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The Protection of Prisoners of War against Forced Returns: a Study of the Intersection of the Obligation to Repatriate and the Non Refoulement Principle

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Abbreviations

DP	Displaced Person
IHL	International Humanitarian Law
ICRC	International Committee of the Red Cross
NNRC	Neutral Nations Repatriation Commission
POW	Prisoner of War
GC III	Third Geneva Convention
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

Introduction

The repatriation of prisoners of war (POW) is regulated by the Third Geneva Convention (GC III).¹ Since their adoption in 1949, the provisions have been widely commented on and interpreted. As GC III contains no explicit clause on voluntary repatriation, any such concept is inferred from state practice and ICRC or scholarly commentary.

Regarding voluntary repatriation, unlike for refugees, there is no codified and binding procedure to assess consent and protect POWs against forcible return, despite evolving state practice and increasing scholarly attention. The consent procedure for refugees will be researched in part 1.2.3. *Consent, ethical, legal and procedural issues*. This will assess the safeguards for voluntary repatriation and the lack thereof, for both refugees and POWs. State practice regarding voluntary repatriation will be addressed in *chapter 2: Case Studies* and will focus on the practice of repatriation before the Geneva Conventions, the Korean War and the Gulf Wars. *Chapter 3: Critical review of literature* will address the literature regarding non-refoulement and the obligation of repatriation of POWs. It will weigh the opinions of authors and identify gaps and inconsistencies in the articles. Their contemporary relevance is based in the evaluation of new conflicts, the identification of legal gaps and the increased scrutiny on forced repatriations.

Lastly this thesis will explain why and how frameworks adopted in refugee law should inform framework on POW repatriation and should be adopted by international humanitarian law (IHL). This thesis advocates for the expansion of the involvement of international organizations – especially the ICRC – and the harmonization with the UNHCR mandate in the process of POW repatriation, evolving the bridge of procedural standards between refugee law and IHL.

Conceptualization

Voluntary repatriation will be understood in this thesis as the return of individuals to their country of origin based on their own free will and informed consent. Such repatriation must be both free from any form of coercion, based on the individual's genuine choice and facilitated and monitored by institutions to ensure safety, dignity and sustainability of return.²

¹ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, art 118.

² Alfred de Zayas, 'Repatriation', *Max Planck Encyclopedia of Public International Law* (2011) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e868?d=%2F10.1093%2Faw%3Aepil%2F9780199231690%2Faw-9780199231690-e868&p=emailAAkXKbYD6gTKA#:~:text=During%20the%20armistice%20negotiation%20in,repatriating%20them%20to%20the%20North.>> accessed 11 July 2025; Mollie Gerver, 'Refugee Repatriation and the Problem of Consent' (2018) 48 *British Journal of Political Science* 855.

Consent is understood to signify freely given, informed and voluntary agreement of an individual to a course of action. Particularly in the context of voluntary return or repatriation, consent means the genuine and uncoerced decision to accept or refuse return after being fully informed of their options and the potential risks or opportunities involved.³ Consent is foundational in both treaty law and customary international law, and its validity requires the absence of duress and the presence of clear, accessible information.

Non-refoulement is the fundamental principle of refugee law that prohibits states from returning, expelling or transferring persons to countries or territories where they are at risk of ill-treatment, persecution or other human rights violations.⁴ This thesis understands non-refoulement as regulated by Article 33 of the Refugee Convention.

Subchapter 0.1: Methodology

This thesis will research the intersection of the obligation to repatriate prisoners of war and the principle of non-refoulement, in particular when, how and why the principle of non-refoulement should (or should not) apply to prisoners of war. This overlap is rarely analyzed in depth, despite general scholarly agreement on its relevance.

The main research question is as follows:

To what extent are the principle of non-refoulement and the obligation of repatriation of prisoners of war compatible?

This is divided into two sub-questions:

- What are the legal and practical difficulties in the application of both legal regimes?
Does one principle prevail?
- Are there alternative solutions?

Firstly, this thesis will consist of a doctrinal legal analysis. I will use the Third Geneva Convention and its ICRC Commentaries, as they are guiding documents in the field of international humanitarian law, the *travaux préparatoires* and interpret them through recognized forms of legal interpretation. Through ICRC Commentaries and state practice reflected in official reports I will review the obligation to repatriate prisoners of war and how it has been applied by state parties to the relevant conventions and legal frameworks. The same

³ See also: Gerver (n 2).

⁴ Dieter Kugelman, 'Refugees', *Max Planck Encyclopedia of Public International Law* (2010) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e866?rskey=TIzLXp&result=3&prd=MPIL>>.

review will be concluded regarding the principle of non-refoulement by using the Commentaries on the 1951 Refugee Convention.

Through secondary sources and scholarly literature, I will look into the academic debate and opinions, which indicate how (or not) to apply non-refoulement to the question of prisoners of war unwilling to be repatriated. This will be followed by a case study analysis of documented situations where states and international bodies have handled POWs unwilling to be repatriated and if and how the principle of non-refoulement was then connected – or not connected – to the situation. These include the Korean War, the Second World War and the Gulf Wars. The outcomes of these conflicts and the repatriation or non-repatriation will be evaluated to see if a uniform application and treatment can be deducted. If none can be deducted, I will propose one.

I will not include the Russian war of aggression against Ukraine as this poses the threat of studying “a moving target”, as this active conflict can change over the course of the research and render it redundant by doing so. A short subchapter will look at how the recommendations and non-refoulement can be applied in future conflicts, including the Russian war of aggression against Ukraine.

Overall, I will attempt to critically engage with the literature, as the positionality of the authors influences the language and assessment of the conflict, just like mine influences this thesis.

Subchapter 0.2: Positionality

No research happens in a vacuum. All research is influenced by the personal position of the researcher and their previous experiences and existing characteristics. My position as a Belgian, white, heterosexual, educated and middle class woman influences how I view complex themes such as human rights, international humanitarian law and the application in past and present conflicts. I am a national of a former colonizing power which has only in the last few decades started to take responsibility and acknowledge the harm that colonization had in the Democratic Republic of the Congo and its population.

As international law – and by extent, international humanitarian law and human rights law – has been developed during the twentieth century, before and after the independence of many former colonies, it often faces criticism of being colonial in its essence. It must therefore be taken into consideration that my view of IHL and IHRL is influenced by the history of colonization that shaped these legal fields.

Additionally, I have not lived in conflict areas or seen the application of IHL. None of my relatives or social circles have any lived experiences with these topics, so my interpretations

and views stem entirely from legal research and the current global developments, journalistic reports on conflict situations and education. Having studied human rights law, IHL, transitional justice and some introduction courses on philosophy and law in society, I have developed an understanding of international law that is influenced by the approaches of lecturers in the courses. It has been influenced by my political views and the environment where I grew up. I do not pretend to have a neutral or encompassing understanding of the field.

It must therefore be taken into account in what circumstances and previous experiences this research is conducted, contrasting with the conflicts that have shaped and developed the legal field. JACOBSON and MUSTAFA have developed a schematic with which researchers can map and study their positionality.⁵ This schematic is developed to conduct interviews and look at the differences in dynamics between the researcher/interviewer and the interviewee, but it can be used in many different research methodologies as it urges the researcher to engage actively with their social identity.

The schematic is as follows and does not intend to resolve or understand how positionality influences the research, rather to engage with the social identity and use this information as a starting point. The first tier identifies the characteristics that shape my personal social identity. The second tier identifies how these characteristics have an influence on my life. The third tier then indicates what feelings rise from these characteristics. It encourages me to think about these themes and see how they are reflected in the research.⁶

As I am politically progressive and there is an idealistic view that comes with my age (according to some), while also living in a state where human rights are promoted, this can be reflected when writing about the protection prisoners of war should enjoy. I should take this into account when reading sources and assessing them, to be aware of the influences.⁷

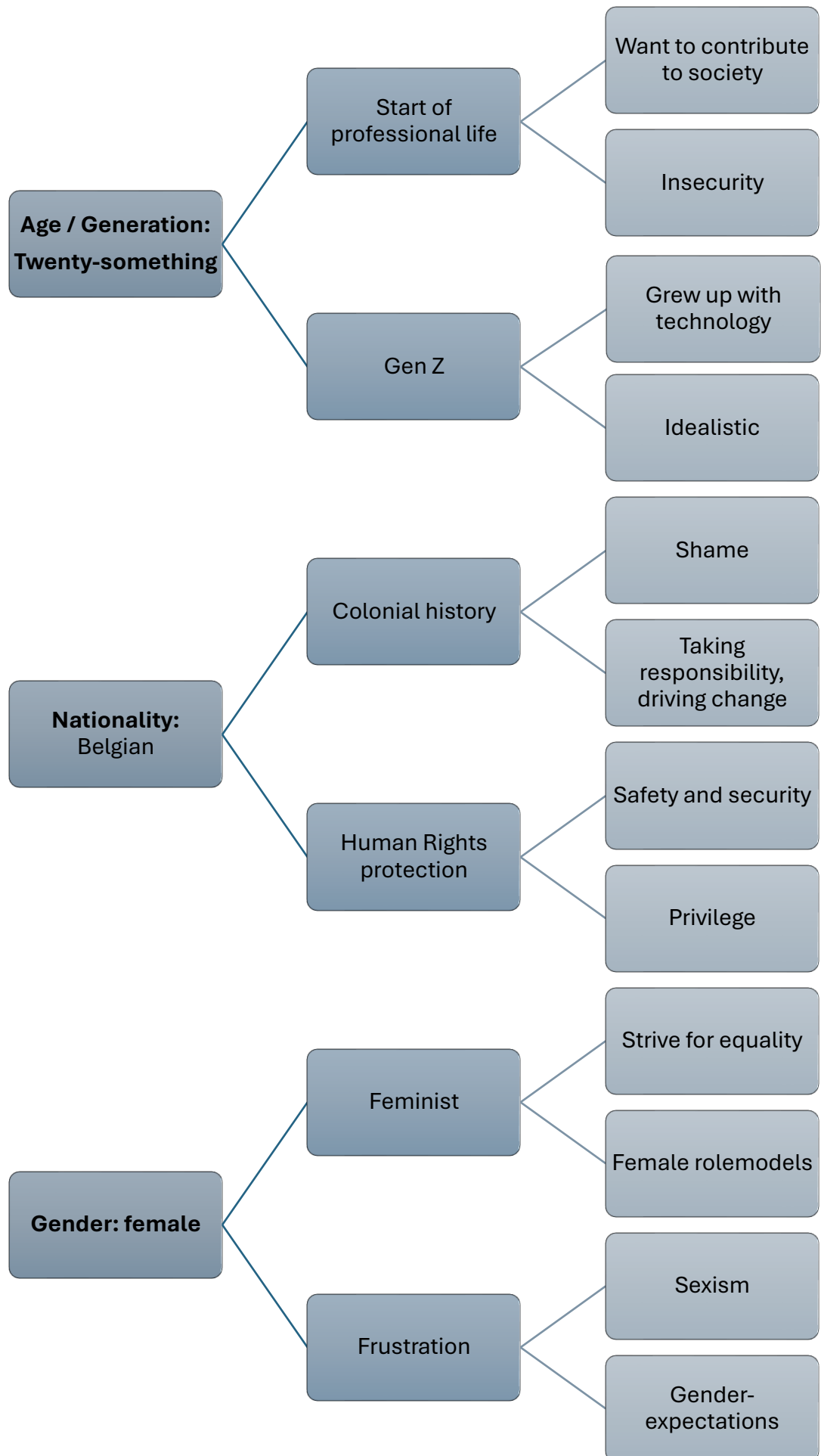
Subchapter 0.3: Normative framework

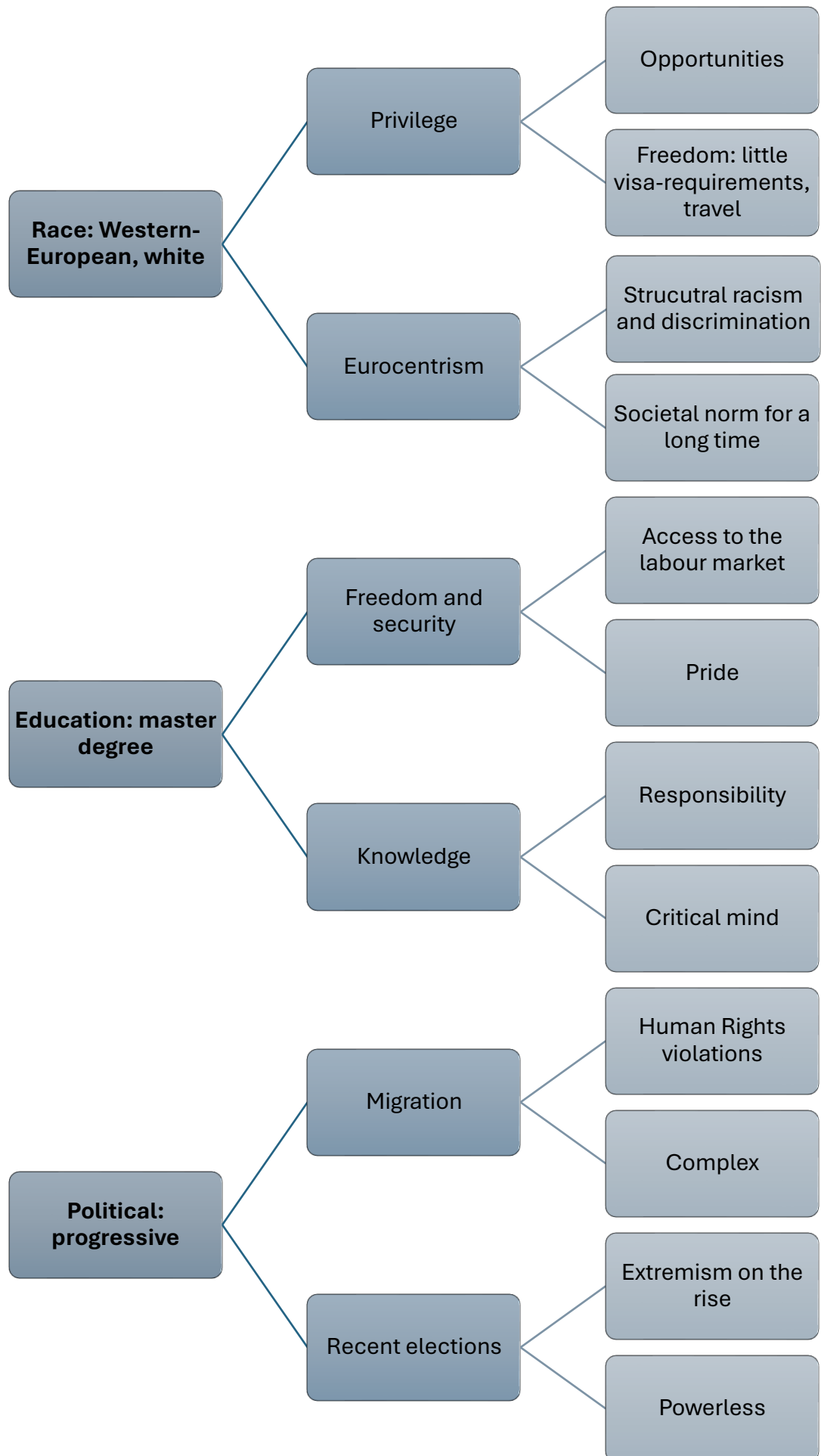
The normative framework of this thesis is important: I aim to have a solution or a proposal of one for the application of both the principle of non-refoulement and the obligation to repatriate prisoners of war. The gap in legal framework should be addressed, which is what this thesis aims for. While respecting both the rules of interpretation and the respective legal fields, a proposal or improvement for the existing legal framework will be made.

⁵ Danielle Jacobson and Nida Mustafa, 'Social Identity Map: A Reflexivity Tool for Practicing Explicit Positionality in Critical Qualitative Research' (2019) 18 International Journal of Qualitative Methods <<https://journals.sagepub.com/doi/10.1177/1609406919870075>> accessed 14 July 2025.

⁶ *ibid* 3.

⁷ *ibid* 4.





Chapter 1: Legal framework

This chapter will establish the applicable legal framework and the legal obligations under various frameworks that are central to this thesis. By clearly stating the obligations and evolutions of the Third Geneva Convention and the Refugee Convention, this chapter facilitates further research and engagement with the historical cases of chapter 2 and the scholarly literature review of chapter 3, ultimately answering the question: “To what extent should non-refoulement apply to prisoners of war under international humanitarian law, and how has state practice shaped this?”

