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CHAPTER 11

TREATMENT OF DETAINED PERSONS

11.1 INTRODUCTION

The law of armed conflict requires humane treatment for all persons who are detained. Treatment detained persons receive above and beyond this minimum standard is dependent on their status at the time they are detained. This chapter examines standards of treatment required for combatants, unprivileged belligerents, noncombatants, and civilians (see 5.4 for definitions).

Commentary

The Hague Conventions of 1907 were an early effort to codify the treatment of captured persons. The 1929 Geneva Convention relative to the Treatment of Prisoners of War further developed POW protection. The issue was comprehensively addressed in the 1949 GC III and in AP I. Since the United States is a party to GC III, it is binding treaty law. The United States is not a party to AP I.

11.2 HUMANE TREATMENT

Pursuant to international law and U.S. policy, all persons under the control of DOD personnel (military, civilian, or contractor employee) during any military operation must be treated humanely and protected against any cruel, inhuman, or degrading treatment until their final release, transfer, or repatriation. At a minimum, humane treatment includes compliance with Common Article 3 of the Geneva Conventions of 1949 in both international and non-international armed conflict. During international armed conflict, Additional Protocol I, Article 75 to the Geneva Conventions, provides additional fundamental guarantees. Although not a party to Additional Protocol I, the United States applies the fundamental guarantees reflected in Article 75 in all international armed conflicts.

Humane treatment is, at a minimum, protection from unlawful threats or acts of violence and deprivation of basic human necessities. It will be afforded to all detained persons without adverse distinction based on race, color, religion or faith, sex, birth or wealth, national or social origin, political

opinion, or any other similar criteria. The following acts are prohibited with respect to all detainees in DOD custody and control:

1. Violence, torture, and cruel treatment

2. Humiliating or degrading treatment

3. Public curiosity and insults

4. Rape, enforced prostitution, and other indecent assault

5. Biological or medical experiments

6. Threats to commit any of the acts above.

Any violation of these rules is strictly prohibited and is not justified by the stress of combat or provocation.

All detainees shall:

1. Receive appropriate medical attention and treatment

2. Receive sufficient food, drinking water, shelter, and clothing

3. Be allowed the free exercise of religion, consistent with the requirements for safety and security

4. Be removed as soon as practicable from the point of capture and transported to detainee collection points, holding facilities, or other internment facilities operated by DOD components

5. Have their person registered, their property accounted for, and records maintained according to applicable law, policy, and regulation, including notice of their detention to the ICRC, and timely access for an ICRC representative to visit them

6. Be respected as human beings.

Detainees may have appropriate contact with the outside world subject to security measures, practical considerations, and other military necessities, including through correspondence, videos, and family contact.

Beyond the baseline humane treatment standard set forth in this section, some persons detained may qualify for POW status under the GPW. If doubt exists as to how to treat a particular detainee, U.S. military personnel should seek guidance through their chain of command. Until this doubt has been resolved, detainees must receive the protections of a POW under the GPW.

The commander should have and be familiar with the following references in making any determinations or seeking guidance relative to detainees. These are in addition to any mission-specific or theater-specific operational orders.

1. DODD 2310.1E

2. DODD 3115.09, Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning

3. JP 3-63, Detainee Operations

4. AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

5. FM 3-63, Detainee Operations

6. FM 2-22.3, Human Intelligence Collector Operations.

Commentary

Common Article 3 to the 1949 Geneva Conventions provides, in relevant part:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and

> those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

This provision applies in both international and non-international armed conflicts. DoD policy has explicitly incorporated the standards in Common Article 3 as minimum standards. For example, DoDD 2310.01E, DoD Detainee Program, provides: "Until a detainee's release, repatriation, or transfer from DoD custody or control, all persons subject to this issuance will, without regard to a detainee's legal status, at a minimum apply . . . [t]he standards established in Common Article 3 to the Geneva Conventions of 1949."[1] DoDD 2310.01E also requires that all detainees "be treated humanely."[2]

Moreover, the United States is of the view that Article 75 of AP I sets forth minimum standards of treatment that accurately reflect the customary law binding upon the United States.[3]

Detainees shall be treated humanely without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, national or social origin, political or other opinion, or any other similar criteria.[4]

All detainees must be treated humanely and protected against cruel, inhuman, or degrading treatment. This requirement has been reflected in international law, domestic law,[5] national policy,[6] and DoD policies (see the sources cited in the text). Failure to treat detainees humanely may violate international and domestic criminal law.

