

Maral Kashgar

The Transfer of Conflict-Related Detainees

Provisions on the Transfer of Detainees
in International Humanitarian Law



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To Nilufar and Pegah

Foreword

I first became involved with the issue addressed in this thesis in 2009 during my Master's studies at the Law Faculty of the University of Ottawa in Canada. At that time, the Canadian Ministry of Defence had to stand trial for its handling of detainees during its participation in the International Security Assistance Force (ISAF) in Afghanistan. Two years earlier, in 2007, Amnesty International had published a report entitled "Afghanistan, Detainees transferred to torture: ISAF complicity?", which criticised States participating in ISAF for transferring detainees to Afghan authorities, even though this put them at risk of torture. The dilemma of the troop contributing States and the difficulties in solving this dilemma, also due to the open legal questions, quickly became clear. This question has accompanied me beyond the preparation of my doctoral thesis into my work as a legal advisor to the German Armed Forces. To this day, the handling of prisoners in armed conflicts raises unresolved questions that pose major hurdles for the States involved in multinational military operations. My work as a legal advisor in particular has shown me how difficult it can be to come up with workable solutions to reconcile the legal requirements with the realities of the situation. This great challenge provided me with the necessary motivation to stick with the doctoral thesis and complete it despite the long time since I began my doctoral studies at the University of Potsdam in 2010. Along the way, I have received great support, especially from the FAZIT Foundation, for which I would like to express my sincere gratitude. Without the generous scholarship and patience, this project would not have succeeded. Furthermore, I would like to thank Fiona Nelson for the native speaker review and Stefan Grossmann for his helpful comments before my oral defence. I would also like to thank Lieutenant Colonel Gloria Axthelm for her support in revising my dissertation during our joint deployment in the 19th/20th German contingent United Nations Multidimensional Integrated Stabilization Mission (MINUSMA) in Mali.

I would like to sincerely thank my doctoral supervisor, Prof. Dr. Andreas Zimmermann, LL.M. (Harvard), as well as my second examiner, Prof. Dr. Heike Krieger, for their valuable comments and constructive criticism, which gave me even more clarity on the red line in my work.

My greatest thanks, however, go to my family. It goes to my parents, Ali Kashgar and Farkhondeh Modarres-Tabatabaei, who always believed in me and, through their hope and expectation that I would achieve what fate denied them, provided the incentive for me to always work on myself to become better. Without them, I would neither have started nor finished the doctoral studies. It goes to Sven Schlögel, my husband and companion, who always had my back and spurred me on to keep fighting and not give up. The world is looking for his equal. Only through him can I realise myself in my work. Above all, however, my thanks go to my daughters, Nilufar and Pegah Schlögel, for whom I take on all the hurdles that professional life can offer a woman in order to show them that they too can achieve anything if they only work hard enough for it. They are the reason why giving up has never been and will never be an option.

I dedicate this work to my parents, my beloved husband and my lovely daughters.

Finally, I would like to point out that the views expressed in this work are exclusively my personal ones, which are independent of the positions of the German Ministry of Defence and the German Armed Forces.

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List of abbreviations

AI	Amnesty International
AIHRC	Afghan Independent Human Rights Commission
AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977
APuZ	Aus Politik und Zeitgeschichte
Australian ILJ	Australian International Law Journal
BCCLA	British Columbia Civil Liberties Association
Brook JIL	Brook Journal of International Law
Buff. Hum. Rts. L. Rev.	Buffalo Human Rights Law Review
CAT	Committee Against Torture
Comp. & Int'l L.J. S. Afr.	Comparative and International Law Journal of South Africa
Court of First Instance	Court of First Instance of the European Communities
CPT	European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment
DASR	ILC's Draft Articles on State Responsibility
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
DPH-Study	Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law
Duke J. Comp. & Int'l L.	Duke Journal of Comparative & International Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EComHR	European Commission on Human Rights
ECOSOC	United Nations Economic and Social Council
EJIL	European Journal of International Law
Essex Hum. Rts. Rev.	Essex Human Rights Review