Subchapter 1.1: Non-refoulement

Refugee law aims to provide protection to refugees and stems from many international conventions. The Universal Declaration of Human Rights of 1948 states in Article 14 that everyone has the right to seek and enjoy asylum from persecution in other countries.⁸ As this Declaration is not a legally binding Convention – although some argue that it has the status of binding customary international law⁹ – there are other instruments to look at to decide the protections and statuses of refugees under international human rights law, such as the Refugee Convention of 1951 and its Additional Protocol of 1967 and the Migrant Workers Convention of 1990.¹⁰ Other regional conventions and frameworks exist as well, such as the Dublin Regulations for the European Union, the 1969 Convention of the Organization of American States and the 1984 Cartagena Declaration.

As the Refugee Convention details the rights and protections refugees receive, this means that another entity is responsible for guaranteeing these rights and protections and refraining from violating these. Many refugee laws and provisions are a product of the aftermath of the First World War, when governments started to draw up provisions and needed to provide travel documents for those who had fled during the war.¹¹ This was a new development, as before this moment, foreigners were usually protected by their state of origin, and now they could not or

⁸ Universal Declaration of Human Rights, UN General Assembly, GA Res 217 A (III) (adopted 10 December 1948) art 14.

⁹ Ionel Zamfir, ‘The Universal Declaration of Human Rights and Its Relevance for the European Union’ (European Parliament Research Service 2018) <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA\(2018\)628295_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf)> accessed 19 July 2025.

¹⁰ Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff 1997) 27.

¹¹ Nehemiah Robinson, ‘Convention Relating to the Status of Refugees - Its History, Significance and Contents’ (Institute of Jewish Affairs 1952) <<https://www.bjpa.org/content/upload/bjpa/conv/CONVENTION%20RELATING%20TO%20THE%20STATUS%20OF%20REFUGEES,%20NEHEMIAH%20ROBINSON.pdf>> accessed 20 July 2025.

did not want to return to their countries out of fear for prosecution.¹² The first arrangements regarding identification and other needs of the new groups of refugees were made regarding specific groups, such as Russian or Armenian groups.¹³ ROBINSON details the lack of enthusiasm of many states to accept international agreements and arrangements for many individual groups of refugees, as any number between 2 and 18 states signed them.¹⁴

However, the displacement of the Second World War increased the numbers of refugees and so it increased the number of issues governments encountered with mass influxes of refugees.¹⁵ The League of Nations started this process and it culminated in the 1951 Refugee Convention, in a desire to protect those who had fled and ensure basic human rights and decent treatment.¹⁶ The main duty bearers of the Convention are therefore the state parties.

A. Personal and material scope of the Refugee Convention

The Refugee Convention is applicable to all those with the status of refugee, regardless of formal recognition, but excludes those who remain within their country's borders.¹⁷ Article 1 of the Refugee Convention defines the term 'refugee' as a person who is unwilling or unable to return to state of nationality or origin, because of fears for prosecution based on race, religion, nationality, membership of a particular social group or political opinion.¹⁸ The obligations resting on refugees are limited. Under Article 2 of the Refugee Convention, refugees must respect the laws and public order of the host State, obligations identical to those of citizens.¹⁹ Non-compliance with this duty can lead to loss of protection of certain rights.

The principle of *non-refoulement* forms the core of the 1951 Refugee Convention, a refugee cannot be returned to a country where they are in danger of mistreatment or threats to their life and freedom.²⁰ The Convention details both the legal obligations for states and the limited

¹² *ibid* 1–2.

¹³ Robinson (n 11).

¹⁴ *ibid* 2.

¹⁵ UNHCR, 'The 1951 Refugee Convention' <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention?gad_source=1&gad_campaignid=22524919840&gbraid=0AAAArCUaL6oqopEBU87pRXTAYptJmoNO&gclid=Cj0KCQjwvvajDBhCNARIsAEE29Wq27Nu1kJItkKDJ9u5543IIm1jgPyJCfzYOxebZj-fspZhPyoSLQgaAih_EALw_wcB> accessed 6 July 2025.

¹⁶ *ibid*; UNHCR, 'UNHCR Note on the Principle of Non-Refoulement' <<https://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258>> accessed 6 July 2025.

¹⁷ Zieck (n 10).

¹⁸ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 1.

¹⁹ *ibid*, art 2.

²⁰ UNHCR, 'The 1951 Refugee Convention' (n 15).

obligations resting on individuals, ensuring a humane and legal framework, based on the principles of non-discrimination, non-penalization and non-refoulement.²¹

States must apply the protections and principles of the Convention without discrimination in regards to race, nationality or religion.²² They must provide access to education at an elementary level in the same way it is provided for their nationals, as well as secondary education, social benefits, work, the judicial system and identity and travel documents.²³ States must cooperate with the United Nations High Commissioner for Refugees to allow it to supervise the execution of the Convention provisions.²⁴

As the provisions ensure decent living conditions for refugees in the new country of residence, they also include obligations for states relating to the treatment of refugees, including a prohibition of expulsion. Expulsion is the whole of measures that authorities of States use to forbid an individual to stay on the territory of that State, including escorting the individual back to the border, or to their State of origin or another State.²⁵ As an exception expulsion can only be applied in the name of national security or public order which is a complicated concept as it is.²⁶ The Executive Committee explicitly states that failure of a refugee to conform to the laws and regulations of the country of residence might not be as grave as when it concerns someone who has not been uprooted and has to adapt to a new environment.²⁷ Expulsions are only allowed in exceptional circumstances, as the consequences of expulsion for the refugee and their relatives or social circle are severe.²⁸

As refugees are granted protection under the Refugee Convention, the UNHCR explains in its note on refugees that the guarantees are in place to avoid refugees becoming uprooted again once they have gained the right to remain in a State or have been granted asylum.²⁹ Additionally to the protection against expulsion and pushbacks, which protect the refugee from being expelled or not allowed into the country, there is also a need for protection against being sent

²¹ Refugee Convention, Introductory note by the Office of the United Nations High Commissioner for Refugees.

²² *ibid* art 3.

²³ *ibid* 16–28.

²⁴ Refugee Convention art 35.

²⁵ Medecins Sans Frontieres, ‘Refoulement (Forced Return) and Expulsion’ (*The Practical Guide to Humanitarian Law*) <<https://guide-humanitarian-law.org/content/article/3/refoulement-forced-return-and-expulsion/>> accessed 6 July 2025.

²⁶ UNHCR Executive Committee Meetings, ‘Note on Expulsion of Refugees EC/SCP/3’ (24 August 1977) <<https://www.unhcr.org/publications/note-expulsion-refugees>> accessed 6 July 2025.

²⁷ *ibid*.

²⁸ *ibid*.

²⁹ *ibid*.

to the country of birth or of origin. Whereas expulsion aims at removing an alien from the territory of the acting state, *refoulement* aims at sending a refugee back to a specific country.

The principle of *non-refoulement* is most notably encased in Article 33 of the Refugee Convention:

*“[N]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”*³⁰

No reservations are to be made to this provision by Contracting States to the Refugee Convention.³¹ Its application is not dependent on lawful status, right of residency or mode of entry.³² It has been similarly adopted in the 1984 Convention Against Torture,³³ and the International Convention for the Protection of All Persons from Enforced Disappearance and applies to every person within the effective control of a State.³⁴ If it is not explicitly included in the legal framework, then bodies or councils tasked with assessing violations of the rights protected by the concerned convention may have explained or interpreted the framework to include this implicitly, such as the Human Rights Council set out in its authoritative interpretation of the International Covenant on Civil and Political Rights.³⁵ This explanation implies that non-refoulement applies as soon as a person is apprehended by State authorities, this effective control has been debated by regional human rights courts, such as the European Court of Human Rights (ECtHR).

The Oxford Commentary on the Refugee Convention clarifies that although an absolute prohibition to refoulement was proposed at first, proposals negotiating states led to the inclusion

³⁰ UNHCR, 'The 1951 Refugee Convention' (n 15) art 33.

³¹ Note on the Principle of Non-Refoulement, UNHCR, 'UNHCR Note on the Principle of Non-Refoulement' (n 16).

³² OHCHR, 'Technical Note: The Principle of Non-Refoulement under International Human Rights Law' (5 July 2018)

<<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> accessed 7 July 2025; Walter Kälin, Martina Caroni and Lukas Heim, '(Prohibition of Expulsion or Return ("Refoulement")/ Défense d'Expulsion et de Refoulement)' in Andreas Zimmermann, Terje Einarsen and Franziska M Herrmann (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol 2e* (2nd edn, Oxford University Press 2024) no 24 <<https://academic.oup.com/oxford-law-pro/book/58066/chapter/477888465>> accessed 12 August 2025.

³³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3.

³⁴ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc A/RES/61/177, art. 16.

³⁵ UN Human Rights Committee (HRC), 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) para 9 <<https://www.refworld.org/legal/general/hrc/1992/en/11086>> accessed 20 July 2025; Jonathan Horowitz, 'Transferring Wartime Detainees and a State's Responsibility to Prevent Torture' (2012) 2 American University American University National Security Law Brief 43, 53.

of the exceptions in the article.³⁶ Article 33 must be understood to also prevent further refoulement by the State of destination, although this is not included in its text. This ensures that refugees will not be returned to a State that is at first glance safe, but has a policy of returning refugees to other States in what then constitutes refoulement.³⁷ The Oxford Commentary indicates that this applies too to extradition obligations, Article 33 must be interpreted in a way that aligns with other universal and regional human rights framework so that refugees are protected against extradition if their lives would be at risk and it would constitute refoulement.³⁸

It has become a norm of customary international law.³⁹ Article 5 of the Convention allows it to be applied at all times, during peace and war alike,⁴⁰ thanks to which the other conventions and legal frameworks, such as international humanitarian law, can be applied to refugees.⁴¹

Subchapter 1.2: Repatriation of Prisoners of War

This subchapter includes a doctrinal approach of the obligations for state parties and prisoners of war under the Third Geneva Convention. Detaining Powers have obligations towards the combatants they detain as prisoners of war. Prisoners of war (hereafter: POW) are combatants that fall into the hands of adverse parties or enemy parties over the course of an armed conflict.⁴² As combatants they are granted protection under international humanitarian law. They are captured to prevent further participation in the hostilities.⁴³ The legal framework regulating these instances is the Geneva Convention relative to the Treatment of Prisoners of war, the additional Protocols I and II, the Regulations added to the Convention of 1907 on respecting the Laws and Customs of War on Land (IV) and bilateral agreements between belligerent states.⁴⁴ Article 2 of the Third Geneva Convention serves as basis for its application, as all High Contracting States are bound by the Convention in case of a declared or undeclared armed

³⁶ Kälin, Caroni and Heim (n 32) nos 17–20.

³⁷ *ibid* 81; Division of International Protection of the United Nations High Commissioner for Refugees, *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37* (Division of International Protection of the United Nations High Commissioner for Refugees 1997) 138.

³⁸ Kälin, Caroni and Heim (n 32) no 98.

³⁹ Note on the Principle of Non-Refoulement, UNHCR, ‘UNHCR Note on the Principle of Non-Refoulement’ (n 16); Kälin, Caroni and Heim (n 32) no 26 ff.

⁴⁰ Refugee Convention art 5.

⁴¹ Stephane Jaquemet, ‘The Cross-Fertilization of International Humanitarian Law and International Refugee Law’ (2001) 83 *International Review of the Red Cross* 651, 653.

⁴² Medecins Sans Frontieres, ‘Prisoners of War’ (*The Practical Guide to Humanitarian Law*) <<https://guide-humanitarian-law.org/content/article/3/prisoners-of-war/>> accessed 6 July 2025; Third Geneva Convention (1949) (1949) art 4.

⁴³ Marco Sassòli, ‘Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: a commentary* (Oxford University Press 2016).

⁴⁴ de Zayas (n 2).

conflict. It is also applicable if one of the belligerent parties is not a High Contracting Party but has accepted the application of the Third Geneva Convention nevertheless.

To ensure decent treatment of prisoners of war, Detaining states have obligations to comply with, such as the provision providing for humane treatment (Article 13 GCIII), respect for their person and honor (Article 14 GCIII), maintenance and equal treatment of the prisoners (Articles 15-16 GCIII). The minimum standards of protection must be upheld and protect the prisoners from public curiosity, coercion and torture. Additionally, the Detaining power must update the International Committee of the Red Cross about the individual POWs capture and what their conditions are (Article 122 GCIII).

During captivity, it is possible to arrange intermittent releases and repatriations of prisoners of war, according to Article 110 GCIII, when seriously wounded or ill prisoners are unlikely to recover within a year.

When the armed conflict comes to an end, Detaining powers have the obligation to immediately release and repatriate the prisoners, which is unconditional and there is no discretionary margin for the state (Article 118 GCIII).

When POWs are to remain *hors de combat*, they can either be detained by the Detaining power, or they can be released on parole or to a neutral third party state.⁴⁵ They can also be repatriated to their State of origin, but are to be held to Article 117 of the Third Geneva Convention, namely that they will not return to active combat.⁴⁶

On the other side is the home state, or the state on which the prisoners of war depend and participate for in the armed conflict. This state must in its turn accept the repatriations, as it is implied that repatriation is a reciprocal process (Article 118 GCIII). When this provision is read jointly with Article 12 (4) of the International Covenant on Civil and Political Rights which provides that no one can be deprived of the right to enter their own country, it must be assumed that there is an obligation for the home state to accept the repatriated persons.

The home state must also participate in the mixed medical commissions to decide on the eligibility of the prisoners of war that are to be repatriated during the hostilities, under Article 109 and 112 GCIII. Article 109 §3 Third Geneva Convention allows sick or wounded POWs to refuse repatriation, but applies only to POWs in medical distress.⁴⁷

⁴⁵ Third Geneva Convention (1949) art 109 (2).

⁴⁶ de Zayas (n 2).

⁴⁷ Third Geneva Convention (1949), art. 109.

Under the Third Geneva Convention, obligations arise for neutral parties and the International Committee of the Red Cross alike. The ICRC must visit camps for prisoners of war, verify the conditions they live in and facilitate communication (Article 126 GCIII). It has a neutral status and must ensure humanitarian support and monitoring.

The captured individuals at last have obligations to comply with too. They must provide their name, rank, date of birth and serial number as per Article 17 GCIII. The identification is important as Detaining powers and the ICRC have obligations to communicate who has been captured and monitor their situation. To allow them to fulfil their obligations, the prisoner of war must in their turn provide this information. They are additionally prohibited from using violence to escape, although non-violent escape is not necessarily punishable under the Convention. Provisions 49-57 GCIII explicit the conditions in which the prisoners can work, when a Detaining power exceeds these conditions and categories of labor that can be performed, the prisoner of war can refuse to do so and should not be punished for this refusal. From all of these obligations for the various actors that are involved in an armed conflict, the obligation to repatriate prisoners of war is essential to this thesis, including the modalities and whether the provision has an absolute character.

1.2.1 Repatriation as Default Rule

This section involves both a doctrinal exposition of Article 118 GC III, as well as interpretative claims based on the Commentaries on the Third Geneva Convention and authoritative scholars in the field.

Repatriation of prisoners of war is the standard rule at the end of an armed conflict, following Article 118 GC III. This unilateral obligation applies regardless and no agreement must be made for the obligation to take effect.⁴⁸ The article stipulates that POWs must be repatriated after cessation of active hostilities, according to the timeline each State Party sets out for themselves, or according to an agreement between the Detaining states. The Detaining states will bear the costs of this themselves and the measures should be brought to the attention of the POWs.⁴⁹

⁴⁸ This applies to all obligations under the Geneva Conventions and not merely article 118 GC III. See also Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War* (Schulthess 1977) 129ff.

⁴⁹ Third Geneva Convention (1949), art. 118.

As the ICRC frames it, repatriation of POWs is necessary to be in line with the “spirit of the Geneva Conventions” and avoid prolonging the war captivities.⁵⁰ The Online Casebook confirms this as a rather strict obligation, as no provisions allow prisoners of war to *not* be repatriated after an armed conflict, but state practice since the Second World War and refugee law – more specifically *non-refoulement* – could grant the prisoners of war such a right.⁵¹

A. ICRC Commentaries

The ICRC Commentary of 2020 confirms that the obligation to repatriate is subject to exceptions if prisoners face the risk of violations of their fundamental rights when they return to the territory of their home state.⁵² The Commentary asserts that each case should be addressed individually, with a review for the grounds on which the prisoner refuses repatriation as this protects the prisoner against propaganda influencing his or her decision or pressure being exercised by outside influences.⁵³ Non-refoulement is not explicitly referred to in the Third Geneva Convention but the Commentary does explicitly conclude that the interpretation of article 118 GC III that it puts forth is to be understood in line with the principle of non-refoulement.⁵⁴

This indicates that the Commentary and the ICRC confirm an existing tension between the obligation to repatriate and other human rights principles, but it does not resolve the legal tension as it offers little guidelines on how to bring state actions in line with both principles. Additionally, it does not offer any guidance on issues such as assessing of voluntariness, it only

⁵⁰ International Committee of the Red Cross, ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 Commentary of 2020’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-118/commentary/2020?activeTab=>> accessed 22 June 2025.