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1. DoDD 2310.01E, DoD Detainee Program, ¶ 3.3 (Mar. 15, 2022).
2. *Id.* ¶ 1.2.b.
3. *See* Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011); DOD LAW OF WAR MANUAL, § 8.1.4.2.
4. GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3; DOD LAW OF WAR MANUAL, § 8.2.6. *See also* AP I, art. 75(1); AP II, art. 2(1).
5. 42 U.S.C. § 2000dd.
6. *See, e.g.*, Exec. Order No. 13491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

Detainees must be protected against violence to life and person, particularly murder of all kinds, mutilation, cruel treatment, torture, and any form of corporal punishment.[7] They must also be protected against outrages upon personal dignity, particularly humiliating and degrading treatment.[8] This includes protection against rape, forced prostitution, and other indecent assault. Indecent assault is generally referred to today as sexual assault. Detainees are also protected against insults and public curiosity. For example, displaying detainees publicly to expose them to ridicule and humiliation is prohibited: "All detainees will be respected as human beings . . . . They will be protected against . . . public curiosity . . . ."[9] Furthermore, "humane treatment implies that detainees will be protected from insults and public curiosity."[10] To protect detainees against public curiosity, amongst other reasons, DoD policy has generally prohibited the taking of photographs of detainees except for authorized purposes.[11] Medical and biological experiments involving detainees are likewise forbidden. The principle requiring humane treatment of detainees "also incorporates the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment, the prohibition against corporal and collective punishment and medical experiments; and includes threats to commit the foregoing acts."[12]

Threats to commit the unlawful acts described above (i.e., violence against detainees, humiliating or degrading treatment, or biological or medical experiments) are also prohibited.[13] This prohibition may be understood to arise separately (i.e., as a distinct prohibition against certain threats), or it may be understood to result when such threats

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7. GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3.

8. DOD LAW OF WAR MANUAL, § 8.2.2.

9. DoDD 2310.01E, DoD Detainee Program, ¶ 3.4.b (Mar. 15, 2022). *See also* DoDD 2310.01E, The Department of Defense Detainee Program, ¶ E4.1.1.3 (Sept. 5, 2006).

10. Copenhagen Process on the Handling of Detainees in International Military Operations, The Copenhagen Process: Principles and Guidelines annex (Chairman's Commentary) ¶ 2.3 (Oct. 19, 2012).

11. *See, e.g.*, Army Regulation 190-8/Office of the Chief of Naval Operations Instruction 3461.6/Air Force Joint Instruction 31-304/Marine Corps Order 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 1-5.d (Oct. 1, 1997).

12. Copenhagen Process, *supra* note 10, annex ¶ 2.1.

13. DOD LAW OF WAR MANUAL, § 8.2.4.

> constitute torture or other abuse. For example, 18 U.S.C. § 2340 defines "torture" to include "severe mental pain or suffering" caused by or resulting from:
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .
>
> Wounded and sick detainees shall be cared for.[14] They should receive the medical care and attention required by their condition.[15] Medical care should, wherever possible, be undertaken with the consent of the wounded or sick detainee.[16] However, medical actions to preserve the detainee's health may be justified even if the detainee refuses to consent. For example, it is not prohibited to administer vaccinations to detainees to maintain their health and prevent epidemics. Similarly, it is not prohibited to order detainees to be fed if they undertake a hunger strike.[17]
>
> Detainees shall be provided with adequate food, drinking water, and clothing.[18] Daily food rations for detainees shall be sufficient in quantity, quality, and variety to keep detainees in good health or, in

14. *Id.* § 8.8.
15. *See, e.g.*, Copenhagen Process, *supra* note 10, annex ¶ 9.
16. DODI 2310.08E, Medical Program Support for Detainee Operations, ¶ 4.7 (June 6, 2006).
17. *Id.* ¶ 4.7.1.
18. DOD LAW OF WAR MANUAL, § 8.5.