List of abbreviations

EU	European Union
EuGRZ	Europäische Grundrechte-Zeitschrift
Eur. J. Migration & L.	European Journal of Migration and Law
EWCA	Court of Appeal in England and Wales
EWHC	High Court of Justice of England and Wales
FC	Federal Court (Canada)
FCA	Federal Court of Appeal (Canada)
FCAFC	Federal Court of Australia Full Court
GC	Geneva Convention
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949
GC III	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV	Geneva Convention Relative to the Protection of Civilians of 12 August 1949
Geo. Wash. L. Rev.	The George Washington Law Review
German FCC	German Federal Constitutional Court
German FCJ	German Federal Court of Justice
GILJ	Georgetown Immigration Law Journal
Harv. Int'l L.J.	Harvard International Law Journal
HRC	Human Rights Committee
HRI	Human Rights Institute
HRL	Human Rights Law
IAC	International armed conflict
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IJRL	International Journal of Refugee Law
ILA	International Law Association
ILC	International Law Commission
Int'l L. Stud. Ser. US Naval War Col.	International Law Studies Series. US Naval War College

IO	International Organisation
IOLR	International Organizations Law Review
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
Isr. L. Rev.	Israel Law Review
IsrSC	Supreme Court of Israel
Italian YIL Online	Italian Yearbook of International Law Online
JCSL	Journal of Conflict and Security Law
JHIL	Journal of History of International Law
JICJ	Journal of International Criminal Justice
JILPAC	Journal of International Law of Peace and Armed Conflict
J. Int'l Peacekeeping	Journal of International Peacekeeping
Loy. L.A. Int'l & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
Marquette L. Rev.	Marquette Law Review
McGill LJ	McGill Law Journal
Melbourne JIL	Melbourne Journal of International Law
Mil. L. & L. War Rev.	Military Law and the Law of War Review
MoU	Memorandum of Understanding
MPCCC	Military Police Complaints Commission of Canada
MRM	MenschenRechtsMagazin
MRT	Moldavian Republic of Transdnistria
NATO	North Atlantic Treaty Organisation
NDS	Afghan National Directorate of Security
Netherlands Int'l L. Rev.	Netherlands International Law Review
NILR	Netherlands International Law Review
NGO	Non-governmental organisation
NIAC	Non-international armed conflict
NJW	Neue Juristische Wochenschrift
Nordic JIL	Nordic Journal of International Law
Notre Dame L. Rev.	Notre Dame Law Review
NVwZ	Neue Zeitschrift für Verwaltungsrecht
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Policy
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PIL	Public International Law
POW	Prisoner of war
RoE	Rules of Engagement
SCC	Supreme Court of Canada
SPT	UN Subcommittee on Prevention of Torture

List of abbreviations

UK	The United Kingdom of Great Britain and Northern Ireland
UKHL	The United Kingdom House of Lords
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNComHR	United Nations Commission on Human Rights
UN GA	United Nations General Assembly
UNHCHR	United Nations Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UN Mercenary Convention	International Convention Against the Recruitment, Use, Financing and Training of Mercenaries
UN SC	United Nations Security Council
UN SG	United Nations Secretary General
U. Rich. L. Rev.	University of Richmond Law Review
US	United States
USA	The United States of America
USCA	United States Court of Appeals
USDC	District Court of the United States of America
USSC	Supreme Court of the United States of America
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
Wash. U. Global Stud. L. Rev.	Washington University Global Study Law Review
YIHL	Yearbook of International Humanitarian Law
YLJ	The Yale Law Journal
ZaöRV	Zeitschrift für ausländischen öffentliches Recht und Völkerrecht

Chapter 1: Introduction

The vast majority of contemporary armed conflicts are of non-international character. The classical non-international armed conflict takes place between a State's government and one or more non-State armed groups.¹ In many of these non-international armed conflicts the territorial States seek military assistance of the international community in the restoration of peace and security in their territories.²

One of the military measures vital for stabilizing the security situation in a country is the detention of individuals who participate in hostilities against the host nation and/or the international forces assisting the host State in its fight against insurgents.³

Detention and transfer operations are not only vital to the protection of a State's own troops, as well as to the civilian population. Beyond that, such operations play a significant role in counter-insurgency operations because they provide the participating States with the opportunity to gain crucial intelligence.⁴ The troop contributing States have increasingly

1 See Lindsay Moir, "The Concept of Non-International Armed Conflict" in Andrew Clapham, Paola Gaeta, Marco Sassòli, eds., *The 1949 Geneva Conventions. A Commentary* (Oxford: Oxford University Press, 2015) for details and further references.

