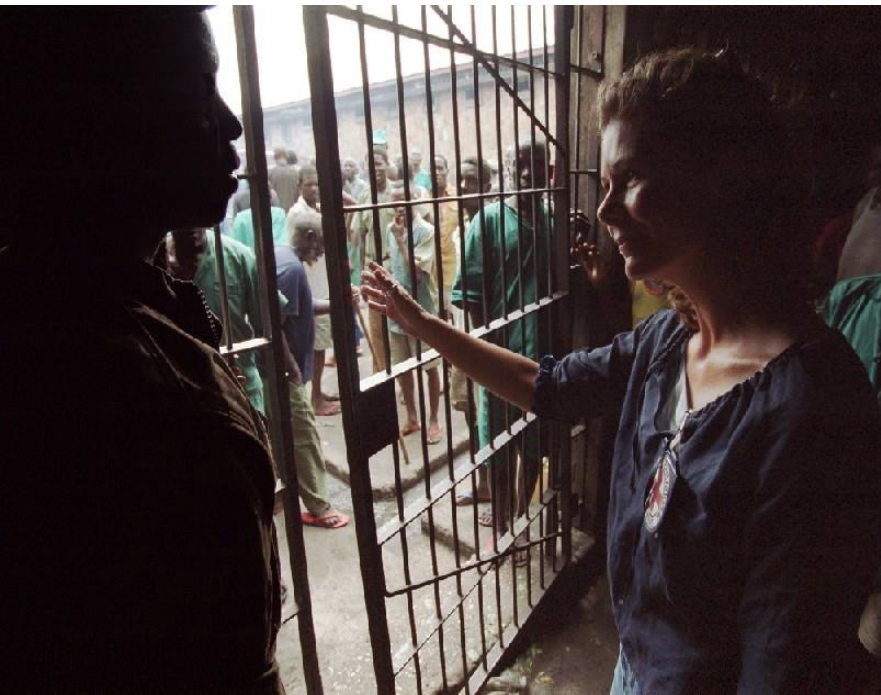
Security detention

Criminal detention

Combatants

Civilians

Fighters





ICRC

WHO CAN BE DETAINED IN AN IAC?

COMBATANTS/POWS



NON COMBATANTS/ RETAINED PERSONNEL



GC I, art. 28

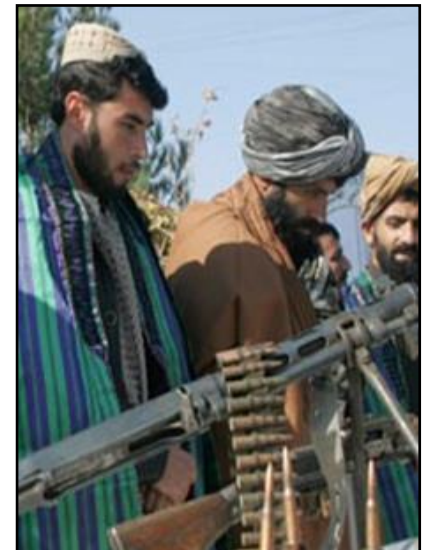
GC III, art. 4
AP I, art. 43(2)