> any event, no worse than that afforded the local civilian population. DoD practice has been to account for the internees' customary diet. For example, the detainee's cultural and religious requirements have been considered in determining and ensuring the appropriate diet. Sufficient drinking water shall be supplied to detainees. As needed, detainees shall receive adequate clothing, underwear, and footwear suitable for the climate.
>
> Detainees shall be granted free exercise of religion, consistent with the requirements of detention.[19] Their religious practices shall be respected; they shall be allowed to practice their religion, and, if requested and appropriate, they may receive spiritual assistance from persons, such as chaplains, performing religious functions. DoD practice has been for detainees to be provided religious materials of their faith (e.g., copies of religious texts), as well as time and other accommodations for religious exercise.[20]
>
> A proper accounting of detainees is an important part of a State's implementation of the requirements of humane treatment.[21] The detaining authority should register detainees within a reasonable time, taking into account other essential tasks and resource limitations that may affect the detaining authority's ability to register detainees.[22] DoDD 2310.01E provides:
>
> > 3.6 Detainees will be registered, and property in their possession will be inventoried. Records of their detention and such property will be maintained according to applicable law, regulation, policy, and other issuances.
> >
> > . . . .
> >
> > b. DoD Components will maintain full accountability for all detainees under DoD control. Detainees will be assigned an internment serial number within 14 days after

19. *Id.* § 8.11; DoDD 2310.01E, DoD Detainee Program, ¶ 3.4.a (Mar. 15, 2022).

20. *See, e.g.*, Admiral Patrick Walsh et al., Department of Defense, *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement* 25 (2009).

21. DOD LAW OF WAR MANUAL, § 8.5.

22. *See* Copenhagen Process, *supra* note 10.

> their capture by, or transfer to, the custody or control of DoD personnel, barring exceptional circumstances.[23]

Registration of detainees assists in ensuring that all detainees can be accounted for and that allegations of illegal detention can be addressed. DoD practice has been to register detainees with the National Detainee Reporting Center, which is also used to account for the detention of POWs under GC III and protected persons under GC IV. The practice also has been for property in the possession of detainees to be inventoried and for records of such property to be maintained to ensure accountability of it (e.g., to prevent theft) and to ensure its lawful disposition.

Subject to security measures, practical considerations, and other military necessities, detainees should be afforded appropriate contact with the outside world, including (1) receipt of individual or collective relief; (2) correspondence; (3) communication with family; and (4) ICRC access.[24] They shall be allowed to receive individual or collective relief and send and receive letters and cards, the number of which may be limited by a competent authority if it deems this necessary. DoD practice has been, where practicable, to grant detainees the means to communicate with family members (e.g., exchange of letters, phone calls, and video teleconferences with family, family visits).[25]

An impartial humanitarian body, such as the ICRC, may offer its services to the parties to the conflict.[26] All departments and agencies of the federal government shall provide the ICRC with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility

23. DoDD 2310.01E, DoD Detainee Program, ¶ 3.6 (Mar. 15, 2022). *See also* DoDD 2310.01E, The Department of Defense Detainee Program, ¶ 4.4.1 (Sept. 5, 2006).

24. DOD LAW OF WAR MANUAL, § 8.10.

25. DoDD 2310.01E, DoD Detainee Program, ¶ 3.4.a(2) (Mar. 15, 2022).

26. GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3; DOD LAW OF WAR MANUAL, § 8.10.4.

owned, operated, or controlled by a department or agency of the U.S. government, consistent with DoD regulations and policies.[27]

Some detained individuals may qualify for POW status. Should any doubt arise regarding status, they shall enjoy the protection of GC III until a competent tribunal has determined their status. See § 11.3 below.

11.3 COMBATANTS

Generally, combatants are members of the armed forces of a State, with the exception of medical personnel and clergy. Militias and irregular forces can qualify as combatants by meeting certain requirements. See 5.4 for more information.