2 Sylvain Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" (2009) 91 IRRC 873 (Vité), pp. 85 *et seq.*

3 Bruce Oswald, "Some controversies of detention in multinational operations and the contributions of the Copenhagen Principles" (2013) 95 IRRC 891/892 (Oswald, 2013), pp. 708.

4 In the case of *R (on the application of Maya Evans) v. Secretary of State for Defence* before the British High Court of Justice, a case concerning the legality of the British detainee transfer practices during the British participation in the NATO led International Security Assistance Force (ISAF) in Afghanistan, the British Secretary of State highlighted the importance of detention and transfer operations for the success of the military operation in Afghanistan.

The High Court summarized the United Kingdom's position on the importance of the detainee transfers as follows:

[...] The Secretary of State's evidence points to the vital importance of detention operations to UK armed forces operating in southern Afghanistan, in particular Helmand province. The counter-insurgency campaign in southern Afghanistan is challenging and highly dangerous, with a particularly high threat from improvised explosive devices, ambushes and snipers. Hundreds of UK service personnel have been killed or wounded. There have also been

resorted to detainee transfers in the past decade. During the International Security Assistance Force (ISAF) mission in Afghanistan alone, 7,146 individuals were captured by ISAF States and Afghan authorities in the period between December 2009 and September 2011⁵ of which ISAF States transferred approximately 2,000 to Afghan custody between 2009 and 2010⁶. According to the ISAF standard operating procedures, individuals detained by ISAF States were not to be kept in detention for more than 96 hours, subject to extension in certain circumstances. After 96 hours they had to be either released or transferred to Afghan custody.⁷

many civilian casualties. Detention operations are central to the efforts of UK forces to protect themselves and local civilians from such attacks. They are also crucial to the UK's wider contribution to assisting the Afghan Government to bring security and stability to the country, for example by enabling insurgents to be prosecuted before the Afghan courts and by providing the opportunity for the gathering of intelligence. If it were not possible to transfer detainees to Afghan custody, the consequences would be very serious. Detainees would have to be released after a short time, leaving them free to renew their attacks and cause further death and injury. The opportunity to prosecute them and to gain intelligence would be lost. [...]

EWHC, *R (on the application of Maya Evans) v. Secretary of State for Defence* [2010] EWHC 1445 (EWHC, *Evans*), para. 23.

The case of *Evans* is a particularly important case for the purposes of this thesis because it deals with precisely such detainee transfers between allied States during military counter-insurgency operations.

- 5 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Tom Koenigs, Marieluise Beck (Bremen), Volker Beck (Köln), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN, „Folter in afghanischen Haftanstalten“, 15. November 2011, Drucksache 17/7748, (answer of the German Federal Government to the parliamentary question put by the Members of Parliament Tom Koenigs, Marieluise Beck (Bremen), Volker Beck (Cologne), further Members of Parliament and BÜNDNIS 90/DIE GRÜNEN, “Torture in Afghan detention facilities”), introduction.
- 6 UNAMA, “Treatment of Conflict-Related Detainees in Afghan Custody”, UN OHCHR, October 2011, available at <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/HRReports.aspx> (UNAMA, 2011), p. 39; Human Rights Institute, “U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada”, Columbia Law School, December 2010, available at <http://web.law.columbia.edu/human-rights-institute/detainee-transfers-afghanistan>, p. 6.
- 7 EWHC, *Evans*, supra fn. 4, paras. 1 and 19; FC, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Judgment of 12 March 2008, [2008] FC 336 (FC, *Amnesty International*, FC 336), para. 61; UNAMA, 2011, supra fn. 6, p. 39; AIHRC, “Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan”, 17

The transfer of conflict-related detainees is however not a phenomenon which only occurred during the ISAF mission in Afghanistan. The Memorandum of Arrangement agreed between the United States, the United Kingdom and Australia on 23 March 2003 shows that transfer operations played a significant role in the international military operation in Iraq as well.⁸

