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"Deprivation of liberty and armed conflicts: exploring realities and remedies"

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Strengthening the legal framework protection of detainees: what role for standard-setting?

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Armed forces of a number of countries are frequently deployed in international military operations to help restore peace in an armed conflict abroad, acting in common either under a mandate from the UN Security Council or by invitation from the Government of the conflict State (assistance missions), or occasionally in a collective self-defense operation led by NATO.

During such operations, arrest and detention for a shorter or longer period of members of independent non-State armed groups taking active part in the hostilities is almost impossible to avoid. Regardless of the nature of the armed conflict or the mandate under which the international forces operate, the problem remains that such persons are neither regular combatants nor civilians entitled to protection under the laws of war. Their legal status, in particular in NIACs, is unclear and so it has become a common practice of the armed forces deployed in the conflict to try and avoid, if at all possible, arresting or detaining anyone. Indeed, there is even some disagreement as to whether there is a direct legal basis in IHL to detain anyone at all.

For obvious reasons, however, it would appear sensible to try and reach international agreement on some minimum rules on the handling of persons

falling into this middle-category between combatant and civilian status. Such rules have been debated for several decades and various proposals have been made to this effect, notably by the ICRC, and by a number of States and international organizations and NGOs. However, no international solution has been reached so far because of different legal and strategic concerns and conflicting political interests.

General impressions

It is obvious that the problems on the ground related to deprivation of liberty are quite complex. The applicable law, moreover, is unclear and insufficient which in turn raises the question of whether at all the problems of detention can be solved by legal means. Many scholars seem to hold the view that law is just politics in a formal dressing and that the problems relating to deprivation of liberty during armed conflict can most efficiently be handled in a military-political context with tailored agreements and understandings rather than by formal international law. I tend to disagree, respectfully; law is much more than just that. There is, notably, a constitutional legal and democratic procedure for the making of laws which implies that law cannot simply be bargained away. Besides, law is an instrument that provides regularity, accuracy, protection and accountability in a manner which politics cannot. Moreover, the legal system includes a formalized judicial procedural mechanism for ultimately resolving legal disputes, namely the Courts, whose judgements are final. In my view, thus, the problems relating to deprivation of liberty are best dealt with in a legal form – rather than in pragmatic military arrangements.

The rationale on detention and rules

To detain or not detain? As I shall try to explain, there are obvious strategic, practical, ethical and legal concerns involved in the discussion of strengthening the protection of detainees in armed conflicts, and it is indeed difficult to find a reasonable balance between them.

The main reason for detaining non-State actors in armed conflicts is normally to prevent them from returning to the battlefield and posing once again a security risk to our own or allied forces (self-defense). We may also detain such persons in order to deter others from joining and taking part in the hostilities for fear of being arrested, or to extract intelligence from the

detainees, although neither of these reasons seem to carry much benefit because of their obvious shortcomings. An additional reason for detaining non-State actors is sometimes that we cannot hand them over to the local authorities for risk of human rights abuses.

However, there are indeed good reasons for not detaining foreign fighters. In assistance missions, for instance, States often find themselves in a situation where they do not have legal authority (jurisdiction) to detain, or prosecute for that matter, foreign fighters without permission from the host State – and that is rarely given! Another reason for not detaining members of armed groups is that it is sometimes very difficult to ascertain their identity and thus to determine their status under IHL; mistakes or inconsistencies in this regard cause hostile propaganda and capricious arrests are therefore unattractive. The lack of clear procedural rules governing detention and the periodical review thereof, in addition to the fact that we do not (or rarely) have adequate detention facilities at our disposal, may further explain why we avoid detentions.

Common rules or not? Different from the issue of the legal basis for depriving persons of their liberty during armed conflict is the question of whether at all we wish to have common international rules on detention.

According to one view, there is indeed merit in developing common rules on detention because it would provide a unified legal regime that all or at least most States in international coalitions could immediately adhere to, knowing that the other members of the coalition would act similarly, consistent with the same rules. Since the existing legal framework is unclear, much of the discourse on the matter could be brought to rest if States and the relevant international organizations could find agreement at least on a set of minimum standard rules.

- Such rules might reduce problems of coordination arising out of the fact that while some of the participating States in international military operations have enacted their own national rules on detention, different from one another, other States do not have any readymade rules available at all to their forces regarding detention.
- Detainees captured by the armed forces of one State in a coalition are transferred to another member State, typically because the detaining State does not itself dispose over detention facilities, or because the detainee(s) is/are to be detained in the territory of another State. In these cases, such transfers would be greatly facilitated if all involved were working on the basis of a common set of rules.

