



BOFAXE

A Much-Needed Queer Look at International Humanitarian Law (PART 1)

An Obligation to Monitor the Situation of Prisoners of War with Diverse SOGI?

— People with diverse sexual orientations and gender identities (SOGI) are particularly vulnerable in times of conflict. However, due to the gender binary it is based on, international humanitarian law (IHL) does not address the specific needs and vulnerabilities of individuals with diverse SOGI and few attempts have been made to improve their protection of under IHL (Margalit, p. 239).

Against this background, the initial objective of this article was to examine the situation of Prisoners of War (POWs) with diverse SOGI in the context of the Russian aggression against Ukraine. However, the United Nations (UN) and OSCE reports on the human rights situation and compliance with IHL in Russia and Ukraine make little or no mention of diverse SOGI, indicating that the protection gap of people with diverse SOGI in armed conflict even extends to monitoring. Therefore, the following questions arise: Does IHL offer special protection to POWs with diverse SOGI? Are States, which are not parties to a conflict, obliged to report on compliance with such legal standards? It is these questions that the present blog post seeks to answer.

SOGI-Specific Rights as a Matter of IHL

IHL does not specifically reference persons with diverse SOGI. These persons enjoy the same rights as other POWs (Margalit, p. 251). Additionally, Article 16 of Geneva Convention (GC) III prohibits adverse distinction in the treatment of POWs on certain non-exhaustive grounds. Sexual orientation and gender expression are not explicitly included in this provision, but, as Rossouw argues, considering the GCs' purpose to treat all persons, who do not participate in hostilities, humanely, 'similar criteria' within the meaning of Article 16 GC III encompass SOGI (Rossouw, p. 773-777). This is in line with the Yogyakarta Principles, which apply international human rights standards to SOGI issues and reflect international legal standards. According to these principles, SOGI are 'integral to every person's dignity and humanity' and, therefore, adverse distinction based on them constitutes impermissible discrimination. Thus, GC III implicitly prohibits to discriminate people with diverse SOGI because of their sexual orientation or gender identity. To ensure compliance with this provision, States cannot only observe whether Detaining Powers comply with the general provisions of Geneva Convention III. Rather, they must also monitor whether individuals are systematically subjected to unlawful treatment due to diverse SOGI.

Specific rights for POWs with diverse SOGI can also be derived from general provisions of IHL (Margalit, p. 250). Article 13 GC III requires the humane treatment of POWs. This obligation is reflected in further provisions of GC III, but its scope goes beyond those and pervades all aspects of the treatment of POWs. Article 13 requires Detaining Powers to refrain from inhumane treatment of POWs and to protect them proactively from inhumane treatment by others, e.g. by other POWs. This includes, for example, protection from sexual abuse, torture and other acts of violence and intimidation. Article 14 GC III reaffirms the provision on humane treatment by entitling POWs to respect for their person, which is commonly understood as protection of their physical and moral integrity. The International Committee of the Red Cross (ICRC) stresses that this entitlement encompasses respect for the essential attributes of a person and the right to act in accordance with these.

Depending on specific needs and risks different POWs face, different measures may be necessary to guarantee the protection granted by Articles 13 and 14 GC III. Recognising that female POWs face needs and risks different from those of male POWs, such as medical needs for reproductive health care or an increased vulnerability to violence, the drafting States decided that specific measures were necessary to guarantee the humane treatment and personal integrity of women POWs, e.g. separate dormitories, and conveniences. Due to the broad scope and imperative nature of Articles 13 and 14, explicitly mentioned provisions and groups must not be considered exhaustive. In its commentary, the ICRC explicitly stresses that 'the requirement of separate dormitories may also extend to other categories of persons with distinct needs or facing particular risks where not doing so would violate the obligation of humane treatment'.

Regarding Article 14 the ICRC establishes that, in addition to women, other sexual and gender minorities are particularly vulnerable to ill-treatment, such as sexual violence. Both, detention and armed conflict give rise to circumstances that significantly increase their vulnerability. Studies, for instance, demonstrate higher rates of sexual violence by fellow inmates and detention staff against individuals with diverse SOGI compared to other detainees (Arkles, p. 517). As persons with diverse SOGI are criminalised and marginalised around the world (Outright International, p. 6), detention personnel and other POWs are likely to be hostile towards individuals with diverse SOGI (Margalit, p. 254). Bearing in mind the obligation of conduct to protect all POWs from such treatment, it is obligatory for Detention Powers to enact special protection measures for POWs with diverse SOGI.



BOFAXE

A Much-Needed Queer Look at International Humanitarian Law (PART 2)

An Obligation to Monitor the Situation of Prisoners of War with Diverse SOGI?

