

United States, Screening of Detainees in Vietnam

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, Document No. 155, 1979, pp. 748-751]

UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM.

DIRECTIVES NO. 381-46, MILITARY INTELLIGENCE:

COMBINED SCREENING OF DETAINEES

(27 December 1967)

SOURCES

National Archives of the United States

62 AJIL 766 (Annex only)

12 Santa Clara Law. 236 (1972) (Annex only)

12 Wm. & Mary L. Rev. 798 (1971) (Annex only)

[...]

1. PURPOSE This directive provides policy guidance for the combined screening of detainees, and for the activation, as required, of Combined Tactical Screening Centers (CTSC).

2. GENERAL

a. The forces that capture or detain suspect personnel are responsible for the prompt screening and classification of detainees.

b. Criteria for determination of status and classification of detainees is contained in paragraphs 3 and 4 of Annex A.

c. Disposition of detained personnel who have been classified will be made in accordance with paragraph 5 of Annex A.

[...]

4. DISCUSSION [...] All detainees must be classified into one of the following categories:

a. Prisoners of War.

b. Non-Prisoners of War.

(1) Civil Defendants.

(2) Returnees.

(3) Innocent Civilians.

5. CONCEPT

[...]

b. Combined screening of detainees will be conducted at the lowest echelon of command practical; normally at the brigade or division Prisoner of War (PW) collecting points. Screening centers should be located near sector/sub-sector headquarters for ease of access to both military and civilian files.

c. The mission of the CTSC is to optimize the screening and classification of a large number of detained personnel to permit effective exploitation of knowledgeable sources for immediate tactical information and to expedite the proper disposition of PW's and Non-Prisoners of War.

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8. SCREENING PROCEDURES

a. The detaining unit will insure that the proper documentation is initiated and maintained on every individual detained. It is imperative that data reflect circumstances of capture and whether documents [or] weapons were found on the detainee.

b. Maximum use must be made of interrogators and interpreters to conduct initial screening and segregation at the lowest possible level. Participation in the initial screening by all agencies represented in CTSC is encouraged. However, the sole responsibility for determining the status of persons detained by US forces

rests with the representatives of the United States Armed Forces.

- c. Detainees will be classified in accordance with the criteria established in Annex A. [...]
- d. To preclude rejection by the PW camp commanders of PW's of questionable status, evidence gathered to substantiate the determination that the detainee is entitled to PW status must be forwarded with the prisoner. Improperly documented PW's will not be evacuated to PW camps.

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ANNEX A

CRITERIA FOR CLASSIFICATION AND DISPOSITION OF DETAINEES

1. PURPOSE To establish criteria for the classification of detainees which will facilitate rapid, precise screening, and proper disposition of detainees.

2. DEFINITIONS

- a. Detainees. Persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provision of the Geneva Conventions.
- b. Classification. The systematic assignment of a detainee in either PW or Non-Prisoner of War category.
- c. Prisoners of War. All detainees who qualify in accordance with paragraph 4a, below.
- d. Non-Prisoners of War. All detainees who qualify in accordance with paragraph 4b, below.

3. CATEGORIES OF FORCES

- a. Viet Cong (VC) Main Force (MF). [...]
- b. Viet Cong (VC) Local Force (LF). [...]
- c. North Vietnamese Army (NVA) Unit. [...]
- d. Irregulars. Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.

(1) Guerrillas. Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.

(2) Self-Defense Force. A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These forces do not leave their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.

(3) Secret Self-Defense Force. A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

4. CLASSIFICATION OF DETAINEES

a) Detainees will be classified PW's when determined to be qualified under one of the following categories:

(1) A member of one of the units listed in paragraph 3a, b, or c, above.

(2) A member of one of the units listed in paragraph 3d, above, who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.

(3) A member of one of the units listed in paragraph 3d, above, who admits or for whom there is a proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.

b) Detainees will be classified as Non-Prisoners of War when determined to be one of the following categories:

(1) Civil Defendants

(a) A detainee who is not entitled to PW status but is subject to trial by GVN for offenses against GVN law.

(b) A detainee who is a member of one of the units listed in paragraph 3d, above, and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or belligerent act under arms.

(c) A detainee who is suspected of being a spy, saboteur, or terrorist.

(2) Returnees (Hoi Chanh). All persons regardless of past membership in any of the units listed in paragraph 3, above, who voluntarily submit to GVN control.

(3) Innocent Civilians. Persons not members of any units listed in paragraph 3, above, and not suspected of being civilian defendants.

5. DISPOSITION OF CLASSIFIED DETAINEES

a. Detainees who have been classified will be processed as follows:

(1) US captured PW's and those PW's turned over to the US by FWMAF will be detained in US Military channels until transferred to the ARVN PW Camp.

(2) Non-Prisoners of War who are suspected as civilian defendants will be released to the appropriate GVN civil authorities.

(3) Non-Prisoners of War who qualify as returnees will be transferred to the appropriate Chieu Hoi Center.

(4) Non-Prisoners of War determined to be innocent civilians will be released and returned to the place of capture.

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Discussion

1. a. Are the criteria stipulated in this directive for determining prisoner-of-war status consistent with Convention III? Who qualifies for prisoner-of-war treatment under IHL? For which category of detainees does the directive go beyond what Convention III stipulates? (HR, Art. 1; GC I, Art. 28(2); GC III, Art. 4; P I, Art. 44(5))
b. Are the persons who are classified as non-prisoners of war protected by Convention IV? (GC IV, Arts 4 and 5)
c. Are the dispositions of the various classified detainees in section 5 of the above document consistent with IHL? May some or all of those detainees be handed over to the government of South Vietnam? (GC III, Art. 12; GC IV, Arts 4, 5 and 45)
2. a. Why does Art. 5(2) of Convention III exist? Why must a "competent tribunal" decide on a detained person's status? What constitutes a "competent" tribunal? Does a military tribunal qualify?
b. Is the status of persons to whom the directive denies prisoner-of-war status to be determined by a competent tribunal under Art. 5(2) of Convention III?
3. Is the implementation of this directive consistent with Art. 5(2) of Convention III? May States Parties create such directives? Must they? Does a screening centre such as the Combined Tactical Screening Centers meet the requirements of Art. 5(2) of Convention III? Does failing to provide a tribunal hearing for the determination of a person's status constitute a violation of the Conventions? Is it considered a "grave breach"? (GC I-IV, Arts 49/50/130/146 respectively; GC III, Art. 5(2))
4. While an individual's status is being determined, to what kind of treatment is that person entitled? Only

humane treatment as stated above in Annex A, para. 2(a)? Or prisoner-of-war treatment until the status is determined or even proven by a competent tribunal, even though the person may not qualify as such? What does Art. 5(2) of Convention III mean by “the protection of the present Convention”?

5. If Protocol I was applicable, which elements of the directive would comply with or violate the Protocol? Does this directive contribute to making certain aspects of Protocol I customary international law? (GC III, Arts 4 and 5; P I, Arts 43-45)

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