- For States with no available rules on detention, furthermore, it would relieve the commanding officer and the Tactical Operational Command from first having to determine what to do with the detainee(s).
- A set of common rules would reduce the risk of human rights abuses against the detained persons, and might boost the morale among own troops by knowing that they are directed to act according to international standards.
- Finally, communication of a common set of rules on detention to the adverse, non-State party (in a language they understand) just might serve as an incentive for that party to also treat our captured soldiers in a similar fashion, relying on a motive of strategic reciprocity ("if we treat their detained warriors humanely, they may treat our captured soldiers likewise"). This argument may not draw much support from groups such as ISIL, Al Qaëda and others who take pride in decapitating captured "infidels" on live TV. However, this entire exercise of standardizing rules on detention is as much about wider dissemination of IHL globally to every group or force engaged in armed conflict and the argument of reciprocity should therefore not be dismissed right away.
- The main argument, on the other hand, against common rules governing exterritorial detention of non-State actors in armed conflict abroad is that each situation of capture, arrest, surrender or seizure is unique and wholly dependent on the concrete circumstances of the operation, the purpose of the arrest and the nature of the mandate. For this reason, it is simply not possible to agree on any formulation that intends to cover all situations of detention.
- The commanding argument, thus, is that each State will wish to have a free hand in the determination of how to handle each specific case individually. This is not only an operationally convenient position which leaves the determination of status and conditions to the commanding officer's professional discretion, it is also a solution that provides the best level of safety and security for the detaining forces because they can take all precautionary measures unbound of any common rules which, in the circumstances, may limit their freedom of action.
- However, the "free-hand" argument is in some way countered by the fact that many States have already provided their forces –

before deployment – with a set of national rules on detention which, obviously, are binding upon those forces and thereby limit their freedom of choice. Armed forces, to be sure, never have a completely free hand when it comes to deprivation of liberty of persons during armed conflicts.

- Yet such national rules would, in most cases, be well rehearsed by the soldiers through training, exercises and drills before deployment, and such rules are also tailored to meet particular domestic legal requirements which common rules may not satisfy. Such national rules, therefore, have the advantage of being immediately known, understood and practiced by the troops who are going to use them, and they comply with domestic laws.
- Besides, national rules can, if need be, be adjusted or amended faster and more easily than common rules in order to overcome a legal or practical impediment on the ground.

If any middle ground is to be found between these opposing views, all of which deserve merit, it would have to be – as just pointed out by Professor Sivakumaran – in the form of a short set of minimum standards founded on basic principles of humanitarian law. Certainly, a single comprehensive "one-size-fits-all" convention is neither possible nor necessary at this point.

The concerns

There are, roughly speaking, four distinct concerns or predicaments that come to mind in our reflections about adopting a set of common standard operating procedures on detention:

The first concern is strategic in the sense that there seems to be a lack of military support for a set of common rules – and hence an absence of political appetite for pressing ahead for such rules. In the balance for States between having to observe a set of common international detention rules on the one hand, and preserving their national freedom of action on the other, the preference is clearly for the latter – even if the actual need for preserving national autonomy in detention matters is perhaps exaggerated. By comparison, thus, the different national regulations are routinely modelled over the same set of basic rules and are, therefore, already relatively similar. These, then, might just as well be internationalized.

The second concern is factual and has to do with appreciation of the fact that each individual case of detention is unique and different from the next case, for which reason there is an inclination towards allowing for each case to be handled on its own particular merits. Yet, for the same reason as just mentioned above, the practice is nevertheless that most detention cases are managed anyway by comparably similar rules revolving around the same few aspects of self-defense, security, interrogation, criminal proceedings, discipline, transfers and human rights protection (including adequate food, clothes, climate protection, access to religious services, exercise and open air, education for kids, separation of men and women, etc.). These rules, in other words, could be harmonized and made international.

The third concern is ethical in the sense that any detention involves reflections about the respect for our enemies as human beings – no matter how cruel and revolting they may appear; it is really about the values imbedded in our culture. If we have no human regard for those who fight against us and hence no misgivings about how to treat them if captured, then there is no need to worry about drafting common rules on their detention; armed rebel groups and non-State fighters do not seem to respect us, anyway, so why should we respect them? – I hope that the arrogance, denigration and loss of fundamental human values in this line of thinking are obvious to all of us, and I strongly suggest that we refuse to allow all the Boko Harams, the ISILs, the Daësh or similar groups of this World to succeed in preventing us from trying to improve the law for the benefit of Mankind.