51 Marco Sassòli, Antoine Bouvier and Anne Quintin, ‘Release’ (*How does law protect in war?*) <

⁵² International Committee of the Red Cross, 'Third Geneva Convention, 2020 Commentary' (n 50), 4469.

⁵³ *ibid.*, 4470.

⁵⁴ *ibid* 4469.

refers to existing state practice in the Korean Wars, the Gulf Wars and the Ethiopian-Eritrean War.⁵⁵

The state practice will be researched and addressed in the chapter 2, including the Korean War Armistice negotiations and the second World War.

1.2.2 Debate on Voluntary Repatriation

A. Negotiation process of the 1949 Geneva Conventions

The Geneva Convention negotiations aimed at improving humanitarian protection for vulnerable groups during armed conflicts, including the rights of prisoners of war.⁵⁶ The Convention of 1929 was ineffective in preventing the horrors that occurred during the Second World War, so new approaches and negotiations were necessary.⁵⁷ In 1945, the Conference of Governmental Experts started negotiations. During this conference, one of the main concerns was that many prisoners of war had committed suicide after the Second World War as they did not want to be repatriated to a state in comparison to which they had a different ideology.⁵⁸

During the negotiations of the Third Geneva Convention, the topic of non-repatriation or refusal of repatriation by prisoners of war was discussed. The Austrian delegation argued that a possibility should be included that allows each prisoner to express their will on repatriation, or refuse to be repatriated.⁵⁹ They argued that the provision should be amended in a way that allowed the POW to choose a state to be transferred to, provided that this state accepted.⁶⁰ The negotiators actually sought to include more clear provisions in many other cases too, favoring clear determination of rights over room for interpretation.⁶¹ The Holy See for instance argued that religious organizations should be explicitly included as organizations that may aid prisoners of war during their detention.⁶²

On the other hand, the unpredictable nature of warfare was recognized, unforeseen circumstances require adaptable language, as the delegation of the United Kingdom pointed out in regards to Article 83 of the 1929 Prisoners of War Convention.⁶³ After the debates, no

⁵⁵ International Committee of the Red Cross, 'Third Geneva Convention, 2020 Commentary' (n 50), 4468.

⁵⁶ Sassòli (n 43).

⁵⁷ Jan P Charmatz and Harold M Witt, 'Repatriation of Prisoners of War and the 1949 Geneva Convention' 62 The Yale Law Journal 391.

⁵⁸ Mark Elliott, 'The United States and Forced Repatriation of Soviet Citizens, 1944-47' (1973) 88 Political Science Quarterly 253, 258.

⁵⁹ F Bugnion, 'Christiane Shields Delessert: Release and Repatriation of Prisoners of War at the End of Active Hostilities' 710 Revue Internationale de la Croix-Rouge.

⁶⁰ Charmatz and Witt (n 57).

⁶¹ Final Record of the Diplomatic Conference of Geneva 1949, Vol 2, Section B 322.

⁶² *ibid* 322-323.

⁶³ *ibid* 16.

provision allowing refusal of repatriation was included, as they feared that Detaining States would abuse this to draw out the hostilities or that such a provision would weaken Article 118 of the Third Geneva Convention.⁶⁴

The provisions were drafted according to this view of preventing abuse and accelerating repatriation. For instance, Article 118 GC III now places the time of repatriation at the moment that active hostilities have ceased, whereas Article 75 of the Convention of 1929 used to link it to the conclusion of peace, which meant that repatriation could in certain circumstances only be effected years after the hostilities had ceased.⁶⁵ By phrasing the text in a stricter manner, it essentially facilitated forced repatriation, which would violate many other human rights of the prisoners, including the prohibition of torture and inhuman treatment.

To avoid further abuse, Article 7 common to the Conventions was introduced, which confirms the rather absolute character of the rights and obligations of the Third Geneva Convention as it prevents prisoners of war renouncing them. MAYDA thinks this indicates an absoluteness as he argues that this confirms how prisoners enjoy the rights because the Geneva Conventions grant them regardless of state action.⁶⁶

The *travaux préparatoires* indicate however that an absolute interpretation of the obligation of repatriation might not have been the goal of the drafters. While avoiding abuse was a concern, the principle can be read in a less strict way although it is phrased almost unconditionally.⁶⁷ This lies at the center of the debate on repatriation and non-refoulement for prisoners of war.

B. ICRC practice on voluntary repatriation

The International Committee of the Red Cross is tasked with a variety of duties regarding prisoners of war, partly due to treaties concluded after the First and Second World Wars, but also because of treaties concluded after many wars of independence in former colonies.⁶⁸ In the treaty between France and the United States on the treatment of German prisoners of war for example, France designated the ICRC as a protecting institution for the POWs.⁶⁹ Treaties concluded later with Japan and the Evian Agreement that ended the Algerian War of

⁶⁴ Bugnion (n 59).

⁶⁵ Charnatz and Witt (n 57) 399.

⁶⁶ Jaro Mayda, 'The Korean Repatriation Problem and International Law' (1953) 47 American Journal of International Law 414, 436.

⁶⁷ *ibid* 431.

⁶⁸ Julio A Barberis, 'El Comité Internacional de La Cruz Roja Como Sujeto Del Derecho de Gentes' in Christophe Swinarski, Jean Pictet, and Internationales Komitee vom Roten Kreuz (eds), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge: en l'honneur de Jean Pictet = Studies and essays on international humanitarian law and Red Cross principles* (Nijhoff 1984) 635.

⁶⁹ *ibid* 637.

Independence also assigned tasks relating to prisoners of war to the ICRC, especially when it came to repatriation.⁷⁰

The International Committee of the Red Cross has a mandate to facilitate repatriation of prisoners of war in accordance with the principles of the Third Geneva Convention, as decided by Articles 9, 10 and 118 GC III. The procedure must be voluntary, as no one should be repatriated against their will and force should not be used.⁷¹ In its Commentaries from 2020 the ICRC indicates that refusal to repatriation cannot be based on an inconvenience, but must be rooted in a graver danger.⁷² The ICRC states that it follows the same procedure, whenever it is involved in a repatriation process. First, it organizes information sessions for prisoners of war on the circumstances and rights to repatriation they enjoy.⁷³ After checking the identity of the prisoners, it will ensure their voluntariness to be repatriated, as it has a mandate to initiate visits to prisoners of war and detainees, and it will conduct interviews with the POWs without any witnesses present to establish their will without undue influence.⁷⁴

The ICRC has in some cases referenced the voluntariness of repatriation, but offers no clarity on the procedure. In the 2020 Commentary it explains that this is largely due to the unique circumstances of each conflict. The Commentary elaborates on the repatriation plan which should always adhere to the procedural requirements of article 118 GC III and include other practical points such as administration and transportation.⁷⁵ It remarks as an example of procedural repetition that during the repatriation of Iraqi and Irani prisoners of war in the aftermath of the Gulf Wars, it made sure that the soldiers involved in the repatriation process were actually returning because of their own free will. In the repatriation process of Ethiopian and Somalian prisoners of war from the Ogaden Conflict, it visited each prisoner of war to determine whether they wanted to be repatriated.⁷⁶

Issues arise when all POWs have been repatriated and those who refuse continue to be interned. In those cases, they lose their protected status under the Third Geneva Convention. Here the ICRC claims that the now former prisoners of war still fall within the scope of protection of the Fourth Geneva Convention until they are re-established elsewhere.⁷⁷ It refers in the 2020 Commentary to the situation regarding Iraqi POWs in 1991, when Saudi-Arabia accepted this

⁷⁰ Barberis (n 68).

⁷¹ International Committee of the Red Cross, 'Third Geneva Convention, 2020 Commentary' (n 50), 4473.

⁷² *ibid* 4470.

⁷³ International Committee of the Red Cross, 'Third Geneva Convention, 2020 Commentary' (n 50), 4473.

⁷⁴ *ibid*.

⁷⁵ *ibid* 4475–4480.

⁷⁶ International Committee of the Red Cross, 'Annual Report 1988' (1989) 25 & 36.

⁷⁷ International Committee of the Red Cross, 'Third Geneva Convention, 2020 Commentary' (n 50) no 4471.

approach regarding the POWs that were not repatriated nor granted asylum within Saudi-Arabia either.⁷⁸

Through the Commentaries on the Geneva Conventions, interpretations have been put forward indicating that Article 118 GC III should be interpreted as acknowledging an inalienable right of POWs to be repatriated, with no exceptions unless a POW fears prosecution or unjust measures upon return.⁷⁹ The Commentary of 2020 on the Third Geneva Convention however reaffirms the exception to repatriation, made on a case-by-case evaluation.⁸⁰ The exception applies if there are serious reasons for the POW to fear that they will be subjected to unjust measures affecting their liberty, or if the repatriation would be in violation of general principles of international law that protect human beings.⁸¹

1.2.3 Consent: ethical, legal, procedural questions

Voluntary repatriation requires consent. This is what the United Nations (UN) drew upon during the armistice negotiations of the Korean War and what the negotiators discussed during the drafting of the Geneva Conventions. Voluntary repatriation means that POWs express their will to be repatriated or consent to it.

The element of consent in repatriation is an issue in both the doctrinal and the practical aspect of repatriation, for prisoners of war but also other categories of persons who can be repatriated, such as refugees or patients in need of care in their countries of origin.⁸² The same ethical considerations can be applied to prisoners of war, as the dangers they face upon repatriation can be similar to refugees (i.e. prosecution or inhumane circumstances, ill-treatment). Three possible issues with the notion of consent will be discussed here: the ethical question, the legal framework on consent and lack thereof and lastly the procedural issues with consent.⁸³

This section is relevant in this thesis as consent is at the center of the obligation to repatriate prisoners of war and their refusal thereof. As mentioned above, the UN considered this during the Korean War Armistice negotiations and the negotiations for the Geneva Conventions touched upon this element as well. To assess the practical approaches of voluntary repatriation and the academic literature on the intersection with non-refoulement, it is vital to have a clear

⁷⁸ *ibid* 4472.

⁷⁹ Vincent Chetail, 'Introduction: Voluntary Repatriation in Public International Law: Concepts and Contents' (2004) 23 *Refugee Survey Quarterly* 1, 6.

⁸⁰ Jemma Arman and others, 'The Updated ICRC Commentary on the Third Geneva Convention: A New Tool to Protect Prisoners of War in the Twenty-First Century' (2020) 102 *International Review of the Red Cross* 389, 407.

⁸¹ *ibid*.

⁸² Michael J Young and Lisa S Lehmann, 'Undocumented Injustice? Medical Repatriation and the Ends of Health Care.' (2014) 370 *The New England Journal of Medicine*; Gerver (n 2).

⁸³ Gerver (n 2).

view of the notion of consent within refugee law and the issues that come with it. Whether a POW gives informed consent or not to repatriation directly affects whether the practice is in line with international standards, or not. Most of the approaches to the ethical, procedural and legal questions presented in this chapter stem from refugee law, as the notion of voluntariness is more elaborately researched there and applied on a regular basis.⁸⁴

A. Ethical questions

First, the ethical issue questions whether consent was coerced or given truly voluntary. If consent is given, was it truly informed consent and were the prisoners aware of the risks that repatriation poses to them?⁸⁵ Was their decision then overridden by authorities or was it respected and was their autonomy properly exercised?

1. *Genuine voluntariness or coercion*

The question of true consent versus coercion exercised to get someone to agree with repatriation is regularly addressed in relation to refugees.⁸⁶ GERVER asserts that when refugees are repatriated by non-governmental organizations (NGOs) or international organizations, there are instances where the refugees cannot give genuine consent to be repatriated.⁸⁷ She argues that when faced with a dilemma between rock and a hard place, staying in a country or at a border where refugees are refused entry or decent living conditions, and being repatriated to the country of origin where there is a risk of prosecution or the refugees lived in terrible circumstances – which were the reason for seeking refuge elsewhere to begin with – the choice is influenced by coercion anyway.⁸⁸ Choosing the lesser of two evils is not a free and genuine choice, but rather one between two intolerable situations. The UNHCR itself admits that pull-factors such as wanting to return to family and familiar environments, are more important than push-factors such as political hostility in the country of refuge as this influences the voluntariness of return.⁸⁹

⁸⁴ United Nations High Commissioner for Refugees, 'Handbook on Voluntary Repatriation: International Protection'.

⁸⁵ Gerver (n 2); Aman Vijayaraghavan and Hamsa Vijayaraghavan, 'The Illusion of Consent – Voluntary Repatriation or Refoulement?' (*International Law Blog*, 25 September 2019) <<https://internationallaw.blog/2019/09/25/the-illusion-of-consent-voluntary-repatriation-or-refoulement/>> accessed 13 July 2025.

⁸⁶ UNHCR, 'Handbook on Voluntary Repatriation: International Protection' 10 <<https://www.unhcr.org/media/handbook-voluntary-repatriation-international-protection/>>.

⁸⁷ Gerver (n 2).

⁸⁸ *ibid*, 11.

⁸⁹ UNHCR, 'Handbook on Voluntary Repatriation: International Protection' (n 86) 10–11.

The ethical dilemma here also relates to whether NGOs and international organizations should assist in repatriation, even when refugees express the intention to be repatriated. According to GERVER, the UNHCR assists in repatriation because doing nothing would be worse, combining the views of other scholars on the UNHCR's stance towards repatriation with her own added critique.⁹⁰

Through her research and interviews, GERVER found that organizations with humanitarian intentions eventually did help in repatriation requests when refugees wanted to avoid detention or deportation.⁹¹ She therefore asks whether refugees can truly give consent in situations like these. To her, repatriation is a viable choice only if NGOs fail to improve the conditions or mitigate the risks refugees face, depending on many factors including but not limited to the actions of the government, the actions of international organizations themselves and whether they contribute to the situation that makes repatriation the only option.⁹²

The UNHCR provides some clarification on this in its Handbook on Voluntary Repatriation, it recognizes that refugees might use different criteria than the UNHCR to evaluate whether returning to their country of origin is safe, so while the UNHCR might not deem it safe it will provide limited assistance but will also refrain from promoting returns to this country.⁹³

2. Risk assessment

Refugees might also be unable to estimate the risks they are returning to upon repatriation. There often is too little data about the situation in their country of origin to assess whether they risk serious harm or not.⁹⁴ Aman and Hamsa VIJAYARAGHAVAN refer to the Rwandan returnees when discussing this lack of information. What seemed to be voluntary repatriation was in fact lack of information repatriation, as data was not disseminated in an appropriate manner to the refugees to allow them to form their opinion.⁹⁵ It is not only sharing such information that distorts the risk assessment, but it is also often impossible to actually gauge the situation in the country of origin or the destination of repatriation. If a conflict is ongoing, it is frequently impossible to keep logs of the situation and present them to refugees.⁹⁶ GERVER asserts that many of her interviewees returned precisely for this reason, they did not know the

⁹⁰ Gerver (n 2); Michael Barnett, 'UNHCR and the Ethics of Repatriation' (*Forced Migration Review*, 2001) <<https://www.fmreview.org/barnett/>> accessed 15 July 2025.

⁹¹ Gerver (n 2).

⁹² *ibid.*

⁹³ UNHCR, 'Handbook on Voluntary Repatriation: International Protection' (n 86) 15.

⁹⁴ Gerver (n 2) 27.

⁹⁵ Vijayaraghavan and Vijayaraghavan (n 85).

