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Ways to Address Legal and Implementation Challenges when Armed Groups Detain

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1. Introduction

In order to address legal and implementation challenges when armed groups detain, it is first necessary to understand what the challenges are. Accordingly, the first part of this presentation will identify some of the legal and implementation challenges. In the second part, I will provide some suggestions for tackling these challenges.

2. Legal and implementation challenges

2.1 Legal challenges

The first legal challenge relates to lack of knowledge on the part of the armed group concerning the rules on detention. Some armed groups have detailed knowledge of the law of armed conflict generally and the rules on detention specifically; but others are unaware of the law.

There is also a challenge of complexity. There is a very real danger that the law is becoming overly-complicated. If we think about the rules on detention in non-international armed conflicts, we have to look to common Article 3 of the 1949 Geneva Conventions, Additional Protocol II to the Geneva Conventions, customary international humanitarian law, international and regional human rights law and soft law standards, and we also need to analyse the relationship between human rights law and international humanitarian law. If the armed group is controlled by a third state – and I use the word ‘control’ deliberately vaguely – there might also be questions concerning the character of the armed conflict and the consequent relevance of the Third Geneva Convention, Additional Protocol I to the Geneva Conventions, and different customary rules.

Because of the complexity, there are also challenges of uncertainty, for example, whether, and if so, in which situations armed groups are bound by human rights law, the relationship between human rights law and international humanitarian law, and so on.

Despite the complexity, there are also insufficient rules in the law of non-international armed conflict, such as in relation to the transfer of detainees as well as concerning the notification of the capture of individuals.

At the same time, the point should not be overstated because the fundamental rules relating to the treatment of detainees and the conditions of detention are reasonably clear.

2.2 Implementation challenges

Turning to challenges of implementation, even if an armed group is aware of the law and seeks to comply with it, it might be unable to do so fully due to its lack of capability. It might not control territory, or it might control territory only at night, or it might have insufficient personnel. Sometimes we see instances of detainees being killed because the group is unable to detain them.¹

There might also be ‘strategic’ reasons as to why the armed group does not comply with the rules on detention. It might be to send a message to the opposing party to the armed conflict, for example, by killing detainees. Or it might be in retaliation for the opposing party killing detainees.

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¹ See eg J-M Henckaerts and L Doswald Beck, *Customary International Humanitarian Law, Volume II: Practice* (CUP, 2005) 976, referring to an unidentified armed group.

Individuals might also be kept in detention in order to be used as a bargaining chip in later negotiations.

There might also be rejection of the law, whether total or partial. There are various reasons for this, including that the law of armed conflict is perceived as ‘western’; that the law does not fit with the group’s ideology; that it is seen as biased in favour of states; and so on. Many of these objections are not particular to the rules on detention, but are made to the law of armed conflict or international law more generally.

3. Ways to address the challenges

Given that there are a number of legal and implementation challenges, there needs to be a range of approaches to address them. In terms of the implementation challenges, the approaches need to be tailored to the particular armed group in question and the particular situation on the ground. There can be no ‘one size fits all’ approach.

Given that the topic allocated to me is ‘ways to address ... challenges’, I shall try to put forth some concrete suggestions. As requested, I will also discuss the detention of vulnerable persons.

3.1 Legal challenges

First: the legal challenges. Lack of knowledge of the rules on detention needs to be addressed through dissemination, instruction and incorporation of rules into armed groups’ practices and materials. I won’t say any more about this given that the topic is well-known, but work still needs to be done on who best should give the training, how it should be given, whether to appeal to the group’s ideology, and so on.

In terms of the complexities of the law, it is important to operate at different levels. At the over-arching level, the law is indeed complex and it might be inevitably complex given that we do have two separate bodies of law – the law of international armed conflict and the law of non-international armed conflict – and we do have different bodies of law which apply during armed conflicts – the law of armed conflict and human rights law – rather than a neat, integrated whole.

But this complexity at the over-arching level should not be carried through to a complex set of rules that are applied by an individual fighter on the ground in a detention centre. Instead, we need to translate the

lengthy list of rules, from different sources, into a clear, easy to follow list of 10 or 15 rules on conditions of detention and treatment of detainees that are simple to understand and can be applied on the ground.

More controversial is the legal basis for internment by armed groups. Even if there is a legal basis for internment by armed groups in the law of armed conflict – and some armed groups, such as the Farabundo Martí National Liberation Front (FMLN²) have taken the view that there is – the grounds and procedures for internment are not set out in that body of law. As such, the armed group would need either to apply domestic law (or equivalent) or set out its own law containing, for example, the grounds and procedures for internment.

In practice, whereas a number of armed groups have set out the legal framework for criminal detention, adopting penal codes and the like,³ far fewer have laws relating to internment. Thus, one area to which attention needs to be paid is the legal framework relating to internment by armed groups and, in particular, whether armed groups are to be supported in developing laws on point. That of course will be a sensitive issue, but it is not one that can be ignored, particularly considering armed conflicts which are fought between armed groups.

3.2 Implementation challenges

3.2.1 Groups that seek to comply with the law

Even if all the legal challenges are addressed, there might still be challenges of implementation.

One of the underlying difficulties concerning the rules on detention is that the same rules apply to all armed groups and the category of ‘armed groups’ covers a broad spectrum of actors. It includes groups that only barely meet the degree of organization required for the group to be a party to a non-international armed conflict through to groups which exercise effective control over a significant portion of a state’s territory.