The fourth concern is legal because, as it has already been highlighted by previous speakers, the existing IHL rules on detention of non-State actors are unclear, not only in international armed conflicts but also, and in particular, in non-international armed conflicts. As we have pointed out several times already, such persons are not combatants and hence not entitled to protection as POWs under GCIII, and they have lost their right of protection as civilians under GCIV by virtue of their taking an active part in the hostilities. What remain available to them are really just the minimum standards in common Article 3 of the Geneva Conventions and perhaps also the descendant rules in Additional Protocol II (i.e. if the detaining State is a party to the Protocol). If we are trying to come up with a set of common rules on detention, it would make sense at least to start with clearing them up a bit.

A closer look at the law

The rules in APII are cautiously modelled over the standards applicable to Prisoners of War under GCIII according to which POWs shall enjoy a number of privileges during internment in international armed conflicts, including the right not to be transferred to a country which does not comply with GCIII; the right to be treated humanely; the right not to be subjected to physical mutilation, torture, rape or violence or exposed to public curiosity; the right to protection against the rigours of war and climate; to enjoy respect for their person and honour; to only surrender their surname, first names and rank upon capture; not to be held in solitary confinement; to have access to fresh air and physical exercise; to receive sufficient clothing, food, drinking water and adequate medical care; to exercise their religion and attend religious services; to receive payment for their work; to send and receive letters; not to be detained with ordinary criminals; to have a fair trial if prosecuted and not to be prosecuted for their lawful acts of war; to be released by the end of hostilities; and to receive visits by ICRC delegates. Altogether, the Geneva Conventions include more than 170 rules regarding deprivation of liberty in armed conflicts.

Contrary to what seems to be a widely perceived assumption, indeed, many of the privileges in GCIII and GCIV are in fact available under APII also in non-international armed conflicts (see articles 4-7) – except for the right not to be exposed to public curiosity or to be held in solitary confinement; to only give their name and rank upon capture; to receive payment for their work and to be released by the end of hostilities. However, the difference between the two legal regimes rather lies in the fact that violations of the rights and privileges under GCIII are made grave breaches of the Convention and thus defined as war crimes. APII, in contrast, does not include any criminalization of non-compliance with the requirements in the Protocol, the provisions of which are merely formulated as simple duties of the detaining powers: "Persons deprived of their liberty shall be provided with…".

There is, as many speakers have already pointed out during this roundtable, a distinction to be made between the legal right to deprive persons of their liberty on the one hand, and the modalities by which the persons are detained on the other. While the first aspect is concerned with the legal basis and grounds on which we can lawfully detain someone in an armed conflict, the latter has to do with the procedures and conditions applicable to internment.

As to the legal basis and grounds for detention, there seems to be wide support for the view that, despite the lack of any clear provision in IHL to this effect, armed forces in armed conflict can indeed deprive a person of its liberty either for security reasons, as a means of self-defense – or for reasons of imperative humanitarian necessity in order to prevent further civilian carnage or destruction. In contrast, presumably, this would also include a right for armed non-State rebel groups in control of territory to detain persons belonging to armed forces of the adverse party in an armed conflict, or even to deprive civilians of their liberty in order to protect them, but that appears to be disputed.

The second aspect about the conditions and modalities for detention in non-international armed conflict is more complex. In IHL, thus, neither common Article 3, nor APII include enforceable procedures or modalities which States are legally obliged to introduce in their national legislation.

However, international organizations such as NATO and the UN have adopted detailed rules on detention of non-ISAF personnel and in UN Peace Operations, respectively. The Copenhagen process, likewise, concluded in 2012 by adopting a document on the "Handling of Detainees in International Military Operations". Most notably, the ICRC has produced (in 2011) a comprehensive study on "Strengthening Legal Protection for Victims of Armed Conflicts" and in most national jurisdictions the armed forces are well equipped with procedures and modalities to be followed in cases of detention. In addition, the international conventions on Human Rights, such as the European Convention on Human Rights, the UN Convention on torture, etc., also include important provisions regarding the handling of persons deprived of their liberty.

At this point, I believe we should focus on the latter aspect regarding procedures and modalities because this is the area with the greatest challenges in both law and practice.

Looking forward

As already mentioned, and for the reasons lined out above, it is highly unlikely that States shall ever be able to conclude, within a foreseeable time, a comprehensive international and legally binding convention on the conditions of deprivation of liberty during non-international armed conflicts. Accordingly, we should be looking for a simpler and less ambitious instrument to include a collection of the most basic principles to

which all or most States could agree without having to enter into a formal international legal instrument.

