

Prisoners of war: high-intensity warfare’s blind spot?

Philippe Ryfman • Lawyer at the Supranational Specialised Public Prosecutor's Office of the Ministry of Justice and Human Rights of Peru

For several years now, a new dynamic has been emerging, possibly heralding a paradigm shift: the resurgence of high-intensity inter-state wars, such as the conflict between Russia and Ukraine. Historically focused on civilians, the field of protection is likely to see a return of the fate of combatants, particularly prisoners of war, to the forefront of the issue. As Philippe Ryfman explains, prisoners of war are still relatively invisible.

During the second half of the 20th century and the first few years of the 21st, our understanding of armed conflicts changed considerably. Until 1945, international armed conflicts (IAC) occurred predominantly between two official nation-states. This era was followed by a long period of civil wars, wars of decolonisation, internal revolts and minority insurrections, all placed in the category of non-international armed conflicts (NIAC). A source of considerable death and destruction with dramatic consequences, they remained localised conflicts, often considered low to moderate in intensity. This rather simplified distinction should be more nuanced, of course. Whereas armed conflicts between nation-states has not completely disappeared (the wars between Israel and the Arab world, India and Pakistan, Iraq and Iran, Ethiopia and Eritrea, Armenia and Azerbaijan, the Gulf Wars), the interference of third-party states in NIAC has occurred on a regular basis, causing these non-international conflicts to become, at least partially, international in nature (Nigeria, Democratic Republic of the Congo, Afghanistan, former Yugoslavia, Ethiopia, Syria, Yemen and so forth).

The resurgence of interstate conflicts

Nevertheless, since the beginning of this decade, a new conflict dynamic has surfaced, a probable indication of a change in paradigm. Some nation-states have made clear their ambition to become new “intermediate” (Turkey)¹ or regional powers, or to regain regional power status (India, Iran, South Africa, Saudi Arabia, Brazil, Indonesia, Israel); others, an empire approach has fostered several countries’ return² and repositioning on the world stage (China, Russia). Their drive is no longer limited to economics, diplomacy or soft power: it now includes the open or indirect resorting to the threat and use of military force. Just as important, the deadliness of the many ongoing armed conflicts has risen to levels not seen since 1945.

¹ Dorothee Schmid, *La Turquie en 100 questions. La Puissance opportuniste*, Éditions Tallandier, 2023.

² Emmanuel de Waresquiel, « Le Retour des Empires », *Historia*, n° 917, mai 2023.

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As of now, the return of NIACs to centre stage does not appear to be a throwback from the past but rather a possible future.³ Common characteristics are identifiable: these conflicts are massive, high to very high intensity, include the generalised use of highly destructive weapons, reinstatement of the draft, indiscriminate bombings, fighting in urban areas, significant consequences for victims (combatants and non-combatants) and will likely last a long time.

This re-emergence of war between nation-states – including the conflict in Ukraine as an obvious example – appears to have taken by surprise humanitarian organisations, both private (non-governmental organisations [NGOs], Red Cross/Red Crescent international movement) and intergovernmental (United Nations [UN] humanitarian agencies), which have been both overstretched and called into question, along with international humanitarian law (IHL) specialists. There are many reasons for this relative lack of preparedness which it is not possible to analyse in detail here. However, one of them is partly due to the fact that protecting victims in a war zone – the key element for humanitarian action in a similar context – has historically and progressively focused on protecting and rescuing civilians. Whereas what could happen – and what is actually occurring in Ukraine, and for the first time in eighty years – is that the ratio between military losses and civilian casualties reverses course: in other words, the former is now much greater than the latter. Naturally, it is not possible to take less interest in the outcome of the group ranking second in casualties in a war situation, on the contrary. Yet we have to pay attention to the other issue now returning to the forefront: the fate of the combatants. When considering the number of men and women mobilised for the conflict, wartime medicine and rescuing the wounded once again have an important role to play. We will not cover this topic here since our focus is on prisoners of war (POWs).

