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Al-Libi and Detention at Sea

By **Peter Margulies** Thursday, October 10, 2013, 5:00 PM

While no navy captain likes stormy weather, the controversy over the temporary detention on a navy vessel of the captured Al Qaeda leader Abu Anas al-Libi is a tempest in a teapot. As John Bellinger noted Monday, al-Libi's detention appears to clash with the language of Article 22 of the Third Geneva Convention. John's championing of international humanitarian law (IHL) in the Bush administration makes him an honest broker on this issue. That said, a closer look at the context of Article 22, state practice, and commentary by the ICRC alleviates the conflict that John identified.

Article 22's prime concern is with the health and safety of POWs. It's true, as John notes, that Article 22 states that POWs "may be interned only in premises located on land." However, we need to read that language in conjunction with the other language in the Article. The sentence containing the internment on land requirement adds that the detention site must afford POWs "every guarantee of hygiene and healthfulness." The ICRC Commentary to Article 22 reiterates the concern about detainees' health, and notes that to that end, internment should not occur on makeshift "boats, rafts, or 'pontoons.'"

As Greg Noone noted in an excellent 2004 article in the *Naval War Review*, Article 22 was drafted against the backdrop of massive US POW losses in World War II that occurred because of disease, poor treatment, and attacks by opposing submarines. US subs attacked Japanese naval vessels that carried POWs but failed to display the distinguishing markings required of such custodial vessels. Thousands of POWs lost their lives as a result of confinement on these "Hell Ships." Since the Obama administration has made clear that it will abide by Common Article 3 of the Geneva Conventions and confine detainees in safe conditions without subjecting detainees to "cruel, inhuman, and degrading treatment," al-Libi's detention will be a far cry from the situation that drove Article 22's enactment. The analysis might be different if al-Libi's detention at sea were prolonged. However, the Obama administration has indicated that the detention will be transitory, paving the way for a transfer to the U.S. criminal justice system. That hybrid approach worked well in the case of the Somali commander Ahmed Abdulkadir Warsame; it should be effective here, as well.

It also bears mentioning that Article 22 applies here only to the extent that it constitutes customary international law, which hinges in part on state practice. As Ryan Goodman and Sarah Knuckey have noted, by its terms, Article 22 only applies to state parties to the Geneva accords. Article 22 may well have force, like other provisions of the Geneva Conventions, as customary international law (CIL) that would govern detention of non-state actors. We determine CIL through the state practice prism. States have actually interpreted Article 22 flexibly, lending additional support to the US position.

Flexibility in state practice was evident during the Falklands War between the United Kingdom and Argentina. During that conflict, Britain detained thousands of Argentine POWs safely aboard navy vessels, because tent shelters the British had sent had been lost in a naval battle. Winter was imminent, and the British believed that detention on naval vessels was safer than detention on land in improvised conditions. Argentina agreed. Moreover, the ICRC's own guidance indicates that a rule of reason applies to Article 22 – modification of the internment on land rule is appropriate, the ICRC has suggested, when detention on navy vessels is safer and offers the "best available accommodation."

The ICRC's balancing test is even more relevant in al-Libi's case because the alternative to temporary detention on a naval vessel would be indefinite detention at Guantanamo. Congressional restrictions would hinder al-Libi's transfer from Guantanamo for a US criminal trial. In contrast, temporary detention on a naval vessel facilitates transfer to the criminal justice system. Some critics of the administration's move, such as Senator Lindsey Graham, believe that detention at Guantanamo is preferable to a civilian trial for al-Libi. Those who do not share this view should regard al-Libi's transitory confinement as a safe and prudent alternative.

Topics: Detention: Law of, Terrorism Trials: Military Commissions, AUMF, Non-International Armed Conflict, Detention & Guantanamo, Terrorism Trials & Investigations, International Law: LOAC, International Law

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