



Prisoners of war in contemporary armed conflict: Interpreting the Third Geneva Convention 70+ years after its negotiation

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Too often the term “prisoner of war” (PoW) conjures up black-and-white images of soldiers detained in the Second World War. Recent events have brought PoWs back into the fore of the public consciousness, in particular how they must be treated and what rights they are entitled to in contemporary conflicts. For example, what is the role of social media in respecting their dignity? What is the role of the ICRC’s Central Tracing Agency and States’ National Information Bureaux today? Given developments in international human rights law and international and domestic criminal law, may PoWs be tried for their conduct during hostilities and, if so, what guarantees are they entitled to?

In this post published to mark the anniversary of the 1949 Geneva Conventions Ellen Policinski, a legal adviser working on the ICRC’s project to update the Commentaries on the Geneva Conventions and their Additional Protocols, highlights some aspects of the Third Geneva Convention (GCIII) that may be particularly relevant today, including some of the findings of the updated ICRC Commentary, and points readers towards some resources that digest the findings of this once-in-a-generation study.

ICRC Humanitarian Law & Policy Blog · Prisoners of war in contemporary armed conflict: Interpreting GCIII 70+ years after its negotiation

Recently, the ICRC published its updated Commentary on the Third Geneva Convention (GCIII) relative to the treatment of prisoners of war, which contextualizes the 1949 Convention for contemporary conflicts. The updated Commentary on GCIII was published in English, and translations into the other five official UN languages as well as Ukrainian are planned. It is freely available online in an article-by-article format in the ICRC’s Treaties and Commentaries Database.

Launched in June 2020, the updated Commentary is a *useful tool for practitioners*, taking into account the more than seventy years of State practice and legal and technical *developments* since GCIII was drafted. It is therefore an essential resource to answer questions about the status and treatment of PoWs in contemporary international armed conflicts. There have already been several articles and blog posts digesting the findings of this encyclopedic resource.

An article summarizing its main findings is available in Arabic, Chinese, English, and Russian *via the International Review of the Red Cross*. As the authors of that article point out, in addition to extensive legal and archival research, “updating the Commentaries on each of the 143 articles of GC III required consideration of a wide range of historical, legal, military, ethical, socio-cultural and technological issues. As with the updated Commentaries on GC I and GC II, the development of the updated Commentary on GC III involved a collaborative effort, with input from ICRC and non-ICRC lawyers, specialists with subject-matter expertise (including military personnel, protection officers specializing in detention, and academics), and others.”

Who is a PoW?

Under *Article 4*, people become prisoners of war if they are captured or otherwise fall into the hands of the enemy. Broadly speaking PoWs are captured combatants, but more specifically they are:

- a. members of the armed forces of a party to the conflict, including members of militias or volunteer corps forming part of such armed forces (this includes members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power);
- b. members of other militias or other volunteer corps that belong to a party to the conflict, provided that such groups:

- are under responsible command;
- have a fixed distinctive sign recognizable at a distance;
- carry arms openly; and
- conduct operations according to the law of armed conflict;

- c. civilians (including journalists and contractors) who accompany the armed forces provided they are authorized by the armed force they accompany;
- d. members of crews of merchant marine and civilian aircraft of a party to the conflict who do not benefit from more favourable treatment under international law;
- e. participants in a *levée en masse*; and
- f. the military wounded, sick and shipwrecked who fall into the hands of an enemy.

Which categories of persons are entitled to PoW status is one of the things discussed by Jean-Marie Henckaerts and Col. Dick Jackson (ret.) with Tracey Begley on episode 108 of *Intercross: The podcast*. In that episode, they discuss the definition of “prisoner of war”, highlighting issues that have arisen since 1949. For instance whether being a national of the capturing State affects PoW status, the obligation for regular armed forces to distinguish themselves from the civilian population, and whether the collective conditions under Article 4(a)(2) also apply to the regular armed forces of the State.

Each of these issues are examined in the *Commentary on Article 4*, which unpacks the elements of PoW status in detail, indicating the ICRC’s understanding of the issues and pointing out diverging views. Additional challenges, including the status of members of armed forces in non-international armed conflicts and the status of mercenaries and similar actors were discussed at the *September 2021 Nordic Launch of the updated Commentary on GCIII*.