Prisoners of war: the need to avert a “forgotten continent”

It is clear today that POWs are practically invisible. When they escape execution during their capture, their fate is not a high priority, except for their families and a few humanitarian organisations, starting with the International Committee of the Red Cross (ICRC), whose voice is often lost amongst the many others. Yet IHL and the aid process have since the First World War and in part for the Second World War historically made POWs their focus. To such an extent that science fiction aficionados pedantically consider whether or not IHL would apply to extraterrestrials attempting to invade Planet Earth, posing the question: “What would we do after capturing and incarcerating extraterrestrials who have committed war crimes but are legally incompetent?”⁴

Yet in spite of POWs’ lack of visibility and the incomplete sources on current armed conflicts, the fate and status of POWs deserve consideration. The situation of Ukrainian prisoners in Russia and Russian prisoners in Ukraine unfortunately constitute a “textbook case”. Occurring in real time, it brings to the forefront the way IHL norms, at least given the sources available, are only randomly being applied. Nevertheless, whatever the outcome of this war, it is important to start thinking right away about the POWs, especially given the timetable for humanitarian stakeholders to document the situation and to discuss and think about the means of action as well as the tools for protection and assistance. In addition, let us not forget that it might be necessary to take other potential major conflicts into

³ French National Assembly, Information Mission Report from 17 February 2022, presented by Patricia Mirallès and Jean-Louis Thiériot, deputies in the Preparing for High-Intensity Conflict Committee; Stéphane Audouin-Rouzeau, *La Part d’ombre. Le risque oublié de la guerre*, Éditions Les Belles Lettres, 2023; Thierry Burkhard (Head of the Joint Chiefs of Staff of the French military), « La Force militaire fait un retour brutal sur la scène internationale », *Le Monde*, 8 novembre 2022.

⁴ Damien Roets, « Le crime d’agression interplanétaire », in Pierre-Jérôme Delage (dir.) *Science-fiction et science juridique*, IRJS éditions, 2013, p. 360.

consideration in the coming years (for example the South China Sea, North Africa, the Middle East, etc.). If the number of POWs, especially in Ukraine, remains relatively low today – although the exact figure is still unknown – nothing prevents their protection, safety and status from becoming a major issue in the near future, or from rising to levels similar to world conflicts from last century.

After a short summary of the main provisions in the Third Geneva Convention (referred to hereafter as GC III)⁵ and traditional law regarding the issue, a case study (using open sources) on the fate of POWs in the Russo-Ukrainian War will provide the first lessons, especially with regard to complexity factors, therefore providing an operational viewpoint for humanitarian stakeholders. Beyond the required minimum, still insufficient, reaffirming IHL rules in the matter means making sure human rights for detainees do not fall by the wayside.

Primary provisions in international humanitarian law regarding prisoners of war

Of course, it would be erroneous to think that IAC since 1945 have not seen enemy soldiers captured and detained through the end of the conflict and even beyond. POWs have always been a major issue of concern for adversaries, just as much for the Iran-Iraq War (September 1980- August 1988), the Eritrean- Ethiopian War (May 1998 to June 2000), the various Arab-Israeli wars since 1948, the Indo-Pakistani wars since 1947 or during the “Sand War” in 1963 between Algeria and Morocco. This was obviously the case during the Vietnam War, and in a very explicit manner, since it was an international conflict between the United States (US) and North Vietnam. However, the number of POWs remained limited and never transformed into a system of mass incarceration with the construction of sizeable prison camps, as was the case in the 20th century during the First and Second World Wars.

Conventional international law

It is the GC III “relative to the treatment of prisoners of war” of 12 August 1949 which, for the most part, established the rules for their protection and the various rights that they are afforded. In fact “prisoners of war are not: deprived of their freedom for having committed (or presumed to have committed) a reprehensible act [...] but rather to prevent them from taking part in combat. Since they are not imprisoned for punitive reasons, they should receive exemplary treatment”.⁶ GC III goes into great detail in its 143 articles. Article 13 stipulates that “prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention”. The first general principle governing the notion of freedom for this specific type of captive covers the protection and preservation of their lives. This obligation is an integral to customary law and a key foundation of IHL.