⁹⁶ Gerver (n 2) 29.

situation they were returning to.⁹⁷ It is Schrödinger's Cat so to say, as long as one does not know the situation in the country, it could be worse or it could be better than their current situation. Others end up regretting their decision, they end up having to flee again and come to UN internally displaced person camps where the conflict rages on not far from the camps.⁹⁸ One of the organizations GERVER worked with tried to mitigate this issue by visiting and contacting the repatriated refugees, ascertaining whether they were safe and using this as a guideline for future repatriations, which turned out to be complicated due to connectivity issues and continued displacement.⁹⁹ GERVER maintains that if the risks are certain and allow for an informed decision, then organizations and the UN can in good conscience assist in repatriation, but can refugees consent to something unknown, just because it might be better than remaining in detention but also possibly worse?¹⁰⁰

If this is applied to prisoners of war, many similarities present themselves. While conditions in detention might not be ideal, it is also often uncertain what risks await them upon repatriation. It is likely impossible to assess the situation during an ongoing conflict, when they are repatriated thanks to intermittent prisoner exchange agreements, such as the Russian Federation and Ukraine have concluded in the past few months.¹⁰¹

There is always a possibility of being charged with collaboration or for disclosing any information during captivity. During an armed conflict, it is not presumptuous to think relations between the belligerent states are at such a low that persons returning from captivity become suspicious by association. For instance, the Office for Democratic Institutions and Human Rights – part of the Organization for Security and Cooperation in Europe – published its 7th report on the ongoing war of aggression in Ukraine and the human rights violations happening during the armed conflict.¹⁰² Civilians living in the Ukrainian territories occupied by the Russian Federation are being coerced to work with the occupying authorities and afterwards possibly sentenced by the Ukrainian authorities for collaboration.¹⁰³ While these civilians are being coerced, they are punished for their actions nevertheless. There is a possibility of similar

⁹⁷ Gerver (n 2).

⁹⁸ *ibid* 30.

⁹⁹ Gerver (n 2).

¹⁰⁰ *ibid*.

¹⁰¹ Aleksandar Vasovic and Vladyslav Smilianets, 'Russia and Ukraine Exchange Prisoners of War' *Reuters* (9 June 2025) <<https://www.reuters.com/world/europe/russia-ukraine-exchange-group-younger-prisoners-war-moscow-says-2025-06-09/>> accessed 17 July 2025.

¹⁰² Office for Democratic Institutions and Human Rights, 'Seventh Interim Report on Reported Violations of International Humanitarian Law and International Human Rights Law in Ukraine' (ODIHR - OSCE 2025) 594634.

¹⁰³ *ibid* 61.

coercion and subsequent collaboration prosecutions happening or being assumed by any of the belligerent states, which puts the repatriated prisoners of war at risk of accusations.

Similarly, during the Korean War Armistice negotiations, the United Nations faced the issue that prisoners of war were afraid of persecution back in China or Korea for “collaboration” with the enemy, simply by either being captive or talking to the detaining powers on the issue of repatriation. Having expressed opinions against repatriation or against the communists regime, many prisoners of war were afraid for being punished upon return.¹⁰⁴ The risk of collaboration charges is uncertain, but was enough to refrain from immediately and forcibly repatriating the prisoners.

These examples show that risk of prosecution or deprivation exist and are issues to be considered, arguing against forced repatriation. *A fortiori* must situations where the risks are not certain but possible at the same time be considered when assessing the validity of consent to repatriation. If it is this difficult deciding on repatriation when the risks are somewhat clear and doubts exist on whether voluntariness exists, then it is even more so when the risks are unclear.

3. *Autonomy and integrity*

The last part of the ethical dilemma is whether the individual’s autonomy is truly respected. Autonomy requires both the right and the capacity to make decisions free from coercion and influence. Respecting a person’s choice also means safeguarding the integrity of the choice, ensuring it is informed, voluntary and independent. Coercion or pressure from authorities that view repatriation as preferable regardless of the conditions to which one returns, undermines both autonomy and integrity, rendering the decision no longer genuinely one’s own.¹⁰⁵

BARNETT argues that humanitarian organizations and institutions have evolving views, at some point repatriation became more preferable to the UNHCR and so they pushed indirectly for this, which takes away the autonomy of the refugee.¹⁰⁶ GERVER also sees the influence of NGOs or international organizations as an element diminishing the autonomy and integrity of choice of refugees.¹⁰⁷

¹⁰⁴ Charmatz and Witt (n 57).

¹⁰⁵ Barnett (n 90); Gerver (n 2).

¹⁰⁶ Barnett (n 90).

¹⁰⁷ Gerver (n 2).

B. Legal questions

The next issue is whether the notion of consent addressed by international humanitarian law. The Geneva Convention does not mention consent in its text as a requirement for repatriation, nor does any provision indicate what constitutes free and informed consent – unlike for example medical law, where the notion of free and informed consent is extensively described. Additionally, can consent be given if it equates *refoulement*? In these cases, repatriation conflicts with other human rights standards.¹⁰⁸ This concerns POWs, but also refugees.¹⁰⁹ Detaining state have obligations under IHL to ensure the safety and welfare as well as respect for the rights of detainees, so if a prisoner consents to repatriation to a state while this would constitute as *refoulement*, the Detaining state fails to provide protection. If conditions change after the transfer agreements have been made, Detaining states are obligated to interfere with the transfers, including when transferring to a third party state.¹¹⁰

C. Procedural questions

Lastly, there are considerable procedural issues with consent to repatriation. How is consent assessed in general and how can states assess whether consent was given informed and free of coercion of other prisoners?

1. Lack of clear procedures

As GERVER notes, there are no uniform or standardized processes to verify whether consent has been given free of coercion and truly voluntarily, leaving assessments vulnerable to manipulation and abuse. DROEGE finds that the ICRC must be able to establish that the decision of the prisoner of war has been made freely, which is a case by cases approach.¹¹¹ The ICRC has a policy of only assisting in repatriations that are truly voluntary.¹¹²

As DROEGE notes, it is firstly up to the transferring state to assess whether there are risks awaiting the detainee after transfer. She admits that humanitarian law does not contain procedural obligations for these transfers, which identifies a gap in protection for the POW.¹¹³

¹⁰⁸ Vijayaraghavan and Vijayaraghavan (n 85).

¹⁰⁹ *ibid*; Gerver (n 2).

¹¹⁰ H McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Dartmouth ; Gower Pub Co 1990) 92.

¹¹¹ Cordula Droegge, 'Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges' (2008) 90 *International Review of the Red Cross* 669, 674.

¹¹² *ibid* 681.

¹¹³ *ibid* 679.

D. Mitigation

To mitigate the assessment risks and lack of procedural obligations under IHL, DROEGE supplements it with refugee law and human rights law, where there is an obligation to provide an independent and impartial body where the transferee can lodge a complaint or challenge the decision of their transfer.¹¹⁴ As it is not directly included in refugee law, DROEGE draws upon the general human rights framework and the right to an effective remedy and fair trial.¹¹⁵

The obligation of states to inform the individuals timely of the intended transfer and provide an opportunity to address the independent body either themselves or through representatives should be fulfilled so they can address any fears regarding prosecution or threats upon transfer. This is closely linked to being informed by a legal counsel and being able to make a well-informed decision.¹¹⁶

It is important to note that this ties to the ethical considerations of consent, all of the procedural mitigation relies on having clear information relating to risk assessment upon repatriation, free from pressure or undue influence, which as noted before is difficult to assess in the first place during ongoing conflicts.

The Indo-Lankan Accord of 1987 and the ensuing repatriation of Sri Lankan Tamils however, is an example of where the issues regarding consent were properly addressed. As Aman and Hamsa VIJAYARAGHAVAN show in their article, the implementation of the Accord allowed the Tamils to make informed choices regarding their repatriation, although the Accord itself did not include specific safeguards on voluntariness.¹¹⁷ By allowing the UNHCR to conduct interviews with the refugees before their return and monitor the voluntariness of these returns, the Indian government ensured that the process was based on the valid will of the refugees. The authors note that the process was interrupted at various times when the conflict in Sri Lanka flared up and political and military circumstances were too volatile, this paired with the refusal of the courts to let refugees be returned against their will¹¹⁸ makes it a prime example of how consent can be properly addressed and the repatriation process can be based on true voluntariness even when the legal framework and precedents are lacking.¹¹⁹

¹¹⁴ Droege (n 111).

¹¹⁵ *ibid* 680.

¹¹⁶ Droege (n 111).

¹¹⁷ Vijayaraghavan and Vijayaraghavan (n 85).

¹¹⁸ Ragini Trakroo and others (eds), *Refugees and the Law* (Second edition, Human Rights Law Network 2011) 440.

¹¹⁹ Vijayaraghavan and Vijayaraghavan (n 85).

E. UNHCR's approach to assessing voluntariness

The UNHCR has written a guide on voluntary return to assess the will of the refugees. The guide can be applied to prisoners of war too and can serve as an example for how independent bodies, such as the ICRC, can go about the process. It is based on free and untethered access to the individuals in question.¹²⁰ Free access allows the UNHCR to monitor the conditions in which the refugee stays, so they can gauge what influence the conditions may have on the decision of the refugee. The untethered access works both ways, refugees must be able to reach the UNHCR to express concerns and fears, without having to fear negative impacts from the contact and communication.¹²¹

Secondly, the UNHCR takes into consideration that there is individual decision-making, but also group or collective decision-making, as refugees may be part of a larger traditional or religious group that influences their views on repatriation.¹²² The UNHCR nuances this by acknowledging that leadership of communities are often men, so they make efforts to ensure that women can express their views too and participate in the collective decision-making.¹²³

By addressing specifically what makes repatriation *non voluntary* and including the responsibility to intervene when this is the case, they prevent *refoulement* and prevent it from being hollowed out.¹²⁴ The handbook includes a list of suggestions for when groups of refugees are being misinformed by other refugees and other measures to ensure informed decision-making regarding repatriation. Some of these measures include ensuring that information is correct and objective, avoiding the use of propaganda and informing the refugee of the assistance the UNHCR can and more importantly *cannot* give after repatriation.¹²⁵

There is an extensive section on interviewing, counselling and registration included too, with crucial safeguards for families and individuals.¹²⁶ This includes a voluntary repatriation form, a key method for refugees to indicate their voluntariness and a possibility to withdraw should be guaranteed, neither do refugees lose the protection status if they apply for repatriation, they can always change their mind.¹²⁷

¹²⁰ UNHCR, 'Handbook on Voluntary Repatriation: International Protection' (n 86) 30.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid* 31.

¹²⁵ *ibid* 32–33.

¹²⁶ *ibid* 35.

¹²⁷ *ibid* 35–37.

Another important safeguard to assess voluntariness is training staff comprehensively and accordingly to their tasks. The UNHCR stresses that the staff is not merely involved in administrative registrations, but is counseling and interviewing the refugees at the same time and will facilitate the effective expression of their will regarding the repatriation.¹²⁸

F. Conclusion

If consent is not given in an informed way, with a relevant risk assessment and procedural safeguards, voluntary repatriation does not take place. Uninformed consent or consent tainted by any of the aforementioned risks leads to pseudo-voluntary repatriation, where it seems to be voluntary but the expression of will of the person involved is lacking. The absence of consent leads to forced repatriation, which in turn violates the principle of non-refoulement.¹²⁹ This argumentation should be analogically applied to prisoners of war. Debates about the genuine consent of prisoners of war to repatriation has led to international controversy and possible human rights violations, such as the Korean War Armistice negotiations. Having a clear view on consent, the issues and the procedures, leads eventually to a more clear understanding and mitigation of the issue.

¹²⁸ *ibid* 37.

¹²⁹ Vijayaraghavan and Vijayaraghavan (n 85).

Chapter 2: Case Studies: Korean Wars and the First Gulf War

This chapter addresses historical cases where prisoners of war were not repatriated or wished to not be repatriated. It establishes a historical overview of conflicts where non-repatriation *should* have been a possibility, and where it had been argued for or suggested by army officials or resulted in extensive debates – such as during the Korean War Armistice negotiations where repatriation was delayed substantially due to these debates. It aims to answer the question of what legal and practical difficulties there have been for the compatibility of non-refoulement and the obligation of repatriation in the past.

This section focuses on the World Wars to assess the situation before the 1949 Geneva Conventions and the Korean and Gulf wars after the ratification of the Conventions, as these conflicts saw some of the largest numbers of prisoners of war and are well documented. The Korean and Gulf Wars indicate essential refusals to repatriation, previously either unknown or undocumented in detail. As the Geneva Conventions were applicable to both conflicts, and the Additional Protocols were applicable during the Gulf Wars, they are essential to this thesis to assess the practice in IHL and to see where non-refoulement can or should have been considered.

Subchapter 2.1: Practice of repatriation and non-repatriation before the Geneva Conventions

A. First World War

At the end of the First World War, a limited practice of non-repatriation had evolved through treaties concluded mostly with the Soviet Government of Russia. The causes of this were manifold: the Russian Revolution and the civil war, the collapse of the Russian Empire and the formation of the new Soviet Union.¹³⁰ Prisoners of war were also used as a cheap labor force, resulting in reluctance from for instance the Soviet Union to let them be repatriated to their countries of origin.¹³¹ Treaties between the Soviet Government and other parties in the First World War included provisions stating that prisoners of war did not have to be repatriated if they did not want to and the Detaining state agreed to this.¹³² Eventually, the treaty was annulled by the Soviet Union and the issue of repatriation remained unsolved.¹³³

¹³⁰ Gulzhaukhar Kokebayeva, 'Repatriation Of Russian Prisoners Of War In The World War I' (2017) <<https://www.europeanproceedings.com/article/10.15405/epsbs.2017.01.02.22>> accessed 28 July 2025, Abstract.

¹³¹ Reinhard Nachtigal and Lena Radauer, 'Prisoners of War (Russian Empire)' (1914-1918 *International Encyclopedia of the First World War*, 8 October 2014) <https://encyclopedia.1914-1918-online.net/article/prisoners-of-war-russian-empire/#toc_repatriation> accessed 28 July 2025.

¹³² Kokebayeva (n 130) 4.

¹³³ *ibid* 5.

The approach regarding Russian POWs was not uniform, nor particularly regulated: it consisted of ad hoc agreements and bilateral treaties and implementation was irregular at best. It should be considered more as a delay than an actual practice of non-repatriation, as most of the issues in this case were caused by practical impossibilities of returning the prisoners of war.

B. Second World War

During the Second World War, a reciprocal treatment of prisoners of war could be observed.¹³⁴ Germany desired equal reciprocity when dealing with the repatriation of POWs, exchanging one Allied prisoner for a German one, which posed issues for specifically the British army as they held much fewer German soldiers than the other way around.¹³⁵

Italian prisoners were also used as labor force by the British, after the Italian surrender in 1943 and being grouped into the Italian Service Units.¹³⁶ Many prisoners did agree to joining these Units voluntarily, as the other option was remaining in the POW camps and repatriation was not possible yet due to the ongoing hostilities in the north of the country; no southern Italian POWs were repatriated even though the hostilities had ceased there as their labor was necessary and valuable.¹³⁷

After the end of the war, millions of Soviet POWs found themselves imprisoned in the Allied zones. The Soviet Union was no signatory to the Hague Conventions and the later Geneva Conventions.¹³⁸ Many POWs committed suicide from 1944 onwards when it became clear they would be repatriated to the Soviet Union.¹³⁹ It was however decided to repatriate the POWs, if necessary by using force, as there was fear that POWs in Soviet territories would otherwise not be repatriated likewise.¹⁴⁰ Although American officials held that forceful repatriation should not be carried out and no internal agreement was reached on the matter, the conference of Yalta decided otherwise.¹⁴¹ All considerations of granting asylum to Soviet POWs or citizens if they did not want to return were abandoned.¹⁴² Agreements on forced repatriation were made

¹³⁴ 'Spoilt Darlings?', in James D Morrow, *Order within Anarchy: The Laws of War as an International Institution*, vol 5 (1st edn, Cambridge University Press 2014) 209 <<https://www.cambridge.org/core/product/identifier/9781107273627/type/book>> accessed 30 July 2025.

¹³⁵ *ibid* 208–209.

¹³⁶ *ibid* 232.

¹³⁷ *ibid*.

¹³⁸ Nikolai Tolstoy, 'Forced Repatriation to the Soviet Union: The Secret Betrayal' (1988) 17 *Imprimis*.

¹³⁹ *ibid*; Elliott (n 58) 253.

¹⁴⁰ Tolstoy (n 138); John A Haymond, 'Most POWs Want to Go Home—But After World War II, Some Faced Death on Arrival.' (18 September 2023) <<https://shop.historynet.com/blogs/new-the-latest-from-historynet-com/most-pows-want-to-go-home-but-after-world-war-ii-some-faced-death-on-arrival>> accessed 2 August 2025.

¹⁴¹ Tolstoy (n 138) pt Repatriation Policy; Elliott (n 58) 262.