As *Ramin Mahnad points out*, PoW status is perhaps the clearest example of how protected status granted by the Geneva Conventions is tailored to address particular vulnerabilities, especially for those who are in the hands of the adversary. He explains the implications of PoW status, including its protections and so-called combatant immunity, concluding that IHL “leverages immunity to incentivize compliance with its rules: combatant PoWs are protected against prosecution for lawful acts of war, but they can be put on trial for IHL violations, especially war crimes.”

Prisoners in the hands of the enemy: The role of the ICRC

The protection of PoWs and other persons who have fallen into the hands of the adversary are guaranteed by some of the most *basic IHL rules*, and are “*at the heart of the ICRC’s humanitarian work*“. As an organization the ICRC is always working to ensure better protection in the face of the *realities of detention in contemporary armed conflict* by clarifying the norms codified in the Geneva Conventions. As Helen Durham *points out*, the updated Commentary on GCIII is part of those efforts, providing “up-to-date definitions of key concepts on the treatment of detainees, like humane treatment, decent conditions of detention, special protection of women, family contacts and avoiding prisoners going missing.” This is in line with the ICRC’s role as the *guardian of IHL*.

Article 126 of GCIII gives *the ICRC* the right to visit PoWs to supervise respect for the Convention. As *the updated Commentary clarifies*, the ICRC’s activities on behalf of PoWs are “left to the ICRC’s initiative and may be carried out freely according to circumstances. In performing this role, the ICRC...retains full discretion regarding its own actions. This is in line with the specific humanitarian nature of the ICRC and its *principles* of independence, *neutrality* and *impartiality*.”

GCIII provisions, including *Article 123*, also entitle the ICRC’s *Central Tracing Agency* (CTA) to receive information about those in the hands of the adverse party, including PoWs and dead military personnel. The CTA helps remedy family separation, prevents people from going missing and seeks to search for those who do go missing. One important way it does this in international armed conflicts is to collect and centralize information about the fate and whereabouts of those in enemy hands, including PoWs and other protected persons deprived of their liberty, and transmit this information to the parties to the conflict and the families. As *Helen Obregón Gieseken and Ximena Londoño* write, “The CTA, as an integral part of the ICRC, is part of a *permanent international organization* of non-governmental nature enjoying international legal personality as well as privileges and immunities in the international and domestic legal orders. As such, the neutrality of the CTA flows from the manner in which it carries out its work; guided by the *Fundamental Principles* of the Red Cross and Red Crescent Movement.” *The updated Commentary clarifies* how the *National Information Bureaux* (NIBs) of *each party* to an international armed conflict and the CTA work. The work of the CTA is being *seen in practice* in the ongoing international armed conflict between Russia and Ukraine.

Preparing to detain: What must States do ahead of military operations?

As *Kelisiana Thynne* notes, there are certain preparations that States must make in advance so that they are able to detain PoWs in compliance with their obligations under international law. In her words, “If you haven’t prepared for this eventuality beforehand, you will be scrambling to catch up with your IHL obligations and you will waste time, resources and lack respect for human dignity and wellbeing in the process.” Already in peacetime, the armed forces dealing with PoWs must receive *specific instruction*, the Geneva Conventions must be *disseminated to the general population* in the national language (meaning that they must be *translated*), domestic legislation *must be passed*, and other necessary measures must be taken under domestic law to penalize *grave breaches* of IHL and repress IHL violations. Other measures, such as preparing a so-called “*Article 5 tribunal*” to determine PoW status and establishing appropriate places to intern PoWs, must also be put in place.

Ximena Londoño and Helen Obregón Gieseken point out that *National Information Bureaux* must be established by States from the outbreak of international armed conflicts and/or occupation (and ideally in peacetime) in order to be able to account for enemies that fall into their hands, including PoWs and fallen soldiers, and transmit the required information to the country concerned and to families via the ICRC’s CTA.

