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

Detainee transfers under IHL of IAC and under IHL of NIAC

Tilman RODENHÄUSER
Legal Adviser, ICRC

In many of today's conflicts, individual States or multinational forces, such as UN peacekeeping forces, assist a territorial State in its fight against one or more non-State armed groups. Armed forces that operate extraterritorially are often hesitant to take detainees or to keep them under their own control. This may have various reasons, including a lack of infrastructure or unclear legal framework for detaining fighters for longer periods, the interest to transfer detainees to the host State in order to responsibilize its criminal justice system, or transfer requests by the host State which is often interested in prosecuting detained persons.

In principle, transferring detainees is not a problem. In practice, however, time and again such transfers have brought detainees into the hands of a power that does not respect the transferred detainee's fundamental rights. Especially in contemporary operations against alleged 'terrorists', transfers can bear a real risk of torture, disappearances or extrajudicial killings.

Legally speaking, in the context of detainee transfers the main issue is the principle of *non-refoulement*, which the ICRC broadly defines as prohibiting transfers of persons into the hands of an authority where there are substantial grounds for believing that the person would be in danger of

certain fundamental rights violations.[1] Today, this principle is found in international refugee law, human rights law and IHL.[2] In light of these different sources, one argument that is still raised by some is: "*non-refoulement* is an issue of human rights law, not IHL", suggesting that it may be a principle designed for peacetime and somewhat irrelevant in the context of detainee transfers in armed conflicts. This, however, is far from true: Even before the principle was codified in article 33 of the 1951 Refugee Convention Relating to the Status of Refugees, or in article 3 of the 1986 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, it was included in the Third and Fourth Geneva Conventions of 1949.

Detainee transfers under IHL of IAC

Indeed, in international armed conflict, the Third and Fourth Geneva Conventions contain clear basic norms on detainee transfers. These provisions stipulate in essentially similar terms that a prisoner of war or a protected non-repatriated person who is deprived of liberty

- "may only be transferred by the Detaining Power to a Power which is a party to the Convention"; and
- Prior to the transfer, "the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention".[3]

Importantly, with regard to either prisoners of war or civilian internees, the Third and Fourth Geneva Conventions prohibit not only transfers if there is a risk of torture, ill-treatment, extrajudicial killing and other grounds for which the principle of *non-refoulement* is generally recognized. Both Conventions also prohibit detainee transfers if the receiving power is not able or willing to apply the respective Convention, meaning that all violations of the Conventions are relevant under these provisions. Thus, in IAC the rules on detainee transfers are much stricter than the principle of

---

* The views presented in this conference paper are those of the author and do not necessarily reflect those of the ICRC.

[1] See ICRC, Commentary on the First Geneva Convention, 2016, para. 708.

[2] For a more detailed discussion of the principle of *non-refoulement* under international refugee and human rights law, see ICRC, Note on Migration and the Principle of *Non-Refoulement*, International Review of the Red Cross, 2018.

[3] See article 12 Convention (III) relative to the Treatment of Prisoners of War; article 45 Convention (IV) relative to the Protection of Civilian Persons in Time of War.

non-refoulement as enshrined in refugee or human rights law. With regard to civilians protected under the Fourth Geneva Convention, the Convention also emphasizes: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[4]

The Third and Fourth Geneva Conventions also define post-transfer obligations for the transferring State. The Conventions require that if the receiving "Power fails to carry out the provisions of the Convention in any important respect" and the transferring power learns about this, the transferring power shall

- "take effective measures to correct the situation"; or
- "shall request the return" of the detainee.[5]

These obligations are quite unique in international law – there is no other field of international law that provides similarly clear and robust post-transfer obligations.

Detainee transfers in non-international armed conflicts

In most contemporary armed conflicts, the Third and Fourth Geneva Convention are, however, not applicable in their entirety. Instead, we have to apply IHL applicable in non-international armed conflicts (NIAC). Relevant IHL treaty norms, notably article 3 common to the four Geneva Conventions and the rules contained in Additional Protocol II,[6] do not provide explicit rules on detainee transfers. While this leads some to argue that the principle of *non-refoulement* does not apply in NIAC, there are cogent reasons to conclude that it does.

