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How to Patch a Gap? The Legal Regime of Internment in Armed Conflict in Eastern Ukraine:

Domestic Approach[*1]

Abstract. International Humanitarian Law (IHL) offers various instruments enabling parties involved in armed conflicts to maintain order in occupied territories, with one of the most significant being internment. While this practice is well-regulated and explicitly authorised in international armed conflicts (IAC), the authorisation of internment in non-international armed conflicts (NIAC) presents legal challenges.

The NIAC in Eastern Ukraine exemplifies how Ukraine attempted to address a gap in IHL regulations by turning to domestic law. However, the normative framework applicable to NIAC, which includes IHL, International Human Rights Law (IHRL), and domestic law, raises questions regarding their intersection. This article illustrates how the preventive detention implemented by Ukraine was designed to function as a distant 'relative' of traditional internment under IHL. It also examines how Ukrainian authorities sought to align their IHRL obligations with the context of the NIAC in Eastern Ukraine by amending national legislation.

The article concludes that domestic law serves as the main source for justifying internment in NIAC, given the scope of state jurisdiction. Neither IHL nor IHRL can be utilised to provide a legal ground to intern individuals in NIAC. Domestic law, being a ground for internment in NIAC, even under derogations, shall comply with the standards established by IHRL.

Keywords: internment, NIAC in Eastern Ukraine, IHL, IHRL, domestic law

Introduction

The outbreak of armed conflict in Ukraine in 2014 has prompted scholars to explore the boundaries of international law and conduct a substantial number of studies on a wide range of topics.[*2] However, some issues, like internment and detention, remain less studied. This gives space to examine some of the 'terrains'

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[2] Sergey Sayapin and Evhen Tsybulenko (eds), *The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (Springer 2018); Veronika Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015) 75 ZaöRV 27–50; Oleksandr Zadorozhnii, *Russian Doctrine of International Law after the Annexation of Crimea* (K.I.S 2017); Majid Nikouei and Masoud Zamani, 'The Secession of Crimea: Where Does International Law Stand?' (2016) NJIL 85(1) 37–64.

of armed conflict in Ukraine. This work will focus on the events from 2014 to 2022, during which debates on the legal qualification of armed conflict and applicable law were underway.[*3]

The Revolution of Dignity and the change of the Ukrainian political trajectory to pro-European is a 'U-turn' moment in the relationship between Ukraine and Russia. The occupation of Crimea indicates the start of the aggression and the onset of the armed conflict between Ukraine and the Russian Federation. This part is commonly referred to as an international armed conflict (IAC) between Ukraine and the Russian Federation. However, the armed conflict in Eastern Ukraine has a more sophisticated story from an international law point of view. It incorporates two armed conflicts. The armed conflict between Ukraine and non-governmental armed groups (NGAGs), namely the Luhansk People's Republic ('LPR') and the Donetsk People's Republic ('DPR'), is referred to as a non-international armed conflict (NIAC), and the armed conflict between Ukraine and the Russian Federation is an IAC. This article focuses on the events of NIAC between Ukraine and NGAGs ('LPR' and 'DPR'). It does not aim to evaluate the IAC between Ukraine and the Russian Federation in Crimea or Eastern Ukraine.

In light of the NIAC with the 'DPR' and the 'LPR', Ukraine enacted special emergency regimes to tackle the NIAC in Eastern Ukraine, such as the Anti-Terror Operation (ATO) and the Joint Forces Operation (JFO). In addition, Ukraine set up a few new legal instruments to assist the ATO and the JFO, among which was preventive detention. Preventive detention was introduced in 2014 and allowed public prosecutors to detain individuals for more than 72 hours in the area where the ATO, later the JFO, was conducted.[*4] Preventive detention is not an invention of Ukraine; this instrument generally originates in International Humanitarian Law (IHL), which can be titled internment, security detention, preventive detention, detention for security reasons, etc. Security detention or internment entails '[…] a deprivation of liberty ordered by the executive on the basis of a future security threat without criminal charge.'[*5] In IHL, these terms are interchangeable and utilise identical meanings, yet the national law and International Human Rights Law (IHRL) meanings can differ.

The article follows the doctrinal legal approach, while including international court practice and domestic legislature. It is based on fundamental legal instruments in the field, such as the Geneva Conventions and Additional Protocols. Furthermore, it incorporates the core works of Hill-Cawthorne Lawrence, Kubo Mačák, Jelena Pejic, Jelena Plamenac, and others.

This paper has the following structure: first, it presents one of the ways to approach the qualification of armed conflict in Eastern Ukraine; second, it delves into the authorisation and regulation of internment under IHL; third, it reflects on the compatibility of security detention with IHRL obligations; and lastly, it elaborates on the notion and regulation of preventive detention introduced by Ukraine. Therefore, the article exemplifies how Ukraine utilised national legislation to govern internment in the NIAC in Eastern Ukraine, considering the IHL's ambiguity on the matter and the need to comply with IHRL obligations.