As conflicts are increasingly fought by coalitions of forces, additional preparations need to be taken, ideally in peacetime, to ensure that member States are able to uphold their international obligations. For multilateral forces, implementing GCIII requires determining which State, concretely, is the Detaining Power, as this may not be immediately clear. *Steven Hill* discusses this and other challenges faced by multilateral forces, including ensuring that they’re able to comply with pre- and post-transfer requirements under *Article 12* and considerations related to the *principle of assimilation*, requiring that PoWs be treated similar to or in the same way as members of the Detaining Power’s own forces. Multilateral forces should also think about how they will divide roles and responsibilities to communicate with the Central Tracing Agency.

As *Keiichiro Okimoto* concludes in his blogpost, where UN peacekeepers intervene in international armed conflicts as combatants they also must comply with GCIII. This would also require preparation in advance.

What protections are PoWs entitled to?

Based on his experience as a military lawyer, *Tim Wood* observes that “captured persons, be they prisoners of war or detainees, are at risk of being exposed to treatment that could be considered inhumane or where an adverse distinction is made on the basis of race, colour, religion or faith, sex, birth or wealth or any other similar criteria.” In his *blog post* he emphasizes the need for updated interpretations of the law, given the lack of the necessary consensus to negotiate a new treaty to protect PoWs.

GCIII contains fundamental protections that all PoWs are entitled to. Notably, *Article 13* and *Article 14* underpin more detailed provisions that come later in the Convention, providing that PoWs must be treated humanely with respect and without discrimination at all times. *Cordula Droege* outlines *ten essential protections for prisoners of war*, concluding that “Seventy years on, the Third Geneva Convention remains the most important international treaty protecting prisoners of war... and, when read together with the more contemporary interpretations provided by the updated Commentary, is a practical and invaluable source for safeguarding the humane treatment of prisoners of war in armed conflicts.” Droege speaks further about why GCIII is still so important today in *this video*.

The protections codified by the 1949 Geneva Conventions must be interpreted in light of modern technology and social realities. One question that was raised by recent media reports is how protections designed to regulate images and information related to PoWs and deceased combatants should apply in an increasingly digital world. *Ramin Mahnad* explains the prohibition against exposing PoWs to public curiosity. As Mahnad *writes*, “According to the *updated Commentary on the Third Geneva Convention (GCIII)*, any materials that enable individual prisoners to be identified must be presumed to subject them to public curiosity and, therefore, may not be transmitted, published or broadcast. If there is a public interest in revealing the identity of a prisoner (for instance, owing to their seniority or because they are wanted for prosecution) or if it is in the prisoner’s vital interest to do so (for example, when they go missing), the identifying material may exceptionally be released, but only insofar as it respects the POWs’ dignity.” This applies to traditional media and to social media; the communication channel does not matter.

Technological advancements aren’t the only changes that have implications for how the law is interpreted and applied. Expertise in a variety of sciences, including social and medical sciences is more sophisticated than it was 70 years ago, and societal circumstances have changed. One example is the way society treats people with disabilities. In her article in the *International Review of the Red Cross*, *Priscilla Denisse Coria Palomino* looks at the way the updated Commentary on GCIII approaches *Article 30* related to isolation for cases of “mental disease” in the light of the modern understanding of disability, especially the social model of disability promoted by the Convention on the Rights of Persons with Disabilities. Understandings of the effects of *isolation and solitary confinement* have also shifted, and experts are now aware that deprivation of contact can cause physical and mental harm. Thus, as observed in the *commentary on Article 89*, “it would appear that solitary confinement is becoming less and less accepted as a penalty in both law and practice.”

As *Yvette Issar* points out, PoWs facing trial benefit from the right to a fair and regular trial. This is particularly important since “combatants captured on the battlefield are at risk of unfair treatment in many ways, including wrongful or unfair prosecution. Being interned, they are in a weaker position to mount an effective defence compared to people who are not deprived of their liberty. Furthermore, as they are in the hands of an enemy State, they have to contend with the sentiments of their captors.” GCIII provides certain minimum guarantees as outlined by Issar in *her blog post*, and above and beyond these they may benefit from standards applicable to the military personnel of the Detaining Power pursuant to the *principle of assimilation*. According to the updated Commentary, this includes human rights law guarantees, which have developed since GCIII was drafted.

These minimum guarantees come on top of the considerations of humanity, morality and conscience that already needed to be taken into consideration in interpreting and applying GCIII, as pointed out by *Katayoun Hosseinnejad and Pouria Askary* in *their article* examining the role of “leniency” in disciplinary measures taken against PoWs in light of the updated Commentary.