First, in the view of the ICRC the categorical prohibitions in common Article 3 prohibit a transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violations of their fundamental rights.[7] Indeed, the object and

[4] Article 45 Convention (IV) relative to the Protection of Civilian Persons in Time of War.

[5] For a basic discussion of what is meant by a failing to 'carry out the provisions of the present Convention in any important respect' or 'effective measures to correct the situation', see ICRC, Commentary on the Geneva Conventions of 12 August 1949, Volume IV, 1959, p. 269.

[6] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[7] See ICRC, Commentary on the First Geneva Convention, 2016, para. 708.

purpose of the absolute prohibitions listed in common Article 3 would not be respected if a detainee was transferred into the hands of an authority where there is a real danger that these guarantees are disrespected. Moreover, in light of the obligation of all parties to armed conflicts to ensure respect for IHL, it would be difficult to see how such party could argue that it respected its obligation and do all it can to ensure respect for IHL if it transfers a detainee into the hands of an authority that likely disregards the fundamental prohibitions of common Article 3.[8] As part of IHL, this principle binds all parties to armed conflicts, be they States, armed groups or UN forces. It also applies to all types of detainee transfers, irrespective of the nature of the receiving power, meaning it applies to transfers to State and non-State entities.

Second, the principle of *non-refoulement* is also well-established in human rights law. It is explicitly included in Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In addition, the Human Rights Committee holds that a *non-refoulement* obligation is implicit in at least the prohibition of torture or cruel, inhuman or degrading treatment or punishment and the right to life under the ICCPR.[9] Similar conclusions have been drawn by regional human rights bodies, in particular in the jurisprudence of the European Court of Human Rights.[10] As human rights law continues to apply in armed conflicts and is also understood as binding States extraterritorially, human rights law and IHL complement each other on this issue.

Operationalizing the principle of non-refoulement in armed conflict

There is generally rather broad acceptance that the principle of non-refoulement applies in NIAC. Nonetheless, there are key questions that have to be addressed in military operations in order to operationalize the principle.

Procedural safeguards

A party that intends to transfer a detainee has to assess whether there are substantial grounds to believe that the person would be in danger of

[8] Ibid, para. 711.

[9]

[10] For a detailed discussion, see ICRC, Note on Migration and the Principle of *Non-Refoulement*, International Review of the Red Cross, 2018.

fundamental rights violations if transferred. As indicated in article 3(2) CAT, this assessment should include an objective assessment of the situation of detainees in the hands of the receiving power.[11] Moreover, in order to effectively assess the dangers the individual detainee may face, the detainee needs to be heard and have the possibility to challenge the transfer.[12] Unfortunately, there is limited guidance in IHL or human rights law on the exact elements that such individual procedures need to follow.

In the ICRC's experience, at least three procedural safeguards are required to ensure that the principle of non-refoulement is effective:

- First, the transferring authority has to inform the concerned person in a timely manner of the intended transfer;
- Second, transferring authority has to grant the person concerned the opportunity to express any fears he or she may have about the transfer and explain why he or she would be at risk. Such fears need to be assessed by an independent and impartial body.[13]
- Third, the transfer needs to be suspended during this assessment.

These guarantees are also reflected in the 'procedural safeguards' that the Committee against Torture requires under its recent general comment on the principle of *non-refoulement* under the Convention against Torture.[14] They are also found in the jurisprudence of human rights bodies on what 'effective remedies' need to be provided.[15] What remains unclear is whether human rights bodies would, in times of armed conflict, require

[11] Article 3(2) CAT states: 'For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.'

[12] Under human rights law, this forms part of the right to effective remedy. See Article 2(3) of the International Covenant on Civil and Political Rights; Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 25 of the American Convention on Human Rights.

[13] For a summary of discussions among States on what may constitute such an impartial and independent body, see ICRC, Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Thematic Consultation of Government Experts on Grounds and Procedures for Internment and Detainee Transfers, 2014, available at https://www.icrc.org/en/download/file/10895/report_-_second_thematic_consultation_-_detention_-_october_2014.pdf

[14] See Committee against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, 9 February 2018, para. 13.