1. The matter of the qualification of armed conflict in Ukraine before 2022

IHL recognises two types of armed conflict: IAC and NIAC. The case of armed conflict in Ukraine is complex, and a distinction between a few simultaneous armed conflicts is required. I submit that from 2014 until 2022, there were three main armed conflicts: (i) the IAC between Ukraine and the Russian Federation in Crimea; (ii) the IAC between Ukraine and the Russian Federation in Eastern Ukraine; and (iii) the NIAC between Ukraine and the NGAGs 'LPR' and 'DPR'.

3 See: ICRC, 'News Release 14/125, International Committee of the Red Cross, Ukraine: ICRC calls in all sides to respect international humanitarian law' (23 July 2014) <https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm> accessed on 28 November 2024; Robert Heinsch, 'Conflict Classification in Ukraine: The Return of the "Proxy War"?' (2015) 91 ILS 324; ICC, 'Report on Preliminary Examination Activities' (2016) <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf> accessed on 15 December 2024 (hereinafter – Report on Preliminary Examination Activities).

4 Law on Preventive Detention of Persons in the Area of the Anti-Terrorist Operation, 2014 (hereinafter – Law on Preventive Detention, 2014).

5 Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016) 1; Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87 IRRC 376.

Considering the complexity of armed conflict in Ukraine, I proceed with the concept of 'mixed' armed conflict as a theoretical framework to address the research objective of this article. This approach assists in dealing with complex conflicts through different lenses involving multiple actors. However, it does not entail the existence of the third type of armed conflict qualification in IHL. The primary aim of the mixed conflict approach is to distinguish the applicability of the law of international armed conflict (LoIAC) and the law of non-international armed conflict (LoNIAC) to the different parties involved in armed conflict.

For instance, the International Court of Justice (ICJ) treated the armed conflict in Nicaragua through the prism of the mixed approach.[*6] In a similar vein, the International Criminal Tribunal for the former Yugoslavia (ICTY), in the Tadic case, acknowledged that '[…] the parties themselves considered [the armed conflicts] at different times and places as either internal or international armed conflicts or as a mixed internal-international conflict.'[*7]

Therefore, I argue that, due to its factual complexity, the armed conflict in Eastern Ukraine (2014–2022) had elements of both IAC and NIAC. The LoIAC applied to the hostilities between Ukraine and Russia, and the LoNIAC applied to hostilities between Ukraine and non-governmental armed groups. As the International Criminal Court (ICC) framed it, 'an international armed conflict [was], in the context of armed hostilities in Eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.'[*8]

Apart from the possibility of approaching the armed conflict in Eastern Ukraine within the mixed armed conflict paradigm, the ICC pointed out that '[…] armed conflict in Eastern Ukraine may be internationalised if Russia exercises overall control over armed groups in Eastern Ukraine.'[*9] The question of control remains pivotal for establishing attribution and state responsibility. So far, the ICJ in the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*[*10] and the European Court of Human Rights (ECtHR) in *Ukraine and the Netherlands v. Russia*[*11] greatly contributed to the matter.[*12]

However, it is important to stress the difference in the legal regimes under which these tests were established and applied.[*13] Even if the ECtHR confirmed that the 'acts and omissions' of NGAGs can be attributed to Russia under the European Convention on Human Rights (ECHR), it does not entail that this level of control satisfies the control tests of the ICJ or ICTY (ICC). The nature, founding instruments, and jurisdiction of these judicial bodies presuppose the divergence in conclusions. The ICJ deals with state conduct and responsibility, while the ICC (ICTY) enforces individual criminal responsibility, and the ECtHR establishes human rights violations. Thus, any interfusion between these regimes should be treated with caution.

6 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment)* [1986] ICJ Rep, 14, para 219 (hereinafter – 'Nicaragua v. United States of America').

7 *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (October 1995), para 73.

8 ICC, 'Report on Preliminary Examination Activities' (2016), para 169 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf> accessed on 15 December 2024 (hereinafter – Report on Preliminary Examination Activities).

9 Ibid, para 170.

10 See: *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgement [2024] <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> accessed on 5 December 2024.

11 *Ukraine and the Netherlands v. Russia* App no 8019/16, 43800/14 and 28525/20 (ECtHR Grand Chamber, 9 July 2025).

12 For the discussion see: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment)* [1986] ICJ Rep, 14; *Prosecutor v. Dusko Tadic* (Appeal Judgement) IT-94-1-A (15 July 1999); James G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 315; Sylvain Vite, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91 IRRC 71; Djemila Carron, 'When is a conflict international? Time for new control tests in IHL' (2016) 98 IRRC 1024; Lauri Mälksoo, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment' (2024) 118 AJIL 519.