¹⁴² Haymond (n 140).

between the Soviet Government and the British and American Governments, including forced repatriation of Soviet civilians who had found themselves in captivity.¹⁴³

Many of the Soviet prisoners returning were treated harshly: soldiers who enlisted in the German Army were tortured or killed, Soviet soldiers who had been POWs taken captive by Germany or who had surrendered were put on trial or subject to suspicion.¹⁴⁴ The Soviet army had issued a policy in 1941 when Germany invaded the Soviet Union, labelling all soldiers who were captured by enemy forces as traitors.¹⁴⁵ POWs were tried for surrendering in violation of explicit orders not to do so, and also those who did not commit any crime and were not persecuted for it, were sent to the labor camps and Gulags for sentences up to six years.¹⁴⁶ In some cases, Ukrainian POWs who had fought for Germany in the war but were technically Soviet citizens were shot upon arrival after repatriation.¹⁴⁷ Overall, the Soviet Union acted harshly towards anyone, citizen or soldier, who appeared to have been working under German leadership, whether it was voluntary or forced.¹⁴⁸

On the other hand, many German and Japanese prisoners of war were captured and imprisoned by the Soviet forces, sent to labor camps deep into the Soviet territory and used to rebuild the Soviet economy. The prisoners often died of the circumstances in the camps during the first years of captivity, after which conditions improved to keep the POWs alive and capable of labor.¹⁴⁹ Repatriation and release started in 1949, four years after the end of the war.

Conclusion

This section underscores that although the Convention of 1929 did stipulate obligations regarding the treatment and repatriation of prisoners of war, compliance was fragmented and often done in the best interests of the state rather than out of respect for the obligations under international law and the rights of prisoners of war. Often their rights had to make way for the interest of the state, be it labor or strategical bartering with the other side. Repatriation was often delayed for reasons unrelated to the prisoners themselves.

Subchapter 2.2: The Korean War

As the Geneva Conventions did not bring any clarity on voluntary repatriation and included abstract articles on repatriation of prisoners of war (see chapter 1.2) negotiations on repatriation

¹⁴³ Shields Delessert (n 48) 148.

¹⁴⁴ ‘Spoilt Darlings?’ (n 134) 233.

¹⁴⁵ Haymond (n 140).

¹⁴⁶ ‘Spoilt Darlings?’ (n 134) 233–234.

¹⁴⁷ McCoubrey (n 110) 108.

¹⁴⁸ ‘Spoilt Darlings?’ (n 134) 233.

¹⁴⁹ *ibid.*

snagged on multiple occasions. The Korean War was a first test of the new principles of international humanitarian law and the new protections for POWs that resulted from the Geneva Conventions.¹⁵⁰ When it became clear that only a minority of POWs would accept repatriation, the United Nations feared situations similar to the Soviet repatriations after the Second World War.¹⁵¹ With the fate of these new POWs in mind, an impasse during peace negotiations occurred when Detaining states could not agree on the repatriation of prisoners of war.

Chinese and North Korean powers demanded the return of all prisoners without exception, while the United Nations opposed this.¹⁵² The UN favored “voluntary repatriation” over the obligation to repatriate, as they argued this would occur forcefully.¹⁵³ While many found this the correct interpretation of Article 118 GC III, the legal basis for such an approach was unclear.¹⁵⁴ CHARMATZ and WITT describe a different stance of the United Nations over the course of the peace negotiations in the Korean Wars. First, the UN claimed that voluntary repatriation meant that only those who “elect repatriation should be sent home”,¹⁵⁵ which later morphed into no forced repatriation, meaning that the POWs need to be released but only repatriated if they can be delivered without using force to do so.¹⁵⁶

CHARMATZ and WIT put forward that the UN was concerned about the human rights of the returnees, as the West was convinced communist countries (North Korea and China) would mistreat them in retaliation and this would all result in violations of the Geneva Convention.¹⁵⁷ The United Nations conducted interviews to find out what position the POWs held, resulting in only 70.000 of the 170.000 stating they would voluntarily return to their respective states.¹⁵⁸

The relevance of this case is addressed by the authors as well; as this dates back to the 1950s, it could be decisive for the treatment of prisoners of war of other conflicts, especially since GC III dates back to 1949 and this is a new historical development. The United Nations tried to put forward an interpretation of the Geneva Convention whereas the Chinese and Korean governments argue in favor of a literal one. As Article 7 of the Convention includes an

¹⁵⁰ Neville Wylie and James Crossland, ‘The Korean War and the Post-War Prisoner of War Regime, 1945–1956’ (2016) 23 *War in History* 439, 451.

¹⁵¹ S Carvin, ‘Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War’ (2006) 11 *Journal of Conflict and Security Law* 67, 80.

¹⁵² Charmatz and Witt (n 57) 391.

¹⁵³ Charmatz and Witt (n 57).

¹⁵⁴ JAC Gutteridge, ‘The Repatriation of Prisoners of War’ (1953) 2 *The International and Comparative Law Quarterly* 207, 207.

¹⁵⁵ Charmatz and Witt (n 57) ADD FOOTNOTE 3 SOURCE.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

impossibility of the prisoners to renounce their rights, this (then) new approach of non-repatriation might not have been tenable.¹⁵⁹

This ultimately led to the Armistice Agreement being phrased in a way that took the prisoners' opinion into account. It includes a provision allowing prisoners of war to express their wish to return or not, as well as provisions on what to do with those who have elected not to return.

*"[...]all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture"*¹⁶⁰

*(b) Each side shall release all those remaining prisoners of war, who are not directly repatriated, from its military control and from its custody and hand them over to the Neutral Nations Repatriation Commission for disposition in accordance with the provisions in the Annex hereto, "Terms of Reference for Neutral Nations Repatriation Commission."*¹⁶¹

A. The Neutral Nations Repatriation Commission

The negotiations led to the establishment of a Neutral Nations Repatriation Commission (NNRC) of five states, led by India, to decide on the matter. The Commission gained responsibility – and custody – over the prisoners of war.¹⁶² Voluntary repatriation had caused a stalemate and delay in the negotiations of one and a half years, which was ultimately resolved through the *Terms of Reference on prisoner exchange* section of the Armistice Agreement.¹⁶³ For a period of ninety days, the NNRC would provide explanations on the repatriation process to the prisoners of war, so POWs could make an informed decision on their repatriation.¹⁶⁴

In accordance with the provisions regulating the functioning of the Commission, POWs had the possibility to refuse repatriation, so over fifteen thousand Chinese POWs and eight thousand North Korean POWs exercised their right to refusal.¹⁶⁵ A small amount of British and American POWs initially refused repatriation as well, although most changed their minds and voluntarily

¹⁵⁹ SHIELDS DELESSERT adds that the provisions of the Resolution of the United Nations General Assembly on forcible repatriation and the provisions of the Armistice Agreement on prisoners of war are no authoritative interpretations of the Third Geneva Convention, as they lack the competency to do so. See also: Shields Delessert (n 48) 165.

¹⁶⁰ Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers on the other hand, concerning a Military Armistice in Korea (27 July 1953) 47 AJIL Supp 186, Article III-51-a.

¹⁶¹ Ibid, Article III-51-b.

¹⁶² David Cheng Chang, 'The Korean War Prisoners Who Chose Neutral Nations: An Introduction' (2020) 27 Journal of American-East Asian Relations 214, 224.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Paul J Springer, 'Prisoners of War and Repatriation' in Matthew S Muehlbauer and David J Ulbrich (eds), *The Routledge history of global war and society* (Routledge, Taylor & Francis 2018) 211.

repatriated.¹⁶⁶ After the initial period of ninety days during which the NNRC explained and informed the prisoners of war, another thirty day period was designated to allow the Commission to support prisoners of war to request asylum in neutral third states.¹⁶⁷ After carrying out its tasks regarding repatriation and asylum in neutral countries, the NNRC was dissolved.¹⁶⁸

B. Strengths of the Neutral Nations Repatriation Commission

The United Nations were able to enact voluntary repatriations, despite the objections of the Chinese and Korean regimes at the beginning of the negotiations, by introducing the NNRC.¹⁶⁹ As both the UN and the United States had advocated for voluntariness, it was seen as a political victory amidst tensions with communist regimes.¹⁷⁰ It also managed to uphold the humanitarian approach while staying within its mandate and duration of operation.¹⁷¹

Many political elements of the negotiations and the repatriations were supported by this achievement, such as the issue of the independence of Taiwan, which will not be further elaborated on in this thesis, as it falls outside of its scope.¹⁷²

C. Criticism on the Neutral Nations Repatriation Commission

A first issue with the NNRC is that the option of asylum in a neutral country was never formally introduced through legal framework, as CHANG notes in his paper.¹⁷³ During the explanation phase, there were only two options: repatriation or non-repatriation, so CHANG asserts that the introduction of a formal option of asylum in a neutral country would have led to more prisoners actually choosing this path instead of the low number of 88 prisoners of war.¹⁷⁴ The challenge of this option lay in the way the repatriation explanations omitted the possibility of asylum which was only available after the period of 120 days in which the NNRC operated.¹⁷⁵ As the

¹⁶⁶ Springer (n 165).

¹⁶⁷ Chang (n 162) 225.

¹⁶⁸ *ibid* 225–226; Korean Medals Blog, ‘Neutral Nations Repatriation Commission’ (*Korean Medals, the Orders and Medals of Korea, 1900 To Present*, 2023 2022) <<https://koreanmedals.com/neutral-nations-repatriation-commission/>> accessed 3 August 2025.

¹⁶⁹ David Cheng Chang, *The Hijacked War: The Story of Chinese POWs in the Korean War* (Stanford University Press 2020) 4.

¹⁷⁰ *ibid*.

¹⁷¹ George Hays and Milada Polišenská (eds), *Korean Security and the 65 Year Search for Peace: International Conference, Prague, April 26th-27th, 2018 : Conference Proceedings* (Anglo-American University 2018) 11.

¹⁷² Chang (n 169) 8.

¹⁷³ Chang (n 162) 217.

¹⁷⁴ *ibid* 225.

¹⁷⁵ *ibid* 226.

prisoners of war were mostly illiterate, they had to hear of this option through knowledgeable individuals or had to be in contact with ICRC delegates who knew this option existed.¹⁷⁶

Secondly, instead of explaining the repatriation options to all of the prisoners of war, in reality only fractions of the POW populations went through the process. According to CHANG, anti-Communists groups among the POWs obstructed the process to prevent prisoners from choosing repatriation.¹⁷⁷ At the same time, coercion and manipulation of POWs could not be prevented, especially as North Korean and Chinese observers and translators demanded access to POW camps.¹⁷⁸

Thirdly, CHANG asserts that contrary to policy, the voluntary repatriations were a result of coincidence and ignorance, rather than strategic decision-making.¹⁷⁹ According to him, the anti-Communist groups in the prisoner of war camps had more influence over the process than the official policy of the United States that was against forced repatriation.¹⁸⁰ Their pressure on POWs support the claims that prisoners are not in a position to make free and informed decisions. CHANG argues that a free choice made by prisoners is by its nature impossible, as they were not in conditions that allow for important decisions to be made free from influence.¹⁸¹

Lastly, there were internal issues in the NNRC which led to Switzerland submitting a separate report from the NNRC.¹⁸² Czechoslovakia accused India, Switzerland and Sweden for listening to representatives of POWs that Czechoslovakia considered to be agents and terrorists.¹⁸³

CHANG puts forward that the lack of publicity on the process of the repatriation and NNRC was due to its prolongation of the conflict and ensuing casualties on both sides.¹⁸⁴ Given that the Chinese and Korean Communist regimes faced stains to their reputation by agreeing to voluntary repatriation, CHANG deems it unlikely that they would agree to a similar Commission and process again in future conflicts.¹⁸⁵ The United Nations and United States too had faced difficulties, as the process was largely interfered with by anti-Communists prisoners

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ Hays and Polišenská (n 171) 11.

¹⁷⁹ Chang (n 169) 15.

¹⁸⁰ *ibid.* 16.

¹⁸¹ *ibid.* 15.

¹⁸² Hays and Polišenská (n 171) 16.

¹⁸³ *ibid.* 15.

¹⁸⁴ Chang (n 169) 9, 15.

¹⁸⁵ *ibid.* 8.

of war.¹⁸⁶ Both sides having lost control during the process means that in future conflicts, no NNRC has been established.

Additionally, the political will for this commission was the result of ideological differences by the negotiating parties. That combined with the large numbers of POWs who refused repatriation, and the need for neutral states who sent personnel to the conflict zone, formed a complex combination that is difficult to repeat.¹⁸⁷ This explains why the NNRC was a non-recurring instance during other conflicts, where POWs refused repatriation.

Conclusion

The Korean War led to an evolution of the obligation of repatriation that included a right ‘not to be repatriated by force’, which adds a layer to the Geneva Conventions, but leaves equally gaps in the interpretation and execution of this right.¹⁸⁸ As this essentially led to a softer application of Article 118 of the Third Geneva Convention, KILIBARDA and KOLB indicate that the rule now read repatriation, or another form of release, instead of the strict obligation of repatriation.¹⁸⁹ The NNRC as mandated by the Armistice Agreement was a peculiar instance as a product of contemporary politics and tensions between ideological regimes.

Subchapter 2.3: Iraq-Iran war (1980-1988) and the First Gulf War

The Iran – Iraq war from 1980 until 1988 and the First Gulf War, between 1990 – 1991 starting with the invasion of Kuwait by Iraq, led to another internationally charged conflict with prisoners of war and subsequent refusals to be repatriated. Although there is ample documentation regarding the Iran – Iraq war and the prisoners of war, less information is available on the First Gulf War.

A. Iran-Iraq War

During the war between Iran and Iraq hundreds of thousands of soldiers were captured. By 1988, after a conflict of eight years, the ICRC reported after registration of POWs that Iran held

¹⁸⁶ *ibid* 16.

¹⁸⁷ Paul Wolfgeher, ‘The UNCREG Story Munsan-Ni, Korea 1 September 1953 - 31 December 1953’ (*Korean War Educator*) <https://thekwe.org/topics/united_nations/uncreg/index.htm?utm_source=> accessed 11 August 2025; See also: Donald W Boose, ‘The Korean War Truce Talks: A Study in Conflict Termination’ (2020) 30 *The US Army War College Quarterly: Parameters* <<https://press.armywarcollege.edu/parameters/vol30/iss1/1/>> accessed 11 August 2025; Hays and Polišenská (n 171) 39.

¹⁸⁸ Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *The American Journal of International Law* 239, 256. As SHIELDS DELESSERT pointed out, the Armistice Agreement and the UN Resolutions on the topic of the Korean War and repatriation of POWs are not competent to interpret the Geneva Conventions authoritatively. See also Shields Delessert (n 48) 163–165.

¹⁸⁹ Robert Kolb and Pavle Kilibarda, ‘Human Rights and Humanitarian Law’, *Max Planck Encyclopedia of Public International Law* (2022) no 51 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e811?prd=MPIL#law-9780199231690-e811-div1-4>>.

estimated over 50.000 Iraqi prisoners of war, while Iraq held about 18.000 Iranian soldiers.¹⁹⁰ Simultaneously, both sides blamed the other for having undisclosed camps where unregistered POWs were being held.¹⁹¹ The ICRC itself reports “the ill will” of belligerent parties when approaching the repatriation of prisoners of war, leading to a strenuous and lengthy repatriation process, until Iraq announced in 1990 that it would release all POWs.¹⁹² Meyer presumes this to be a result of Iraq invading Kuwait by that time now needing to re-establish relationships with Iran in turn.¹⁹³ The repatriation process of the war and negotiations for the end of the conflict were heavily influenced by the United Nations.¹⁹⁴ The mandate of the Security Council was based on Resolution 598 from 1987 and urged the parties to conduct repatriation in accordance with the Third Geneva Convention and without delay after the hostilities had ceased.¹⁹⁵ The International Committee of the Red Cross sent a delegation of over sixty persons to Baghdad and Teheran to support the repatriation process, establishing dialogue with the respective governments and overseeing the process.¹⁹⁶

¹⁹⁰ Marco Sassòli, Antoine Bouvier and Anne Quintin, ‘Iran/Iraq, 70,000 Prisoners of War Repatriated’ (*How does law protect in war?*) <

¹⁹² Daniel Palmieri, 'Crossing the Desert – the ICRC in Iraq: Analysis of a Humanitarian Operation' (2008) 90 *International Review of the Red Cross* 137, 143.

¹⁹⁴ John Quigley, 'Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War after the Close of Hostilities' (1989) 5 *American University Journal of International Law and Policy* 73, 73.