Commentary

See generally Chapter 9 of the DoD Law of War Manual and Chapter 3 of FM 6-27/MCTP 11-10C.

Pursuant to Article 4A of GC III, persons entitled to POW status include members of the armed forces of a State that is a party to the conflict, including deserters; military medical and religious personnel not entitled to retained personnel status (e.g., those not exclusively engaged in medical duties at the time of their capture); members of certain militia and volunteer corps; members of regular armed forces who profess allegiance to a government or authority not recognized by the detaining power; persons authorized to accompany the armed forces; members of crews of merchant marine vessels or civil aircraft; and participants in a *levée en masse*.[28]

Certain categories of persons are not entitled to POW status. They include spies, saboteurs, and other persons engaging in similar acts behind enemy lines, as well as nationals of the detaining power or its co-belligerents, such as a defector who subsequently is captured by the force from which he or she defected.

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27. Exec. Order No. 13491, Ensuring Lawful Interrogations, § 4(b), 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

28. *See also* DOD LAW OF WAR MANUAL, § 9.3.2.

> The persons who are not necessarily excluded from POW status simply because they belong to one of these categories include mercenaries; persons who are alleged to have committed war crimes; nationals of neutral or non-belligerent States serving in the armed forces of an enemy State; and persons whose capture has not been acknowledged by the power to which they belong.
>
> Although not entitled to POW status, some detainees are treated as POWs under GC III. They include persons belonging, or having belonged, to the armed forces of an occupied State if it is deemed necessary to intern them, and persons belonging to one of the categories enumerated in Article 4 of GC III who have been received by neutral or non-belligerent powers on their territory and whom those powers are required to intern under international law.

11.3.1 Standard of Treatment

Combatants (see 5.4.1) who are captured or detained during an international armed conflict are entitled to POW status. Which detainees are entitled to POW status is determined by the capturing State applying the rules provided in the GPW. Because the GPW only applies during international armed conflict, there is no legal entitlement to POW status in a noninternational armed conflict. Persons in those conflicts who meet the definition of combatants (e.g., members of the armed forces) receive some of the same protections.

If there is any doubt as to whether a person is entitled to POW status, that individual must be accorded the protections afforded POWs until a competent tribunal convened by the detaining power determines the status to which that individual is entitled. This is known as an Article 5 tribunal based on GPW, Article 5. As a matter of policy, a State can grant POW protections to individuals who do not qualify as a matter of law. Detainees who do not qualify for POW status must still be afforded the protections of CA3 of the 1949 Geneva Conventions.

Prisoner of war status carries with it extensive rights and privileges. The GPW details the rights and obligations of both prisoners and detaining powers and should be consulted if a commander is charged with the care of POWs. When POWs are given medical treatment, differences in treatment

among detainees may only be based on medical grounds. When treated together with members of U.S. armed forces, differences in treatment may be based only on medical grounds. Prisoners of war may be questioned upon capture but are required to disclose only their name, rank, date of birth, and military serial number. Humane treatment must be afforded at all times and torture, threats, or other coercive acts are prohibited.

Commentary

There is no POW status during a non-international armed conflict. However, during an international armed conflict, GC III applies to persons referred to in Article 4 from the time they fall into the enemy's power until their final release and repatriation.[29] Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of GC III until a competent tribunal has determined their status.[30]

As noted in the commentary to § 11.2 above, detainees who do not qualify for POW status are entitled to at least the treatment set forth in Common Article 3 to the 1949 Geneva Conventions and Article 75 of AP I.

POWs must at all times be humanely treated.[31] They are entitled to respect for their persons and their honor[32] and must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.[33] Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a POW in its custody is prohibited; such conduct is a serious breach of GC III.[34]

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29. GC III, art. 5.

30. *Id. See also* DOD LAW OF WAR MANUAL, § 4.27.2 (POW Protections for Certain Persons Until Status Has Been Determined), § 4.27.3 (Competent Tribunal to Assess Entitlement to POW Status or Treatment).

31. GC III, art. 13.

32. *Id.* art. 14.

33. *Id.* art. 13.