Similarly, in accordance with Article 25, POWs must have access to favourable quarters (and even equivalent to the forces of the Detaining Power), taking into consideration their culture and the customs, and they should not be prejudicial to their health. This implies that the buildings where they are imprisoned comply with adequate health and safety conditions where, for example, showers are

⁵ The full text of the Third Geneva Convention is available online in the ICRC database: <https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties>.

⁶ Damien Scalia et Marie-Laurence Hébert Dolbec, « Prisonniers et détenus », in Sandra Szurek, Marina Eudes et Philippe Ryfman (dir.), *Droit et Pratique de l'action humanitaire*, LGDJ/LEXSENSO, 2019, 3^e partie, Titre I, Chap 5, p. 728.

made available. Article 26 covers food rations to be provided, and Article 27 requires that proper clothing, underwear and footwear be provided in sufficient quantities. In addition, Article 13 also prohibits POWs from being exposed to “public curiosity”, a frequent source of tension since putting captured soldiers on display offers the capturing army a way to imply that it has gained an upper hand in the conflict.

Finally, to ensure compliance with prisoner conditions as established by IHL, the ICRC has the authority and prerogatives providing it with the right to gain access to POWs and the detention centres (Article 126). It is important to note that, contrary to widespread opinion fed by experiences from the First and Second World Wars, humanitarian access to POWs is not the exclusive purview of the ICRC (Article 10, paragraph 3). Even though the ICRC has been attributed a certain status, other humanitarian organisations – starting with NGOs – can, at the least, be present at detention centres to provide assistance (such as medical) to POWs. Articles 10 and 126 cover several situations, including the right for a third-party neutral state, referred to as a “Protecting Power”, to be accorded access to POWs if they are not involved in the armed conflict. It is not required that they be designated as such by the Belligerent Power whose nationals are detainees, an agreement between the Protecting Power and the Detaining Power is sufficient to exercise this option.

Additional Protocol 1 (hereafter referred to as AP I) passed on 8 June 1977, “relating to the Protection of Victims of International Armed Conflicts”,⁷ can also be applied, especially with regard to its Articles 43 and 44 that target militias or paramilitary organisations fighting alongside regular armies.⁸

Customary law

The practice of visiting internment locations can be attributed to the norms established gradually and adapted to IAC during the 20th century. As of today, through customary law, they are an integral part of the body of IHL. Three norms stand out and are applicable and applied by the ICRC. The first establishes that delegates from the ICRC have access to all prisoners and all areas of detention locations and must be provided with a list of all detained individuals at the camp. It goes without saying that delegates sent by the ICRC are qualified to provide humanitarian assistance to those prisoners who require certain vital needs be met. This usually involves providing foodstuffs but also organising contact and communication with family members. The second norm makes sure that delegates are able to visit on a periodic basis. And the third – probably the most well known – is the ability to freely interact with other detainees of their choice without being monitored.⁹

End of captivity

POWs must quickly be released and returned to their home country “after the cessation of active hostilities” according to Article 118 of GC III, which even specifies “without delay”. Repatriation during conflict is also possible and even theoretically required of the Detaining Power (Articles 109 and 110). This rule applies to repatriating the severely sick or wounded and all other prisoners too sick or wounded to take up arms again. While under normal circumstances these repatriations do not require any compensation or quid pro quo, they are usually used as a pretext for a prisoner exchange.

⁷ The full text of the Protocol is available online in the ICRC database: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977?activeTab=1949Cs-APs-and-commentaries>

⁸ This is the case in Ukraine with pro-Russian militias from the self-proclaimed Republics in Donbas, as well as mercenaries from the Wagner Group.

⁹ Damien Scalia et Marie-Laurence Hébert Dolbec, « Prisonniers... », *op. cit.*, p. 737-738.

Pre-case study on the fate of prisoners of war in the Russo-Ukrainian War

As of the writing of this article,¹⁰ the IAC that began when Russia invaded Ukraine on 24 February 2022 is still underway, making it difficult to analyse the fate in store for the POWs of the Belligerent Powers. The information available is partial, difficult to collect and up for debate, while both sides are doing their best to exploit detention conditions of their side's captured soldiers to their benefit (especially with regard to public relations about the war). However, based on publicly available information, we can provide our initial observations.