¹⁹⁶ Sassòli, Bouvier and Quintin (n 190).

were subjected to pressure, ideological and political intimidation, indoctrination or re-education and other degrading treatment which was established and reported on by the ICRC.¹⁹⁸

The changing regimes in Iran led to complicated situations too. During visits of UN investigators to Iraqi POW camps, Iranian prisoners of war asked whether they would be repatriated to Iran if they refused.¹⁹⁹ Some were loyal to previous regimes, others to dissident organizations, and overall prisoners were concerned that they would await reprisals for lack of loyalty upon their return to their home state.²⁰⁰ Notably, the ICRC had restricted access to the POW camps and limited options on registering and monitoring prison conditions and POWs.²⁰¹ Both states accused the other of violating the Geneva Conventions, while committing various violations of the Conventions themselves.²⁰²

B. First Gulf War

The Gulf War in 1990-1991 where Iraq invaded Kuwait, brought the topic once more to attention. UN Security Council Resolution 686 dealt with the repatriation of detained forces, among many other issues addressed by the Resolution.²⁰³ Iraq again did not allow the ICRC to access the prisoners of war of Kuwaiti or other nationality, nor the civilians that were caught up in the conflict.²⁰⁴ MEYER sees a possible explanation in the cause of the conflict: as Iraq considered Kuwait a province and not an independent state, it deemed the Geneva Conventions not applicable as there was no international armed conflict.²⁰⁵ Additionally, MEYER argues that Iraq would not want the Geneva Conventions to apply as it did not want to respect them.²⁰⁶

Iraqi POWs indicated unwillingness to repatriation.²⁰⁷ Again, the ICRC argued that prisoners of war unwilling to return should not be forced to do so.²⁰⁸ It found that POWs should be granted asylum status, but warned the POWs nevertheless that it might be difficult finding a state where they would be granted asylum.²⁰⁹ Many Iraqis who did not wish to return to their country due

¹⁹⁸ Matthew Evangelista and Nina Tannenwald, *Do the Geneva Conventions Matter?* (Matthew Evangelista and Nina Tannenwald eds, Oxford university press 2017) 267.

¹⁹⁹ Meron (n 188) 256; Quigley (n 194) 82.

²⁰⁰ Quigley (n 194) 82.

²⁰¹ Evangelista and Tannenwald (n 198) 266.

²⁰² Evangelista and Tannenwald (n 198).

²⁰³ Peter Rowe, 'Prisoners of War in the Gulf Area' in Peter John Rowe, *The Gulf War 1990-91 in international and English law* (Routledge Sweet & Maxwell 1993) 202.

²⁰⁴ Meyer (n 193) 228.

²⁰⁵ *ibid.*

²⁰⁶ Meyer (n 193).

²⁰⁷ Rowe (n 203).

²⁰⁸ Jaquemets (n 41) 663; Rowe (n 203) 202–203.

²⁰⁹ Rowe (n 203) 203.

to real fears of persecution were given refugee status in Saudi Arabia.²¹⁰ Here too the ICRC mentions assessing the will of POWs to be repatriated, as it was involved in the repatriation process in 1991.²¹¹ However, as an unexpectedly large number of Iraqi soldiers had become prisoners of war, the ICRC did not have the capacity to interview each and every POW. In the case of Iraqi POWs detained in Rollestone by the United Kingdom, the ICRC interviewed all those who wanted to be repatriated instead of those who refused.²¹² Only one prisoner at Rollestone indicated the wish to return to Iraq, all others were released locally and could travel to a destination of their choice.²¹³

The ICRC lobbied at various times during conflicts after the Second World War to be recognized as a neutral intermediary party, and tried to do so again in the Gulf Wars. Finally, in 1991, the *Tripartite Commission* was established with representatives from France, the United Kingdom, the United States, Kuwait, Iraq and Saudi Arabia. Its mandate is aimed at providing clarity on missing persons and prisoners of war, mainly for the families of the missing. While this Commission had no mandate to deal with prisoners of war and their repatriation and was in no way similar to the NNRC of the Korean War, it is noteworthy that neutral commissions or bodies with representatives were installed all throughout conflicts in the last century, as it indicates a possibility for cooperation even between belligerent states.

Conclusion

The Max Planck Encyclopedia concludes its entry on repatriation with the note that a balancing test should be applied to repatriation on one hand and the human rights of concerned groups on the other hand.²¹⁴ What remains to be seen is how this balancing test should be carried out, as neither the ICRC in its reports nor the case studies indicate what the approach to follow is. More so, the interviews or assessment of voluntariness happen case-by-case, as during the Korean War those who did not want to be repatriated were interviewed, but during the Gulf War, only those who did want to return to Iraq and were detained at Rollestone were interviewed.

²¹⁰ Meron (n 188) 256.

²¹¹ Palmieri (n 192) 144.

²¹² Colonel Gordon Risius, 'Prisoners of War in the United Kingdom' in Peter John Rowe, *The Gulf War 1990-91 in international and English law* (Routledge Sweet & Maxwell 1993) 301.

²¹³ *ibid* 180.

²¹⁴ de Zayas (n 2).

Chapter 3: Critical review of literature

While literature does address non-refoulement within the context of prisoners of war and generally agrees that it is or should be applicable, it is necessary to look at the context of the literature and the geopolitical influences. What follows is an overview of what authors have written on the matter, which arguments are put forward in relation to repatriation of POWs and whether non-refoulement is foreseen in the Geneva Conventions. The views of the authors are grouped per subject or argument on repatriation, starting with the oldest articles to show if an evolution has been made regarding a certain aspect throughout the years.

This chapter aims to answer the research question on what the legal and practical difficulties regarding repatriation and non-refoulement are, supported by scholar's opinions, in combination with the previous chapter on case studies and the chapter on legal framework.

A. Expression of will of the prisoner of war

The article by RUBLI in 1965 does not explicitly address the topic of non-refoulement and prisoners of war, as he writes mostly on the repatriation of the sick and wounded.²¹⁵ He does however state that the wishes of POWs are an essential consideration in the repatriation process, as any political upheavals taking place in their home state can pose a danger to them after repatriation.²¹⁶

Christiane SHIELDS DELESSERT studied the repatriation and release of prisoners of war, as part of her research in 1977. She studied situations in which POWs were unwilling to be repatriated.²¹⁷ She argues that in some cases, POWs who refuse repatriation have been qualified as deserter, yet although deserters are often not repatriated, they cannot renounce their rights under the Geneva Conventions and sever ties with the state they are serving.²¹⁸ She comes to the conclusion that a possible solution could be the establishment of a third party commission, containing independent experts, who could ascertain whether prisoners wished to return or not and whether they expressed their free will or not.²¹⁹ SHIELDS DELESSERT also links the Geneva Conventions to human rights, which can influence the application of the Conventions and limit the right of a State to have all POWs repatriated.²²⁰ She therefore finds that the individual will of the POW should be taken into account, and proposes various reformulations

²¹⁵ Dr Jean-Maurice Rubli, 'Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War' (1965) 57 *International Review of the Red Cross* 623.

²¹⁶ *ibid* 628.

²¹⁷ Bugnion (n 59).

²¹⁸ Shields Delessert (n 48) 185–190.

²¹⁹ Bugnion (n 59).

²²⁰ Shields Delessert (n 48) 196.

of article 118 GC III and formulates a model agreement to guide States in future conflicts.²²¹ This is in line with the recommendations that will be proposed in chapter 4 of this thesis.

Concerning the Iran-Iraq wars, authors discuss the negotiating phases of the Geneva Conventions in the years between the end of the Second World War and their ratification and their entry into force in 1951. QUIGLEY agrees that state practice since 1949 has shown that the will of the prisoner of war should be taken into account, with the ICRC conducting interviews with the POWs to determine their stance on repatriation.²²² As he writes his article in 1989 amidst the Gulf Wars, he finds that since 1949, in both the Korean War and the Iran-Iraq War of 1980-1988, refusals of repatriation resulted in non-repatriation.

CHETAIL's article supports this view of changing state practice. He sees an interpretation and practice that includes respect for the individual autonomy of the subject of the rights which means that they would not be repatriated through force.²²³ He deduces from UN General Assembly Resolution 610(VII) that refusals by POWs should be taken seriously, and during the Gulf Wars when Iraqi POWs were not repatriated after indicating their refusal to do so.²²⁴

He does state however that voluntary repatriation is an undefined concept, its meaning changes with the body of law that discusses it, whether it be human rights law, humanitarian law or refugee law.²²⁵

B. Non-renunciation of rights

Another view of refusals of repatriation is taken by CERONE. According to him, the wishes of the POW are an important element in the process of establishing whether they refuse based on humanitarian grounds.²²⁶ As per Articles 7 and 8 common to all four Geneva Conventions, POWs cannot renounce the rights attributed to them by the Convention.²²⁷ The unwaverability of rights, as CERONE calls it, imposes an absolute prohibition intended to prevent coercion and abuse by Detaining states, as POWs find themselves in hostile environments of an armed conflict.²²⁸ He maintains that the right in itself remains unwaverable exactly for this reason, but

²²¹ *ibid* 198–203.

²²² Quigley (n 194) 83.

²²³ Chetail (n 79) 4.

²²⁴ *ibid* 5.

²²⁵ *ibid* 2.

²²⁶ John Cerone, 'Expert Opinion on the Non-Renunciation of Rights Under International Humanitarian Law' (2017) 11 <<https://www.nrc.no/globalassets/pdf/legal-opinions/cerone.pdf>> accessed 4 August 2025.

²²⁷ Non renunciation of rights serves as a protection for POWs. After seeing the effects of loss of POW status during the Second World War, when POWs fell under civilian status and could for instance be sent to disciplinary camps, out of reach for the ICRC. See also Shields Delessert (n 48) ch VII.

²²⁸ Cerone (n 226) 21.

the will as expressed by the POW is an important element to decide whether the POW genuinely refuses repatriation based on “humanitarian grounds” or under pressure or influence of outside actors.²²⁹

CERONE notes that the Commentary of 1960 indicates that repatriation is usually in accordance with the will of the prisoner of war, so exceptions to repatriation can only be based on humanitarian grounds.²³⁰ It is important to establish whether a POW is recalling the humanitarian exception for their refusal, as this is the exception that the Commentary sees in the Geneva Conventions. Humanitarian grounds include the risk of measures taken against the POW that will affect their life severely.²³¹ For this reason, CERONE asserts that POWs must refuse at their own initiative, rather than at the suggestion of a Detaining power.²³² A Detaining state cannot offer the option of non-repatriation to a POW, as this would constitute coercion or influence on the POW.

Lastly, according to CERONE, the Commentary indicates that the Detaining state may grant asylum to the POW if there is a risk of measures that influence the life of the POW severely, which stems from the Second World War, in the aftermath of which a tendency developed to not repatriate those who refused.²³³

CERONE essentially argues oppositely from what has been discussed in subchapter 1.2: while the article has a rather absolute stance and the prohibition of renunciation of rights is absolute, there are exceptions to the rule. Cerone thinks that it is a flexible provision, which allows room to accommodate the best interests of the individual concerned, aligning with the humanitarian objectives of the Geneva Conventions.²³⁴ According to him, repatriation involves a case-by-case evaluation for every protected person who wishes to refuse repatriation and renounce their rights, in opposition to Articles 7 and 8 of the Convention.²³⁵

This thesis argues that while this interpretation of the Conventions and the Commentaries makes sense when addressing the absolute character of these provisions, it simultaneously leaves a lot up to discussion. If the expression of refusal of the POW is merely an indication or an important factor, that means that there are other factors that can outweigh the wish of the

²²⁹ *ibid* 11.

²³⁰ *ibid* 10.

²³¹ *ibid*.

²³² *ibid* 17; International Committee of the Red Cross, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (1960), art 118, 541.

²³³ Cerone (n 226) 10.

²³⁴ *ibid* 11.

²³⁵ *ibid* 17.

POW. If the Home state might want to pressure for repatriation, based on its national interests rather than the interest of the POW, this could outweigh the wish of the POW. As he admits that the standards and thresholds for consent are high in the Geneva Conventions – since they had the intention of preventing pressure or coercion by the Detaining state on the POW – he suggests that the standards of human rights law should be applicable, requiring consent to be informed and free.²³⁶ As this too implies a case-by-case assessment, it opens the door to complications and delays due to individual assessments and heightened standards of consent.

C. Non-refoulement and the Geneva Conventions

QUIGLEY connects repatriation to principles of Human Rights law, such as the right to seek asylum and the right to emigrate, which would be violated by enforcing repatriations; he notes that the Geneva Conventions offer no protections against reprisals for POWs returning to their home state, nor when POWs refuse to return and reprisals would be taken against their families.²³⁷ This suggests that *refoulement* is possible when following the obligations set out by the Geneva Conventions, which is not entirely the case according to the authors that will be discussed below.

DROEGE has identified non-refoulement within the Geneva Conventions, as Article 45(4) of the Fourth Geneva Convention includes a prohibition of returning persons to countries where they fear prosecution.²³⁸ She states that whereas the Fourth Geneva Convention explicitly addresses non-refoulement, no such provision can be found in the Third Geneva Convention for healthy POWs, but Article 109 does indicate that sick and wounded POWs cannot be repatriated against their wishes during the hostilities. According to her, the relevant provision must be interpreted in such a way that it extends to healthy POWs, just like RUBLI asserted (see chapter 3, A).²³⁹

In Article 12(2) of the Third Geneva Convention, DROEGE additionally reads an implicit mention of non-refoulement, as it pertains to transfers by Detaining powers. These can only take place if the Detaining state has ensured itself that the other state will comply with the Geneva Conventions. As there is no further reference to special circumstances or risks, it implies non-refoulement according to DROEGE.²⁴⁰

²³⁶ *ibid* 15.

²³⁷ Quigley (n 194) 83.

²³⁸ Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art. 45; Droege (n 111) 674.

²³⁹ Droege (n 111) 674, footnote 18.

²⁴⁰ *ibid* 675.

GILLARD then poses that the interpretation of non-refoulement depends on what legal branch invokes it, refugee law, IHL or human rights law.²⁴¹ She refers to the Commentaries on the Third Geneva Convention and Articles 12 and 118 of the Third Geneva Convention, as the only exception to repatriation is the risk of measures that impact the life and security of the POW and even more so if this were on grounds relating to their race, social class or political and religious views.²⁴² GILLARD actually sees a broader protection in Article 12 of the Third Geneva Convention than non-refoulement would normally offer as it protects against any violation of any right protected usually under the Convention, rather than just persecution or torture or violation of fundamental rights.²⁴³ Where DROEGE sees but an implicit protection, GILLARD finds that the Third Geneva Convention actually offers more protection than the principle of non-refoulement by itself.

HOROWITZ then addresses other issues in his article on state responsibility during transfers in wartime, dealing mostly with the protection gaps that can be filled by applying human rights law to the situation of POWs.²⁴⁴ Whereas DROEGE and GILLARD establish a certain level of protection, HOROWITZ asserts that the Geneva Conventions apply too narrowly and therefore offer limited protection.

While Detaining states have to make sure that the receiving state is able and willing to abide by the Geneva Conventions, the relevant provisions are applicable only to their respective groups of protected persons, Article 12 GC III and Article 45 GC IV are therefore only applicable to respectively POWs and protected persons.²⁴⁵ HOROWITZ indicates that the scope of application is therefore narrow, as nationals of neutral states or co-belligerent parties to the conflict that nevertheless still uphold diplomatic relations with the Detaining power fall outside of the protection of these Articles.²⁴⁶ He also criticizes that Article 118 GC III does not protect against refoulement, as he deduces from the difficulties during the Korean War negotiations.²⁴⁷ He additionally finds that during non-international armed conflicts, the Geneva Conventions offer too little protection due to the state-centric approaches of the negotiating parties.²⁴⁸

²⁴¹ Emanuela-Chiara Gillard, 'There's No Place like Home: States' Obligations in Relation to Transfers of Persons' (2008) 90 *International Review of the Red Cross* 703, 707.

²⁴² *ibid* 710, footnote 21.

²⁴³ *ibid* 710.

²⁴⁴ Horowitz (n 35).

²⁴⁵ *ibid* 46.

²⁴⁶ *ibid* 47.

²⁴⁷ *ibid* 49–50.

²⁴⁸ *ibid* 51–52.

