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Ukraine Symposium – Transfers of POWs to Third States

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July 19, 2023

by [Marten Zwanenburg](#), [Arjen Vermeer](#) | Jul 19, 2023



Introduction

On 9 June 2023, media [reported](#) that Hungary received eleven Ukrainian Prisoners of War (POWs) from Russia. More than a week later, Reuters [reported](#) that three of these persons had been repatriated to Ukraine. The exact circumstances of how the group of eleven came to be in Hungary and what subsequently happened to them remains mysterious. What is certain is that the event complicated diplomatic relations between Ukraine and Hungary. On June 19, the spokesman of Ukraine's Ministry of Foreign Affairs issued a [statement](#) in which the ministry accused Hungary of receiving the POWs from Russia without the knowledge of the Ukrainian government. It also stated that attempts by Ukrainian diplomats to establish direct contact with the POWs were unsuccessful, and that claims by Hungary that they were free were untrue.

According to the statement, the POWs were kept in isolation and did not have access to open sources of information. Their communication with relatives took place in the presence of third parties and they were denied the right to establish contact with the Embassy of Ukraine. The statement concluded by stating that Hungary's actions can be qualified as a

violation of the provisions of the European Convention on Human Rights (ECHR). Two days later, Hungary's Foreign Minister issued a statement in which he claimed that the POWs came to Hungary as a result of the work of the Russian Orthodox Church and the Hungarian Maltese Charity, and without the participation of Hungary's government. According to this statement, the soldiers had free movement within the country. Media reports suggest that the plan was a personal initiative of Deputy Prime Minister Zsolt Semjén, who negotiated the transfer of Ukrainian POWs of alleged Hungarian ethnicity with the Russian Orthodox Church.

This post does not attempt to establish which version of events is correct. Rather, it aims to shed light on some international legal questions raised by the different versions presented by the States involved. These questions concern the transfer of the POWs, transmission of information, status after transfer, treatment and access, and finally, release and repatriation. These questions are more complex than they might initially seem.

Transfer

A key provision regarding the conditions of transfer of POWs to another power is Article 12(2) of Geneva Convention III (GC III). It states that the detaining power, in this case Russia, may transfer its POWs to another State if that State is a party to GC III and when that State is willing and able to apply GC III to the satisfaction of the detaining power (see also *Prosecutor v. Mile Mrksic, Veselin Slijivancanin*, para. 71). First, it must be stressed that the detaining power is responsible for the POWs' treatment until their final release and repatriation (GC III, art. 5). Article 12(2) of GC III clarifies that once the POWs are transferred, the responsibility for the application of GC III falls on the State receiving the POWs while they are in its custody. Without a legal basis, this responsibility cannot be delegated to any other entity.

Second, the USSR made a reservation to Article 12 (which has not been withdrawn by its successor the Russian Federation) that it "does not consider as valid the freeing of a Detaining Power, which has transferred prisoners of war to another Power, from responsibility for the application of the Convention to such prisoners of war while the latter are in the custody of the Power accepting them." If the POWs were transferred under Article 12, therefore, Russia considers it has a continuing responsibility towards the Ukrainian servicemembers. It is unclear if, and how, that shared responsibility has been effectuated. Third, there is no requirement for the third State to be a party to the armed conflict itself. The new detaining power could therefore be a neutral State, as confirmed by the International Committee of the Red Cross (ICRC) 2020 *Commentary* to Article 12(2) of GC III. Hungary is a party to GC III, yet not a party to the conflict between Russia and Ukraine. Fourth, Russia was required to satisfy itself that Hungary was willing and able to apply GC III. Fifth, this provision certainly implies that the transferring belligerent party and the receiving neutral

party can come to a special agreement (GC III, art. 6) regarding a transfer of POWs. It is unknown whether such an agreement exists between Russia and Hungary. It is worth noting that the consent of Ukraine for Article 12 GC III transfers is not strictly required.

As an alternative legal basis for transfer, certain sick and wounded POWs or POWs who have undergone a long period of captivity could be transferred to a neutral country, thereby ending their captivity (see GC III, arts. 109-117). Such transfers are also subject to Article 12 of GC III. Media reports, however, do not mention any cases of Ukrainian POWs being sick or wounded or interned for a long time and who had to be transferred for that reason. Moreover, Article 111 of GC III encourages the neutral power, the detaining power, and the power on which the POWs depend to conclude an agreement on the POWs' internment until the close of hostilities. The updated ICRC 2020 *Commentary* clarifies that "the time restriction should be interpreted as a maximum" and does not exclude "agreements for a predetermined period of time." On the basis of the available information, this option must be discarded as there were reportedly no efforts to come to any such agreement in this case, in contrast to an agreement between Russia, Turkey and Ukraine.

