

*How should combatants be treated once they find themselves in the hands of the enemy? How do their “combatancy privilege and immunity” materialize, when in captivity? What can justify their internment as prisoners of war (POWs) and how long can this captivity last? Can they be tried for taking part in hostilities? What is the role of the ICRC in protecting and assisting POWs? What are National Information Bureaus (NIBs) and how do they relate to POWs? All these questions touch upon one of the fundamental protection regimes in international humanitarian law (IHL): the protection of POWs, which this highlight seeks to explore, drawing on the Combatants and POWs previous highlight.*

*VERSION FRANCAISE (PDF) => CLIQUEZ SUR LE LIEN SUIVANT: Coup de projecteur: "Entre les mains de l'ennemi! Le traitement des prisonniers de guerre et le rôle du CICR" disponible sur le site du blogue Quid Justitiae de la Clinique de droit pénal et humanitaire (traduction de l'Université Laval).*

### **Combatant privilege and immunity**

In international armed conflicts (IAC), members of the armed forces of a Party other than medical personnel and chaplains are considered as combatants (Article 43(2), AP I). Accordingly, the most important feature of combatant status is the “privilege of combatancy”, which affords them “the right to participate directly in hostilities”. Such “right” obviously does not mean that their enemies are under a corollary obligation not to react to such participation in hostilities and agree to be fought without reacting. It only means that, once combatants fall into hands of the enemy, they must be considered as POWs (Article 4(A)(1)(2)(3), GC III) and enjoy immunity from prosecution for acts carried out in conformity with IHL (“combatant immunity”, see: “immunities”). It has to be stressed that even combatants who have violated IHL are entitled to POW status when falling into the hands of the enemy, provided they meet the requirements under Article 4, GC III or under Article 44 (3), AP I (when the latter is applicable). However, they do not enjoy immunity from prosecution for violations of IHL that are punishable under the national law of the capturing State (Common Art. 1, GC I-IV in view of the Updated Commentary, paras 183 and 214; Article 49(1)(2), GC I; Article 50(1)(2), GC II; Article 129(1)(2) GC III; Article 146(1)(2), GC IV; Article 85(1), AP I) or as a matter of international criminal law.

Although POWs may not be prosecuted for their participation in hostilities, they may be interned until the end of active hostilities without almost any judicial or administrative procedure (Article 21, GC III). The purpose of this internment is not punitive, but only aims to prevent them from continued direct participation in hostilities. It also seeks to protect them, *inter alia*, from the dangers resulting from ongoing hostilities.

### **Treatment of POWs**

Combatants are protected as POWs as soon as they are in the power of the enemy and until they are

released or repatriated (Article 5, GC III). The crux of the protection regime of the Third Geneva Convention lies in the obligation to always treat POWs humanely (Article 13, GC III). Furthermore, not only must POWs be protected against acts of violence, intimidation, insults and public curiosity, but they are also entitled to respect for their person and honour in all circumstances (Article 14, GC III). During their internment, POWs benefit from a detailed protection regime to ensure they receive, *inter alia*, suitable accommodation, food, clothing, hygiene and medical treatment.

### **Release and repatriation of POWs**

Once active hostilities have ceased, POWs must be released and repatriated without delay (Article 118, GC III). This obligation follows on logically from the primary justification for interning POWs, which is to prevent captured combatants from taking up arms again against the Detaining Power while hostilities are ongoing. Once these have ended, this justification no longer exists and captivity must end as soon as possible. The determination as to when active hostilities have ceased with a sufficient degree of stability and permanence to activate the obligation to release and repatriate has to be made in the prevailing circumstances of each case by looking at the facts on the ground. In the ICRC's view active hostilities may be considered to have ceased when there is no reasonable expectation of their resumption (Updated Commentary to Article 118, GC III, para. 4455). It must be stressed that, even after the cessation of active hostilities, POWs remain protected under the Third Geneva Convention until they have been finally released and repatriated (Article 5, GC III).

### **National Information Bureaus**

When an IAC breaks out, but ideally already in peacetime, each party to the conflict must establish a NIB in order to account for enemies that fall into their hands, including POWs and fallen soldiers, and transmit information to the country concerned and to families via the ICRC's Central Tracing Agency (Article 122, GC III). Such NIBs thus play a key role for families in securing news about the fate and safe treatment of POWs.

### **The ICRC's right to visit POWs**

In order for POWs to be protected effectively, their treatment must be open to supervision. This is why the Third Geneva Convention grants representatives of Protecting Powers and delegates of the ICRC access to all places where POWs may be held. Representatives and/or delegates must be allowed to interview the prisoners and their representatives without witnesses, if necessary, through an interpreter, and to freely select the places they wish to visit. The duration and frequency of these visits may not be restricted, and visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure (Article 126, GC III). Again, such practical arrangements, while not an end in themselves, are key to ensure that treatment of POWs complies with required standards under IHL.

### **The ICRC's right of initiative and its role as a "neutral intermediary"**

Besides the obligation for Detaining Powers to let its delegates visit POWs under the Third Geneva Convention, the ICRC may also undertake other humanitarian activities for the protection of POWs and for their relief with the consent of the Parties to the conflict concerned (Article 9, GC III; "right of initiative"). At the latter's request, the ICRC, as a neutral intermediary, can facilitate the release or the exchange of POWs or detainees by ensuring their safe transfer.

Based on over a century of humanitarian action for POWs in warfare, this neutral intermediary role ought to be considered more as a condition for having preserved human dignity and hope for thousands of individuals, rather than as a particular prerogative of the ICRC.