He does propose some rectifications and recommendations to ensure comprehensive protection. Not exhaustively, these include new codification efforts for IHL that could lead to better and all-encompassing protection for all vulnerable groups in an armed conflict, no matter their status or the nature of the conflict – whether international or not.²⁴⁹ He also argues that states could follow the precedent set out by the United Nations and the ICRC, as well as the United States and the United Kingdom by refusing to repatriate POWs if humanitarian reasons apply.²⁵⁰ HOROWITZ finds that states could install risk management mechanisms and apply Articles 12 GC III and 45 GC IV by way of analogy.²⁵¹ He lastly also proposes that states apply human rights law extraterritorially to allow gaps in protection to be filled and that monitoring mechanisms should be installed within the Detaining state to ascertain compliance with international obligations.²⁵²

While these recommendations and solutions align with what this thesis will recommend in the next chapter, improvements can be made to them, as they rely heavily on state parties actually complying with international obligations. If international obligations regarding *refoulement* are violated, it is a far stretch to assume that other obligations regarding these prisoners of war will be complied with – including organizing monitoring systems at the level of the Detaining state that is unwilling to protect the rights of the POWs in the first place.

RETTTER and RYLATT more recently addressed non-*refoulement* and prisoners of war in their chapter “Negotiating the International Legal Fate of Detainees”.²⁵³ According to them, the legal position of POWs refusing repatriation remains unclear until then, in 2021. They refer to DROEGE when asserting that non-*refoulement* should be applied to POWs, connecting it to Common Article 3.²⁵⁴ If there is a case in which a prisoner refuses repatriation, the Detaining state should only release them, refraining from repatriation. Their chapter offers no more clearance on what this exactly entails procedurally.

Conclusion

Although scholarly consensus indicates that non-*refoulement* should be applied to prisoners of war and that Article 118 GC III has been interpreted in a way that softens the absolute character

²⁴⁹ *ibid* 64.

²⁵⁰ *ibid* 65.

²⁵¹ Horowitz (n 35).

²⁵² *ibid*.

²⁵³ Jake Rylatt and Mark Retter, ‘Negotiating the International Legal Fate of Detainees’ in Marc Weller, Mark Retter and Andrea Varga (eds), *International Law and Peace Settlements* (1st edn, Cambridge University Press 2021) 581 <https://www.cambridge.org/core/product/identifier/9781108627856%23CN-bp-25/type/book_part> accessed 7 August 2025.

²⁵⁴ Rylatt and Retter (n 253).

of the provision, what remains up to debate is how exactly this can be applied during and after conflicts, when repatriation is at hand. Many of these articles focus on the doctrinal perspective, either on the IHL or Refugee law part, but lack a holistic approach to the how and the what of non-refoulement as applied to the obligation to repatriate. There are little existing procedural safeguards and humanitarian agency involvement that leads to actual policy including the voices of POWs and taking their choices into account. Merely establishing that non-refoulement applies does not suffice if the way to do so is not described.

A case-by-case approach as has been argued by the ICRC and many of these authors, although effective, is not efficient. In cases where the ICRC is prohibited from entering into the territory of the Detaining state, there is no know-how or procedure that internal institutions can follow to ascertain the voluntariness of POWs regarding repatriation and delays inevitably follow. When large amounts of POWs indicate unwillingness, it might even change its approach and only interview those who do want to return, as happened at Rolleston during the Gulf War (see subchapter 2.3). It is also impossible to determine whether the case studies and articles align with the ICRC method for assessing voluntariness, as the case-by-case approach essentially prevents a procedure from being deducted.

Another essential question for this chapter was whether the case studies (chapter 2) were in line with what the literature prescribes. Of course, as many of these articles were written long after the resolution of the Korean War, it is more likely the other way around that the Korean War has influenced the articles of the following decades. As can be seen, many of them base their approach to voluntariness on the Korean War and specifically how the United Nations refused to repatriate POWs when it became clear that they did not want to. It does not seem that the articles written between the end of the Second World War and the Conference of Geneva as a starting point and the Gulf Wars at the end of this time period had much influence on how the repatriation process would be conducted during the Gulf Wars. There too, it led to confusion and delays as Iraq refused access to the ICRC and there was little legal certainty on the matter.

As for the Geneva Diplomatic Conference, while the option of voluntary repatriation was discussed but ultimately discarded due to state-centric concerns and worries of abuse, the practice in the following decades seemed to take a 180° turn. Instead of fearing abuse or coercion by states, it became more of a question on how to ensure that repatriation would not take place when POWs indicated their reluctance or refusal to the process.

Lastly, there is still a gap in the protection of POWs when they refuse to be repatriated. While authors do agree that non-refoulement is applicable, there is little clarity on the procedures to

follow. To protect their rights effectively and indefinitely, it is important to have a legal framework codifying it, including protection mechanisms and neutral party assessments, as will be discussed in the next chapter. This answers the question of what legal and practical difficulties exist in the application of both regimes, as protection gaps still remain after establishing the scope and interpretation of non-refoulement and the obligation of repatriation.

The legal difficulties include the interpretation of the obligation of repatriation, which has evolved throughout the Commentaries of the ICRC and state practice, but leaves procedures regarding consent and assessment of voluntariness up to debate. The application of non-refoulement, while agreed upon, has not been codified regarding POWs and does not close the gap of protection within IHL.

Chapter 4: IHL and non-refoulement, recommendations

This chapter will demonstrate the conceptual and practical overlap between IHL and refugee law (Subchapter 4.1). Based on this overlap and the protection gaps that have been identified regarding the protection of prisoners of war and refusal to repatriation, I will formulate recommendations (Subchapter 4.2). These will be based on the cross-influence the legal fields have had on each other, which serves as precedent for the suitability of adopting principles and procedures of refugee law into protection frameworks for POWs. This chapter aims to answer the question whether one obligation prevails and whether there are alternative solutions.

Subchapter 4.1: The Reciprocal Influence of International Humanitarian Law and Refugee Law

It has been demonstrated that international humanitarian law applies specifically to armed conflicts, both international and non-international, and offers protection to all those involved in or affected by the conflict.

As this thesis draws comparisons between refugees and prisoners of war, it is important to note some differences between the two groups and explain why these are not dealbreakers for a transposition.

Firstly, refugees are in essence unrepatriable.²⁵⁵ Protection from forced returns applies to refugees, unless specific, legally recognized exceptions apply. These include instances of national security of Article 33(2) of the Refugee Convention.²⁵⁶ In case of loss of status of refugee, the prohibition of refoulement does not apply anymore.²⁵⁷ Prisoners of war on the other hand should by default be repatriated, as the legal framework dictates.²⁵⁸ This applies to all POWs, unless narrowly defined exceptions apply that prevent repatriation, such as the exception for the wounded and the sick of Article 109 (3) GC III.

The fields of refugee law and international humanitarian law have influenced each other however, which has led to authors arguing that perhaps the two fields could be applied supplementary instead of conflictingly.²⁵⁹ Through a *gap-filling approach*, parts of refugee law can be incorporated into international humanitarian law and provide a more comprehensive protection for individuals such as prisoners of war.²⁶⁰ The connection between both fields is

²⁵⁵ Zieck (n 10) 65, 101.

²⁵⁶ Refugee Convention art 33(2).

²⁵⁷ Zieck (n 10) 102.

²⁵⁸ Third Geneva Convention (1949) art 118.

²⁵⁹ Jaquemet (n 41) 652.

²⁶⁰ Kolb and Kilibarda (n 189) no 51.

undeniable, especially as both fields aim at protecting the same fundamental rights of persons in specific situations that happen to be different.²⁶¹

Both legal fields are grounded in human dignity and humanitarianism towards vulnerable groups, be it those who face armed conflicts or political suppression.²⁶² Both branches aim to reduce suffering and offer protection for individuals in severe circumstances and have strong protection goals.²⁶³

The last few decades have shown an increasing necessity of interaction between IHL and refugee law, as mass movements of refugees have been closely linked to armed conflicts and mass expulsions.²⁶⁴ This has led to a shift from preserving the distinction between the fields, to developing convergences and complementariness rather than strict distinction.²⁶⁵

A. The Relationship between Refugee Law and International Humanitarian Law

1. Overlaps and convergences

Firstly, the two fields overlap when refugees get caught up in an armed conflict and they are both victim of the conflict and refugee at the same time.²⁶⁶ Similarly, armed conflicts often cause large streams of refugees, so events that are governed by IHL can cause consequences governed by refugee law.²⁶⁷

The exclusion from the definition of refugee of individuals who have committed war crimes indicates an early cross-reference between the fields as well. The Refugee Convention was drafted in 1951 and shows the influence of IHL in the drafting there clearly.²⁶⁸ The Cartagena Declaration of 1984 and The Convention of 1969 on the Organization of African Unity

²⁶¹ H Gros Espiell, 'Derechos Humanos, Derecho Internacional Humanitario y Derecho Internacional de Los Refugiados' in Christophe Swinarski, Jean Pictet, and Internationales Komitee vom Roten Kreuz (eds), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge: en l'honneur de Jean Pictet* = *Studies and essays on international humanitarian law and Red Cross principles* (Nijhoff 1984) 711.

²⁶² Jennifer Moore, 'Protection against the Forced Return of War Refugees' in David James Cantor and Jean-François Durieux (eds), *Refuge from inhumanity? war refugees and international humanitarian law*, vol 17 (Brill Nijhoff 2014) 411.

²⁶³ *ibid.*

²⁶⁴ Rachel Brett and Eve Lester, 'Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead: A Non-Governmental Organization's View' (2001) 83 *International Review of the Red Cross* 713, 417.

²⁶⁵ V Moreno-Lax, 'Systematising Systemic Integration: "War Refugees", Regime Relations, and a Proposal for a Cumulative Approach to International Commitments' (2014) 12 *Journal of International Criminal Justice* 907, 908.

²⁶⁶ Jaquemet (n 41).

²⁶⁷ Espiell (n 261) 710.

²⁶⁸ Vincent Chetail, 'Armed Conflict and Forced Migration: A Systematic Approach To International Humanitarian Law, Refugee Law, And International Human Rights Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford handbook of international law in armed conflict* (Oxford Univ Pr 2014) 712.

recognize the interplay between refugee law and IHL by expanding the definition of refugee.²⁶⁹ It now includes references to various events including violence and armed conflict, internal conflicts and international conflicts or occupations by other states.²⁷⁰ CHETAIL asserts that more examples can be found on the influence of IHL in the drafting process of the Refugee Convention, for instance in Article 8 as it resembles Article 44 GC IV, although the Refugee Convention includes a broader approach than the Fourth Geneva Convention.²⁷¹

Recent examples of the convergence and co-application of IHL and refugee law are the Convention on the Rights of the Child of 1989 (CRC) and the Guiding Principles on Internal Displacement of 1998, which include references to both refugee law and IHL and connect it with human rights law, recognizing the importance of these fields.²⁷² BRETT and LESTER include a *caveat* here, as the CRC is not the most effective connection between the fields due to its separation of children from the general human rights field.²⁷³

2. *Simultaneous application of IHL and refugee law*

In JAQUEMET's opinion, the two legal fields can be applied consecutively when victims of an armed conflict are caused to flee from it and become refugees, if they are not adequately protected by IHL and flee for it then refugee law becomes applicable with all its inherent protections.²⁷⁴ This is often the case in conflicts that see recurring violations of IHL and human rights law which then forms the basis for the refugee status of the individual that calls the refugee protection to existence.²⁷⁵ CHETAIL confirms this in his chapter on armed conflict and forced migration from 2014, seeing a concurrent applicability while advocating for a complementary application. He argues that the norm which offers the most protection should be applied in case of conflicting overlaps.²⁷⁶ He criticizes the *lex specialis* approach that is often defended, as this does not encompass the complex relationship between the legal fields and views it as merely a "conflict".²⁷⁷

Jennifer MOORE argues similarly that a concurrent and complementary approach is preferable over the *lex specialis* or conflicting approach, as there is need for a *lex communis* which includes

²⁶⁹ Brett and Lester (n 264) 417.

²⁷⁰ Chetail (n 268) 725.

²⁷¹ *ibid* 712.

²⁷² Brett and Lester (n 264) 714.

²⁷³ *ibid*.

²⁷⁴ Jaquemet (n 41).

²⁷⁵ *ibid*.

²⁷⁶ Chetail (n 268) 702.

²⁷⁷ *ibid* 701–702.

the principles that are common to both legal fields.²⁷⁸ She criticizes the strict division between the legal fields, as this causes refugees to be caught in the protection gaps and unable to recall the protection of either field, while they should be protected by both.²⁷⁹ She argues that humanitarian non-refoulement is grounded in both legal fields, therefore offering protection from both fields. LESTER and BRETT also stress the need for the greatest protection, where this has already been recognized in the relationship between IHL and human rights law, refugee law and IHL would benefit from a similar logic.²⁸⁰ They put forth the consideration of what law provides a more encompassing protection in a given situation, combining protections from the fields if necessary or using application through analogies from one field in the other.²⁸¹

Similarly, Violeta MORENO-LAX builds on this debate and proposes a cumulative approach. True conflicts between the fields of IHL, refugee law and human rights law are rare according to her, so what is actually just a diverse view is often labelled as a conflict.²⁸² She argues for compliance with the strictest standard, whether it be from IHL, refugee law or human rights law as the obligations are cumulative.²⁸³

Refugees and displaced persons (DP) are protected by IHL and the Additional Protocols to the Geneva Conventions, when they cross borders into territories of states not participating in the armed conflict, they become protected by refugee law primarily.²⁸⁴ ESPIELL argues that there is a practical interwovenness between the fields too, as the Agreement between the International Committee of the Red Cross and the League of Red Cross Societies for the purpose of specifying certain of their respective functions decides in its very first Article that the term civilian population shall also include refugees and DPs.²⁸⁵

Most importantly, JAQUEMET argues that refugee law has drawn inspiration from IHL, for instance by adopting the principles of distinction as it now applies to the “refugees only” status of many refugee camps and settlements or the exclusion of persons who have committed war crimes from protection under the Refugee Convention.²⁸⁶ As there clearly are principles that apply to both fields and have been borrowed from one and implemented into the other, then this

²⁷⁸ Moore (n 262) 413.

²⁷⁹ *ibid.*

²⁸⁰ Brett and Lester (n 264) 724.

²⁸¹ *ibid* 724–725.

²⁸² Moreno-Lax (n 265) 924.

²⁸³ *ibid.*

²⁸⁴ Espiell (n 261) 711.

²⁸⁵ Agreement between the International Committee of the Red Cross and the League of Red Cross Societies for the purpose of specifying certain of their respective functions 1969 art 1; Espiell (n 261) 711.

²⁸⁶ Jaquemet (n 41).

should also be possible for prisoners of war and non-repatriation or voluntary repatriation, as legal framework lacks in this area and leaves gaps of protection for vulnerable groups.

The prisoner of war can apply for refugee status according to JAQUEMET if the following conditions are met:²⁸⁷

- Article 1, A (2) of the Refugee Convention is applicable, which relates to the well-founded fear for prosecution based on religion, ethnicity, nationality, membership of a certain group;²⁸⁸
- There is no indication or reason to suspect that the prisoner of war has committed grave war crimes or crimes against humanity and²⁸⁹
- They have laid down their arms and are no longer involved in any military activity in the country where they are applying for asylum, likely to be the country of detention as a prisoner of war.²⁹⁰

3. Critiques on the relationship between IHL and refugee law

The authors offer critiques too, specifically how IHL treats refugees in armed conflicts. CHETAIL finds that while IHL specifically prohibits forced displacements and therefore prevents civilians from becoming refugees, it also does not take the specific needs of refugees into account at all.²⁹¹ He identifies only 3 provisions in all of the Articles of the Geneva Conventions and Additional Protocols that specifically touch upon refugees, which apply solely during international conflicts or occupations. This leaves a protection gap according to him in situations of internal, non-international conflicts.²⁹² He criticizes the lack of specific protection for refugees as a result of this lack of specified provisions, while refugees are still protected as civilians under the Conventions as clarified by Article 73 of the First Additional Protocol.²⁹³ As even this provision requires recognition of refugee status before the conflict had started, this creates dangerous gaps in protection, according to CHETAIL.²⁹⁴ This is reflected by MOORE, as the Geneva Conventions make no mention of non-refoulement of refugees caused by armed conflicts.²⁹⁵

²⁸⁷ *ibid* 658.

²⁸⁸ Jaquetmet (n 41).

²⁸⁹ *ibid*.

²⁹⁰ *ibid*.

²⁹¹ Chetail (n 268) 704–705.

²⁹² *ibid*.

²⁹³ *ibid* 706–707.

²⁹⁴ *ibid*.

²⁹⁵ Moore (n 262) 418.

