International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

41st ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

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

Sanremo, 6-8 September 2018

Keynote address

Between international humanitarian law, human rights law and standards: challenges in conducting detention operations in non-international armed conflicts

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First of all, on behalf of the Secretary-General of the North Atlantic Treaty Organization (NATO), Jens Stoltenberg, as well as the almost 200 civilian and military lawyers hailing from 29 Allied Nations and many partners who work throughout the NATO system, I would like to extend my very sincere thanks to the International Institute of Humanitarian Law and the International Committee of the Red Cross for their kind invitation. I am so proud of the strong links that exist between NATO and the Institute not only in the person of my predecessor, Baldwin de Vidts, amongst the leadership of the Institute but also in the extensive education and training activities of the Institute which represent a real added value. One fact that I would like to share with you, Mr. President, is that in the recent revision of NATO's standardisation agreement on IHL training and education the practices of the Institute in that area were

really very formative in developing our multinational standards that we have shared with all our 29 Member States. So I congratulate the Institute for that.

For more than 40 years this Round Table has been a great platform in the field of international law where practitioners and academics can come together and discuss questions of importance to the international legal community.

As both Professor Fausto and Dr. Helen Durham explained, in comparison to an international armed conflict (IAC), treaty law regarding deprivation of liberty of persons within a non-international armed conflict (NIAC) is very limited. By contrast, the four Geneva Conventions applicable to an IAC contain more than 175 provisions regarding detention. This is why I am very pleased that the Sanremo Institute, in co-operation with the ICRC, has taken up this topic for discussion and study at this Round Table.

This is an area of the law where careful study of State practice will pay off by contributing to the dual goals of ensuring a high level of protection for detained persons in accordance with international law and maintaining military effectiveness and a sense of realism given the missions our armed forces are called upon to carry out.

In this spirit, I would like to use this keynote speech to share how NATO has dealt with detention issues in two of its operations: the Kosovo Force or KFOR and the International Security Assistance Force or ISAF in Afghanistan, because I feel that this history helps illustrate some of the challenges.

After describing NATO's specific experiences, I would also like to share three general challenges that I see for detention operations in a NIAC.

Of course, there are some limitations to what I am in a position to say from my perspective in an international organization. NATO itself does not detain. This is a task for individual NATO Allied Nations as well as operational partners that participate in such operations and have concluded a Participation Agreement with NATO. It is those States that are responsible for respecting the law applicable to them. Still, some lessons can be drawn from NATO's multilateral experience, particularly since detention remains an area that tends to raise particular challenges of legal interoperability and will likely do so into the future.

Historical and Legal Background

NATO has given special attention to the topic of detention in non-international armed conflicts for about two decades now.

During the Cold War, planning in the field of detention was focused at a potential war between the Warsaw Pact and NATO. This would most likely have been an international armed conflict with the Geneva Conventions applying *in toto* and the majority of prisoners having POW status. This meant that there were specific and settled rules one could have relied on in the field of detention.

After the end of the Cold War, NATO was called upon to take on different missions. The 1990s, therefore, brought a departure from the well-charted land of IAC detention into an area of the law where rules on detention were much less clearly settled.

First is the question of legal basis which, according to the circumstances, can be found in a UN Security Council Resolution under Chapter VII of the UN Charter, an international agreement, customary international law, national law, national or international jurisprudence and case law, or even a combination of these sources. I do not want to prejudge the outcome of the debate in the first panel, but I do want to draw your attention to the fact that there is a clear view of a number of NATO nations - as well as an ICRC institutional position as reflected most recently in the two Commentaries - that there is an inherent power to detain in a NIAC derived from treaty and customary international law.

Then there is the question of conditions of NIAC detention, where operations made clear that militarily workable operational policies needed to be developed. This is the jumping off point for my quick review of NATO experience in Kosovo and Afghanistan.

NATO's Past Experiences

Kosovo

In Kosovo, UN Security Council Resolution 1244 (1999) authorized KFOR to use "all means necessary to fulfil its responsibilities". This broad mandate undoubtedly includes the power to detain.

However, when establishing KFOR, there was no clear set of rules or state practice for detaining individuals in peace-enforcement or peace-keeping missions. Troop-contributing nations interpreted international law differently and were bound by varying legal frameworks. For example, there was no consensus as to what extent human rights law applied.

