

**BRIEF FOR THE INSTITUTE FOR INTERNATIONAL LAW OF PEACE AND ARMED CONFLICT AT
RUHR UNIVERSITY BOCHUM IN THE OVERSIGHT BOARD’S CASE CONCERNING THE
“ARMENIAN PRISONER OF WAR VIDEO” (2023-004-FB-MR)¹**

INTEREST OF THE AUTHORS:

The authors of this brief are scholars of international law representing the Institute for International Law of Peace and Armed Conflict, one of Germany’s leading research institutions in international humanitarian law. The authors have collectively spent decades researching and writing about different aspects of international humanitarian law (IHL) that are relevant for this case. This brief is submitted to provide an overview of the applicability of international humanitarian law to Meta’s conduct and a legal assessment thereof.

SUMMARY OF THE ARGUMENT

International humanitarian law, in particular the Third Geneva Convention Relative to the Treatment of Prisoners of War (GCIII), is applicable to online activities by Meta, a U.S. corporation whose activities in this case are closely linked to the international armed conflict in Nagorno-Karabakh. The individuals allegedly depicted in the “Armenian prisoner of war video” qualify as prisoners of war (POWs) under Article 4 (A) GCIII with Azerbaijan as their detaining power. By deciding to keep a video that depicts at least one POW online and thereby making him identifiable without a compelling public interest justifying this decision, Meta did not act in accordance with its legal obligation and corporate social responsibility to protect prisoners of war from “public curiosity” under Article 13 GCIII.

BACKGROUND

This case arose in the context of the conflict over Nagorno-Karabakh between the internationally unrecognized Republic of Nagorno-Karabakh, a “*de facto* self-governing state-like entity”² closely associated with the Republic of Armenia, on one side, and the Republic of Azerbaijan on the other side.³ This conflict has a long and disputed history which, at its core, relates to the territorial control over Nagorno-Karabakh and certain surrounding areas.⁴ It shall suffice to recall that after the dissolution of the USSR, the conflict escalated into the First Nagorno-Karabakh War (1988-1994) during which Armenia gained control over Nagorno-Karabakh, followed by a period of unstable ceasefires (1994-2020), and the Second Nagorno-Karabakh War in 2020 during which Azerbaijan recaptured large parts of the disputed region. Another ceasefire agreement ended the latter conflict and 2.000 Russian peacekeepers have been monitoring the situation hitherto. During September and October of 2022, violent altercations were reported along the 200-km long border between Armenia and Azerbaijan.⁵ Since approximately this time,

¹ This brief was authored by Pierre Thielbörger and Jan-Phillip Graf for the Institute for International Law of Peace and Armed Conflict (IFHV) at Ruhr University Bochum, Germany. Pierre Thielbörger serves as Professor of Public International Law at Ruhr University Bochum and has been the Executive Director of the IFHV since 2014 (contact: pierre.thielboerger@rub.de; +49 234 32-27934; Massenbergr. 9b, 44787 Bochum, Germany). Jan-Phillip Graf is a Research Associate and SYLFF Young Leaders fellow at the IFHV (contact: jan-phillip.graf@rub.de; +49 234 32-27366; Massenbergr. 9b, 44787 Bochum, Germany). All parties have provided written consent to the filing of this brief and therein allow the Oversight Board to publish or attribute their comments publicly.

² Andriy Melnyk, ‘Nagorny-Karabakh,’ in: *Max Planck Encyclopedia of International Law*, 2013, para. 1 (emphasis added).

³ Heiko Krüger, *The Nagorno-Karabakh Conflict: A Legal Analysis*, Springer 2010; Tim Portier, *Conflict in Nagorno-Karabakh, Abkhazia, and South Ossetia: A Legal Appraisal*, Brill 2001.

⁴ Thomas de Waal, *Black Garden: Armenia and Azerbaijan Through Peace and War*, New York University Press 2013.

