Comment: Detention in Non-International Armed Conflict by States – Just a Matter of Perspective on Areas of Limited Statehood?

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Manuel Brunner's well-elaborated contribution illustrates how detention in NIACs by States is permeating practice as much as legal discourse. It also demonstrates how much of a pressing issue it has become for lawyers approaching the issue from various angles of international and domestic law. In fact, detention is one of IHL's predominant aspects that receives legal attention and adjudication nowadays. From an IHL perspective, however, the approach usually taken in these fora raises a number of concerns.

In this regard, there are three themes of *Manuel Brunner's* contribution that I would particularly like to comment on: the quest for legal authorisation (1.), the doctrinal pitfalls of addressing detention in NIACs through the lens of human rights treaties (2.), and finally, the implications of addressing the issue from a human rights perspective for areas of limited statehood on the meta-level (3.). It will be shown that the conceptual understanding of areas of limited statehood lays open the underlying structures of the doctrinal questions surrounding a legal basis for States to detain in NIACs.

A. Rule of Law and the Need for Legal Authorisation

Manuel Brunner's contribution addresses the question of whether there is a legal basis for detention in IHL itself. Notably, it is not asked whether detention is *permitted* in IHL, but whether IHL provides a legal *authorisation* for it. Framing the research question in this particular way is based on a premise which warrants some consideration.

In fact, requiring a legal authorisation does not correspond to the traditional concept of international law. Despite the doctrinal controversy surrounding the *Lotus* principle, discussed already in other contributions of

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this volume,[1] international law was not built on the notion that sovereign exercise of power would *ipso facto* require a legal basis to authorise it. Quite the contrary, international law, as a basic principle, was rather indifferent to State action *vis-à-vis* individual persons, as this was the inherent domain of the State rooted in its international sovereignty.[2] Hence, the traditional question an international lawyer asks is whether something is not prohibited, and thus permitted.[3]

The question of legal authorisation is rather known from the domestic legal context. In German administrative law, for instance, the legal basis of authorisation to act is called *Ermächtigungsgrundlage* – it provides the basis for empowering the State to act face to face with its citizens, particularly to intervene in their individual rights. These individual rights create the need for such authorisation by law, the principle of statutory reservation.[4] IHL, in contrast, is usually thought of in restrictive terms.[5]

Why *Manual Brunner* nonetheless chose to apply this mode of thinking to IHL with a view to detention becomes apparent further into his contribution; there, he offers the interim conclusion that, 'under human rights law, a legal basis for detention is required'. This is a crucial statement as it reveals that the question of the legality of detaining in NIACs is approached from a human rights perspective. The individual right to liberty of the person detained makes it necessary that an authorisation in law exists as a basis.[6]

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1 See Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law' in this volume 59 (hereafter Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?'); Pia Hesse, 'Comment: neither Sunken Vessel nor Blooming Flower! The Lotus Principle and International Humanitarian Law' in this volume 80 (hereafter Hesse, 'Comment').

2 Cf Samantha Besson, 'Sovereignty' in MPEPIL (online edn, OUP April 2011) para 70.

3 Cf Dissenting Opinion of Judge Van Den Wyngaert in Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) (Judgment) [2002] ICJ Rep 3, para 51.

4 See Peter Lerche, 'Vorbehalt des Gesetzes und Wesentlichkeitstheorie', in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte*, vol. III (C.F. Müller 2009) 301.

5 Hans-Peter Gasser, 'International Humanitarian Law' in MPEPIL (online edn, OUP December 2015) paras 1, 3.

6 Oliver Dörr, 'Arbitrary Detention' in MPEPIL (online edn, OUP March 2007) paras 12 et seq (hereafter Dörr, 'Arbitrary Detention').

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It is, of course, in no way wrong to apply this requirement to detention in NIACs. However, one needs to be conscious of the fact that it is a deliberate move to search for authorisation, not simply permission, in international law.[7] At least, on the international plain there is no abstract rule of law that requires an authorising legal basis for State action. This requirement surfaces when human rights are concerned. With this in mind, some of the doctrinal questions appear in a different light.

B. Concerns Regarding the Human Rights Paradigm

The question of whether IHL provides an express authorisation for detention in NIACs is *a priori* alien to IHL as a legal system. Unsurprisingly, neither Justice *Leggatt* nor the judges at the ECtHR or any other court could find such a provision in international humanitarian treaty or customary law. Of course they were not able to, as IHL does not provide an express authorisation to kill non-civilians in NIAC either.[8] Yet, one can hardly claim that killing a non-civilian in a NIAC would be illegal under international law due to a lack of express authorisation.[9]

The simple reason for this, as *Manuel Brunner* delineates in the beginning, is that the original lawmakers of IHL considered NIACs a (largely) internal affair of the State. At that time, it would have been completely beside the point to consider that international law could bar a sovereign State from killing or detaining members of armed non-State groups in a NIAC. There was no need to provide for positive authorisation in international law. As *Manuel Brunner* points out, IHL addresses only some aspects of *how* detention in NIACs may be conducted. In fact, addressing the 'if' of such acts – even if this meant authorising them – would have been more intrusive to States' sovereignty than leaving it unaddressed. Excluding it upheld the original freedom of States. Hence, the contemporary quest for express authorisation by IHL in the context of NIACs runs fully counter to this legal regime's original conception and *raison d'être*.