In response to criticism about such matters, the Force Commander introduced directives and standard-operating procedures that defined several basic standards for detention operations. These documents came to form the key NATO internal framework of rules for KFOR detention operations.

Under this framework, an individual can be detained under the authority of the KFOR Commander where this is absolutely necessary as a last resort if three conditions were met. First, the individual must constitute a threat to KFOR or to a safe and secure environment in Kosovo. Second, the civilian authorities in Kosovo must be unable or unwilling to take responsibility for the matter. Third, the person's detention is necessary because the threat cannot reasonably be addressed by lesser means.

The directive contains certain due process safeguards. For example, detainees have the right to be informed of the reasons for their detention. Under the directive, the fact that a person may have information of intelligence value by itself is not a basis for detention and detainees have the right to be informed of the reasons for their detention. Detentions beyond 72 hours have to be authorized by COMKFOR himself. Detainees may submit petitions to COMKFOR, which must be considered. The ICRC was granted access to KFOR's detention facilities and the KFOR Claims Office was established to deal with the complaints against KFOR generally.

Looking at the big picture, the KFOR Commander established standards that effectively replicated the standards in Common Article 3 applicable to Nations and were very close to the standards provided in Articles 42 and 78 of the Fourth Geneva Convention for IACs. Over time, partially owing to public

concerns but also due to a changed situation on the ground, due process safeguards were expanded to incorporate applicable human rights standards.

Since the days when our forces originally had to put these documents in place to meet an operational need, much has happened in Kosovo. UNSC 1244, of course, remains in place but UNMIK is no longer the executive authority in Kosovo. Most importantly, we have local police and law enforcement institutions that have taken over day to day police work. Kosovo's institutions are still developing but we have come a long way from the immediate post-conflict period. Nevertheless, KFOR retains detention authority in extreme cases. More importantly, the basic approaches established in Kosovo have abiding relevance. This is in part because they were the point of departure for NATO's policies in Afghanistan.

Afghanistan

The legal bases for ISAF were UN Security Council Resolutions 1386 (2001) and 1510 (2003). Taken together they authorize ISAF to "take all necessary measures" to establish a secure environment in Kabul and the rest of the country.

When NATO assumed the lead for ISAF in 2003, there was a push to agree upon certain practical standards on a NATO-wide level that might assist Nations in detention operations. This was a sensible and pragmatic process that attempted to deal with reasonable differences in legal frameworks and interpretation as well as different operational appetites.

It was not possible to agree to such NATO-wide guidelines or other attempted policies regarding detainees at the HQ level, either in Brussels or at SHAPE.

As a fall-back ISAF developed Standard Operating Procedures (SOPs), which generally provided that those captured by ISAF be released or transferred within 96 hours to the Afghan authorities. A detainee could be held for more than 96 hours where necessary. The ISAF Commander held the authority to extend detentions beyond 96 hours for logistical or medical reasons.

What was the source of the so-called 96-hour rule? It was a practical yardstick that was developed under operational circumstances. It was derived in part from analogous provisions in national legislation.

Many procedures and rules that proved effective for KFOR were included in the ISAF SOPs. They cured certain weak points that the first versions of the KFOR framework contained. For example, detainees were provided with more robust ways to challenge their detention, and more sophisticated mechanisms to prevent factual errors were included. A continuous review of the reasons of the detention was institutionalized by the ISAF SOPs. Of course, the ICRC was informed about the detention of an individual as soon as practicable and had access to all detention facilities run by ISAF troop-contributing nations for inspection purposes.

In the end, I believe the ISAF SOPs established a more stringent standard than required under international law and were effectively closer to IAC rules.

From a practical military operational perspective, there was great value in having such a set of common standards and procedures in the context of the multinational military effort: without it, we may have had many different practices applying in relation to those detained by Allies and therefore a potential lack of overall predictability.

Whilst neither policy was developed to be a definitive statement of international law requirements, they benefitted the detainees substantially in times of great legal uncertainty.

Challenges of NIAC Detention

NATO has encountered several challenges over the last years in handling detainees, and we have tried to constantly improve the way we work to meet and mitigate these challenges. I would like to point out what I believe to be the three main legal challenges NATO currently faces when conducting detention operations in a NIAC.