Most of what we need in terms of substance is already there in the various documents relating to detention issued by the ICRC, international organizations, NGOs and States. The task at hand, therefore, is to trawl through these instruments, once again, in order to identify and bring together what we believe to be the most important basic rules on detention, including definitions of detention, internment, arrest, confinement and other relevant concepts, and clarification of certain terms such as "absolute necessity", "imperative security reasons", etc.

If States were able to find common ground in their handling of the strategic, factual, ethical and legal concerns discussed above, they might agree to adopt that set of common basic rules which can be deducted or crystallized from the existing instruments. Were this to happen, furthermore, there might be a good chance that at least some of the non-State armed rebel groups would also go along with such standards; after all, the purpose of having common rules on detention is to reduce the suffering of the detainees and to strengthen the moral ground for the detainers.

Depriving persons taking part in the hostilities of their liberty in the context of non-international armed conflicts is not going to go away any time soon and I believe it is now time to look beyond the immediate concerns and move towards an agreement on deprivation of liberty of such persons.

Conclusion

In conclusion, I would like to seize this opportunity to propose a number of rules for further consideration – adding that these are only proposals and certainly non-exhaustive, and also that the third part below (on definition of the terms) is merely added to meet the plea that simple rules need to be precise in order to have effect!

1. Persons not belonging to the forces of the detaining power can only be deprived of their liberty during armed conflict:

   - <u>if</u> the persons or person poses a significant security risk to the detaining power's own forces or allied forces, or to civilians, or to the person him-/herself;

- if it is deemed absolutely necessary for the safety of the detaining power or allied forces, or for the safety of the detainee him-/herself, or for the safety of civilians or civilian objects;
- if there is otherwise, in a given situation, a duty to act for imperative humanitarian reasons;
- if detention is permissible under the host State agreement, in the Rules of Engagement or other legal instruments applicable to the operation; and
-if the person is subject to an international warrant of arrest issued by a competent Court;

2. Detainees should under all circumstances benefit from the following privileges:

- Right to be promptly informed, in a language he or she understands, of the reasons for their detention;
- Registration and medical examination and essential medical care as soon as possible upon capture;
- Right not to be subjected to torture, violence, rape, inhuman or degrading treatment;
- Right to be detained in places away from the hostilities;
- Right to protection from climatic impact;
- Right not to be confined to isolation or solitary cells (except in limited periods for disciplinary reasons);
- Right to have free access to open areas and exercise during day-time;
- Right to practise religion and receive spiritual services;
- Right to receive food and water comparable to what is available to the local population;
- Right to equal conditions of work, including payment, as the local population;
- Right to internment with captured family members, if possible, otherwise separation of men from women and children in detention facilities;
- Right for female detainees and children only to be supervised by female guardians;
- Right to send and receive letters, (subject to censoring);
- Right to visits by family, if possible, and by the ICRC;
- Right to be released in safety by the end of hostilities or as soon as the reasons for internment have ceased to exist;

- Right not to be transferred to a non-compliant State;
- Right to safety protection during transfers;
- Right to periodical reviews of the grounds and conditions of detention;
- Right to be questioned with the assistance of an interpreter and, if possible, in the presence of a counselor or another detainee;
- Right to a fair trial by a lawfully constituted and independent Court if prosecuted for any crime relating to the armed conflict, including the right to be informed of the charges against him/her, to be prosecuted only on the basis of individual criminal liability and only for acts that were legally criminal at the time of their commission, to seek amnesty for lawful acts of war, be heard in person, to be presumed innocent until proven guilty, to bring evidence in his or her defense and to cross-examine the prosecutor's witnesses, not to be compelled to incriminate him- or herself, to be assisted by an interpreter, and, if possible, by a counselor or another detainee; not to be convicted twice for the same crime (*ne bis in idem*), and to have access to judicial appeal against decisions and judgements.

3. For the purpose of these Rules,

(a) "significant security risk" means…
(b) "absolutely necessary" means…
(c) "detaining power" means…
(d) "imperative humanitarian reasons" means…
(e) "detention" means…
(f) "internment" means…
(g) "safety" means…
(h) "security" means…
(i) "Access to open air" means…
(j) "family members" means…
(k) "periodical review" means…
(l) "transfer" means…

I have stayed away at this point from trying to suggest definitions of these terms because this will be a matter for further deliberations. The purpose of this presentation was merely to show that it really should not be insurmountable to find agreement on basic rules about deprivation of

liberty, and to remind us all that it is time to move on in a constructive process.