First, it is important to point out that this war, from the very beginning, has received widespread media coverage. However, it is not trivial that the fate of POWs has very rarely been discussed, and this includes research publications. There are a few exceptions, usually produced by legal experts specialising in IHL, but the topic is often covered as one among many legal issues. Julia Grignon, professor at the Université Laval (Quebec) and research director at France's Institute for Strategic Research (*Institut de recherche stratégique de l'école militaire* in French), continues to write about the issue¹¹ on a regular basis. By contrast, *Questions Internationales*, in its series of in-depth articles about the conflict,¹² makes no mention of the POW issue.

Ukrainian prisoners of war in Russia

While their exact number remains unknown, estimations range from a few hundred to several thousand; one Russian diplomat even mentioned the number 6,000 in October 2022. Chronologically, the recurring fighting in the Donbas has generated, since 2014, a first group of captives. According to unconfirmed information – and in spite of several encounters over the past eight years of fighting – there were still POWs in this category when the Russian offensive began in February 2022. During the first few days of the offensive, a second group of Ukrainian soldiers was captured, most in the eastern part of the country. A third cohort is made up of survivors from the fierce battles that took place in the cities around the Black Sea, especially in Mariupol, where forces remained entrenched in the Azovstal steel plant. With a now stabilised front, along with the Ukrainian counter-offensive in autumn 2022, the capture of soldiers from the Kyiv army on the battlefield now appears rare and sporadic.

The creation of dedicated camps has yet to be documented, whether in territories occupied by Russian troops or in Russia itself. The known or supposed detention locations are either prisons – such as Olenivka prison,¹³ near Donetsk – or buildings within military installations. However, it seems that prisoners are gradually being dispersed throughout several establishments within the Russian Federation prison system. According to several sources, civilians have also been detained (local Ukrainian elected officials, civil servants, journalists, people living in the occupied areas suspected of being hostile towards Russians) and mixed in with soldiers at the detention centres. Different statements made by released prisoners seem to corroborate the poor, even horrendous, conditions at the detention centres. The use of torture during interrogations after capture (and even beyond) appears widespread.

¹⁰ June 2023.

¹¹ Julia Grignon, « Amplitude et subtilité du Droit International Humanitaire dans la guerre en Ukraine », in *Le Rubicon, Les Nouvelles formes de guerre*, 2022, Éditions des Équateurs, p. 131-144.

¹² See « Ukraine – Entre Est et Ouest », *Questions Internationales*, n° 118, avril/mai 2023, especially the article by Yves Boyer, « La Guerre en Ukraine : “la mêlée sanglante” », specifically dedicated to its military aspect.

¹³ Antoine Malo, « Les rescapés de Marioupol », *Journal du Dimanche (JDD)*, 24 décembre 2022.

In addition, various media and social media¹⁴ have broadcast footage of summary executions of captured soldiers, such as the video of a Ukrainian soldier who, after being disarmed and taken prisoner, was shot¹⁵ and killed upon shouting “Glory to Ukraine”.¹⁶ The video of a prisoner being decapitated was also broadcast in April 2023.¹⁷ For the moment, POW safety does not appear guaranteed. A detention building at Olenivka prison was bombed at the end of July 2022, resulting in the death of fifty-three people and causing dozens of casualties. Each Belligerent Power conveniently placed blame on the other.¹⁸

ICRC delegate visits – in compliance with the articles of GC III and GC IV¹⁹ for civilian detainees – have taken place. The rules regarding confidentiality explain, naturally, the lack of information regarding the issue. However, the ICRC clearly does not have access – on this side – to all of the detention locations, quite the opposite. The ICRC recognises the problem, declaring that it is well aware “that several prisoners of war and civilian detainees have not yet received a visit from our teams”, adding that “this is why we demand access to all prisoners, in accordance with our humanitarian commitment and the mandate accorded to us by the Geneva Convention”.²⁰