It can be assumed that any international military operation in which States participate in assistance of a host State to re-establish and maintain peace and security on the latter's territory will involve detention and detainee transfer operations.⁹ Such measures are inevitable and important military means in accomplishing the international military mission, especially when the operations are counter-terrorist or counter-insurgency operations. In its concluding report on the 32nd International Conference of the Red Cross and the Red Crescent (International Red Cross Conference) the ICRC highlighted that

[t]he transfer of detainees is a common feature of detention operations in armed conflict. In NIAC, transfers are particularly prevalent

March 2012, available at <http://www.aihrc.org.af/en/daily-reports/1041/treatment-of-conflict-related-detainees.html> (AIHRC, 2012), pp. 28-29; AI, "Afghanistan, Detainees transferred to torture: ISAF complicity?", November 2007, AI Index: ASA 11/011/2007, available at <https://archive.amnesty.ie/reports/afghanistan-detainees-transferred-torture-isaf-complicity> (AI, "Afghanistan, Detainees transferred to torture: ISAF complicity?"), p. 11.

- 8 In this Memorandum of Arrangement, the mentioned States agreed upon the procedures of transfers of individuals captured during the operations in Iraq from one State to the other. For the text of the Memorandum of Arrangement see ECtHR, *Hassan v. The United Kingdom*, Judgment of the Grand Chamber of 16 September 2014, Case no. 29750/09 (ECtHR, *Hassan*), para. 16.
- 9 Cf. also ICRC, 31st International Conference of the Red Cross and Red Crescent, "Strengthening legal protection for victims of armed conflicts", 28 November – 1 December 2011, Draft Resolution & Report, Document prepared by the International Committee of the Red Cross, October 2011, Doc. no. 31IC/11/5.1.1 (ICRC, 31IC/11/5.1.1), p. 11; ICRC, "Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty, Thematic Consultation of Government Experts on Grounds for Internment and Detainee Transfers, 20-22 October 2014, Montreux, Switzerland", available at <https://www.icrc.org/en/document/detention-on-non-international-armed-conflict-second-thematic-consultation-government-experts> (ICRC, Montreux 2014), p. 42; ICRC, 32nd International Conference of the Red Cross and Red Crescent, "Strengthening international humanitarian law protecting persons deprived of their liberty", Concluding report, 8-10 December 2015, Document prepared by the International Committee of the Red Cross, Doc. no. 32IC/15/19.1 (ICRC, 32IC/15/19.1), p. 15.

where multinational forces or extraterritorial military operations are concerned. In such situations, the hand-over of detainees from international forces to host State authorities, or between international forces themselves, raises a number of humanitarian, legal and operational issues. However, even in NIACs taking place in the territory of a single State, the participation of foreign nationals in hostilities against that State has become a present and much discussed phenomenon. Where these detainees are transferred to their home State for prosecution, similar humanitarian questions could arise.¹⁰

1 States struggling with detainee transfers during military operations

The problem of such transfer practices is, however, that the receiving States often do not comply with their human rights law and international humanitarian law obligations. Therefore, such transfer practices were heavily criticized, particularly by international human rights organisations.¹¹

For instance, amnesty international published a report in 2007 titled “Afghanistan – Detainees transferred to torture: ISAF complicity?”, after it had received information about torture, other ill-treatment and arbitrary detentions perpetrated by certain Afghan authorities.¹² In this report, amnesty international criticized NATO’s “transfer or release practice” and accused the ISAF States for being complicit in the illegal treatment of detainees. This report focused on cases in which ISAF States lost track of transferred detainees, the difficulties in monitoring detainees in Afghan custody, and the practice of on the spot transfers without documentation.¹³

1.1 Canada

Shortly before the amnesty international publication, the Canadian newspaper Globe and Mail reported about torture and ill-treatment of detainees

10 ICRC, 32IC/15/19.1, *supra* fn. 9, p. 16.

11 See for instance AI, “Afghanistan, Detainees transferred to torture: ISAF complicity?”, *supra* fn. 7; UNAMA, 2011, *supra* fn. 6; AIHRC, 2012, *supra* fn. 7; HRI, 2010, *supra* fn. 6.