CIVILIANS/ CIVILIAN INTERNEES



GC IV

UNPRIVILEGED BELLIGERENTS/ CIVILIANS DIRECTLY PARTICIPATING IN HOSTILITIES



US Policy/ ICRC
Guidance

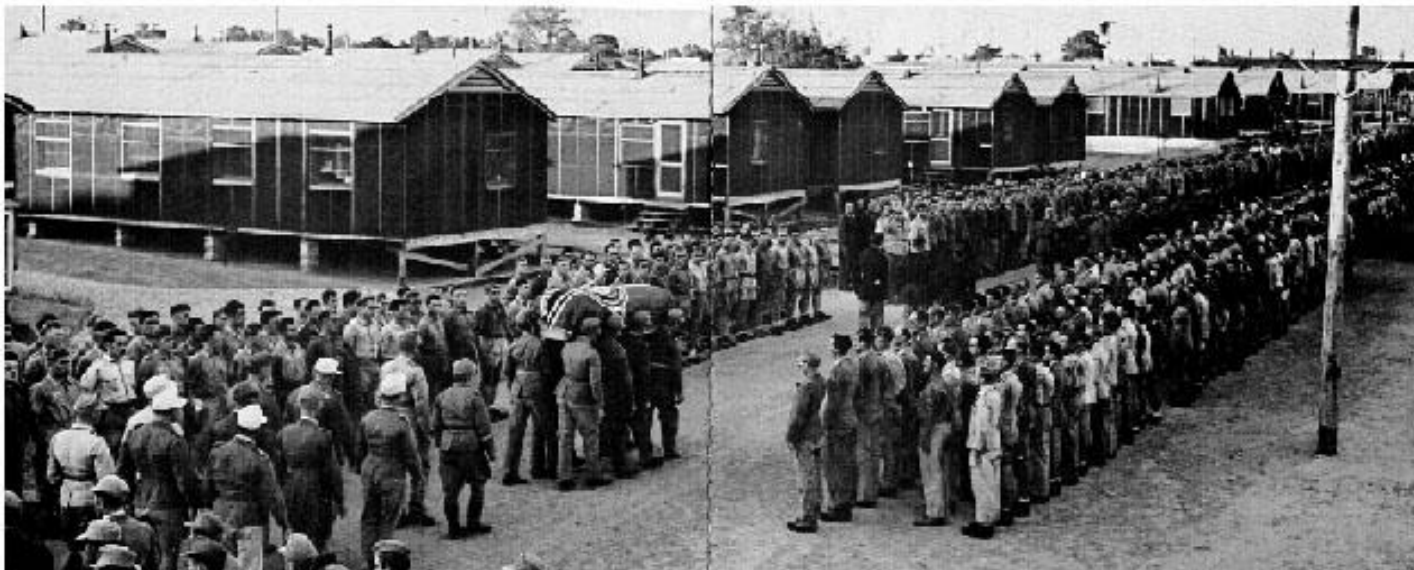
International armed conflict - POWs

Purpose: Prevent combatants from taking part in hostilities

Consequence: No punishment for participation in hostilities

- **Release & repatriation**

- ▶ Article 5 tribunals
- ▶ Special agreements for Wounded & Sick
- ▶ Indefinite detention?
 - ▶ “Without delay after the cessation of active hostilities”
- ▶ No reciprocity



International armed conflict - POWs

Treatment

- **Upon capture**
 - ▶ Evacuation from combat zone
 - ▶ Search
- **During internment**
 - ▶ Place of internment/communal living
 - ▶ Humane treatment
 - ▶ Quarters, food, medical...
 - ▶ Interrogation rights
 - ▶ Medical and religious personnel
 - ▶ Correspondence with family
 - ▶ ICRC visits



International armed conflict - Civilians

Who is a protected civilian?

- Protected persons on the own territory of a party
- Protected persons in occupied territory

Rule: *Unlike combatants, civilians may not be automatically deprived of liberty*



When can protected persons be interned?

- ▶ “absolutely necessary” for security of the State
- ▶ necessitated by “imperative reasons of security”

International armed conflict - Civilians



Procedural safeguards

- **When should they be released?**
 - ▶ “As soon as the reasons which necessitated his internment no longer exist”
 - ▶ After the conflict, “as soon as possible”
 - ▶ But pending criminal procedures

- **Review mechanism**

- ▶ Right of appeal
- ▶ Appeal should be decided with the least delay possible
- ▶ Subject to periodical review, if possible every 6 months
- ▶ By a competent body

Non-international armed conflict

Rule: No protected status in NIAC – neither POW or civilian

Problem: Under domestic law, prohibition to participate in hostilities



- Internment implicitly authorized under IHL
- But silent on the reasons for detention

Only in relation to treatment:

- ▶ Humane treatment
 - ▶ Food, water, hygiene, health
 - ▶ Place of internment away from battlefield
 - ▶ Allowed to practice religion
 - ▶ Women held in separate quarters
 - ▶ Correspondence with family
- Transfers
 - ▶ Principle of non-refoulement???