First, I believe ensuring legal interoperability between Allies to be a key challenge. Whilst there is agreement that, Allies have the power to detain in NIACs, there is a lack of certainty on where the relevant limits of that power lie**.** In particular, Allies that are signatories to the ECHR usually regard these limits as much stricter than the other Allies. Twenty-seven out of twenty-nine Allies are subject to the rulings of the European Court of Human Rights and twenty-eight are party to the Rome Statute. Nevertheless, I believe past

experience has shown that armed conflict detention and IHRL (in particular articles 3 and 5 of the ECHR) can be reconciled in practice.

Legal interoperability among Allies is a key theme that will continue to present a challenge to NATO in future operations. Here, NATO can serve as a platform for Nations to agree on interpretations of the law that work for everybody. This can be hard, as the failure to achieve consensus on a NATO-wide detention policy has shown. In the past, operational necessity has, however, always led to practical solutions. As you see from the way we have come since the late 1990s, NATO has served as a platform for the harmonization of minimum legal standards both through the practical cooperation of Allied troops in the field as well as the work of national representatives and NATO staff at headquarters level.

In parallel to these efforts on the NATO side, there have been a variety of international initiatives to clarify relevant matters such as the resolution of the Quadrennial Conference that Dr. Durham discussed, the ICRC Report on Humanitarian Observations and Lessons Identified on the ISAF Campaign, and other initiatives such as the Copenhagen Principles.

NATO has followed these developments closely and has contributed to some of them like, for example, the Copenhagen Principles. While NATO-level work has been challenging in the past, there may be scope for further work. This would have the advantage for us of being able to ensure that the standards put on paper are practical and not detached from the reality of combat on the ground. Given the abiding nature of legal interoperability concerns, I continue to believe that a multilateral approach that takes into account broad-based concerns would pay off.

One good example of such potential progress is being given at the moment at SHAPE, which is drafting practical guidance to help commanders recognise command responsibility, and staff to plan multinational detention operations with common standards. The guidance draws on international treaty law, customary international law, as well as other best practices such as the Copenhagen Principles and well-tested national procedures.

The second challenge relates to the transfer of detainees. Particularly in Afghanistan, but also in Kosovo, the practice shifted towards short-term detention with a subsequent transfer of the detained persons to local authorities. On the one hand, this policy helps NATO stay clear of the potential legal problems that prolonged detentions pose. At the same time this is part of our

strategy of handing back more and more responsibility to local authorities. On the other hand, the transfer of detainees brings into play important principles related to their return.

In Afghanistan, NATO Allies have been criticised for turning detainees over to the Afghan authorities because of alleged mistreatment they face in Afghan prisons. When such allegations were credible, the transfer of detainees was suspended and inspections of Afghan facilities as well as the monitoring of previously transferred prisoners were increased. Nevertheless, there is more work to be done to ensure that diplomatic assurances given to Allies are consistently and systematically complied with. Many troop-contributing Nations chose to enter into bilateral arrangements with Afghanistan prior to the hand-back or turnover of detainees, and make such transfers subject to agreed ICRC visits.

The third and final challenge I see is that security detention and criminal detention follow different legal regimes. This implies the need for an early decision on which kind of detention to impose on an individual. Shifting a security detainee into criminal detention at a later stage poses significant hurdles because evidentiary standards are much higher in criminal procedure than those required for security detention.

Along similar lines, if a troop-contributing nation decides to detain for security reasons but then later transfers the detainee to a host nation this can create problems if that nation does not employ security detention. If the troop-contributing nation is not able to also transfer sufficient evidence admissible for prosecution, this may result in premature release or arbitrary detention.

Conclusion

While detention is the responsibility of Nations, in Alliance operations, we as an organization do our utmost to promote common standards, thereby bridging potential gaps and increasing the level of protection for detainees. This is not always easy, especially in a multinational context, but it is essential.

In conclusion, I am sure that this most interesting roundtable will promote dialogue in the spirit of multinational cooperation with the goal of using the instruments international law gives us to find solutions that protect civilians

and enable our forces on the ground to carry out the missions we entrust to them.