The parallels between the fields are evident in how the principles and rules from one body of law have been used to inform or strengthen the application of the other field and how the mandates of institutions interact. MOORE for instance puts forth humanitarian non-refoulement. As states have the right to exclude persons from finding refuge within their borders, non-refoulement protects individuals from being returned to situations where they fear persecution. Humanitarian non-refoulement expands this by also preventing persons from being returned to situations of armed conflict and military atrocities.²⁹⁶

According to MOORE, an example of humanitarian non-refoulement is the United States practice of Temporary Protected. In the 1990s, this option was introduced to prevent deportation if there was a situation of unrest in the country to where the individual would have been deported, including armed conflicts and violence.²⁹⁷

Here too the repatriation of POWs can be seen as an example of the interrelation of IHL and refugee law. CHETAIL uses the Korean War as an example of how non-refoulement has already been applied in IHL, as the obligation of repatriation was substituted with refugee law. According to CHETAIL, this is likely the only actual conflict between IHL, refugee law and human rights law.²⁹⁸

4. *Procedural Parallels*

LESTER and BRETT indicate the parallels between refugee law and IHL, such as separation of armed elements in camps. The UNHCR meticulously preserves the separation of armed elements in refugee camps, so they remain the safe and demilitarized zones they are intended to be.²⁹⁹ This relates to how the ICRC has clarified in the past that to be in compliance with IHL, combatants must be disarmed and interned in neutral states and separated from normal refugees.³⁰⁰ As according to the ICRC, combatants cannot be automatically excluded from protection under Article 1, F the Refugee Convention, and a case-by-case assessment is necessary, this shows how IHL influences the application of refugee law in a practical setting.³⁰¹

BRETT and LESTER point out how both IHL and refugee law have institutions with mandated field-presence and assistance. They identify that the UNHCR can benefit from the ICRC and

²⁹⁶ *ibid* 414.

²⁹⁷ *ibid* 421.

²⁹⁸ Chetail (n 268) 731.

²⁹⁹ Brett and Lester (n 264) 716.

³⁰⁰ *ibid* 717.

³⁰¹ *ibid* 718.

its longstanding experience in policies and advisory services.³⁰² However, both legal fields have these mandated institutions as a parallel.

Conclusion

The complementary approach is useful in light of the recommendations that will be formulated in subchapter 4.2, as this thesis concurs that it offers greater protection to prisoners of war to apply refugee law to certain situations by using analogue reasoning. Based on the arguments established by these authors, the discourse on the application of refugee law and IHL already establishes situations in which the fields borrow from each other. The *gap filling approach* has been considered and deemed fitting to provide the most protection, so it can be similarly applied to POWs. Subchapter 4.2 therefore recommends assessing consent of POWs in the way that the UNHCR has longstanding practice of assessing it.

Subchapter 4.2: Recommendations

As POWs are at risk of persecution after their return, they are functionally similar to refugees regarding the need for non-refoulement and assessment of genuine consent to repatriation. These academic endorsements for harmonization of standards between IHL and refugee law combined with the precedents of cross-field borrowing of concepts serve as a basis for the following recommendations.

The practical benefits of these recommendations and interrelation of IHL and refugee law include an improved legitimacy of the repatriation process. Aside from legitimacy, the recommendations provide legal certainty and predictability for all stakeholders involved, including states, POWs and their families and the agencies that are involved in repatriation processes. Lastly, these recommendations offer protection for POWs that are at risk if repatriation would have been carried out against their wishes.

1. Codification of best practices

Refugee law influences IHL, just as human rights law has influenced IHL. Academic discourse agrees on the interrelation between the legal fields, as the previous subchapter shows. Yet, the interrelation between the fields has not yet been codified.³⁰³ This leads to uncertainty and *ad hoc* approaches when the legal fields overlap or protection gaps are identified. Solving the uncertainty of the co-application of these fields offers a steady guideline for future legal complications. If clarity exists on the simultaneous application of IHL and refugee law, then it

³⁰² *ibid* 722–723.

³⁰³ Kolb and Kilibarda (n 189) no 55.

resolves the ambiguous and fragmented intersection of the fields, leading to more legal certainty and effective gap filling approaches, resulting in an overall enhanced protection.³⁰⁴

2. Adoption of Refugee Law practices on consent procedures for POW repatriation

The lack of clear procedure on assessment of consent given by POWs, especially whether it was given in a free and informed way, significantly hinders the process of repatriation.³⁰⁵ *Ad hoc* assessments take much more time and create uncertainty, as the procedure could change between conflicts. Although this lack of written procedure allows for flexibility and the ICRC can adapt its approach to the changing circumstances of each individual conflict, it slows down the whole process. As happened in Rolleston (see subchapter 2.3), if the ICRC decides to completely take an opposite approach, it affects the legitimacy of the procedure.

As has been established in subchapter 1.2 regarding consent, the UNHCR has clear procedures and guidelines on how to assess consent. Good practices have been identified, for instance in the Indo-Lankan Agreement, showing that consistency in assessment is an achievable goal. By adopting similar procedures into IHL, either through policy guidelines of the ICRC or through other legal frameworks that adopt procedural guidelines, these gaps can be resolved.

3. Monitoring body

The UNHCR is the responsible entity for refugees³⁰⁶ and has a considerable role to play when it comes to the protection of refugees and voluntary returns. One of the UNHCR's tasks includes promoting the voluntary repatriation and it has become policy through institutional framework by the UNHCR.³⁰⁷ While authors admit that the UNHCR has encountered problems with compliance and monitoring functions, it is still legally and institutionally required to deal with issues concerning voluntary repatriation.

As in post-conflict situations where the repatriation of prisoners of war is discussed, there are concerns of partiality of the detaining powers, an entity should be established to be responsible for assessing the voluntariness and oversee the procedure of repatriation. In contrast with the mandate of the UNHCR, the ICRC mandate does not have such an explicit indication that it should deal with repatriation of POWs. While it is *de facto* involved in these processes, there is no legal foundation based on which the ICRC is explicitly mandated to assess the voluntariness

³⁰⁴ Chetail (n 268) 733–734.

³⁰⁵ This is supported by the study of SHIELDS DELESSERT, as she concludes that giving a choice to prisoners of war should be accompanied by strong mechanisms that can oversee the process and assess the wishes of POWs, countering abuse by Detaining states. See Shields Delessert (n 48) 205–206.

³⁰⁶ Zieck (n 10) chs 4–5.

³⁰⁷ Chetail (n 268) 727–728.

and refoulement risks in cases where POWs refuse repatriation. It is therefore advisable to explicitly include this task in the mandate of the ICRC.

The lack of codification leaves it up to *ad hoc* decisions on how to evaluate the consent of POWs every single time, with issues such as the credibility of the ICRC (as was the case in Iraq during the conflicts between 1980 and 2011) complicating the process. If a uniform approach is adopted, either through policy-making at the level of the ICRC or through adopting legal framework in additional protocols, an entirely separate treaty or an MOU – whichever is most likely to lead to an agreement by states, it provides better protection for POWs by reducing the delays caused by negotiations, ensuring procedures for consent and having an independent body of oversight (be it the ICRC or another one).

The mandate of the ICRC could additionally be amended to explicitly refer to repatriation of POWs, although this requires a lengthy procedure and majorities of two-thirds of participating states to be reached. As there are political difficulties regarding amendments in both the drafting and the voting stage, it will take time and diplomatic effort to come to an agreement. It is not unthinkable that the same objections at play during the Diplomatic Conference of Geneva in 1949 are still relevant and put forth by participating states (see subchapter 1.2).

In case no required majorities can be reached for the amendment of the statutes, another possibility includes the adoption of an additional protocol to the Geneva Conventions. Here, a mandate and procedure for assessing consent and voluntariness for the ICRC can be included and bind the states that choose to ratify the AP.³⁰⁸

Lastly, as the ICRC itself has been the subject of critique for its composure during past conflicts, negotiating parties could disagree whether it is the best placed instance to deal with voluntary repatriation.³⁰⁹ If this is the case, a new neutral body could be established with this exact

³⁰⁸ For a full understanding of the Amendment procedure for the mandate of the ICRC, see Statutes of the International Committee of the Red Cross (ICRC) (adopted on 21 December 2017, entered into force 1 January 2018) A1703, art 18.

³⁰⁹ It has been criticized for its action or lack thereof during the Second World War (see also Isabelle Vonèche Cardia, ‘Het Stilzwijgen van Het Internationaal Comité van Het Rode Kruis (ICRC) over de Deportaties Opnieuw Onder de Loep Genomen’ (2022) 134 *Témoigner. Entre histoire et mémoire* 112. Entry to Iraq was restricted during the Gulf Wars, see chapter 2.3, and similar refusals have happened in other conflicts such as the war in Syria and to Ukrainian prisoners of war in Russia, see also International Committee of the Red Cross and United Nations, ‘Syria: Aid Convoy Turns Back after Being Refused Entry to Besieged Daraya’ <<https://www.icrc.org/en/document/aid-convoy-turns-back-after-being-refused-entry-besieged-daraya>> accessed 12 August 2025; Reuters, ‘Red Cross Denied Access to Prisoners at Russian-Held Olenivka despite “intense” Talks -ICRC Chief’ [2022] *Reuters* <<https://www.reuters.com/world/europe/red-cross-denied-access-prisoners-russian-held-olenivka-despite-intense-talks-2022-09-01/>> accessed 12 August 2025.

mandate. This still provides for a body of oversight while avoiding the complicated criticism the ICRC has dealt with.

This subchapter therefore answers the question of what alternative solutions exist to the application of the obligation of repatriation and non-refoulement to offer protection to POWs and lists recommendations that will enhance POW protection.

Subchapter 4.3: Forward looking perspectives

Armed conflicts are unfortunately plentiful and a recurring event. According to the Peace Research Institute in Oslo, 2024 saw more armed conflicts than ever before since 1946.³¹⁰ The Geneva Academy of International Humanitarian Law and Human Rights reports on 110 armed conflicts, worldwide.³¹¹ The Russian War of Aggression against Ukraine is a prominent conflict in European media and politics. As exchanges of prisoners of war have been agreed upon and taken place in the last months, refusals could happen again.

As the question of non-refoulement and its application to POWs has been addressed in Chapter 3, what remains is how to apply the relevant provisions from IHL, human rights law and refugee law to new cases. As POWs are undoubtedly vulnerable groups, actors on the international level should be able to fall back on clear and established procedures and principles.

An important protection gap situates itself in the lack of procedures for assessment of voluntariness and consent to repatriation. This is likely to complicate and delay repatriation processes, which is unfair to both those who want to be repatriated as they experience undue delays or stress and psychological consequences of prolonged captivity while awaiting the outcomes of uncertain procedures. On the other hand, those unwilling to be repatriated could experience the same fears and stress, awaiting a verdict on their future.

In my opinion – supported by the authors discussed in Chapter 3, non-refoulement applies to the POWs of today's conflicts. As they express their opinions on repatriation, this must be taken into account by the assessors, whether that is the ICRC, the Detaining power or other instances involved in the process.

If they refuse to be repatriated, options considered in previous conflicts must be considered, starting with unconditional release after the end of hostilities. Asylum procedures will be dependent on the Detaining states' policies. Humanitarian non-refoulement must be explored

³¹⁰ Peace Research Institute Oslo, 'New Data Shows Conflict at Historic High as U.S. Signals Retreat from World Stage' (*Peace Research Institute Oslo*, 9 June 2025) <<https://www.prio.org/news/3616>> accessed 9 August 2025.

³¹¹ *ibid.*

as a possibility to preclude POWs from repatriation, as well as establishing diplomatic relations with the home state of the POW, especially if this state insists on unconditional repatriation. As the absolute character of the obligation to repatriation has softened, under no circumstance should a POW be repatriated against their wishes.

Conclusion

The research aim of this thesis focused on the gap between the obligation to repatriate prisoners of war and the need to protect POWs against forced returns when they are at risk of serious harm. The research questions guiding this thesis were the following.

To what extent are the principle of non-refoulement and the obligation of repatriation of prisoners of war compatible?

- What are the legal and practical difficulties in the application of both legal regimes?
Does one principle prevail?
- Are there alternative solutions?

This thesis found that the applicable legal framework, the Geneva Conventions and the Refugee Convention, overlap in their humanitarian aim to protect vulnerable groups. At the same time, gaps can be found regarding consent, voluntary repatriation and non-refoulement.

Regarding the Third Geneva Convention, authors identified connections through which non-refoulement is included in the protections offered by the Convention. What remains is a gap to assess the voluntariness and consent of POWs when they refuse repatriation. This leads to cross-field borrowing of procedures to assess consent, particularly from the field of refugee law. As cross-pollination between the fields of IHL and refugee law has long been established, the guidelines offered by the UNHCR on assessing consent can be well implemented in future conflicts when POWs refuse repatriation.

To answer the question of whether one principle prevails over the other, both the case studies and the literature review allow the conclusion that neither principle overrides the other. Rather, a less strict application of the obligation to repatriate prisoners of war through interpretations by the ICRC Commentaries combined with connections to other provisions of the Geneva Conventions will adhere to the principle of non-refoulement. Both obligations can be applied simultaneously, yet when in strict conflict the principle offering the greatest protection must be applied. This aligns with the literature regarding the influence and co-existence of IHL and refugee law.

The value of this thesis lies in the connection between historical conflicts such as the Korean War and the conflicts concerning Iraq, analyzing the doctrinal principles and their real-life application in these cases. This thesis advocates for a more formalized assessment by the ICRC regarding consent, in a UNHCR-like approach to assess and safeguard POW consent to repatriation. The recommendations regarding strengthening institutional mandates and

harmonizing procedural safeguards has real life significance in light of contemporary and future conflicts.

However, challenges remain after these recommendations. The continued variability of state practice endangers POW treatment in conflicts. Future research could therefore include empirical studies on the implementation of IHL regarding POWs and could deepen doctrinal coherence.

The protection of prisoners of war is not merely a matter of legal interpretation and adherence to relevant Conventions, but an imperative at the heart of international humanitarian protection. The international community must go beyond abstract commitments and codify clear, universally binding procedures by drawing upon the safeguards of refugee law, ensuring that no individual is returned to a place where they will face torture, persecution, or death. By harmonizing the voluntary repatriation framework with the ICRC mandate, states and humanitarian actors can close the existing gap in protection and realize the humanitarian ideals embedded in both the Geneva Conventions and the Refugee Convention.

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Abstract

This thesis examines the tension between the principle of non-refoulement and the obligation to repatriate prisoners of war (POWs) when POWs refuse repatriation due to fear of ill-treatment or persecution. It researches how these obligations interact, identifies gaps in protection and proposes solutions to conflicts in application. Particular attention is given to deficiencies in consent and assessment procedures, as well as the absence of clear mechanisms for these assessments. The literature review reveals a scholarly consensus on the applicability of non-refoulement to POWs. Using doctrinal legal research and case studies from the Korean War, the Iran-Iraq War of 1980-1988 and the Iraq-Kuwait War of 1990-1991, this thesis argues for codifying the relationship between international humanitarian law and refugee law. It recommends adopting refugee law procedures on consent and granting the ICRC a similar mandate to that of the UNHCR, thereby creating more consistent, enforceable standards. These measures would strengthen POW protection in future conflicts. Further empirical research could assess the practical implementation of these procedures and enhance doctrinal coherence.

Abstrakt

Diese Abschlussarbeit untersucht das Spannungsverhältnis zwischen dem Grundsatz des Non-Refoulement und der Verpflichtung zur Repatriierung von Kriegsgefangenen, wenn diese die Rückführung aus Furcht vor Misshandlung oder Verfolgung ablehnen. Sie erforscht, wie diese Verpflichtungen miteinander in Beziehung stehen, identifiziert Schutzlücken und schlägt Lösungen für Anwendungskonflikte vor. Besonderes Augenmerk gilt Defiziten bei Einwilligungs- und Bewertungsverfahren sowie dem Fehlen klarer Mechanismen für diese Bewertungen. Der Forschungsstand zeigt einen wissenschaftlichen Konsens über die Anwendbarkeit des Non-Refoulement auf Kriegsgefangene. Auf Grundlage rechtsdogmatischer Forschung und von Fallstudien zum Koreakrieg, zum Iran-Irak-Krieg (1980–1988) und zum Irak-Kuwait-Krieg (1990–1991) plädiert diese Arbeit für eine Kodifizierung des Verhältnisses zwischen humanitärem Völkerrecht und Flüchtlingsrecht. Sie empfiehlt die Übernahme flüchtlingsrechtlicher Verfahren zur Einwilligung und die Zuerkennung eines dem UNHCR vergleichbaren Mandats an das IKRK, um einheitlichere und durchsetzbare Standards zu schaffen. Diese Maßnahmen würden den Schutz von Kriegsgefangenen in zukünftigen Konflikten stärken. Weitere empirische Forschung könnte die praktische Umsetzung dieser Verfahren bewerten und die dogmatische Kohärenz weiter verbessern.