Russian prisoners of war in Ukraine

Their number is also indeterminate. Here too, prisoners have been scattered through the Ukrainian prison system. It appears that Ukrainian authorities have created a genuine Russian POW camp in which the prisoners (in addition to food and medical care) have the right to write to and even call their families.²¹ Its location is unknown. Since the detention facility is part of the prison system, even prior to the war it met much higher standards when compared to the Russian prison system in terms of incarceration conditions and prisoner rights. This is likely the result of efforts made by each Kyiv government since the Maidan Revolution in 2014. The latter sparked a vast democratic movement, as well as the involvement of Ukrainian civil society in keeping an eye on the prison system. In addition to soldiers from the Russian army, mercenaries from the Wagner Group figure among the detainees. There do not appear to be any civilian detainees, or at least not very many. In terms of abuse, while there may very well be some, it is not systematic. Bits of information are circulating, especially on social media, about prisoner treatment and the location of the detention centres. In some cases, summary executions of captured combatants are mentioned. However, none of this information has been corroborated or verified by independent sources, and at this point it does not appear very reliable.

¹⁴ Their authenticity has not yet been fully verified.

¹⁵ The UN High-Commission for Human Rights considers this video to be real (AFP on 8 March 2023).

¹⁶ *Le Monde* with AFP, « Ce que l’on sait de la vidéo d’exécution d’un soldat ukrainien, élevé depuis au rang de héros », 8 mars 2023.

¹⁷ *Le Monde* with AFP, « En Ukraine, la vidéo de décapitation d’un soldat sème l’effroi », 12 avril 2023.

¹⁸ Anissa El Jabri, « Explosions dans la prison d’Olenivka : la Russie persiste et signe », *Radio France Internationale* (RFI), 11 août 2022.

¹⁹ The Fourth Geneva convention is “relative to the protection of civilian persons in time of war”. For this conflict, it applies to civilian detainees. The full text is available online in the ICRC database: <https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties>

²⁰ Frédéric Joli (spokesperson for the ICRC in France), « Aux fausses informations, les bonnes questions... et bonnes réponses », *L’humanitaire dans tous ses États*, 17 mars 2023, <https://blogs.icrc.org/hdtse/2023/03/17/aux-fausses-informations-les-bonnes-questions-et-bonnes-reponses>

²¹ Interview with Dmytro Lubinets, Ukrainian Human Rights Commissioner, « Le Comité international de la Croix-Rouge doit publiquement condamner la Russie », *Le Monde*, 11 février 2023.

Initial lessons

While never before in history has humankind been able to follow a war like this one so closely from anywhere on the planet and in almost real time with a daily abundance of information, the latter is only partial, and from what we know, far from encouraging. Among the initial lessons to be learned, the first is that the fate of POWs in their respective camps remains unclear. There is a strong link between the need to improve their protection and the ability to observe imprisonment conditions. The second lesson confirms that the main provisions in GC III and AP I – as we have summarised them – are not being followed, or at least very little; this is especially the case on the Russian side. It remains unclear how many POWs there will be – even if only approximately. However, in a summary report in mid-June 2023 of all its humanitarian action in Ukraine from February 2022 to May 2023, the ICRC finally provided some initial figures. It states that it has “visited more than 1,500 prisoners of war [...] in Ukraine and Russia”, though it seems to admit only half-heartedly that it has not had access to all POWs (“The ICRC’s priority remains access to all persons detained in connection with the international conflict”). He also mentions the figure of 5,500 families having received – through its Central Tracing Agency (CTA) – information about relatives who have gone missing.²² And finally, one positive element, several prisoner exchanges have taken place between the two Belligerent Powers since the beginning of the conflict. This is not surprising, since the history and culture of the Russian army teaches that prisoner exchanges are commonplace. Recently in Syria, when the regime in Damascus retook areas once held by rebel forces, with support from the Russian army – the latter organised and supervised several prisoner exchanges between the warring parties.

During prisoner exchanges since the beginning of the Russo-Ukrainian War – especially those involving politicians²³ and oligarchs –, Russian authorities have requested several times that Ukrainian nationals arrested by Ukraine’s prosecutor general or Security Service for suspicion of colluding or collaborating with the invader be included. In this regard, the Ukrainian nationals mentioned do not fall into the category of detained civilians covered by GC IV or AP I, since they are citizens of Ukraine. In addition, these exchanges of military and civilian prisoners occurred through initiatives and guarantees from third-party states in their role as a Protecting Power. This is the case for Saudi Arabia, the United Arab Emirates and Turkey. However, humanitarian organisations – who would be perfectly legitimate in taking responsibility for these prisoners – appear to be systematically excluded, even by the ICRC. At best – and not in all cases – they simply help with logistics by providing transportation.