⁵ International Crisis Group, ‘The Nagorno-Karabakh Conflict: A Visual Explainer,’ 28 March 2023, available at: <https://www.crisisgroup.org/content/nagorno-karabakh-conflict-visual-explainer> (last accessed: 3 April 2023).

videos allegedly depicting the mistreatment of POWs have appeared online.⁶ The facts of this case suggest that the video in question, posted in October of 2022, originates from this period.

The brief will first affirm the applicability of IHL to the Nagorno-Karabakh conflict (1.1), discuss IHL's applicability to online activities by foreign corporations (1.2 and 1.3), and evaluate the legality of Meta's conduct under the Third Geneva Convention (2).

ARGUMENT

(1) Applicability of International Humanitarian Law

(1.1) To the Conduct Allegedly Displayed in the Video

While the exact location of the video is unknown, it can reasonably be assumed that it was recorded somewhere in the Nagorno-Karabakh region, either on Armenian or Azerbaijani territory. According to international law, Azerbaijan maintains the only legally valid claim over the territory of Nagorno-Karabakh as the successor state to the Soviet Republic of Azerbaijan.⁷

International humanitarian law, or the law of armed conflict, i.e., the four Geneva Conventions of 1949 and the two Additional Protocols of 1977,⁸ regulates the conduct of armed hostilities.⁹ According to Article 2 common to all Geneva Conventions, international humanitarian law shall apply “to all cases of declared war or of any other armed conflict [and] all cases of partial and total occupation.”¹⁰ Before the beginning of the Second Nagorno-Karabakh War on 27 September 2020, the situation in Nagorno-Karabakh was widely held to qualify as a case of partial occupation of Azerbaijan's territory by Armenia (via the proxy of the Nagorno-Karabakh Republic over which Armenia has effective control).¹¹ This remains the case in areas over which Armenia still has effective control. There, the law of military occupation¹² and the law of international armed conflicts applies. In all other parts of Armenia and Azerbaijan, the law of international armed conflicts, i.e., the four Geneva Conventions of 1949 and the First Additional Protocol of 1977, applies by virtue of the existence of an international armed conflict.

(1.2) To Online Conduct

This brief, however, is not concerned with the legality of the actions displayed in the video. Rather, we analyze the legality of posting this video on a publicly accessible online platform and Meta's decision to keep the video on public display.

Thus, the question arises of whether the conventional and customary rules of IHL apply to online activities. Although IHL predates the emergence of the internet, there is now general consensus that it applies to “cyber operations executed in the context of an armed conflict.”¹³

⁶ Human Rights Watch, ‘Video Shows Azerbaijan Forces Executing Armenian POWs,’ 14 October 2022, available at: <https://www.hrw.org/news/2022/10/14/video-shows-azerbaijan-forces-executing-armenian-pows> (last accessed 5 April 2023).

⁷ Azerbaijan's legally valid claim over Nagorno-Karabakh is firmly based on the principle of territorial integrity and the *uti possidetis juris* doctrine, according to which the territorial borders of the Azerbaijan Soviet Socialist Republic (which included Nagorno-Karabakh) remained intact after the independence of Azerbaijan on 31 August 1991. Azerbaijan's claim has subsequently been affirmed by the UN Security Council in resolutions 822 (1993), 853 (1993), 874 (1993), 884 (1993), and UN General Assembly resolution 62/234 (2008).

⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

⁹ For a general introduction to IHL see: Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva 2019; ICRC, ‘What is International Humanitarian Law,’ available at: https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf (last accessed 3 April 2023).

¹⁰ Armenia and Azerbaijan have both acceded to the Geneva Conventions in 1993 and are therefore bound by them.

¹¹ Geneva Academy, ‘Military occupation of Azerbaijan by Armenia,’ Rule of Law in Armed Conflicts, 9 October 2022, available at: <https://www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia#collapse4accord> (last accessed 2 April 2023).

¹² Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

¹³ Michael Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, CUP 2017, rule 80, 375.