34. *Id.*

> For example, the murder of POWs is forbidden.[35] A commander may not put enemy prisoners to death even if their presence slows the force's movements or diminishes the force's combat capability by necessitating a large guard, by consuming supplies, or because it appears certain that they will regain their liberty through the impending success of enemy forces. It is likewise unlawful for a commander to kill enemy prisoners in the force's custody on the grounds of self-preservation, even in the case of airborne or commando operations. However, the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of POWs. Older sources that permitted commanders in dire circumstances to deny quarter, such as Article 60 of the Lieber Code, do not reflect the current law.[36]
>
> POWs must be protected against violence by the civilian population.[37] They should be protected not only against unlawful acts by the agents of the detaining power, but also against violence from other POWs.[38]
>
> In addition to the prohibition against violence, POWs are entitled to respect for their persons and their honor in all circumstances. This is a further basis for the unlawfulness of rape or other indecent assault of POWs.[39]
>
> POWs must also be protected against insults and public curiosity.[40] For example, organizing a parade of POWs through the civilian population, thereby exposing them to assault, ridicule, and insults, would be prohibited.[41] And, for the same reason, displaying POWs in a hu-

35. Trial of Nisuke Masuda (The Jaluit Atoll Case), 1 LRTWC 71, 72 (1947).
36. DOD LAW OF WAR MANUAL, § 9.5.2.1.
37. *See, e.g.*, Trial of Erich Heyer (The Essen Lynch Case), 1 LRTWC 88, 89 (1947).
38. GC III COMMENTARY, at 143.
39. *Id.* art 14; DOD LAW OF WAR MANUAL, §§ 8.2.2.1, 10.5.1.2.
40. GC III, art. 13.
41. *See, e.g.*, Trial of Lieutenant General Kurt Maelzer, 11 LRTWC 53 (1949); United States v. Araki, Majority Judgment, 49,708 (Military Tribunal for the Far East, Nov. 12, 1948), *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 574 (Neil Boister & Robert Cryer eds., 2008).

miliating fashion on television or the internet would also be prohibited. For this reason and others, DoD policy has prohibited taking photographs of detainees except for authorized purposes.[42]

Physical mutilation or medical or scientific experiments not justified by the medical, dental, or hospital treatment of the POW concerned and carried out in their interest is forbidden.[43] This prohibition was established in the 1949 Geneva Conventions to prohibit expressly criminal practices that occurred during the Second World War and to prevent the wounded, sick, or shipwrecked in captivity from being used as "guinea pigs" for medical experiments.[44]

However, the prohibition on subjecting the wounded, sick, or shipwrecked to biological experiments does not prevent doctors from trying new treatments that are justified on medical grounds and that are employed solely for therapeutic purposes. Additionally, POWs may voluntarily consent to give blood for transfusion or skin for grafting for therapeutic purposes; such procedures should take place under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.[45]

Taking into consideration the provisions of GC III relating to rank and sex, and subject to any privileged treatment that may be accorded to them because of their state of health, age, or professional qualifications, all POWs shall be treated alike by the detaining power, without any adverse distinction based on race, nationality, religious belief, or political opinions, or any other distinction founded on similar criteria.[46]

The provision of accountability information is crucial because it allows the detaining power to fulfill its obligations under GC III. For example, the detaining power requires this information to establish

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42. DOD LAW OF WAR MANUAL, § 8.2.2.3.

43. GC III, art. 13.

44. GC II COMMENTARY, at 139. *See, e.g.*, United States v. Karl Brandt (The Medical Case), 2 TWC 171, 175–78 (1949).

45. DOD LAW OF WAR MANUAL, § 9.5.2.4.

46. GC III, art. 16.

lists of POWs for evacuation. In addition, the detaining power must gather further information on POWs to facilitate notification of their families. POWs who, owing to their physical or mental condition, cannot state their identity shall be handed over to the medical service. The identity of such POWs shall be established by all possible means, subject to the prohibition of physical or mental torture, coercion, threats, insults, or exposure to unpleasant or disadvantageous treatment.[47]

11.3.2 Trial and Punishment

Unlike unprivileged belligerents, combatants who are captured must not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict. Prisoners of war prosecuted for war crimes committed prior to capture, or for serious offenses committed after capture, are entitled to be tried by the courts that try the captor's own forces and are to be accorded the same procedural rights. These rights must include the assistance of a fellow prisoner, lawyer counsel, witnesses, and as required, an interpreter.