13 For instance: *Ilaşcu and Others v. Moldova and Russia* App no 48787/99 (ECtHR Grand Chamber, 8 July 2004).

2. Legal basis for internment in NIAC under IHL

The primary place to allocate the legal basis for internment in NIAC is IHL. The LoIAC provides a number of rules that tackle the matter of the internment of combatants and civilians. The LoIAC explicitly authorises the parties to armed conflict to detain individuals. Respectively, Art. 21 of the III GC stipulates that 'the Detaining Power may subject prisoners of war to internment',[*14] and Art. 42 of IV Geneva Convention provides that 'the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.'[*15] In addition to clear authorisation, both conventions guide parties to armed conflict through the requirements and standards of treating detained individuals (combatants or civilians).[*16] Consequently, the language of III and IV GC does not give the assumption that parties to IAC cannot detain individuals for security reasons. Parties to IAC under IHL may legally intern individuals, and IHL explicitly grants this power to parties. The reason for such precise regulation is the nature of IAC.[*17] As Lawrence Hill-Cawthorne and Dapo Akande observe, '[…] only an explicit norm of international law can provide the legal authority for targeting, detention, etc. Without such a rule of international law, these actions would be unlawful as a matter of international law, since states do not have the authority to take such action on the territory of another state and have obligations to other states with respect to how they treat nationals of those other states.'[*18]

In contrast, the situation with NIAC is not that apparent. The detention for security reasons of individuals in NIAC, and consequently in NIAC in Eastern Ukraine, is regulated by Common Article 3 (CA 3) and Additional Protocol II (II AP). The CA 3 provides that 'persons taking no active part in the hostilities, […] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.'[*19] As Kubo Mačák submits, '[…] the law contemplates that detention will take place during such conflicts. Common Article 3 mandates humane treatment and prohibits certain acts with respect to several categories of persons, including those placed hors de combat by detention.'[*20] This position reflects a broad consensus on the general 'humanitarian sense' of CA 3 and is supported by judicial practice.[*21] Yet, CA 3 says nothing about the possibility of interning; it articulates the word 'detain' without adding 'for security reasons', as can be seen in the LoIAC. In a similar vein, in the *Serdar Mohammed v Ministry of Defence* case, the British court submitted that 'it is reasonable to assume that if CA 3 and/or [II AP] had been intended to provide a power to detain, they would have done so expressly […].'[*22] Hence, CA 3 is more regulative-oriented than authoritative-oriented. The rule does not provide explicit power for parties to detain.

The continuation of the humanitarian approach is seen in II AP. Art. 5 of II AP states that '[…] the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', supported by Art. 6.[*23] II AP utilises both possibilities 'interned or detained'; thus, as Lawrence Hill-Cawthorne observes, '[…] II AP

14 Convention (III) relative to the Treatment of Prisoners of War. Geneva (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (hereinafter – III Geneva Convention).

15 Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (hereinafter – IV Geneva Convention).

16 See: Section II in III GC for combatants and Section IV in IV GV for civilians.

17 Manuel Brunner, 'Detention for Security Reasons by the Armed Forces of a State in Situations of Non-International Armed Conflict: the Quest for a Legal Basis' in Björnstjern Baade, Linus Mührel, and Anton O. Petrov (eds), *International Humanitarian Law in Areas of Limited Statehood: Adaptable and Legitimate or Rigid and Unreasonable?* (Nomos 2018) 91.

18 Lawrence Hill-Cawthorne and Dapo Akande, 'Locating the Legal Basis for Detention on Non-International Armed Conflicts: A Rejoinder to Aurel Sari' (EJIL: Talk!, 2 June 2014) <http://www.ejiltalk.org/locating-the-legal-basis-fordetention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari/> accessed on 3 December 2024.

19 IV Geneva Convention (IV).

20 Kubo Mačák, 'A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict' (2015) 45 IYHR 89.

21 *Nicaragua v. United States of America (No. 4)*, para 218; *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998), paras 608–609; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2009) xxxvi.

22 Serdar Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB).

23 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (hereinafter – II Protocol Additional to the Geneva Conventions).

recognises that internment will occur in non-international conflicts by specifying minimum treatment standards for internees.'*[24]

Therefore, the language of the LoNIAC is distinctive from that of the LoIAC. The LoNIAC does not explicitly entail parties to the armed conflict to detain individuals for security reasons, as is done in the LoIAC. The LoNIAC elaborates mostly on the guaranteed level of treatment, admitting that internment may happen. Consequently, the question remains as to whether it is possible to locate the legal basis for detention in NIAC. Jelena Pejic says that 'internment is [...] clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of Additional Protocol II, which mentions internment in Articles 5 and 6 but likewise does not give details of how it is to be organised.'*[25]

Lastly, it is important to point out the configuration of the parties to NIAC. If in IAC, the parties are states with equal legal footing, in NIAC, one of the parties is an NGAG—in the case of Ukraine, the 'DPR' and the 'LPR'—and due to the authoritative ambiguity of IHL, this might create the assumption of a different scope of rights and obligations.*[26] However, Common Article 3, '[...]is based on the principle of equality of the Parties to the conflict. It grants the same rights and imposes the same obligations, all of which are of a purely humanitarian character, on both the State and the non-State party'.*[27]

3. The role of IHRL

Since IHL remains ambiguous regarding the authorisation of parties to intern individuals in NIAC, there is a need to consider the scope of the applicable IHRL obligations. In its study, the International Committee of the Red Cross (ICRC) reflects on the prohibition of arbitrary detention in armed conflict. Putting Rule 99 in the context of NIAC, the authors of the study utilise human rights instruments to highlight the role of IHRL in armed conflict.*[28] Nonetheless, the intersection of IHL and IHRL in NIAC creates a need to determine the scope of IHRL applicable to NIAC.