Transmission of Information

In case of "transfers, releases, repatriations, escapes, admissions to hospital, and deaths ..." of POWs, Article 122 of GC III provides that the detaining power must "immediately forward such information by the most rapid means" to the power on which the POWs depend through their respective national Information Bureau. This equally applies to neutral powers that have become detaining powers. The rationale is that POWs must be accounted for to avoid them going missing. Thus, both Russia and Hungary had an obligation to inform Ukraine of the transfer and release of the Ukrainian servicemembers.

Status After Transfer

As was seen above, Article 12 of GC III provides for the transfer of POWs to a neutral power. Under the traditional law of neutrality, a neutral power which receives on its territory troops belonging to the armed forces of one of the parties to the armed conflict *must* intern them based on Article 11(1) of the 1907 Hague Convention V. Hungary is a party to this treaty, as are Ukraine and Russia. This is in contrast to the original detaining power, which *may* intern them based on Article 21 of GC III and must apply all the provisions of GC III. The legal bases for internment by the detaining power and a neutral power are thus different, as are the purposes of such internment. This illustrates the different rationales for the different obligations. For example, the obligation to provide information results from the balance struck between the interests of the detaining power, the power on which the POWs depend, and the individual POW.

The status of POWs who have been transferred to a neutral power is governed by Article 4(B)(2) of GC III. This provision states that POWs who have been received by a neutral power on its territory and whom this power is required to intern under international law shall be treated as prisoners of war. This is without prejudice to any more favorable treatment which this power may choose to give and with the exception of a number of specific articles. If diplomatic relations exist between the parties to the conflict and the neutral power concerned, the parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power. That right is without prejudice to the functions which these parties normally exercise in conformity with diplomatic and consular usage and treaties.

Article 4(B)(2) of GC III refers to persons who have been “received by” a neutral power. The updated ICRC 2020 *Commentary* to GC III explains that this sub-paragraph applies irrespective of how such persons ended up on the territory of a neutral power. Likewise, the obligation to intern members of the armed forces of a party to the armed conflict under the law of neutrality does not depend on how those members ended up in the neutral State concerned. The only exception is escaped POWs, according to Article 13 of the 1907 Hague Convention V.

Persons interned by a neutral power are not POWs. POW is a term reserved for combatants who are held by the enemy. However, the neutral power must accord them the treatment due to POWs.

Under the framework set out above, Hungary would have been obliged to intern the Ukrainian servicemembers and accord them rights under GC III. It would not matter whether they were transferred to the Hungarian government by Russia or whether they ended up in Hungary as the result of a private initiative. For Hungary it would be lawful, even required, to deprive them of their liberty. The servicemembers would not, however, be POWs. Since there are diplomatic relations between Hungary and Ukraine, Ukraine as the party on whom they depend on must be allowed to perform certain functions of a Protecting Power. Interestingly, Ukraine would be both party to the conflict and Protecting Power in that same conflict.

As noted above however, Hungary has denied that it deprived the persons concerned of their liberty, and a number of persons have returned to Ukraine. It is a matter of speculation why Hungary considers that it is not bound by the obligation in the law of neutrality to intern them. One possibility could be that Hungary considers itself a “qualified” neutral. Essentially, qualified neutrality refers to the idea that a neutral may discriminate between an aggressor and a victim in an armed conflict. Assisting the victim would not lead to a violation of the law of neutrality, which traditionally requires neutral States to refrain from supporting one of the parties to an international armed conflict. The notion of “qualified neutrality” in relation to the conflict in Ukraine has been discussed at length in other posts on [Articles of War](#) and [elsewhere](#). For the purposes of this post, it suffices to note that if qualified neutrality is part of the *lex lata* and if Hungary is a qualified neutral, then Hungary would be allowed to

discriminate in applying its obligations under the law of neutrality in favor of Ukraine. Not interned members of Ukraine's armed forces would then not violate neutrality law, notwithstanding Article 11(1) of 1907 Hague Convention V.

Another possibility is that Hungary considers that it is not required to intern Ukrainian servicemembers based on the fact that Article 4(B)(2) of GC III includes the words "without prejudice to any more favourable treatment which [a neutral State] may choose to give" to persons received by it. It may be that Hungary considers that such more favorable treatment can consist of freeing the persons concerned. The ordinary meaning of Article 4(B) of GC III does not seem to support such an interpretation, however. The article's chapeau provides that "the following shall likewise be treated as prisoners of war," and Article 4(B)(2) refers to more favorable treatment in regard of persons "whom [neutral] Powers are required to intern under international law." The "treatment" in Article 4(B)(2) thus seems to refer to the rights and obligations of interned persons, not their internment as such. If the drafters of GC III intended to provide for such a radical departure from the existing law of neutrality, one also could have expected them to do this more expressly.