Beyond these operations, no plan is currently underway to release any POWs or civilian detainees. In the “peace plan” that Ukrainian’s President Volodymyr Zelensky presented to the G20 on 15 November 2022, he emphasised the importance of the issue for the day that peace negotiations begin, his point 4 expressly calling for the unconditional release of both military and civilian captives.

²² Frédéric Joli, based on an ICRC press release dated 14 June 2023, « Ukraine : le point sur les opérations du Comité international de la Croix-Rouge », *L’humanitaire dans tous ses États*, 15 juin 2023, <https://blogs.icrc.org/hdtse/2023/06/15/ukraine-le-point-sur-les-operations-du-comite-international-de-la-croix-rouge>

²³ The most well-known case is Victor Medvedchuk, head of a pro-Russian political party and close friend of President Vladimir Putin.

Prisoners of war: rethinking the issue

This example of a highly-intense interstate conflict shows that the issue of POW treatment should be both reviewed and rethought, as part of our hypothesis that these types of wars will increase in number in the future.²⁴

A complex reality that we cannot ignore

It would be wrong for humanitarian stakeholders to only refer to the provisions stipulated in IHL, just as it would be wrong to consider the ICRC as the only legitimate body to handle the matter. Protection should be considered important for everyone involved in humanitarian aid, especially given its complexity. This is even more relevant with regard to the ICRC – even if all information has not been made, quite rightly, public – as it has been heavily criticised; many feel that the ICRC did not react quickly enough and has been far too removed from the Russo-Ukrainian conflict. Authorities in Kyiv admonish the ICRC for not publicly condemning the fact that it has been prevented from visiting all Ukrainian prisoners in Russia.²⁵

From this point of view, it is a debatable reaction when the ICRC evokes neutrality and confidentiality as well as abstains from any resulting declarations. We may very well see some back-peddling, since the institution has long since admitted its silence (beyond generalising speeches) about atrocities, genocide and mass crimes against civilian populations, as well as the various abuses suffered by POWs (particularly Soviet soldiers) during the Second World War.²⁶ Its leaders have demonstrated over and over again that they no longer shirk from taking a stance publicly regarding certain aspects of the current conflict, including the treatment of POWs. For example, during the Iran/Iraq War (1980–1988), the then president of the ICRC Alexandre Hay denounced Iraq's abuse of Iranian POWs. His successor Cornelio Sommaruga, in a speech in Geneva on 29 July 1992, publicly revealed the existence of internment camps set up by Bosnian-Serb authorities and their poor treatment of detained combatants and civilians.²⁷

It is therefore not surprising that questions regarding the ability of the ICRC to fulfil its mandate to protect POWs in the Russo-Ukrainian War have fostered a fair amount of turmoil within the organisation. Certain current and past personnel consider that, beyond the roadblocks that both Belligerent Powers have erected, the main cause is the fact that the organisation has gradually – over the past twenty years – neglected its primary mission to focus on aid work, similar to the assistance several NGOs currently provide. According to them, this is where the current difficulties for the ICRC originate.²⁸ The succession of four delegation deputy heads in Kyiv during the first year of the war seems to illustrate both its embarrassment in failing to find high-level leaders capable of facing the situations that the personnel was not ready for while at the same time presenting a clear position. Well-known people in the Red Cross/Red Crescent ecosystem have also repeated the same critiques.²⁹

²⁴ See, for example, Frédéric Gros, *Pourquoi la guerre ?*, Éditions Albin Michel, 2023.

²⁵ Dmytro Lubinets, « Le Comité international de la Croix-Rouge doit publiquement ... », *op. cit.*

²⁶ Isabelle Vonèche Cardia, « Revisiter le silence du Comité international de la Croix-Rouge (CICR) face aux déportations », *Témoigner. Entre Histoire et Mémoire*, n° 134, 2022, p. 96-108.