Human Rights monitoring bodies, such as the Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights (ICCPR) and the ECtHR under the European Convention on Human Rights (ECHR), already developed practice on IHL and IHRL interaction.*[29] The International Court of Justice has also demonstrated the possibility of interconnection between the ICCPR and IHL.*[30]

3.1. The HRC's approach

The HRC is a monitoring body that has developed a practice regarding the interplay between IHL and the ICCPR. In General Comment No. 35, the HRC submits, '[...] security detention (sometimes known as administrative detention or internment) [is] not in contemplation of prosecution on a criminal charge [and]

24 Hill-Cawthorne (n 5) 84.

25 Pejic (n 5) 377.

26 Frédéric Mégret, 'Detention by Non-State Armed Groups in Non-International Armed Conflicts: International Humanitarian Law, International Human Rights Law and the Question of Right Authority' in Ezequiel Heffes, Marcos D. Kotlik, and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors* (T.M.C. Asser Press 2020) 177.

27 IHL Database, 'Commentary 2016. Article 3 - Conflicts not of an international character' para 578 <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016#Fn_AF31E1B8_00255> accessed on 14 December 2025; Ezequiel Heffes, 'Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterization of International Humanitarian Law' (2015) 20 (2) JCSL 236.

28 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2009) v.1 348.

29 *Al-Jedda v. the United Kingdom* App no 27021/08 (ECtHR [GC], 7 July 2011); *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR [GC], 7 July 2011); *Hassan v. the United Kingdom* App no 29750/09 (ECtHR [GC] 16 September 2014); *Georgia v. Russia (II)* App no 38263/08 (ECtHR [GC], 21 January 2021); *Ukraine and The Netherlands v. the Russian Federation*; *Ram Maya Nakarmi v. Nepal* Comm No. 2184/2012 (HRC, 8 May 2017); HRC, 'ICCPR General Comment No. 29: states of emergency (Article 4)' (31 August 2001) CCPR/C/21/Rev.1/Add.11; HRC, 'ICCPR General Comment No. 35: Article 9: Liberty and Security of person' (16 December 2014), CCPR/C/GC/35.

30 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 239*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) [2004] ICJ Rep 177; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment* [2005] ICJ Rep 280; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) [2024] ICJ.

such detention would normally amount to arbitrary detention.'[*31] The Committee explains, 'if, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.'[*32]

Yet, when it comes to the interplay between IHRL and IHL, the HRC concludes '[…] like the rest of the Covenant, article 9 also applies in situations of armed conflict [both IAC and NIAC] to which the rules of international humanitarian law are applicable.'[*33] In addition, the Committee observes that 'while rules of [IHL] may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive.'[*34] For instance, in the *Ram Maya Nakarmi v. Nepal* case,[*35] the HRC affirms that the guarantees provided by Art. 9 do not cease to exist in times of NIAC.[*36] Therefore, the Committee confirms that 'security detention authorised and regulated by and complying with international humanitarian law in principle is not arbitrary.'[*37] Consequently, it is possible to intern individuals in NIAC, from the perspective of the ICCPR, under IHL. However, as discussed above, IHL does not provide a clear authorisation to intern in NIAC; thus, it is further required to determine a definitive legal basis for internment in NIAC.

Article 9 of the ICCPR demands any detention to be 'lawful' and 'non-arbitrary'. To be 'lawful', the detention must be '[…] imposed on such grounds and in accordance with such procedure as are established by law.'[*38] According to the HRC, 'the notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.'[*39] Thus, the ICCPR obliges states to frame the legal grounds for the detention of individuals to meet the lawfulness requirement and introduce guarantees that ensure 'non-arbitrariness'.

Nonetheless, Art. 4 of the ICCPR allows states to derogate from their obligations under the Covenant '[…] public emergency which threatens the life of the nation […]'.[*40] In General Comment No. 29, the HRC certifies that 'during armed conflict, whether international or non-international […]' states can invoke Art. 4 of the ICCPR.[*41] In addition, the Committee stresses that '[the ICCPR] requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law.'[*42] Even when the state derogates from Art. 9, it cannot suspend '[…][the] right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention […]'[*43] because this part of the rights is non-derogable.[*44] Furthermore, in General Comment No. 24, the HRC affirmed that the prohibition of arbitrary arrest or detention is a customary international law (CIL) norm.[*45] According to derogations submitted by Ukraine to the ICCPR in 2015, Ukraine derogated from Art. 9.[*46] Following the HRC's line of

31 HRC, 'ICCPR General Comment No. 35: Article 9: Liberty and Security of person' (16 December 2014), CCPR/C/GC/35, para 15 (hereinafter – General Comment No. 35).