While the term “cyber operation” may include any online activity that falls under IHL’s scope,¹⁴ any such cyber operation requires a link to an armed conflict.¹⁵ While there is disagreement about the nature of such a nexus,¹⁶ we urge Meta to adopt a reading which covers all online activities that potentially contribute to a violation of IHL in furtherance of the hostilities.

Thus, the act of posting a video online which allegedly portrays the mistreatment of members of the Armenian armed forces by Azerbaijan’s armed forces with the objective of furthering the hostilities, is generally covered by IHL.

(1.3) To the Conflict-Related Online Activities of a Foreign Corporation

The more contentious question relates to the applicability of international humanitarian law to the act of allowing the video to be hosted on Facebook, a digital communication service provided by Meta Platforms, Inc., a U.S. corporation. Since corporations only have limited international legal personality,¹⁷ international law generally does not apply directly to corporate conduct, except for certain rules that directly address corporations.¹⁸ This issue is further complicated by the circumstance that Facebook’s provision of an online platform where individuals can upload materials without Facebook’s direct knowledge or consent is merely of a passive nature. In this case, however, the latter issue weighs less since Meta has actively reviewed the video and decided to keep it publicly available.¹⁹ Regarding corporate conduct in relation to armed conflicts, two theories for the applicability of IHL have emerged.

The traditional theory argues that state parties to the relevant IHL instruments are under an obligation, by virtue of Common Article 1 of the Geneva Conventions, to “ensure respect” for the rules of IHL in their domestic legal systems.²⁰ Accordingly, corporations would be bound indirectly via their home state’s third-party obligations. Since the U.S., where Meta is headquartered, is a party to the Geneva Conventions, all rules contained therein as well as customary rules of IHL would apply to the conduct at hand, however, only via U.S. law.

The second position, tentatively advanced by the International Committee of the Red Cross (ICRC), acknowledges the presence of corporations in conflict zones and points out that IHL confers a number of protections and duties on them.²¹ Thus, whenever a corporation’s conduct is “closely linked” to an armed conflict, IHL applies to all corporate activities that might implicate one of its rules. As the conduct portrayed in the concerned video portrays supposed members of armed forces, alleges violations of IHL, and is used as a means of furthering hostilities, Meta’s decision to continue public exhibition of this video on one of its platforms constitutes an activity that is closely related to the armed conflict. Thus, IHL would apply.

Additionally, the authors would like to draw attention to the fact that Meta has publicly “committed to respecting human rights as set out in the United Nations Guiding Principles on Business and Human Rights (UNGPs).”²² The UNGPs clarify in the commentaries to principle 12 that “in situations of armed conflict enterprises should respect the standards of international

¹⁴ Ibid., 376, para. 4.

¹⁵ Ibid., para. 5.

¹⁶ Ibid., para. 6.

¹⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP 2006, 78 et seq.

¹⁸ Tallinn Manual 2.0, 175, para. 6.

¹⁹ Meta Oversight Board, *Armenian Prisoner of War Video*, Case No. 2023-004-FB-MR, para. 2.

²⁰ Emanuela-Chiara Gillard, ‘The Position with Regard to International Humanitarian Law,’ in: *AJIL Proceedings 100* (2006), 130 et seq.

²¹ ICRC, ‘Business and International Humanitarian Law,’ 2006, available at: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0882.pdf (last accessed 3 April 2023).

²² Meta, ‘Corporate Human Rights Policy,’ available at: <https://about.fb.com/wp-content/uploads/2021/03/Facebooks-Corporate-Human-Rights-Policy.pdf> (last accessed 2 April 2023).

humanitarian law.”²³ Regrettably, Meta has neither incorporated IHL in its due diligence policy nor Facebook’s Community Standards²⁴ – a step which is not only incoherent with Meta’s support of the UNGPs, but also opens it up to potential civil or criminal liability in the future.²⁵

Both theories presented above as well as Meta’s voluntary commitment to the UNGPs suggest that its decision to leave the video on public display on Facebook falls under the regulatory scope of international humanitarian law if it implicates any of its rules.