Thus, when clarifying the law, it would be necessary to have something along the lines of Article 5 of Additional Protocol II, which provides for minimum core obligations together with additional obligations that are dependent on the capabilities of the Detaining Power.

² FMLN, *The Legitimacy of our Methods of Struggle*, 8.

³ E.g. CPN-M, Public Legal Code 2060 (2003/2004).

Challenges of implementation are heightened in the case of the detention of particularly vulnerable persons, such as children, the wounded and sick, women, persons with disabilities and older persons. With respect to such individuals, it might be useful to draw on some of the possibilities which exist in the law of international armed conflict.⁴

I. *Mixed Medical Commissions*

The first such possibility is the potential use of Mixed Medical Commissions. Article 109 of the Third Geneva Convention provides that “[p]arties to the conflict are bound to send back to their own country ... seriously wounded and seriously sick prisoners of war....” The examination of the wounded and sick and “all appropriate decisions” relating to repatriation are left to Mixed Medical Commissions.⁵ Each Commission is composed of three members, two of whom belong to neutral States and are appointed by the ICRC, with the third being appointed by the Detaining Power.⁶

The Mixed Medical Commission process of the Third Geneva Convention should not simply be “copied and pasted” when applied to non-international armed conflicts. Instead, it would need to be amended to fit the specificities of that type of conflict. For example, two members of the Commission could be appointed by the ICRC and the third by the armed group, or all three could be appointed by the ICRC following some input from the armed group. And the Commission would examine wounded and sick detainees held by the armed group and make a decision as to their release.

One instructive example of release and repatriation of wounded and sick members of the state armed forces in a non-international armed conflict is the Humanitarian Exchange Accord concluded between the Colombian government and the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) in 2001. That Accord provided for the exchange of wounded FARC members detained by the government and “sick soldiers and policemen” held by the FARC.⁷ A group of doctors recommended by the ICRC performed a medical examination, following which, 69 individuals

⁴ See generally S Sivakumaran, (2018), *Armed Conflict-Related Detention of Particularly Vulnerable Persons*, 94, *International Law Studies* 39.

⁵ Third Geneva Convention, Article 112.

⁶ Third Geneva Convention, Annex II: *Regulations concerning Mixed Medical Commissions*, Articles 1 and 2.

⁷ Government of Colombia/FARC, (2 June 2001), *Humanitarian Exchange Accord*.

were released. Although diverging in certain important respects from the Third Geneva Convention model, the Accord is instructive in demonstrating that a release and repatriation process can be utilized in non-international armed conflicts.

Such a process benefits all concerned. The wounded and sick being detained by the armed group will fare better upon release. The armed group no longer has to expend resources on medical care for the wounded and sick detainees and the state no longer has its members in the hands of its adversary.

II. Other instances of release and repatriation

We should also not forget the exhortation in common Article 3 to conclude *ad hoc* agreements between the parties to the conflict.⁸

In addition to the repatriation of certain categories of wounded and sick prisoners of war, the Third Geneva Convention also provides for the direct repatriation of “able-bodied prisoners of war who have undergone a long period of captivity”,⁹ pursuant to an agreement between the parties.

For its part, Article 132 of the Fourth Convention provides for the parties to endeavour to conclude agreements “for the release, the repatriation, the return to places of residence . . . of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.”

III. Accommodation and internment in a neutral state

A third possibility is accommodation and internment in a neutral state. Both the Third and Fourth Geneva Conventions encourage or acknowledge the possibility of accommodation in a neutral state of certain classes of persons.¹⁰

There are a number of difficulties with the use of this possibility in non-international armed conflicts. There would need to be a third state that is willing to accommodate the individuals. Agreement would need to be

⁸ Common Article 3 provides: ‘The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.’

⁹ *Third Geneva Convention*, Article 109.

¹⁰ *Third Geneva Convention*, Article 110; *Fourth Geneva Convention*, Article 132.

reached between the Detaining Power, the state on which the individuals depend and a third state. And it would generally be impossible to accommodate all persons interned in a non-international armed conflict in a third State. Indeed, the possibility has rarely been used in international armed conflicts.

Nonetheless, in an appropriate case, it might prove possible. Such an approach was used in Afghanistan in the 1980s. During the conflict, the ICRC negotiated with the USSR, Afghan armed opposition groups, Pakistan, and Switzerland and reached an agreement under which Soviet soldiers held by Afghan armed opposition groups would be interned in Switzerland for a period of two years, after which they would return to their country of origin. This was done by analogy to the Third Geneva Convention.¹¹

Such a possibility can prove useful especially for a limited number of particularly vulnerable persons and would also be of benefit to the detainees, the non-state armed group and the state on which the individuals depend.

3.2.2 Groups that do not seek to comply with the law

Finally, in terms of armed groups that do not seek to comply with the law, the position is different. With respect to such groups, a useful approach is to identify sources of influence. Armed groups are frequently funded or supported by third states, the diaspora or local communities. If an armed group has no intention of complying with the law, focus could usefully be on the persons, entities, or states that are supporting the group, financing the group, or otherwise carry influence, such as third states, religious leaders, community leaders, or the diaspora.

4 Conclusion

Ultimately, there is no easy solution to tackling legal and implementation challenges when armed groups detain. Instead, it is necessary to have a range of tools in the toolbox. More generally, it can be useful to look to history and the practice of armed groups to see what has

¹¹ See International Committee of the Red Cross, *Press Release*, (May 20, 1984), reprinted in 281 IRRC 239–40 (1984).

worked and what has not. And if we really want to understand the challenges when armed groups detain, it would be useful and necessary to speak to the groups themselves.