Treatment and Access

Recall that according to Ukraine, the persons concerned after arriving in Hungary were kept in isolation, did not have access to open sources of information, their communication with relatives took place in the presence of third parties, and they were denied the right to establish contact with the Embassy of Ukraine.

If it was indeed the case, this would violate various rules of international law. If Hungary held the persons concerned as interned persons based on the law of neutrality, most of the provisions of GC III apply. In this situation, there would be a violation of Article 69 of GC III, which requires the detaining power to inform the powers on which interned persons depend, through the Protecting Power, of the measures taken to carry out the provisions of Section V of GC III. Restricting their access to information would not necessarily violate international humanitarian law (IHL), as GC III allows for such restrictions as long as minimum requirements concerning the right to correspond with the exterior set out in Article 70 and 71 of GC III are met. Keeping interned persons isolated would violate Article 21 of GC III, unless in the context of penal and disciplinary sanctions or where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

If the persons were not interned by Hungary, the main relevant legal regime is human rights. This includes the ECHR, to which Hungary is a party. If the persons were indeed deprived of their liberty, this could potentially violate Article 5 ECHR (the right to liberty and security), unless such deprivation was based on one of the grounds enumerated in paragraph 1 of that

article. Potentially, depending on the circumstances, limitation of access to open sources of information could violate Article 10 ECHR (freedom of expression), which protects *inter alia* the right to receive and impart information and ideas without interference by public authority.

Finally, if it is true that Ukrainian consular officials were denied access to the persons concerned, then this would violate Article 36 of the Vienna Convention on Consular Relations (VCCR), to which both Hungary and Ukraine are parties. Under this article, consular officers are free to communicate with their nationals and to have access to them. They also have the right to visit nationals of the sending State who are in prison, custody, or detention, to converse and correspond with them, and to arrange for their legal representation. Such a violation would exist irrespective of whether the persons concerned were interned by Hungary or not. If they were not, then no issues concerning interaction between IHL and the VCCR would arise. If they were, Article 4(B)(2) of GC III provides that the performance of the role of Protecting Power by the party on which the persons being interned depend is “without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.” However, the detaining power is, according to that same article, not bound to comply with certain rights, including the right of the protecting power to access the POWs. This is left to the diplomatic and consular usage and treaties.

Release and Repatriation

The detaining power may release POWs at any time (although it may set conditions on their release) but must release and repatriate them at the end of active hostilities (GC III, art. 118). It seems that the obligation to repatriate POWs only applies when active hostilities have ceased, which at the time of writing is not the case. As long as they are released and not repatriated, but still within the power of the enemy, they continue to be considered POWs and afforded the protection of GC III (GC III, art. 5). Yet, Hungary is a neutral power, not an enemy power, and the Ukrainian servicemembers are not POWs in the hands of Hungary but must be treated like POWs. It must be recalled that under the law of neutrality Hungary is under an obligation to intern the POWs but may argue that it is released from this obligation based on “qualified neutrality.” If the servicemembers were originally transferred to Hungary based on Article 12 of GC III, then while Hungary is not an enemy, as long as it maintains control over the Ukrainian servicemembers, they are still to be treated at least according to the standards that govern the treatment of POWs until their final release and repatriation (GC III, arts. 4(B)(2) and 5). This is also the case if they were released by Russia and subsequently transferred to Hungary. The logic of GC III dictates that the POW protection does not cease in case of a transfer to a neutral country.

Another issue is whether Hungary must obtain the agreement of Russia for the release and repatriation of the Ukrainian internees. Absent specific rules and knowledge of an agreement between Russia and Hungary on the matter, Hungary would maintain responsibility over the POWs and would seemingly not, as the detaining power, operate unlawfully by releasing and repatriating the Ukrainian servicemembers with the consent of Ukraine. However, the Pictet

1960 *Commentary* to Article 110 of GC III, in the case of wounded and sick POWs accommodated in a neutral State, applies the following standard: when there is a risk that they “may resume active service” the consent of the transferring power must be obtained before repatriation. It does not appear unreasonable to also apply this to able-bodied POWs. Assuming the Ukrainian servicemembers are able-bodied, Hungary must obtain Russia’s consent before they can be released and repatriated.

Conclusion

This post has broadly laid out the legal framework applicable to the transfer of POWs by a belligerent to a neutral and applied it to the recent transfer of the Ukrainian servicemembers to the territory of Hungary. There is no doubt that IHL provides for the possibility to transfer POWs from a belligerent to a non-belligerent. In this case, the Ukrainian servicemembers that were taken POW by the Russian Federation and transferred to Hungary could have been lawfully transferred under IHL. However, IHL does attach further obligations on Russia and Hungary to afford the required protection to those servicemembers. The minimal information that is currently available publicly seems to cast doubt on the respect for at least some of these obligations.

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