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
WHO CAN BE DETAINED IN AN IAC?

COMBATANTS/POWS

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

CIVILIANS/CIVILIAN INTERNEES

- NON COMBATANTS/RETAINED PERSONNEL
- GC I, art. 28
- 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”
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
Grounds and Procedures in NIAC

12 Procedural Safeguards
Jelena Pejic - 2005

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

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...

ICRC Commentary:
‘imperative reasons of security’ as the minimum legal standard.
Case Study: Guantánamo

- 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.
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 !!