²⁷ Massimo Lorenzi, *Le CICR, le cœur et la raison : entretiens avec Cornelio Sommaruga*, Favre, 1998, p. 22-23.

²⁸ Confidential source.

²⁹ Pierre de Senarclens, « Ukraine, le silence du CICR », *Le Temps*, 24 novembre 2022. The author, a former well-known university lecturer, was Vice President of the Swiss Red Cross and Vice President of the International Federation of Red Cross and Red Crescent Societies during the early 2000s.

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Within this context, it is normal to be surprised by the content in the first speech of the committee's new president Mirjana Spoljaric (since starting her duties in October 2022) before the UN Security Council on 23 May 2023. Indeed (while war rages in Ukraine), she only spoke about protecting – necessary of course – civilians in armed conflicts and did not say one word about POWs.³⁰

Two other components broaden the issue. First, the massive involvement of private military companies (PMC) brings back to the forefront the question of status for captured employees, which their presence alongside the US army in Afghanistan and Iraq had already raised. Other than the extremely high-profile Wagner Group on the Russian side of the conflict, certain analysts consider that PMC are also present on the Ukrainian side. While more discreet working alongside the latter, they are paid to train others or to work on highly advanced military technology. Alongside officially enlisted international volunteers, we also need to include Byelorussian and Russian battalions whose status remains unclear. When captured, must they only be considered mercenaries, in accordance with Article 47 of AP 1? IHL lawyers will have to dig deeper into the issue. The second component involves recording the identity of military and civilian captives, which should also be a priority for the humanitarian organisations working in the field every time the opportunity presents itself (without of course risking their safety). This is often a first and very important step to provide POWs with genuine protection.³¹

It would be appropriate for other private humanitarian organisations – so NGOs – to address this issue in a much more open manner. They have the authority, and IHL allows them to intervene. Paradoxically, the fact that they do not have the same obligation as the ICRC to work with both Belligerent Powers offers a relative advantage. As long all humanitarian principles are followed, especially impartiality, independence, and non-discrimination, it is perfectly admissible for an NGO to work in an area controlled by only one of the Belligerent Powers and handle, with the permission of the latter, protecting POWs, including visits and providing assistance, as well as writing reports on detention conditions.

From this point of view, humanitarian NGOs are not the only organisations that can legitimately address the issue. Also legitimate are NGOs who work to improve prison conditions for common law detainees, as well as those whose field of intervention includes protecting and defending human rights. We can also hypothesise that mobilising so many different NGOs would help prevent them from being stigmatised by either one of the warring parties.

Alternatives

While it is perfectly understandable that the entire humanitarian community was caught off-guard by the start of the Russo-Ukrainian war – the same goes for several observers and intelligence services, it has adapted quickly (particularly with regard to NGOs) in terms of assistance to the civilian populations, on the Ukrainian side at least, as access to the Russian side is almost impossible. However, the same cannot be said of the POWs and it would be regrettable if this situation were to continue. First, this IAC appears likely to continue for a long time, even a very long time – similar to the two world wars in the 20th century – with the risk of other parties entering the conflict. The potential for the number of POWs to increase, without the guarantees that GC III provides (and IHL overall), should be

³⁰ Mirjana Spoljaric, "The protection of civilians is a pre-condition of stability, peace, and recovery", ICRC, press release of 23 May 2023, <https://www.icrc.org/en/document/icrc-president-protection-civilians-is-pre-condition-of-stability-peace-and-recovery>

³¹ Conversation with Frédéric Joli, « Guerre en Ukraine : "Exister dans la liste du CICR est la première des protections accordées au détenu" », *Le Monde*, 3 juin 2022.

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considered wholly unacceptable. Second, if one or two other high-intensity conflicts – also with the potential to last for a long, undetermined duration – began in the upcoming years, the exact same situation for POWs will likely occur. Other wars of this type, as we stated, appear likely and even probable. In these cases, should humanitarian organisations not already begin planning ahead for such situations and make strategic preparations for their occurrence?