Non-international armed conflict

Criminal prosecutions for acts related to the armed conflict (Art. 6 AP II and Art. 75 AP I)

- Conviction pronounced by an impartial and independent court
 - ▶ Must be informed without delay of the particulars of the alleged offence
 - ▶ Non-retroactivity of the law
 - ▶ Presumed innocent until proven guilty
 - ▶ Right to be present at trial
 - ▶ Right not to be compelled to testify against oneself or to confess guilty
- No death penalty if under 18 years at the time of the offence
- No death penalty for pregnant women or mothers of young children
- Encouragement of amnesties at the end of the conflict, except for war crimes





ICRC

Grounds and Procedures in NIAC

12 Procedural Safeguards

Jelena Pejic- 2005



**ICRC
Commentary :**
'imperative reasons of security' as the minimum legal standard



ICRC: "paucity of IHL", human rights provisions may or may not apply.



AP II:
5.1: interned or detained... 5.2 liberty has been restricted in any way...

1- Right to information about the reasons for internment/detention

2- Right to be registered and held in a recognized place

3- Foreign nationals in internment/administrative detention

4- Right to challenge, with least possible delay, the lawfulness of detention

5- Review of the lawfulness must be carried out by an independent impartial body

6- Legal Assistance

7- Right to periodical review of the lawfulness of continued detention

8- Legal representative should be able to attend proceedings in person

9- Contact with-correspond and be visited by-members of family

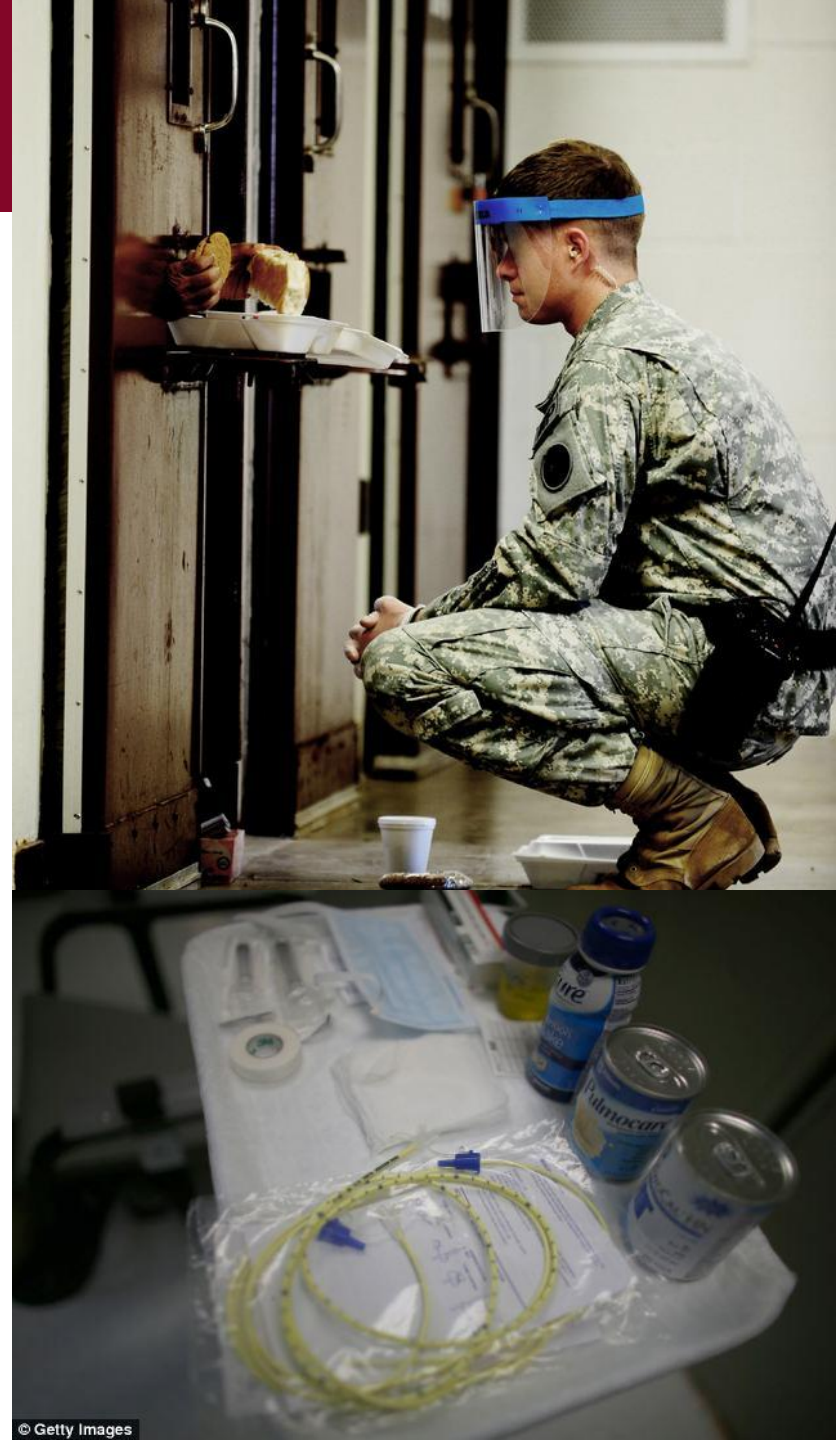
10- Right to medical care and attention required by his or her detention