[15] See, for instance, UN Human Rights Committee, General Comment No. 20 on Article 7, 10 March 1992, para. 9; UN Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15; ECtHR, Hirsi Jamaa and Others v. Italy, Application No. 27765/09, Judgment, 23 February 2012, para. 189.

additional procedural guarantees that go beyond these minimum steps, for the right to have legal assistance.

Diplomatic assurances

Other important but somewhat thorny issues are diplomatic assurances and transfer agreements. Such assurances or agreements are used by many States as well as by UN peacekeeping forces in order to mitigate or eliminate certain risks that may exist if a detainee is transferred. Generally speaking, there are important qualitative differences between diplomatic assurances provided by one State and transfer agreements concluded between two States. The latter will normally be more formal and include not only relevant assurances but possibly also the right for the transferring State to conduct post-transfer monitoring and to take certain steps if assurances are not complied with. In recent years, especially the value of simple diplomatic assurance for mitigating or eliminating a risk of torture or ill-treatment has been a matter of significant disagreement.[16]

It is crucial to recall that assurances or agreements as such do not necessarily remove a danger that would otherwise prevent a transfer. Neither can they, as such, be understood as rendering the principle of *non-refoulement* somehow superfluous. The crux of the matter is whether it can be expected that the assurances, in their practical application and in view of the particular circumstances of each situation, will provide an effective and sufficient guarantee to ensure that the transferred detainee will be protected against unlawful treatment.[17] In this respect, diplomatic assurances or transfer agreements constitute one factor that can be taken into account when assessing whether or not a detainee can be lawfully transferred.

---

[16] Most recently, a number of States expressed disagreement with a draft general comment by the Committee against Torture, which stated that "diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of 'non-refoulement', provided for by Article 3 of the Convention". Committee against Torture, General Comment No. 1 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, Draft Prepared by the Committee, UN Doc. CAT/C/60/R.2, 2 February 2017, para. 20. In contrast, various NGOs expressed strong concern regarding the lawfulness and effectiveness of such assurances. States' and non-State experts' written submissions on the draft are available at: www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx

[17] See Laurent Gisel, The Principle of *Non-Refoulement* in relation to Transfers, in *Detention in Armed Conflicts*, Proceedings of the 15th Bruges Colloquium, 16–17 October 2014, College of Europe/ICRC, 45 *Collegium*, 2015, 113–130, p. 126-127, in particular, references in footnote 54.

In practice, there are situations in which such agreements work and other instances in which they do not work at all. This really depends on the strength and implementation of such agreements. A number of relevant factors to evaluate these agreements are found in national and international jurisprudence.[18] Among these criteria, key practical issues include whether relevant agreements address post-transfer monitoring of the well-being of transferred detainees and steps to be taken in cases of fundamental rights violations.[19] Without assuming such post-transfer responsibilities and effectively implementing them, it is very difficult for the transferring State to monitor compliance with the agreement and the well-being of the transferred person.[20]

Measures aimed to avoid transferring detainees

A final observation with regard to detainee transfers is that in some military operations it appears that armed forces try to avoid taking detainees, possibly with the intention of avoiding transfer obligations.

First, some parties to armed conflicts try to avoid taking detainees through 'immediate handovers', meaning that they handover persons as early as possible to another authority. Seemingly, the idea behind such immediate handovers would be to transfer a captured person before considering the person detained, arguably as a way to avoid the *non-refoulement* obligation. This construct is, however, legally flawed. Basic IHL and human rights law obligations apply and protect individuals as soon as they fall into the hands of a party to an armed conflict.[21] If armed forces

[18] See, for instance, UN Human Rights Committee, Mohammed Alzery v. Sweden, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, para.s 11.3–11.5; ECtHR, Othman (Abu Qatada) v. United Kingdom, Application No. 8139/09, Judgment, 17 January 2012, para. 189. See also United States of America, The White House, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 2016, pp. 42-43.

[19] On the importance of post-transfer monitoring, see, for example, United Kingdom, High Court of Justice Queen's Bench Division Divisional Court, The Queen (on the application of Maya Evans) vs Secretary of State for Defence, 26 June 2010, para. 320.

