

Fair trial guarantees in international humanitarian law

International humanitarian law enshrines a number of fundamental judicial guarantees, violation of which may amount to a war crime under national and international law, writes Emily Camins.*

Introduction

International humanitarian law (IHL) is the body of rules that in wartime protects people who are not, or are no longer, participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. In recognition of the vulnerability of people detained by an opposing power during warfare, IHL has for over a century required that prisoners of war be treated humanely.¹ Legal protection of people detained in the course of war has steadily expanded in scope and detail, such that all persons in the power of a party to the conflict are now entitled to minimum standards of treatment and fundamental judicial guarantees.²

Changes in recent years in the nature of warfare and the classification of belligerents by parties to a conflict have resulted in much debate as to the rights and obligations of individuals and states involved in conflict. This article aims to clarify some of the issues that have been the subject of discussion. It first provides an overview of IHL and when it applies. It then proceeds to examine the obligation of detaining powers to provide fundamental judicial guarantees to people arrested or detained in the course of armed conflict.

What is international humanitarian law and when does it apply?

The rules of IHL are contained primarily in the four Geneva Conventions of 12 August 1949³ and their two Additional Protocols of 8 June 1977.⁴ International humanitarian law applies in situations of armed conflict, imposing obligations and conferring rights equally on all sides regardless of who started the fighting. Although the instruments of IHL do not expressly define 'armed conflict', the International Criminal Tribunal for the Former Yugoslavia has held that an armed conflict exists 'whenever there is a resort to armed force between states, or protracted armed violence between governmental authorities or organised armed groups or between such groups within a state.'⁵

Reflecting the traditional paradigm of war as conflict between nations, IHL draws a distinction between international armed conflict (hostilities between states) and non-international armed conflict (for example,



civil war), setting out different rules which apply in each context. Notwithstanding this distinction, provided a person is detained in the context of an armed conflict – be it international or non-international – he or she will be entitled, to certain fundamental judicial guarantees at a minimum, under IHL.⁶

Minimum fair trial guarantees in international humanitarian law

In 1948, the international community adopted the Universal Declaration of Human Rights, recognising the right of all people to a fair and public hearing by an independent and impartial tribunal.⁷ The following year, the Geneva Conventions were adopted to protect the rights of people in the context of armed conflict. All states have now ratified or acceded to the Geneva Conventions,⁸ and are therefore bound by their terms.

(a) Common Article 3

Article 3 common to the Geneva Conventions (often known as Common Article 3) specifies a number of minimum standards which must be met in the case of armed conflict 'not of an international character' occurring on the territory of a state party to the Geneva Conventions. Case law, however, has interpreted Common Article 3 as containing minimum standards of customary international law which protect people in armed conflict, whether classified as international or non-international.⁹

Broadly, the provision requires that persons who are taking no active part in hostilities, including those who have been removed from the fighting by detention, be treated humanely.¹⁰ More specifically, Common Article 3(1)(d) prohibits:

[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised people.

The International Committee of the Red Cross in its 2005 study on customary international humanitarian law¹¹ reviewed the international practice and jurisprudence in relation to Common Article 3. Following

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the review, the authors of the study found that ‘regularly constituted court’ in Common Article 3(1)(d) means ‘established and organised in accordance with the laws and procedures already in force in a country.’¹² As discussed further below, this standard was accepted by the United States’ Supreme Court in *Hamdan v Rumsfeld, Secretary of Defense*.¹³

In the *Hamdan* case, the court considered whether the petitioner, Salim Ahmed Hamdan, was entitled to the protection of the Geneva Conventions. Hamdan, a Yemeni national, was captured in Afghanistan in 2001 by militia forces and turned over to the US military. In 2002 he was transported to an American prison in Guantanamo Bay, Cuba. Hamdan filed a petition challenging the authority of the military commission convened by the president of the United States to try him.

The court, upholding Hamdan’s petition, found that Common Article 3 applied ‘even if the relevant conflict (that is, the conflict in Afghanistan) is not one between signatories’.¹⁴ The court refrained from characterising the nature of the conflict in Afghanistan as either international or non-international, instead taking the view that the standards in Common Article 3 formed a minimum standard of protection applicable to those detained in the conflict.¹⁵

The court then examined whether the military commission process met the minimum standards set out in Common Article 3. After reviewing the jurisprudence and commentary on the matter, the court found that the military commission process fell foul of the Common Article 3(1)(d) requirement of a ‘regularly constituted court’, as no practical need to deviate from the regular military justice system and establish a special tribunal had been demonstrated.¹⁶ The court went on to find that the military commission process also failed to afford ‘all the judicial guarantees which are recognised as indispensable by civilised people’ because, as well as deviating from the procedures governing courts-martial for no ‘evident practical need’, it also dispensed with principles articulated in Article 75 of Protocol I.¹⁷

Having held that the military commission violated basic principles enshrined in Common Article 3, the court did not consider it necessary to decide whether the more extensive protections of the Geneva Conventions, including those afforded to a prisoner of war, applied.