12 AI, “Afghanistan, Detainees transferred to torture: ISAF complicity?”, *supra* fn. 7.

13 *Ibid.*, summary.

by Afghan authorities after they had been transferred to the latter by Canadian forces. It was alleged that the Canadian military handed over detainees despite knowing that they would face torture in Afghan custody.¹⁴

Prior to this report, amnesty international Canada together with the British Columbia Civil Liberties Association (BCCLA) had filed an application in the Federal Court of Canada challenging this Canadian detainee transfer practice and seeking to halt future transfers.¹⁵ Even the Canadian Military Police Complaints Commission¹⁶ launched investigations into the transfer practice of the Canadian forces in Afghanistan.¹⁷

1.2 United States of America

Other States were also sued before their national courts for their transfer practices during their deployments in armed conflicts. In 2008, for instance, the Supreme Court of the United States of America (US Supreme Court) passed its judgment in the case of *Mohammad Munaf, et al. v. Pete Geren, Secretary of the Army, et al.*, a case concerning the detention of American citizens by United States forces in Iraq. One of the petitioners was, and the other was supposed to be, handed over to Iraqi authorities for being tried before Iraqi courts for having committed hostile or warlike acts during the armed conflict in Iraq.¹⁸ Among other reasons, the US

14 Graeme Smith, "From Canadian Custody into cruel hands", *Globe and Mail*, April 23, 2007, available at <http://v1.theglobeandmail.com/servlet/story/RTGAM.20070423.wdetainee23/BNStory/Afghanistan> (Smith, *Globe and Mail*).

15 FC, *Amnesty International*, FC 336, *supra* fn. 7. The applicants failed with their claim because they entirely relied on the Canadian Charter of Rights and Freedoms which the Canadian Courts declared inapplicable outside Canada. FCA, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Judgment of 17 December 2008, [2008] FCA 401 (FCA, *Amnesty International*, FCA 401).

16 The Military Police Complaints Commission of Canada is a Canadian federal government oversight agency established by the Canadian Parliament in 1999 in order to deal with complaints against the military police and to investigate into allegations of misconduct of the military police in a transparent manner. Military Police Complaints Commission of Canada, <http://www.mpcc-cppm.gc.ca/01/100/100-eng.aspx> (MPCCC).

17 *Ibid.* For its detailed final report of 12 June 2012 see <http://www.mpcc-cppm.gc.ca/03/afghan/2012-06-27/index-eng.aspx>.

18 USSC, *Munaf et al. v. Geren, Secretary of the Army et al.*, Judgment of 12 June 2008, 553 U.S. 674 (USSC, *Munaf*).

Supreme Court rejected the petitioners' claim that *habeas corpus* prohibits United States forces from transferring them to Iraqi custody because the petitioners were

being held by the United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts, [...], release of any kind would interfere with the sovereign authority of Iraq "to punish offences against its laws committed within its borders".¹⁹

Astonishingly, the US Supreme Court rebutted the claim of the petitioners that their transfer to Iraqi custody would likely result in torture by stating that while such allegations are of serious concern, "that concern is to be addressed by the political branches, not the judiciary".²⁰

1.3 United Kingdom

The United Kingdom as well had to face trial for the transfer of individuals to host nations during international military operations.

1.3.1 The case of *Al-Saadoon and Mufdhi v. The United Kingdom*

The *case of Al-Saadoon and Mufdhi v. The United Kingdom* before the European Court of Human Rights (ECtHR), for instance, concerned two Iraqi applicants who were members of the Ba'ath Party in Iraq.²¹ They were suspected of having participated in the murder of two British servicemen in March 2003, when the international armed conflict between Iraq under the regime of Saddam Hussein and the "coalition of the willing" was still ongoing. British forces arrested the two applicants in April and November 2003 and transferred them to Iraqi authorities in December 2008 for being prosecuted before Iraqi courts.²² Shortly before their transfer to the Iraqi authorities, the two applicants filed a complaint against the United Kingdom before the ECtHR.

19 *Ibid.*, p. 20.

20 *Ibid.*, p. 23. See also USSC, *Abdab, et al. v. Obama, President of the United States of America, et al.*, Judgment of 29 February 2012 (USSC, *Abdab*).

21 ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, Judgment of 30 June 2009, Case no. 61498/08 (ECtHR, *Al-Saadoon and Mufdhi*).

22 *Ibid.*, paras. 9-89.