32 Ibid, para 15.

33 Ibid, para 64.

34 Ibid.

35 *Ram Maya Nakarmi v. Nepal* Comm no 2184/2012 (HRC, 8 May 2017).

36 Ibid, para 11.9.

37 General Comment No. 35, para 64.

38 Ibid, para 11.

39 Ibid, para 12.

40 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereinafter – ICCPR).

41 HRC, 'ICCPR General Comment No. 29: states of emergency (article 4)' (31 August 2001) CCPR/C/21/Rev.1/Add.11[3] (hereinafter – General Comment No. 29).

42 General Comment No. 29, para 9.

43 General Comment No. 29, para 16.

44 William A. Schabas, *The Customary International Law of Human Rights* (OUP 2021) 150.

45 HRC, 'ICCPR General Comment No. 24 – Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994), CCPR/C/21/Rev.1/Add.6.

46 Resolution On Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, 2015.

argumentation, the ICCPR provides the right to challenge the lawfulness of detention under the Covenant, even under the derogations. Yet, it requires states to provide legal grounds for detention to safeguard the right to challenge it.

3.2. The ECtHR's approach

The ECtHR submits that '[…] no deprivation of liberty will be lawful unless it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5 § 1.'[*47] In the context of NIAC, grounds 'b' and 'c'[*48] could be utilised by the state. Additionally, the ECHR requires detention to be 'in accordance with a procedure prescribed by law', which dictates that '[…] national law but also, where appropriate, other applicable legal standards, including those which have their source in international law,'[*49] are in force.

The ECtHR had the opportunity to demonstrate the role of Art. 5 in NIAC in the *Al-Jedda v UK* case. As the ECtHR established, 'the applicant was held on the basis that his internment was necessary for imperative reasons of security in Iraq'[*50] due to its alleged relation with terrorist groups and hostilities. The ECtHR affirms that 'no deprivation of liberty will be compatible with Article 5 §1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 […]'.[*51] Additionally, the Court recalls 'that the list of grounds of permissible detention in Article 5 §1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time'.[*52] However, in the context of IAC, the ECtHR confirmed that internment can be legal as long as it is based on IHL (III GC and IV GV).[*53]

In 2015, Ukraine submitted derogations to the ECHR, including Art. 5.[*54] To be lawful, derogations must meet the requirements established by Art. 15, namely to be introduced 'in time of war or other public emergency threatening the life of the nation' and to be 'strictly required by the exigencies of the situation', and measures must be 'consistent with its other obligations under international law.'[*55] In *Ireland v. the United Kingdom*, the Court confirms that the State can derogate from the provisions of Art. 5.[*56] However, the ECtHR also points out that it has the power to determine whether a State has complied with the requirements established by Article 15.[*57] Individuals still can challenge the lawfulness of derogations submitted by a State. In a similar vein, elements of the right to liberty and security under Art. 5, which belong to the CIL or *jus cogens,* cannot be derogated. Hence, individuals can challenge, for instance, the lawfulness of detention as such, since this element of the right to liberty and security is CIL.

In addition, the application of the anti-terrorism legislation system to cope with the NIAC in Eastern Ukraine can be seen as a fulfilment of positive obligations under the ECHR. According to the ECtHR, '[…] Article 2 of the Convention may imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'[*58] Therefore, the Court submitted that 'such a positive obligation may apply not only to situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act, but also in cases raising the obligation to afford general protection to society.'[*59]

47 *Khlaifia and Others v. Italy* App no 16483/12 (ECtHR Grand Chamber, 15 December 2016), para 88.

48 Art. 5 (b) of the ECHR: 'the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law'; Art. 5(c) of ECHR: 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'

49 *Medvedyev and Others v. France* App no 3394/03 (ECtHR Grand Chamber, 29 March 2010), para 79.

50 *Al-Jedda v. the United Kingdom* App no 27021/08 (ECtHR Grand Chamber, 7 July 2011), para 11.

51 Ibid, para 99.

52 Ibid, para 100.

53 *Hassan v. the United Kingdom* App no 29750/09 (ECtHR Grand Chamber, 16 September 2014), para 110.

54 Resolution On Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, 2015.

55 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (CoE, 4 November 1950), ETS 5.

56 *Ireland v. the United Kingdom* App no 5310/71 (ECtHR Plenary, 18 January 1978), para 224.

57 Ibid, para 207.

58 *Osman v. the United Kingdom* App no 87/1997/871/1083 (ECtHR Grand Chamber, 28 October 1998), para 115.

59 *Mastromatteo v. Italy* App no 37703/97 (ECtHR Grand Chamber, 24 October 2002), para 69.