(b) Article 75 of Protocol I

In interpreting the Common Article 3 phrase ‘all the judicial guarantees which are recognised as indispensable by civilised people’, the court drew on Article 75 of Protocol I. Article 75 not only extends the fundamental fair trial guarantees to international armed conflicts, it also elaborates on and clarifies Common Article 3, including in respect of the right to a fair trial.¹⁸

Article 75 prescribes a number of fundamental rights to which a person is entitled if he or she is:¹⁹

- ◆ in the power of a party to an armed conflict;
- ◆ affected by (meaning touched by or concerned with)²⁰ an international armed conflict or occupation; and
- ◆ does not benefit from more favourable treatment under the Geneva Conventions or Protocol I.



Many argue, and it appears from the decision in the *Hamdan* case, that the judicial guarantees contained in Article 75 reflect customary international law applicable in not only international, but also internal, armed conflicts.²¹

In addition to prohibiting absolutely certain acts against the person, such as torture and outrages upon personal dignity,²² Article 75 specifies several fundamental fair trial rights to which a detained person is entitled. Reflecting Common Article 3, Article 75(4) provides that no sentence may be passed nor penalty executed ‘except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure’. Article 75(4) enumerates several such principles.

The first principle ‘[provides] for an accused to be informed without delay of the particulars of the offence alleged against him or her’.²³ This principle is reflected in international treaties (including Article 14(3)(a) of the International Covenant on Civil and Political Rights²⁴), and in national legislation and military manuals.²⁵ While neither Protocol I nor the commentary to it expands on the meaning of ‘without delay’, the Human Rights Committee has commented in relation to Article 14(3)(a) of the ICCPR that the relevant information must be:

given ... as soon as the charge is first made by a competent authority. ... [T]his right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such.²⁶

In addition, while not specified in Article 75(4), it is widely considered that the right to trial without undue delay, provided for in the Geneva Conventions²⁷ and numerous human rights conventions,²⁸ is another essential principle of judicial procedure.²⁹ This principle applies from the time of the charge to the final trial on the merits, including appeal.³⁰

How long a delay is too long? Jurisprudence suggests it is necessary to assess the legality of a delay on a case-by-case basis, having regard to such factors as the complexities of the case, the behaviour of the



Detainees in orange jumpsuits sit in a holding area at Camp X-Ray at Naval Base Guantanamo Bay, Cuba. Photo: US Navy file photo / Newspix

accused, and the diligence of the competent authorities in their conduct of the proceedings.³¹ Cases decided on the basis of Articles 9 and 14 of the ICCPR, which enshrine the right to liberty and the right to a fair trial without delay respectively, have found that periods of pre-trial detention of 22 months and 23 months breached the ICCPR.³²

Other standards set out in Article 75(4) of Protocol I include the principles that an accused must be provided with all necessary rights and means of defence and may only be convicted on the basis of individual criminal responsibility, the principle of legality (that is, that a person must not be convicted of a crime on account of an act which was not criminal at the time it was committed), the presumption of innocence, the right to be present at one's trial, and the right to cross-examine witnesses.³³

Almost all the judicial guarantees in Article 75(4) of Protocol I are reflected in corresponding provisions of international human rights conventions, such as Article 14 of the ICCPR. While human rights conventions apply alongside rules of IHL in times of armed conflict,³⁴ some of their provisions, including Article 14 of the ICCPR, may be derogated from in time of proclaimed public emergency.³⁵ Conversely, the guarantees enshrined in Common Article 3 and elucidated in Article 75 reflect minimum standards applicable in armed conflict which do not allow for any exceptions.³⁶

Conclusion

The right to a fair trial without undue delay is recognised as a minimum standard of humane treatment that applies during both wartime and peacetime. The judicial guarantees protected by Common Article 3 of the Geneva Conventions and clarified in Article 75 of Protocol I apply to persons detained in the course of armed conflict without distinction as to religion, race or political leaning. The judicial guarantees enshrine the right of a detainee to basic procedural safeguards such as the

presumption of innocence, the right to be present at one's own trial and be privy to the evidence, and the right to be informed of the charges against one without undue delay. Moreover, customary international law requires 'swift justice' in the determination of a case. Failure to afford fundamental judicial guarantees might amount to a war crime under national or international laws.³⁷

Except insofar as IHL proscribes prosecutions for acts which were not criminal at the time they were committed,³⁸ it does not prevent war detainees from being tried under international or national criminal laws. It does not shield those detained from justice; rather, it seeks to ensure that the justice process meets fundamental standards of fairness.