11- Allowed to make submissions relating to his or her treatment and conditions

12- ICRC access to persons interned/administratively detained

Case Study: Guantanamo

- What type of armed conflict?
- Status of detainees?
- Ill-treatment issues?
- Criminal prosecutions?
- Release or transfer?
- Right to challenge detention?



Periodic Review Boards

- Executive Order 13567 established periodic review boards in 2011
 - Review Board composed of a representative of each of the following: Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff;
 - Standard of “significant threat”
 - Detainees entitled to military representative and may hire private counsel at no expense to government;
 - File reviews will be every 6 months and full reviews every 3 years;



Periodic Reviews
were carried out in
Afghanistan and Iraq
as well





ICRC

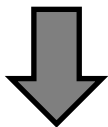
Future of U.S. NIAC detention?



Developing the law on detention

ICRC Project on Strengthening Legal Protection for Victims of Armed Conflict

Mandate given during
the 2011 International
Conference



Detention

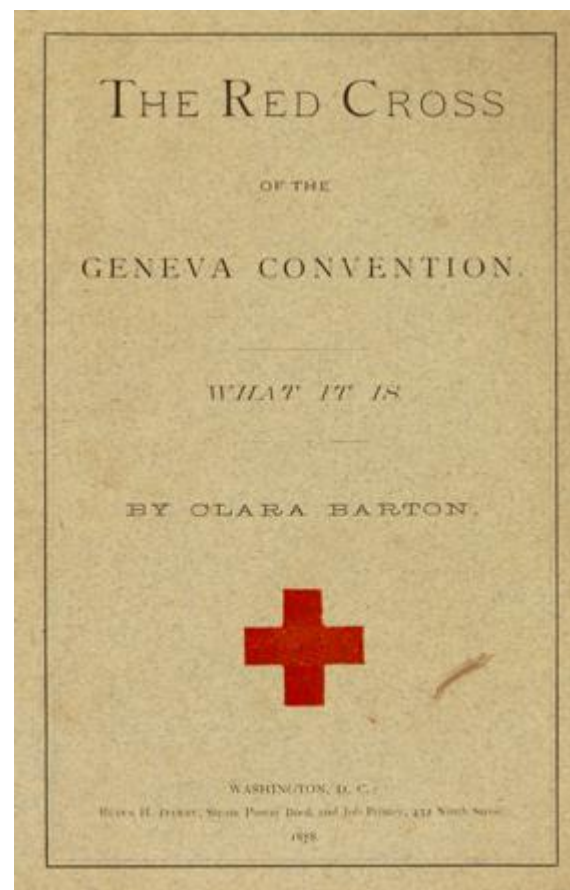
Conditions of detention

Specific protection

Procedural safeguards

ICRC access to persons
deprived of liberty

Transfers





Questions?

THANK YOU !!



ICRC