4. Domestic law

According to the national legislature, state officials in the ATO and JFO could have detained individuals if they had been involved in terrorist activity.*[60] Nonetheless, detention under the Ukrainian anti-terrorism law and ordinary criminal procedure cannot exceed 72 hours.*[61]

For instance, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has demonstrated that in areas of the ATO, '[…] volunteer battalions (often in conjunction with the Security Service of Ukraine (SBU) were frequent perpetrators; information from late 2015 and early 2016 mostly implicates the SBU.'*[62] Later, with regard to the JFO, the OHCHR reported that from 16 November 2019 to 15 February 2020, 'the 75 cases showed a consistent pattern of arbitrary detention or procedural violations at the initial stages of detention (reported by 54 individuals, 72 per cent of the total), with the SBU being mainly responsible.'*[63]

Furthermore, in parallel to the anti-terrorism law and ordinary criminal procedure, Ukraine introduced 'preventive detention' in the areas of conducting the ATO and later the JFO.*[64] Preventive detention extended the time limit to more than 72 hours. By adopting preventive detention, Ukraine has modified the legal grounds and procedure for detention in the ATO and later the JFO.

According to the Law on Preventive Detention, '[…] preventive detention of persons involved in terrorist activities may be carried out for a period of more than 72 hours, but cannot exceed 30 days […]'.*[65] The Law on Preventive Detention stipulates that an individual can be detained based on 'reasonable suspicion of engaging in terrorist activities.'*[66] 'Reasonable suspicion' can be seen as a form of 'security detention' under the LoIAC. Apart from that, the HRC confirmed that 'security detention authorised and regulated by and complying with international humanitarian law in principle is not arbitrary.'*[67]

The Law on Preventive Detention provides that 'preventive detention is carried out by the reasoned decision of the head of the […] department of the Security Service of Ukraine or the head of the […] department of the Ministry of Internal Affairs of Ukraine, with further approval by the Prosecutor in a respected region.' Furthermore, it waives the requirement to obtain a judicial decision to detain an individual for more than 72 hours without bringing criminal charges.*[68] Yet, the Prosecutor is obliged to submit to the respected court a request to determine the measures to ensure criminal proceedings, which includes pre or trial detention. However, this raises the question, 'Does preventive detention amount to security detention under IHL?'

Internment does not require bringing criminal charges since it is based on security grounds within the context of armed conflict. Thus, preventive detention under Ukrainian domestic law is not a 'textbook' example of internment under IHL. However, preventive detention has been related to the NIAC in Eastern Ukraine since it was introduced concerning the ATO (JFO). The requirement to bring criminal charges can be read in light of the *Al-Jedda* case. The ECtHR generally excluded internment from permissible grounds to detain individuals, if '[…] there is no intention to bring criminal charges within a reasonable time'.*[69] Therefore, it can be seen as an attempt to bypass strict approach taken by the ECtHR in *Al-Jedda* and combine Ukraine's IHRL obligations under the ECHR and need to introduce preventive detention.

In addition, Ukraine introduced a 'special regime of pre-trial investigation under martial law, in a state of emergency or in the anti-terrorist operation area', which has been added to the Criminal Procedural Code of Ukraine (CPCU).*[70] The Law stipulates that 'within the territory (administrative area) where martial law

60 Law on Combating Terrorism, 2003.

61 Law on Combating Terrorism, 2003; Constitution of Ukraine, 1996.

62 OHCHR, 'Report on the human rights situation in Ukraine 16 February to 15 May 2016' (2016), para 31 <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf> accessed on 15 December 2024.

63 OHCHR, 'Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020' (2020), para 60 <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/29thReportUkraine_EN.pdf> accessed on 15 December 2024.

64 Law on Preventive Detention, 2014.

65 Ibid.

66 Ibid.

67 General Comment No. 35, para 64.

68 Law on Preventive Detention, 2014.

69 *Al-Jedda v. the United Kingdom* App no 27021/08 (ECtHR Grand Chamber, 7 July 2011), para 100.

70 Law on Special Regime of Pre-Trial Investigation under Martial Law, State of Emergency or in the Area of Anti-Terrorist Operation, 2014 (hereinafter – Law on Special Regime of Pre-Trial Investigation).

or an emergency is in effect or an anti-terrorist operation conducted, where an investigating judge is not able to exercise his/her powers within the time provided for by Articles 163, 164, 234, 247, and 248 of this Code, as well as the powers as to imposing the measure of restraint in the form of 30 days of custody on persons who are suspected of having committed any of the offences under Articles 109–114[-1], 258–258[-5], 260–263[-1], 294, 348, 349, 377–379, 437–444[*71] of the Criminal Code of Ukraine, such powers are exercised by a respective public prosecutor.'[*72] The Law on Special Regime of Pre-Trial Investigation allows the Prosecutor to determine a measure for ensuring criminal procedure if the judge cannot do so due to reasons of hostilities. Yet, it mentions nothing about preventive detention, only about custodial detention, within criminal procedure. Consequently, the CPCU has nothing to say regarding preventive detention either.