Given the similarity of risks faced by internees with diverse SOGI and female internees, the special treatment that women POWs are entitled to [can give guidance](#) on what measures are adequate to guarantee the rights of individuals with diverse SOGI. The [Yogyakarta Principles](#) also set out what measures must be taken to ensure humane treatment and respect for human dignity regarding detention of individuals with diverse SOGI. For example, individuals with diverse SOGI are entitled to participate in the decision on whether they are quartered with other male or female POWs, individuals with diverse SOGI or separately. They must be granted similar freedom of choice regarding the use of sanitary facilities, clothing, searches by guards and monitoring during punitive measures. Due to a fear of discrimination, it is likely that POWs with diverse SOGI will not reveal their SOGI proactively. Detaining Powers must therefore introduce sensible screening procedures which enable POWs to voice their specific needs ([Margalit](#), p. 256). This enumeration of measures, however, is not exhaustive.

States are therefore not only under an obligation to grant to POWs with diverse SOGI the same standards as to all POWs without any adverse distinction, but they are also required to adopt measures that consider their specific needs and risks. Given the hostile attitude of numerous States towards diverse SOGI, it seems likely that Detaining Powers will often not comply with these obligations. Due to the aforementioned lack of monitoring these violations remain invisible, and a climate of impunity is created. This raises the question whether third States have an international obligation to report on the situation of POWs with diverse SOGI in armed conflict.

Beyond Borders: On the External Dimension of Common Article 1

The [Geneva Conventions](#) (GCs) constitute a system of protection that actively integrates third States in the enforcement of IHL ([Azzam](#), p. 59). This is reflected, *inter alia*, in the [Protecting Power System](#) and all States' [responsibility for criminal prosecution](#). Article 89 of Additional Protocol (AP) I [obliges](#) States to act in case of grave violations of the Conventions in cooperation with the UN to terminate those violations.

The cornerstone of this system of protection is [Common Article 1](#) to the four 1949 GCs (CA 1), which obliges the parties 'to respect and ensure respect for the Conventions'. The second part of this provision imposes an [external obligation](#) on States to take actions aimed at ending IHL violations of other States. Although some scholars view the provision as entailing only an internal obligation to guarantee compliance with IHL by the State's population ([Schmitt and Watts](#), p. 681), a contextual reading of CA 1 suggests a broad approach. Indeed, in its [judgement Nicaragua v. the United States](#), the ICJ confirmed with respect to CA 1 an external negative obligation not to support IHL violations. In its [Construction of a Wall Advisory Opinion](#), the ICJ also referred to a positive external obligation, urging all States to bring Israel's non-compliance with IHL to an end.

Even if one is not convinced that CA 1 contained such an external obligation initially, it seems undeniable that it is part of the meaning of CA 1 today. Pursuant to Article 31(3)(b) of the [Vienna Convention on the Law of Treaties](#), the subsequent practice in the application of a treaty establishing the agreement of the parties regarding its interpretation can overlay the original meaning. In this vein, condemnations, sanctions, and further measures adopted by States demonstrate that such practice regarding CA 1 has been employed by States and supports the interpretation of CA 1 in line with the above ([Dörmann and Serralvo](#), p. 719, 721, 727). Various Resolutions of the [General Assembly](#) and the [Security Council](#), as well as [Reports of the Secretary General](#) evince that this practice is also endorsed by the UN.

Guardians of IHL: An External Obligation to Supervise

CA 1 is considered an [obligation of conduct](#) for which contracting parties have certain [discretionary powers](#). Thus, CA 1 obliges States to take measures which are suitable to end violations of IHL. The threshold against which those actions are measured is determined by a State's [capacities and influence](#) on the non-complying State ([Dörmann and Serralvo](#), p. 724). Although CA 1 in principle does not prescribe specific measures, [Kessler](#) (p. 506) and [Azzam](#) (p. 70) argue that it obliges States to supervise compliance with IHL. To fulfil their obligation to act in case of violations, they need to have knowledge of other States' (non-)compliance with IHL. In the past, States and international organisations have regularly mandated [observer missions](#), while [Special Rapporteurs](#) and [human rights organs](#) have additionally reported on observance of IHL. Also, the [European Union's Guidelines on Promoting Compliance with IHL](#) recommend States to supervise compliance with IHL so that they can decide what measures can be taken to end possible violations. This guideline is non-binding but can be considered at least as the representation of a common legal understanding of the duties CA 1 entails ([Breslin](#), p. 409).

Despite its [customary nature](#), CA 1 does not bind international organizations, as it only addresses States. But due to their capacities and expertise, International Organizations constitute vehicles that enable States to fulfil their duties under CA 1 ([Breslin](#), p. 383).

Concluding Remarks

Building on the humanitarian purpose of IHL, comprehensive legal protection for POWs with diverse SOGI can be derived from the Geneva Conventions. Beyond a prohibition of discrimination and an obligation of Detaining Powers to implement special protection measures, third States are responsible to ensure these standards are complied with. Despite the high vulnerability of POWs with diverse SOGI, current reports on compliance with IHL do not monitor violations of these standards and create invisibility and impunity for corresponding violations. To close this protection gap, it is crucial that states live up to their obligation to supervise the situation of individuals with diverse SOGI during armed conflict.