



Detention by non-State armed groups: translating law to practice

April 4, 2023, Analysis / Armed Groups / Detention / Humanitarian Action / Law and Conflict

11 mins read



Tilman Rodenhäuser
Thematic Legal Adviser,
ICRC



Eloïse Lefebvre
Detention Adviser, ICRC



Illustration by Victor Juhasz

From the east of the Democratic Republic of the Congo to the north of Syria, from remote areas of Colombia to the Tigray region of Ethiopia: over the past decade, tens of thousands of people have found themselves detained by non-State armed groups. As part of its mandate, the ICRC works in all parts of the world to protect detainees by State and non-State parties to armed conflicts. Conscious of the unique insight this work provides, the ICRC is now publishing examples from over 80 non-State armed groups on how they have aimed to implement their international humanitarian law (IHL) obligations on the protection of detainees.

In this post, legal adviser Tilman Rodenhäuser and detention adviser Eloïse Lefebvre present four key issues on the protection of detainees in the hands of non-State armed groups.

ICRC Humanitarian Law & Policy Blog · Detention by non-State armed groups: translating law to practice

Public reports and judgments of national and international courts are full of accounts of egregious crimes against detainees held by State and non-State parties to armed conflicts. These reports reflect a shocking reality. Denunciation, ‘naming and shaming’, and accountability are one element of international efforts to change behavior to protect detainees. Another way is to engage in bilateral and confidential dialogue with non-State armed groups to re-iterate and explain their international legal obligations and provide concrete avenues on how they can implement them. This latter approach is what the International Committee of the Red Cross (ICRC) is mandated to do.

Based on our experience in engaging directly with non-State armed groups and the reality we have seen, the ICRC is publishing a study on ‘Detention by non-State armed groups: Obligations under international humanitarian law and examples of how to implement them’. This publication recalls the international humanitarian law rules that protect detainees in non-international armed conflict and, on each rule, presents practical measures that non-

State armed groups have taken to protect detainees. We hope this practical guidance will assist armed groups in implementing their legal obligations, and be used by States, humanitarians, and others who aim to positively influence non-State armed groups to treat detainees in accordance with international humanitarian law.

1. Humane treatment: a question of will, rules, and discipline

The obligation to treat all detainees humanely and the absolute prohibition of violence to life and person are among the most elementary rules of the law of armed conflict. Too often, these obligations are not respected, and reports catalogue physical, sexual, and psychological violence against detainees. Renewed efforts must be taken to prevent and stop such violations.

From decades-long engagement with non-State armed groups and visits to their places of detention, we also know that many groups abstain from such crimes and take steps to respect international humanitarian law. Such practices rarely make the news; however, they can be instructive to strengthen the protection of detainees.

In discussions with the ICRC and others, armed groups have given several arguments on why they aim to abstain from violence against detainees. They have also shared practical measures they take to ensure that their troops treat detainees humanely.

In addition to the clear legal prohibitions (see, in particular, *Common Article 3*; *Article 4 Additional Protocol II*; *Rules 89–97 of the Customary IHL Study*), three practical arguments against torture and other forms of ill-treatment stand out:

- Treating detainees humanely may help protect the group's own members against ill-treatment in the hands of the adversary. In other words, it can prevent a slippery slope of violence and reprisals between adversaries. One armed group's leader further suggested that treating detainees humanely can undermine the adversary's will to fight: if adversaries fear torture and murder if captured, they will fight with greater fury. In contrast, the expectation of humane treatment after capture can reduce an adversary's will to fight because they know they may save their own lives by surrendering (*here*, p. 297).
- Torture is simply not effective in gathering intelligence. One group reported reaching this practical conclusion on its own. Research shows that 'the application of coercion can both initially enhance resistance on the part of the interviewee and, if continually applied, lead to the provision of false information or a false confession' (*here*, para. 21).
- Showing compliance with international humanitarian law – including with respect to the treatment of detainees – is important to gaining the support of local communities as well as States or the international community at large. Several groups reported that their behavior is motivated by this aim.

A set of interconnected and reinforcing measures were reported by non-State armed groups to protect detainees. First, a party to an armed conflict needs clear internal rules (such as a code of conduct or general orders) demanding humane treatment of all detainees and prohibiting all forms of violence to life and person of detainees. Second, these rules must be known to all members of the group, and members who handle detainees must be trained accordingly. And third, to ensure respect for these rules it is essential to have an internal disciplinary system, which includes effective oversight by a responsible commander and punishment when rules are violated. Interestingly, but perhaps not surprisingly, these measures reflect practices commonly seen in State armed forces.

2. Providing humane living conditions: plan, and share what you have

Every detaining authority is responsible for ensuring humane living conditions for each and every detainee it holds. It must maintain detainees in good health, protect their lives while in detention, and respect their physical and mental integrity (see, in particular, *article 5 Additional Protocol II* and *Rules 118 Customary IHL Study*). In many cases, respect for the rules on humane conditions of detention will be affected by the resources available to the detaining power and by operational circumstances. Practice shows, however, that several steps can and should be taken by detaining authorities no matter their situation.