This would mean establishing contingency plans and logistics planning based on a mapping of the potential war zones. This is even more necessary if our hypothesis regarding an increase in the number of prisoners beyond those currently in Ukraine and Russia proves true. Simply allowing an archipelago of camps to reconstitute, similar to those created during the two world wars, would be unacceptable. Especially since alternatives exist, starting with internment camps in third-party countries. We saw the foundation laid for this type of alternative during a prisoner exchange between Russia and Ukraine in September 2022; among them, five Ukrainian regiment commanders who survived the Azovstal steel siege plant in Mariupol were transferred to Turkey instead of repatriated to Ukraine. They will be required to stay in Turkey, under the surveillance of local authorities, until the end of the conflict. This internment option in a neutral third-party country should be seriously considered.

In this regard, we can draw insight from a little-known aspect of the POW situation during World War I. Applying very strict criteria centred on the health of specific prisoners, the Belligerent Powers agreed to release several thousand of them. Between 1914 and 1918, a total of 67,000 wounded or sick POWs were interned in Switzerland. There were still 25,000 of them there when the Armistice of 11 November 1918 was signed. Denmark, Norway, Sweden, and the Netherlands also held a number of prisoners.³² Travelling further back in time to the Franco-Prussian War of 1870, 87,000 French soldiers from General Bourbaki's army took refuge in Switzerland to escape capture by German troops. Interned in the Confederation, they were dispersed throughout several cantons and stayed there until the peace talks ended.

Preparing for the future, however bleak it may be

Contrary to what some facetious lawyers might think, the fate of POWs in future conflicts on Planet Earth is not – as we see it – a matter of science fiction. While we are allowed, of course, to hope that the worst predictions about the future do not come true, it would be irresponsible not to plan for them. Expecting the Belligerent Parties in any conflict to voluntarily and automatically apply IHL norms is completely unrealistic.

Organisation leaders should open or re-open this mammoth task, separately at first, to review any potential deficiencies or lack of commitment within their respective organisations. In this respect, the presence of a strong, committed ICRC that does not hesitate to speak out in the face of unacceptable situations is an absolute necessity. It would be ideal for the ICRC to immediately overcome the challenges it has experienced since the beginning of the war in Ukraine; the funding crisis affecting it since early 2023 has undoubtedly complicated the situation.³³ Humanitarian organisations need to prepare for this possible future together, sharing the tasks required to make sure that POWs enjoy their rights and receive assistance. For several decades they have successfully fulfilled their duty, for

³² François Bugnion, *Face à l'enfer des tranchées. Le Comité International de la Croix-Rouge et la Première Guerre mondiale 1914-1922*, CICR, 2018, p. 86-87.

³³ « Colère au sein du CICR », *Bon pour la Tête*, 17 mars 2023 ; Serge Enderlin, « Le Comité International de la Croix-Rouge traverse la plus grave crise de son histoire », *Le Monde*, 5 juin 2023.

example, with regard to dividing up the work to do in refugee camps, and they should keep doing this. The academic and research world should also do their part, now urgent, to prepare for such a situation. With support from keen observers and analysts, the entire humanitarian community should consider it their obligation to demand the rightful protection of interned combatants and civilians and not absolve themselves of their responsibility by counting on states to fulfil theirs.

Translated from the French by Darin Riesman

Biography

Philippe Ryfman • A specialist in international non-governmental and humanitarian issues, Philippe Ryfman is a lawyer registered with the Paris Bar and an honorary professor and associate researcher at Université Paris I Panthéon-Sorbonne. Through books and articles, he analyses the world of established and emerging non-governmental organisations from the Global North and the Global South, as well as the humanitarian field. He co-edited his most recent book – *Droit et Pratique de l'action humanitaire*, LGDJ, 2019 – with Sandra Szurek and Marina Eudes. He is also a member of the orientation council for *Humanitarian Alternatives*.

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Philippe Ryfman, "Prisoners of war: high-intensity warfare's blind spot?",
Humanitarian Alternatives, no. 23, July 2023, pp. 74–95,

<https://www.alternatives-humanitaires.org/en/2023/07/17/prisoners-of-war-high-intensity-warfares-blind-spot/>