(2) *Legality of Displaying a Video Depicting Prisoners of War under IHL*

Although the case description suggests that the video contains evidence of several IHL violations (possibly even amounting to war crimes), this brief is only concerned with evaluating the legality of publicly presenting the video and not the legality of the actions allegedly portrayed therein.

Meta is correct in its assessment that the supposed members of the Armenian armed forces in the video qualify as prisoners of war (POWs) from the moment of their capture by Azerbaijani forces under Article 4 (A) GCIII. Under Article 12 GCIII Azerbaijan acts as the “detaining power” of the captured Armenian combatants and is therefore primarily responsible for their protection in accordance with all standards set out in GCIII.

Article 13 GCIII stipulates that “prisoners of war must at all times be protected, particularly [...] against insults and **public curiosity**” (emphasis added). While this provision traditionally referred to the prohibited practice of “parading” POWs in front of the civilians or other combatants, the interpretation of Article 13 has evolved to prohibit any exposure to the public, i.e., persons who are not involved in detaining POWs, that has the potential to humiliate or identify them.²⁶ Thus, “the disclosure of photographic and video images [...], irrespective of which public communication channel is used, including the internet,” is prohibited.²⁷ The reason for this strict prohibition is the aggravated danger of public humiliation of POWs online and the safety risks to their families and themselves once they return home.²⁸

However, the important value of photographs or video recordings in raising public awareness and as evidence in criminal trials concerning violations of POWs’ rights has been cited by Meta as a rationale for keeping the video online. State practice,²⁹ case law,³⁰ and scholarly opinions³¹ support the assertion that a compelling public interest may exceptionally override POWs’ interest in protection against public curiosity. There is agreement however, that

²³ UN Human Rights Council, ‘Guiding Principles on Business and Human Rights,’ *UN Doc A/HRC/17/31*, 16 June 2011; UN Human Rights Council, ‘Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses,’ *UN Doc A/HRC/17/32*, 27 May 2011.

²⁴ Meta, ‘Facebook Community Standards,’ available at: <https://transparency.fb.com/policies/community-standards/> (last accessed 3 April 2023).

²⁵ David Hughes, ‘Differentiating the Corporation: Accountability and International Humanitarian Law,’ in: *Michigan Journal of International Law* 42(1) (2021); Regis Bismuth, ‘Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders,’ in: *Denver Journal of International Law & Policy* 38(2) (2010); Eric Mongelard, ‘Corporate Civil Liability for Violations of International Humanitarian Law,’ in: *International Review of the Red Cross* 88 (2006).

²⁶ ICRC, *Commentary on the Third Geneva Convention*, CUP 2021, 592 et seq.

²⁷ *Ibid.*, 593.

²⁸ Gordon Risius and Michael Meyer, ‘The Protection of Prisoners of War Against Insults and Public Curiosity,’ in: *International Review of the Red Cross* 33 (1993), 293.

²⁹ Federal Ministry of Defence of Germany, *Law of Armed Conflict Manual*, 1 May 2013, 120, para. 811, available at: <https://www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf> (last accessed 3 April 2023); New Zealand Defence Force, *Manual of Armed Forces Law Vol. 4*, 2019, para. 12.3.3, available at: <https://www.onlinelibrary.ihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf> (last accessed 3 April 2023); Government of the United Kingdom of Great Britain and Northern Ireland and the British Red Cross, ‘Public curiosity in the 1949 Geneva Conventions,’ available at: <https://www.gov.uk/government/publications/public-curiosity-in-the-1949-geneva-conventions-uk-government-and-british-red-cross-interpretation/public-curiosity-in-the-1949-geneva-conventions-the-interpretation-developed-by-the-government-of-the-united-kingdom-of-great-britain-and-northern> (last accessed 3 April 2023).