These are just some of the many challenges related to PoWs that come up in contemporary armed conflicts, among others. For instance the role of sanctions, which, as *Chanel Chauvet* points out, can affect any remittances that PoWs send or receive.

If a State is unable to meet these or any of its other obligations regarding the treatment of prisoners of war, in the words of *Kubo Mačák*, “it should reallocate resources without delay so as to meet its obligations. If that cannot be done, *the new ICRC Commentary highlights* a spectrum of alternative ‘appropriate measures’ that the Detaining Power may take, including: requesting or accepting assistance from other States; requesting or accepting assistance from an impartial humanitarian organization like the ICRC; or transferring the prisoners to another Power, subject to *Article 12*. If none of these measures are available and if there is no other option for the Detaining Power to cease the continuing breach of its primary obligations under the Convention, then, ultimately, it is obliged to release and repatriate the POWs in question.”

Modernizing the GCIII Commentary: Updating outdated understandings of ‘honor’ and women as ‘the weaker sex’

Durham, Droege, Cameron and Murphy write, “Gender shapes an individual’s experience of armed conflict in complex ways, but trends can be predictable. In particular, women and girls contend with structural gender inequality, including in conflict contexts.” These structural inequalities can be exacerbated in detention, and it is therefore essential to integrate a gender perspective into the way GCIII – and IHL more generally – is interpreted and applied.

As *Catherine O’Rourke* points out, “An area of marked development in international law since the publication of the 1960 Commentaries on the Third Geneva Convention on Prisoners of War (GCIII) is the protection of the rights of women.” In *her blog post* she explores developments in the updated Commentary, noting that “the updated Commentaries evince an important shift in underpinning gender assumptions, in particular concerning the assumption of female non-combatant status implicit and explicit through much of Geneva law, the 1960 Commentary, and indeed the ICRC’s 2001 Women Facing War report.” Other developments she discusses are shifting gender norms away from associating women with modesty and weakness, clearer acknowledgement of the risk of sexual violence in detention by all persons, and the involvement of women in decision making. This is in line with the ICRC’s renewed focus on understanding the *gendered impacts* of armed conflict, highlighted in the recent report on *Gendered impacts of armed conflicts and implications for the application of IHL*.

“While a woman’s experience in a prisoners of war (POW) camp may not differ drastically from men in all cases, the Third Geneva Convention (GCIII) operates to ensure equal treatment in a number of ways where experiences do diverge” according to *Heleen Hiemstra and Vanessa Murphy*. They contrast the 1960 Commentary’s approach with the updated Commentary, which “makes clear that in light of a deeper understanding that women, men, girls and boys may have specific needs, capacities and perspectives linked to the different ways armed conflict and detention may affect them, the specific mention of women in *Article 14(2)* and other places in GCIII is not to be understood as implying that women have less resilience, agency or capacity”. More generally, to operationalize the obligation of equal treatment laid down in *Article 16*, a number of general provisions of GCIII may have gender-distinct applications, depending on the context. This represents significant progress since the 1960 Commentary’s outdated reference to women as “*the weaker sex*”.

Similarly, concepts like “honor” raise the specter of outdated and often gendered ideas. As *Jemma Arman* writes, “a modern interpretation of the term ‘honour’ needs to be stripped back to its core – that to respect a person’s honour is to respect their self-worth, and also the value of that person in the eyes of others.” She goes on to explain that the updated Commentary unpacks the term “honor”, approaching it in a way “that is context specific and alive to the range of factors that give honour meaning, including the cultural, social, or religious background of a person, as well as their gender and age.”

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The updated Commentary on the Third Geneva Convention is the *latest in a long line of IHL Commentaries produced by the ICRC*. The ICRC is currently working on the updated Commentary to the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*.

See also

- Yvette Issar, *On trial: the Third Geneva Convention and judicial guarantees for prisoners of war*, June 23, 2022
- Mikhail Orkin, *In Bruges: the enduring relevance of IHL and the updated Commentaries*, February 23, 2022
- Cordula Droege, *GCIII Commentary: ten essential protections for prisoners of war*, July 23, 2020

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