As above, the first measure armed groups should take is to set out clear rules on providing detainees with humane living conditions, communicate these rules to their members, and ensure that they are enforced by commanders. In addition, as it is almost inevitable for any fighting force to take detainees in the context of hostilities, anticipation, resource allocation, and logistics are essential: detainees will need food and water, medical care, a safe place to stay, and the possibility to correspond with family.

And even where resources are scarce, in the many circumstances one practice has stood out: at the very least, non-State armed groups have provided detainees with food and water, hygiene items, and sanitation facilities, clothing, medical care, and accommodation of a similar standard to that available to the capturing forces/guards. In other words, they share what they have. This reflects a long-standing military practice and legal concept (see *here*, paras 30–38). Moreover, the ICRC has seen practical measures that NSAGs with few resources have taken to alleviate suffering, such as transferring injured detainees to nearby healthcare providers or enabling detainees to send 'Red Cross messages' to their loved ones.

3. Procedural safeguards: know the law and build on existing structures

Can detention by armed groups be lawful? The answer to this question depends on the legal framework we look at. There is little doubt that under the domestic law of the State in which they operate, detention by a non-State armed group would rarely be lawful. Under international law, however, the situation is different: IHL is built on the assumption that all parties to an armed conflict will detain and sets limits on such detention, including procedural ones.

In times of armed conflict, international humanitarian law addresses primarily two types of detention – and both can be observed in the practice of non-State armed groups. One is criminal detention, meaning the detention of a person who is suspected of having committed a crime, is awaiting trial or

sentencing, or who has been convicted of a crime. The other one is internment, which refers to detention for security reasons in situations of armed conflict.

The ICRC has frequently seen – in the same place of detention – soldiers or fighters captured in the context of hostilities and persons detained for alleged crimes. In several cases, non-State armed groups have applied different procedures to the two categories of detainees. Armed groups often refer to captured adversaries as ‘prisoners of war’ (despite the fact that as a matter of law the status of ‘prisoner-of-war’ only exists in conflicts between States, i.e. international armed conflicts) and provide rather limited procedural safeguards, if any. To avoid arbitrary detention, however, minimum procedural safeguards for internment must be respected (see Rule 99 *Customary IHL Study*) – and the practice contained in this study indicates that it is possible to do so.

Regarding criminal law detainees, including adversaries suspected of having committed (war) crimes, a range of practices have been observed which may help parties to an armed conflict to ensure that sentences are only passed by regularly constituted courts affording all indispensable judicial guarantees (see, in particular, Common Article 3; article 6 *Additional Protocol II*; rules 100–102 *Customary IHL Study*). Succinctly, fulfilling this obligation requires having in place laws, a court, and judicial guarantees for the accused. For non-State armed groups, it appears particularly difficult to adopt and promulgate laws and establish regularly constituted courts in contested territories devastated by fighting. One avenue that some armed groups have taken to overcome this challenge is to keep the ordinary criminal law of the territorial State in force and rely on judicial structure already in place prior to the conflict. In other contexts, and especially if civilians are suspected of having committed crimes, non-State armed groups have transferred detainees into the hands of State authorities to administer justice. If non-State armed groups decide to conduct trials, the legal bar set by international humanitarian law is high and there is a real risk of committing the IHL violation – and war crime – of passing sentences or executions without the applicable safeguards (see, for example, *here*).

4. Asking for assistance, and releasing detainees

To conclude, the most challenging question remains: what shall a non-State armed group do if it cannot treat detainees in accordance with its legal obligations? What it cannot do is execute adversaries who are wounded, surrender, or are otherwise captured, for example on the grounds that the group was unable to conduct trials or to care for detainees. That would be a war crime (see Article 8(2)(c)(iv) of the *Rome Statute of the International Criminal Court*). And unfortunately, we have seen that some armed groups have done so.

However, at least two alternative avenues exist.

First, if the main concern is a lack of resources to ensure humane living conditions, groups might allow families to provide support to detained family members, turn to supporting States for help, or approach religious or humanitarian organizations to assist. Many non-State armed groups have relied on these different sources to meet their obligation.

Second, an avenue that is always available, lawful, and in some circumstances legally required (see *here*) is to release detainees. In many cases, non-State armed groups have done so to avoid using resources to care for detainees (especially detainees with specific needs), if their basic needs could not be provided for, if their security could not be guaranteed, or as a sign of political good will.

Whatever avenue is taken, preserving the lives and dignity of detainees must be the paramount concern.

See also

- Ruben Stewart & Celia Edeline, *The NSAG handbook: helping non-State armed groups reduce civilian harm during urban warfare*, March 30, 2023
- Matthew Bamber-Zryd, *ICRC engagement with armed groups in 2022*, January 12, 2023
- Jelena Pejic, Irénée Herbet & Tilman Rodenhäuser, *ICRC engagement with non-State armed groups: why and how*, March 4, 2021