What remains forever at stake in the treatment of POWs and access to them by the ICRC is to preserve humanity in warfare by putting limits to hatred, dehumanization and violence. By giving peace and rebuilding a better chance, this is the legacy of humanity.

### **The law**

More detailed developments and explanations about the above can be found in the following chapters of the “The Law” section:

- “Combatants and POWs”, in particular sub-section III: “Treatment of POWs”.
- “ICRC”, in particular sub-section II: “ICRC activities” and sub-section III: “Legal basis for ICRC action”.
- “Implementation mechanisms”, in particular sub-section IV: “Scrutiny by Protecting Powers and the ICRC”.

### **The practice**

The following selection of case studies from “The Practice” section further illustrates:

#### **Who is a combatant?**

- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 52-56] and [Para. 95]
- ICTY, The Prosecutor v. Prlić et al.
- Malaysia, Osman v. Prosecutor
- Nigeria, Pius Nwaoga v. The State

#### **Combatant immunity**

- Eastern Ukraine: Disputed POW Status
- US, Combatant Immunity and Recognition of belligerency

#### **Treatment of POWs**

- Afghanistan/Canada, Agreements on the Transfer of Detainees
- Bangladesh/India/Pakistan, 1974 Agreement
- ECCC, Detention Sites in Cambodia
- Eritrea/Ethiopia, Partial Award on POWs
- ICRC, Iran/Iraq Memoranda
- United States Military Tribunal at Nuremberg, The Ministries Case
- United States, Former Prisoner of War on a Mission to Hanoi

- United States, Public Curiosity
- United States, United States v. Noriega

### **The ICRC's right to visit POWs and right of initiative**

- ICRC, Protection Policy (5.2. Activities to benefit persons deprived of their liberty)
- ICRC, Visits to Detainees: Interviews without Witnesses
- Afghanistan, Soviet Prisoners Transferred to Switzerland
- Eritrea/Ethiopia, Partial Award on POWs (Part A., paras 28, 29, 45, 55-62, 81 and 84; Part B., paras 100, 150-163)
- Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict
- ICRC, Iran/Iraq Memoranda

### **IHL in Action**

- Yemen, Exchange Agreement and Release of Detainees
- Georgia/Russia, Release of Prisoners of War
- Democratic Republic of the Congo, Release of Prisoners of War

### **A to Z**

Relevant definitions can be found in the "A to Z" section:

Access, Accommodation, Adverse distinction, Armed forces, Central Tracing Agency, Classification of persons, Clothing, Collective punishments, Combatants, Conditions of detention, Consent, Deserter, Detainees, Detaining power, Direct participation in hostilities, Disciplinary sanctions, Escape, Food, Humane treatment, Hygiene, Immunities, Internment, International Committee of the Red Cross, Judicial guarantees, Labour, Levée en masse, Loss of status, Medical treatment, National information bureau, Presumptions, Prisoners of war, Protected persons, Public curiosity, Release, Repatriation, Right of initiative, Spies, Status, Transfer, Tribunal, Uniform.

### **Teaching resources**

- Combatants and POWs (thematic highlight)
- Two, four and eight lesson courses (see "Implementation of IHL" lesson).
- Eight lesson course (see lesson 1).
- Twenty lesson course (see lessons 2 and 14).
- Year-long interdisciplinary seminar (see meeting no. 5)
- A study of one armed conflict (see meeting no. 3)
- Suggested programs for seminars:
  - "Seminar centered on penal aspects" (see meeting no. 2 and suggested research topic 27).
  - "Seminar centered on the substantive rules of international humanitarian law" (see meeting no. 5 and 12 and suggested research topics 19 and 22).

## To go further

- The ICRC's updated Commentary on the Third Geneva Convention, particularly:
  - Article 9 on the ICRC's right of initiative
  - Article 13 on humane treatment of POWs
  - Article 14 on respect for the person and honour of POWs
  - Article 16 on equality of treatment and non-adverse distinction
  - Article 21 on the internment of POWs
  - Articles 29 on hygiene and 30 on medical attention
  - Articles 71 on correspondence and 72 on relief shipments
  - Article 123 on the role of the Central Tracing Agency
  - Article 126 on the ICRC's right to visit POWs
- Movie about activities of the ICRC for persons detained because of armed conflicts or situations of violence: ICRC, "In Detention – The humane way", 2015 (18 min).
- The ICRC's Humanitarian Law & Policy blog series dedicated to the updated Commentary on the Third Geneva Convention, in collaboration with *EJIL! Talk and Just Security*, particularly:
  - POLICINSKI Ellen, "Prisoners of war in contemporary armed conflict: Interpreting the Third Geneva Convention 70+ years after its negotiation", *Humanitarian Law and Policy*, 11 August 2022.
  - Mahnad Ramin, "Shielding prisoners of war from public curiosity", *Humanitarian Law and Policy*, 28 June 2022.
  - ARMAN Jemma, "GC III Commentary: Protecting the honour of prisoners of war", *Humanitarian Law and Policy*, 3 September 2020.
- COTTER Cédric, "The ICRC as a neutral intermediary: Historical and contemporary perspectives", *CROSS-Files*, 2022.
- ARMAN Jemma, HENCKAERTS Jean-Marie, HIEMSTRA Heleen and KROTIUK Kvitoslava, "The updated ICRC Commentary on the Third Geneva Convention: A new tool to protect prisoners of war in the twenty-first century", *International Review of the Red Cross*, Vol. 102, No. 913, 2021, pp. 389-416.
- CRAWFORD Emily, "Combatant status and prisoner of war protections", in CRAWFORD Emily, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, OUP, 2010, pp. 48-77.