³⁰ United States, Court of Appeals for the Second Circuit, *American Civil Liberties Union v US Department of Defense*, Judgment, 2008, 4; Erik Mose, ‘Corporate Criminal Liability and the Rwandan Genocide,’ in: *Journal of International Criminal Justice* 973 (2008).

³¹ Catherine Maia, Robert Kolb and Damian Scalia, *La Protection des Prisonniers de Guerre en Droit International Humanitaire*, Bruylant 2015, 194-2000; Sandra Krähenmann, ‘Protection of Prisoners in Armed Conflict,’ in: Dieter Fleck (ed.), *The Oxford Handbook of International Humanitarian Law*, OUP 2013, 374.

a compelling public interest needs to be conclusively demonstrated and that any materials depicting POWs shall not identify or humiliate them. Only the most exceptional circumstances and only a highly compelling public interest may justify the public transmission of materials that identify POWs (e.g., a depicted POW is wanted by justice or is a senior government official).³² This protective right rests with the individual POWs and cannot be waived by their armed forces or the detaining power. The legal commentary to the Third Geneva Convention therefore recommends that “the media should always resort to appropriate methods, such as blurring, pixelating or otherwise obscuring faces and name tags, altering voices or filming from a certain distance, in order to serve their function without disclosing the prisoners’ identities.”³³ Evidently, Article 13 GCIII is without prejudice to the materials collected by the detaining powers or the ICRC in relation to their activities.

The facts of this case establish that the face of at least one Armenian POW was visible, possibly exposing the injured individual to identification and humiliation. Meta has argued “that the public interest in seeing the content outweighed the risk to the safety and dignity of the prisoners of war.”³⁴ However, the public’s rather abstract “general interest in seeing the content” does not satisfy the specificity required under the “compelling public interest” standard in Article 13 GCIII. Apart from not having elaborated the specific public interest that would compel the publication of this video, Meta has also not explained how the public’s interest could outweigh the POWs’ interest in not being identified or humiliated and whether less intrusive means of balancing the two competing interests would have been available. Therefore, Meta’s decision to keep this video publicly available is inconsistent with Article 13 GCIII.

CONCLUSION & RECOMMENDATION

For these reasons, we conclude that Meta’s decision to leave the video supposedly depicting Armenian POWs on public display on Facebook is not in accordance with applicable international humanitarian law. Article 13 GCIII protects POWs against “public curiosity” which includes a prohibition of sharing videos of them online unless there exists a compelling public interest in doing so. Meta’s “newsworthiness exception” fails to identify a sufficiently compelling public interest its decision is supposed to serve and how it would outweigh the POWs’ interest in not being exposed to public humiliation or identification. Even if such a compelling interest existed, Meta has failed to appropriately protect the POWs from identification by, for instance, pixelating their faces.

We recommend that Meta removes the video from Facebook, or at least takes every available measure to obscure the identity of all portrayed individuals, especially the supposed POWs. Additionally, we recommend that Meta includes international humanitarian law in its due diligence policy and community standards.³⁵ We also recommend that in future cases Meta removes or redacts comparable videos and forwards a copy to the ICRC, the UN High Commissioner for Human Rights, relevant special procedures or fact-finding missions of the UN Human Rights Council, or other impartial humanitarian organizations as well as relevant international and domestic prosecutorial authorities.

³² ICRC, *Commentary on the Third Geneva Convention*, CUP 2021, 594.

³³ In the context of the 2003 invasion of Iraq, France, for instance, issued clear guidelines to the press instructing them “to ensure [...] that prisoners of war cannot be identified and [...] that their statements are not broadcast,” citation taken from *ibid.*, 595.

³⁴ Meta Oversight Board, *Armenian Prisoner of War Video*, Case No. 2023-004-FB-MR, para. 2.

³⁵ Twitter has amended its media policy in response to the conflict in Ukraine to implement the standards of Article 13 GCIII, see: https://blog.twitter.com/en_us/topics/company/2022/our-ongoing-approach-to-the-war-in-ukraine (last accessed 4 April 2023).