[20] For some discussion of the practical difficulties in implementing post-transfer monitoring of detainee treatment, see Droege, Transfers of detainees: legal framework, *non-refoulement* and contemporary challenges, 90 International Review of the Red Cross, 2008, p. 695.

[21] Article 3 common to the four Geneva Conventions applies to 'those placed "*hors de combat*" by sickness, wounds, *detention* or any other cause' (emphasis added). This means that it applies and protects individuals as soon as they fall into the hands of a party to an armed conflict. For detailed discussion of when a person falls within the control of a State

capture and exercise sufficient control over the individual to compel that person into the control of another authority, then the capturing State necessarily exercises effective control over the detainee and thus needs to respect relevant obligations in its handling of this person.[22]

The second issue is partnered operations. In certain contexts, partnered operations are designed in a way that capture and detention are done exclusively by one party. For instance, armed forces operating extraterritorially have been accompanied by a small number of local forces who would be in charge of capture. In other contexts, the ratio might be inverse, with international forces accompanying local forces who do the capture.

Most recently, such partnered operations have raised questions as regards the responsibility of one partner for possible violations of IHL by another. For instance, in 2018 the UK Intelligence and Security Committee of Parliament published a report on 'Detainee Mistreatment and Rendition'.[23] With regard to 'joint units', the report states that in order to avoid the possibility to outsource tasks that UK forces would be prohibited from performing itself, the UK carries 'ethical and moral responsibility' if it has financial or operational authority in joint military or intelligence operations.[24]

Going from 'ethical or moral responsibility' into legal responsibility, a Danish High Court has decided that the Danish government has to compensate Iraqi citizens who were captured in the context of a joint military operation and subsequently ill-treated by Iraqi forces. While Danish forces were not involved in the ill-treatment, the Court held that these forces bore some responsibility because they should have known that the joint operations would bring the captured persons into a danger of fundamental rights violations.[25]

The UK Committee spoke of 'ethical and moral responsibility', and the Danish court did not invoke international law. Yet, partnered detention

---

under IHRL, see Rodenhäuser, Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control, 26 *International Journal of Refugee Law*, pp. 20-23.

[22] See Droege, Transfers of detainees: legal framework, *non-refoulement* and contemporary challenges, p. 683.

[23] United Kingdom Intelligence and Security Committee of Parliament, Detainee Mistreatment and Rendition: Current Issues, 28 June 2018.

[24] Ibid, para. 99.

[25] See Eastern Division of the Danish High Court, *Inge Genefke and Bent Sørensen's Anti-Torture Foundation et al vs. Ministry of Defence*, 15 June 2018. For a discussion of the case, see Anders Henriksen, Detainees in Iraq Win Damages from Denmark in High Court Ruling, *Just Security*, 22 June 2018.

operations do pose questions from an international legal point of view. These include, but are certainly not limited to, the following:

- If individual members of the armed forces of one State are integrated in or accompany a military unit of another State in order to conduct detention operation, would they, in fact, be independent or placed at the disposal of that State?
- If the armed forces of one State facilitate the capture of individuals by organs of another State knowing that the captured persons will likely suffer fundamental rights violations following capture, does this engage the supporting State's international responsibility for aiding and assisting international law violations?
- And finally, how can the facilitation/enabling of the capture of individuals by organs of another State be reconciled with a State's obligation to ensure respect for IHL if the assisting State knows that the captured persons will likely suffer fundamental rights violations following capture?

Conclusion

International law requires that the most fundamental values and norms are respected and protected at all times, including when parties to armed conflicts partner with others in fighting adversaries. Parties to armed conflicts may not transfer a detainee into the hands of an authority where there are substantial grounds to believe that the receiving authority disrespects these norms. States would also engage their international legal responsibility if they aid or assist another State in committing fundamental rights violations. In practice, it is challenging to always respect the prohibition of *non-refoulement* and to ensure humane treatment of detainees and respect for the prohibition of torture or extrajudicial execution post-transfer. It makes partnering with authorities that have a doubtful IHL or human rights record difficult even when such partnerships seem operationally necessary in order to effectively combat an adversary. Instead of pushing back against the law or perceived operational burdens, however, long-term operational success will be achieved if energy is invested to push back against fundamental rights violations.