Endnotes

1. Emily Camins is admitted to practise as a barrister and solicitor of the Supreme Court of Western Australia. She is currently undertaking a Master's degree in Public and International Law at the University of Melbourne. The author acknowledges the input of Pia Riley of the Australian Red Cross in the preparation of this paper. See: the Hague Convention with Respect to the Laws and Customs of War on Land (1899) 32 Stat. 1803, Annex Article 4. For an earlier national example of laws protecting prisoners of war, see Section III of the Instructions for the Government of Armies of the United States in the Field (also known as the Lieber Code), 24 April 1863.
2. See: *Prosecutor v Tadi* Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (ICTY App. Chamber, 2 Oct 1995) ('Prosecutor v Tadi'), ¶102.
3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31 ('First Geneva Convention'); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea (1949) 75 UNTS 85 ('Second Geneva Convention'); Geneva Convention Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135 ('Third Geneva Convention'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287 ('Fourth Geneva Convention').
4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) 1125 UNTS 3 ('Protocol I') and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) 1125 UNTS 609 ('Protocol II').
5. *Prosecutor v Tadi*, ¶70.
6. See: *Prosecutor v Tadi*, ¶102; Geneva Conventions, Common Article 3.
7. Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Article 11.
8. See: www.icrc.org/ihl. Australia signed the four Geneva Conventions on 4 January 1950, ratified them on 14 October 1958, and implemented them with the *Geneva Conventions Act 1957* (Cth).
9. See: *Prosecutor v Tadi*, ¶102 (stating that the character of the conflict is irrelevant in deciding whether Common Article 3 applies); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgment of 27 June 1986), 114.

10. Geneva Conventions, Common Article 3(1).
11. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Volume 1) (2005).
12. Henckaerts and Doswald-Beck above n 11, 355.
13. *Hamdan v Rumsfeld, Secretary of Defense* 548 US (2006) ('Hamdan case').
14. *Hamdan case*, 66.
15. *Hamdan case*, 65-67.
16. *Hamdan case*, 70.
17. The specific principles to which the court referred are that an accused must, absent disruptive conduct or consent, be present for his or her trial and must be privy to the evidence against him or her: per Stevens J at 71, delivering the opinion of the court.
18. See: International Committee of the Red Cross ('ICRC') Commentary on Protocol I, ¶3084; Derek Jinks 'The Declining Significance of POW Status' (2004) 45 *Harvard International Law Journal* 367, 429.
19. Protocol I, Article 75(1).
20. See ICRC Commentary to Protocol I, ¶3011.
21. See *Hamdan case*, 70-71; Henckaerts and Doswald-Beck above n 11, rule 100.
22. Protocol I, Article 75(2)(a)(ii) and (b) respectively.
23. Protocol I, Article 75(4)(a).
24. International Covenant on Civil and Political Rights (1966) 999 UNTS 171 ('ICCPR').
25. For examples see Henckaerts and Doswald-Beck above n 11, rule 100.
26. Human Rights Committee, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, ¶8.
27. See: eg Third Geneva Convention, Article 103 and Fourth Geneva Convention, Article 71.
28. See: ICCPR, Articles 9(3) and 14(3)(c).
29. See: Henckaerts and Doswald-Beck above n 11, 364 and the state practice referred to therein.
30. Henckaerts and Doswald-Beck above n 11, 364.
31. See: *Giménez v Argentina*, Case 11.245, Report No. 12/96, Inter-Am. CHR, OEA/Ser.L/V/II.91 Doc. 7 at 33 (1 March 1996), ¶111.
32. *Sextus v Trinidad and Tobago* HRC Communication No. 818/1998 UN Doc CCPR/C/72/D/818/1998 (16 July 2001); *Brown v Jamaica* HRC Communication No 775/1997, UN Doc. CCPR/C/65/D/775/1997 (Mar 1999), ¶6.11.
33. Protocol I, Article 75(4).
34. See: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, ICJ Reports 2004 (9 July 2004), ¶106; Human Rights Committee General Comment No. 31 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/21/Rev.1/Add.13, ¶11.
35. See: ICCPR, Article 4. See further Human Rights Committee, General Comment No. 29 'States of Emergency (Article 4)' (2001) UN Doc. CCPR/C/21/Rev.1/Add.11.
36. See: ICRC Commentary to Protocol I, ¶3032.
37. See: Rome Statute of the International Criminal Court (1998) 2187 UNTS 90, Article 8(2)(a)(vi) and 8(2)(c)(iv). For an Australian example, see: Commonwealth Criminal Code (being the Schedule to the *Criminal Code Act 1995* (Cth)), s268.76.
38. See Protocol I, Article 75(4)(d).