Following the logic of the legislative changes introduced, the extension of the timeline to more than 72 hours, but not more than 30 days, purports to allow the prosecution to submit a request to determine a measure for ensuring criminal procedure. The issue is that the prosecutor cannot request to apply any measure to ensure the criminal proceedings without notice of suspicion in accordance with Art. 276 of the CPCU. Hence, there must be an open criminal procedure in accordance with the CPCU; an individual must be informed about it, and notice of suspicion must be delivered.

Furthermore, the regulative scope of preventive detention and special regimes of investigation under the martial law is different. The Law on Preventive Detention stipulates preventive detention as a legal institute that does not originate in the CPCU. Preventive detention is rooted in the Law on Combating Terrorism.[*73] Thus, preventive detention is not a measure for ensuring criminal procedure. The Law on Special Regime of Pre-Trial Investigation extends the authority of the prosecutor in particular circumstances, when the judge is not available and when it concerns particular criminal offences, by allowing the Prosecutor to determine a measure to ensure criminal procedure. However, both legal acts require 'reasonable suspicion'.

In the practice of the ECtHR, 'reasonable suspicion' is articulated as follows: 'having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will, however, depend on all the circumstances.'[*74] Furthermore, it stated that 'the other aspect of the existence of a "reasonable suspicion" within the meaning of Article 5 §1(c) of the Convention, namely classification as criminal conduct, requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred.'[*75]

To regulate the application of preventive detention, Order No. 872/88/537 puts in place an Instruction regarding the procedure of preventive detention adopted. This Instruction sheds light on the meaning of 'reasonable suspicion'. According to the Instruction, 'the basis for preventive detention is the existence of a reasonable suspicion that a person has committed terrorist activity, including the commission of a criminal offence provided for in Articles 109–114[-1], 258–258[-5], 260–263[-1], 294, 348, 349, 377–379, 437–444 of the Criminal Code of Ukraine.'[*76] Thus, reasonable suspicion in preventive detention means that the individual committed a criminal offence related to 'terrorist activity', but under Articles 109–114[-1], 258–258[-5], 260–263[-1], 294, 348, 349, 377–379, 437–444 of the Criminal Code of Ukraine, preventive detention cannot be applied to other crimes. However, reasonable suspicion involves '[…] notifying a person of suspicion in accordance with the procedure specified in Chapter 22 of the [CPCU].'[*77] In addition, the detained individual is allowed to challenge preventive detention.[*78] Consequently, preventive detention does not fit the ordinary definition of internment and remains a tool of criminal procedure, but with conflict-related adjustments.

71 Mostly, crimes indicated are crimes against the state and terrorism.

72 Law on Special Regime of Pre-Trial Investigation, 2014.

73 Law on Combating Terrorism, 2003.

74 *Selahattin Demirtaş v. Turkey (No. 2)* App no 14305/17 (ECtHR Grand Chamber, 22 December 2020), para 314.

75 *Sabuncu and Others v. Turkey* App no 23199/17 (ECtHR, 10 November 2020), para 174.

76 Instruction on the Order of Preventive Detention, 2014.

77 Leonid Loboyko and Oleksandr Banchuk, *Criminal Procedure: Study Guide* (Waite 2014) 135; Andriy Khytra, Ruslan Shehavtsov, and Vasyl Lutsyk, *Criminal procedure: A textbook* (Lviv 2019) 454.

78 Instruction on the Order of Preventive Detention, 2014.

Some representatives of civil society highly criticised these changes.[*79] Preventive detention has been characterised as 'artificial and extra systemic' and 'separated from the general system of the criminal process.'[*80] Furthermore, a constitutional submission was made to the Constitutional Court of Ukraine to determine the constitutionality of preventive detention.[*81]

In a similar vein, the Council of Europe (CoE) delivered its comments on both normative acts. Concerns were expressed regarding preventive detention, including the scope of its definition, which at some point would differentiate this legal tool from others.[*82] The analysis pointed out the issues with the legal grounds of preventive detention, which have been discussed above. According to expert analysis, 'in order for someone to be subjected to preventive detention […], it is required that (a) the person concerned is someone "implicated in terrorism", (b) there is a reasonable suspicion that he or she carried out "terrorist activity" and (c) there has been a substantiated decision to impose it by one of several specified persons',[*83] yet the analysis concludes that the Law on Preventive Detention links preventive detention to particular criminal offences, as discussed earlier. The expert highlighted the lack of a revision process of preventive detention.[*84] Additionally, Ukraine submitted derogations to the ICCPR and the ECHR on 5 June 2015, when preventive detention had been in force for almost a year.