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7 The doctrinal twists of this difference are addressed with a view to the infamous Lotus principle by Schöberl and Mühren, 'Sunken Vessel or Blooming Flower?' (n 1) as well as by Hesse, 'Comment' (n 1).

8 See also Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict' (2015) 91 ILS 60, 88-89.

9 Cf *Federal Prosecutor General (Germany)*, *Targeted Killing in Pakistan Case*, Case No 3 BJs 7/12-4, 157 ILR 722, 748.

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There is also a methodological concern in this regard. It pertains, on a first level, to the relationship between IHL and IHRL. The traditional bold *lex specialis* displacement of IHRL as the general regime by IHL as the special one is obsolete. The debate seems to have settled on a situation-specific case-by-case analysis: this means that it needs to be inquired in each instance whether there is a particular *lex specialis* of IHL that can partially displace human rights law or inform its interpretation.[10] Taken as such, these case-specific approaches can provide reasonable solutions.

However, the problem starts when the demanding requirements of contemporary IHRL are applied to the rather antique treaty rules of IHL without the necessary interpretive sensitivity. If the circumstances have changed from a *Lotus*-inspired world to a rule-of-law-based one, this change must be reflected in how IHL provisions are interpreted. Yet, this is often not sufficiently done. IHL is – foreseeably without result – frequently scanned in search for sufficiently clear, predictable and transparent rules. In effect, the lack of regulation by IHL in NIACs is used to incorporate the much more restrictive IHRL regime although this restraint of IHL was originally intended to guarantee States' freedom.

C. Areas of Limited Statehood as a Challenge to the Dichotomy of International Armed Conflicts and Non-International Armed Conflicts

An explanation for this push for international regulation of NIACs via IHRL can be found in the pluralistic setting of areas of limited statehood. It is, however, in this context that the benefits of applying the requirements posed by IHRL indiscriminately to NIACs become doubtful.

When a consolidated State is involved in a NIAC on a foreign State's territory, IHL's essential dichotomy of international and non-international armed conflicts dissolves. This dichotomy, however, had been the rationale behind the structurally different regimes of IHL applying to IACs and NIACs. IACs required comprehensive international legal rules because two sovereign States clashed; thus, authorisation by international law was needed to infringe upon another State's sovereignty. This was a completely

10 For an overview of the three main concepts, i.e. total displacement, partial displacement as the norm conflict resolution and an interpretive solution, see Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in Jens D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (OUP 2016) 78, 103-14.

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different case in an internal conflict: there, IHL only needed to prohibit certain acts out of humanitarian considerations. The law of NIAC thus gave States much more liberty in conducting warfare because other States were not directly affected. An extraterritorial NIAC involves an inter-State element which potentially calls for more international regulation, arguably also authorisation.

Yet, is the approach taken convincing with a view to detention? The mechanical application of the human rights regime to extraterritorial NIACs in areas of limited statehood leads, to some extent, to absurd results. I would also question that the formal insistence on an expressly authorising black-letter rule benefits those concerned.

My first concern regards derogations. Derogations have been proposed as a solution to the conflict of the various legal regimes; in particular, the UK is considering derogating from the ECHR.[11] However, a closer scrutiny of the requirements of derogation clauses in human rights treaties reveals that they do not fit the situation. Is it a threat to the life of the host State's nation, for instance Afghanistan's, which would allow the United Kingdom to derogate from its own human rights obligations as Justice *Leggatt* has suggested in *Serdar Mohammed,*[12] or is it only a threat to that of the sending State's, in that case the United Kingdom's, which would allow it not to comply with its human rights obligations when fighting a war on Afghan soil as *Lord Bingham* proposed in *Al-Jedda*[13]? Case law and scholarship diverge on these questions, which does not come as a surprise as every answer appears arbitrary.

Another concern relates to detention itself. It seems rather odd that British troops could act on the basis of Afghan law to comply with their obligations under the ECHR. Although such relationships are not unknown in the realm of legal and administrative cooperation, particularly in law enforcement, they must fulfill a specific purpose, namely to 'allow the persons concerned to foresee the consequences of their actions'[14]. Would any of the potential sources that *Manuel Brunner* discusses in this regard

11 See the website of the UK Joint Committee on Human Rights regarding the Government's proposed derogation from the ECHR inquiry, <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17> accessed 30 October 2017.

12 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) para 156.

13 *Al-Jedda v Secretary of State for Defence* [2008] 1 AC 332 para 38.

14 Dörr, 'Arbitrary Detention' (n 6) para 12.

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substantively improve the protection of persons engaged in areas of limited statehood?

In the end, detention in NIAC is a paradigm example in which the underlying values and structures of the law of IAC, the law of NIAC and IHRL clash. Reconciling them is a worthwhile effort, but will not be achievable in all instances. Understanding the guiding values and structures involved can, at least, allow to make more prudent doctrinal choices.

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