Although POWs may be subjected to nonjudicial disciplinary punishment for minor offenses committed during captivity, punishments may not exceed 30 days duration. Prisoners of war may not be subjected to collective punishment, nor may reprisal action be taken against them.

Commentary

No POW may be tried or sentenced for an act that is not forbidden by the law of the detaining power or by international law in force at the time that act was committed.[48] A POW can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the detaining power, and if the provisions of Chapter III of GC III have been observed.[49] For example, evidence laws used in the trial of a POW will be the same as those applicable in the trial of a member of the detaining power's military forces.

47. *Id.* art. 17.
48. *Id.* art. 99. *See also* DOD LAW OF WAR MANUAL, § 9.28.
49. GC III, art. 102.

The duration of any single punishment shall in no case exceed thirty days. The maximum of thirty days may not be exceeded, even if the POW is answerable for several acts when punishment is awarded, regardless of whether such acts are related.[50]

Measures of reprisal against POWs are prohibited.[51] In the *Dostler* case, the U.S. Military Commission noted that "under the law as codified by the 1929 Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal."[52]

Collective punishment of POWs is forbidden.[53] This prohibition includes penalties inflicted upon persons or groups of persons for acts that these persons have not committed, including administrative penalties.

11.3.3 Labor

Enlisted POWs may be required to engage in labor having no military character or purpose. Noncommissioned officers may be required to perform only supervisory work. Officers may not be required to work. Any prisoner made to work must have the benefit of working considerations and safeguards similar to the local population.

Commentary

The detaining power may use the labor of POWs who are physically fit, considering their age, sex, rank, and physical aptitude, and with a view, in particular, to maintaining them in a good state of physical and mental health.[54] In determining whether labor should be compelled, as well as the appropriate labor assignment for a POW, the POW's age, gender, rank, and physical aptitude should be considered. "It may be assumed that these criteria are to be considered not

50. *Id.* art. 90.
51. *Id.* art. 13. *See also* DOD LAW OF WAR MANUAL, § 18.18.3.2.
52. Trial of General Anton Dostler, 1 LRTWC 22, 31 (1947).
53. DOD LAW OF WAR MANUAL, §§ 9.26.6, 8.16.2.1.
54. GC III, art. 49.

only in determining whether a prisoner of war should be compelled to work, but also in determining the type of work to which the particular prisoner of war should be assigned."[55]

Noncommissioned officers shall only be required to do supervisory work. Noncommissioned officers not required to do supervisory work may ask for other suitable work, which shall, so far as possible, be found for them. If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may not be compelled to work.[56] Retained personnel and persons treated like retained personnel (e.g., POWs trained as medical personnel who are directed to provide medical care for fellow POWs), however, may not be compelled to carry out any work other than that concerned with their medical or religious duties.[57]

POWs may not be employed on labor that is of an unhealthy or dangerous nature unless they volunteer. For example, removing landmines or similar devices is considered dangerous labor.

Nor may POWs be assigned to labor that would be considered humiliating for a member of the detaining power's forces.[58] Like other enemy nationals, POWs may not be compelled to participate in operations directed against their own country.[59]

POWs may be compelled to do work in the following classes: POW camp administration, installation, and maintenance; agriculture; industries connected with the production or the extraction of raw materials, and manufacturing industries, except metallurgical, machinery, and chemical industries; public works and building operations having no military character or purpose; the transport and handling

55. Howard Levie, *Prisoners of War in International Armed Conflict*, 59 INTERNATIONAL LAW STUDIES 1, 218–19 (1978). *See also* DOD LAW OF WAR MANUAL, § 9.19.