Therefore, I submit that preventive detention cannot be framed within the ordinary scope of internment in IHL because it applies to particular criminal offences and requires bringing criminal charges. Internment does not require bringing criminal charges. Additionally, preventive detention can be seen as a violation of human rights obligations due to a clear clash between the laws on Preventive Detention and on Special Regime of Pre-Trial Investigation with the Constitution of Ukraine. The matter of compliance with the ECHR is also highlighted in the Comments prepared by the CoE,[*85] which concluded that '[…] both the uncertain constitutional status of the preventive detention law and the inadequacy of arrangements for judicial control and other safeguards regarding its use give serious grounds for doubting that the latter could occur compatibly with the Convention.'[*86]

Moreover, domestic law as a primary legal basis for internment in NIAC must comply with the requirements established by international law, including IHL and IHRL even under derogations. As was claimed in the *Serdar Mohammed v Ministry of Defence* case, '[…] it is unnecessary to rely on international law in such conflicts [NIAC], as states can rely on their domestic law to arrest and detain members of organised armed groups who engage in armed conflict within their territory.'[*87] The way Ukraine attempted to establish internment in NIAC in Eastern Ukraine has demonstrated the validity of this submission despite the fact that the attempt has been implemented with many issues regarding compliance with IHRL obligations and has remained within the scope of criminal procedure.

Lastly, it was noted by the OHCHR that both NGAGs and Ukrainian authorities intern individuals in the area of the ATO.[*88] Thus, NGAGs adopted their 'legislature' to detain individuals. According to the OHCHR, both NGAGs had '[…] the practice of 30-day "administrative arrest" and "preventive arrest" in

79 Boris Malyshev, 'ATO as a basis for the adoption of anti-constitutional laws' (LB.ua, 14 August 2014) <https://lb.ua/blog/boris_malyshev/276192_ato_yak_pidstava_uhvalennya.html> accessed on 16 December 2024.

80 Ihor Usenko and Yevhen Rominsky, 'Misconceptions or a relapse of repressive mentality?' (Zakon&Business, 6 May 2014) <https://zib.com.ua/ua/83968-preventivne_zatrimannya_v20_nedomislennya_chi_recidiv_repres.html> accessed on 16 December 2024.

81 Constitutional submission of Kyselyov Andrii Oleksandrovuch, regarding the official interpretation of the provisions of the first part of Article 29 of the Constitution of Ukraine (25 November 2014) <https://ccu.gov.ua/sites/default/files/ndf/18-2513.pdf> accessed on 16 December 2024.

82 Jeremy McBride, 'Comments on the Law of Ukraine on amendment of the Law of Ukraine on combating terrorism and the Law of Ukraine on amendment of the Criminal Procedure Code with regard to special regime of pre-trial investigations under martial law, state of emergency and in the region of anti-terrorist operation' (CoE 2014), para 13 <https://rm.coe.int/16806f235e> accessed on 16 December 2024 (hereinafter – Jeremy McBride, Comments).

83 Ibid, para 14.

84 Ibid, para 30.

85 Ibid, para 124.

86 Ibid, para 154.

87 *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB), para 230.

88 OHCHR, 'Report on the human rights situation in Ukraine 16 February to 15 May 2016' (2016), para 30 <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf> accessed on 15 December 2024.

territory controlled by [the DPR and the LPR], respectively.'*[89] Later, 'the OHCHR identified and further confirmed a consistent pattern of arbitrary detention, often amounting to enforced disappearance, torture and ill-treatment of conflict-related detainees in both [NGAGs].'*[90] Jelena Plamenac also points out that both the DPR and the LPR employed 'preventive detention' identical to that introduced by Ukraine.*[91] The indicated practice of 'preventive detention' illustrates how Ukraine and NGAGs tried to extend the present legal basis for conflict-related detention.

Conclusions

The authoritative ambiguity of IHL on the matter of internment in NIAC presupposes the existence of a complex legal issue. Considering the scope of the guarantees provided by Common Article 3 and II Additional Protocol, it is recognised that internment in NIAC will happen, yet the legal grounds for this remain uncertain under IHL. Consequently, domestic law stands as the only valid realm in which to provide legal grounds for internment in NIAC, taking into consideration the scope of state jurisdiction.

In the case of the NIAC in Eastern Ukraine, national authorities have adopted a special legislature to inject internment (preventive detention) into the national legal system. The nature of NIAC allows states to employ national jurisdiction and does not require engagement with international law, apart from during derogations and when following CIL rules. However, internment is not free from IHRL obligations, which are binding on the state, even in times of emergency. Even though HRC recognises the possibility of internment if it is established and regulated by IHL, the ECtHR did not support this argument with regard to NIAC in the *Al-Jedda* case.

Preventive detention in Ukraine, despite the name, does not originate from IHL and is a product of domestic criminal procedure to modify national law in light of NIAC. Ukraine attempted to combine the idea of internment as a conflict-related solution with its IHRL obligation. In particular, the legislature established a time frame (no more than 30 days), reasonable suspicion, and the right to challenge the grounds of the preventive detention. Nonetheless, the introduced legislative scheme still might fall short in maintaining IHRL standards (internal legal inconsistency with the Constitution, issue of judicial review and lack of terminological clarify).

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90 OHCHR, 'Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020', para 64 <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/29thReportUkraine_EN.pdf> accessed on 15 December 2024.

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