56. GC III, art. 49.

57. DOD LAW OF WAR MANUAL, § 9.19.1.

58. GC III, art. 52.

59. Hague Regulations, art. 23.

of stores not of a military character or purpose; commercial businesses, including arts and crafts; domestic services; and public utilities having no military character or purpose.[60]

11.3.4 Escape

Prisoners of war must not be judicially punished for acts committed in attempting to escape, unless they injure or kill someone in the process. Disciplinary punishment within the limits described in 11.3.2 may be imposed upon them for the escape attempt. Prisoners of war who make good their escape by rejoining friendly forces or leaving enemy-controlled territory must not be subjected to disciplinary punishment if recaptured. They remain subject to punishment for causing death or injury in the course of their escape.

Commentary

On escapes, see DoD Law of War Manual, § 9.25.

POWs who have made good their escape in the sense of Article 91 of GC III, and who are recaptured, shall not be liable to any punishment for their previous escape. In this way, POWs who have escaped successfully are treated similarly to persons who have engaged in espionage and returned safely to friendly lines. But POWs must not kill or wound the enemy by resorting to perfidy.

Under Article 91 of GC III, the escape of a POW shall be deemed to have succeeded when the POW has joined the armed forces of the power on which he or she depends or those of an allied power; left the territory under the control of the detaining power, or of an ally of the detaining power; or joined a ship flying the flag of the power on which they depend, or of an allied power, in the territorial waters of the detaining power, this ship not being under the control of the detaining power.[61] The general principle is that the POW must have gone beyond the reach of the detaining power. Thus, for example, a POW who escapes from the territory of the detaining power

60. GC III, art. 50.
61. *Id.* art. 91.

to the territory of one of the detaining power's allies will not be deemed to have escaped successfully. On the other hand, if the POW reaches neutral territory or the high seas, he or she will have escaped successfully. The situation of POWs who have successfully escaped into neutral territory is addressed under the law of neutrality. See § 7.11 and accompanying commentary.[62]

POWs who do not escape successfully retain their entitlement to POW status upon recapture. In particular, wearing civilian clothes does not deny escaping POWs their status as POWs:

> Additional difficulties have sometimes arisen from the wearing of civilian clothing; during the Second World War, some Detaining Powers stated their intention of considering prisoners of war in civilian clothing as spies and no longer as prisoners of war. This matter is settled by the present provision: a prisoner of war retains that legal status until such time as he has made good his escape.[63]

Several rules limit the punishment of POWs who do not escape successfully. By limiting the punishment for the act of escape, GC III recognizes that POWs may legitimately try to escape from their captors:

> A prisoner of war can legitimately try to escape from his captors. It is even considered by some that prisoners of war have a moral obligation to try to escape, and in most cases such attempts are of course motivated by patriotism. Conversely, in its own interest, the Detaining Power will endeavour to prevent escape whenever possible.[64]

In some cases, POWs may even be under an obligation to escape. For example, U.S. military personnel have a duty to make every effort to escape captivity.[65]

62. *See also* DOD LAW OF WAR MANUAL, § 15.17.1.
63. GC III COMMENTARY, at 454.
64. *Id.* at 445.
65. *See* DOD LAW OF WAR MANUAL, § 9.39.1.3 (Code of Conduct—Article III).

A POW who attempts to escape and is recaptured before having made good his or her escape in the sense of Article 91 of GC III shall be liable only to disciplinary punishment, even if it is a repeated offense.[66] In conformity with the principle stated in Article 83 of GC III (i.e., leniency in favor of disciplinary rather than judicial proceedings), offenses committed by POWs with the sole intention of facilitating their escape and that do not entail any violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only.[67] For example, if a POW steals food, money, or means of transport; wears civilian clothing; or fabricates false documents to facilitate escape and is caught before escaping successfully, such acts may only incur disciplinary punishment.

Escape or attempt to escape, even if it is a repeated offense, shall not be deemed an aggravating circumstance if the POW is subjected to trial by judicial proceedings regarding an offense committed during their escape or attempt to escape.[68] For example, an escaping POW who kills or injures a detaining power guard while escaping could be liable to judicial punishment for that offense. However, the circumstance of escape shall not be deemed to aggravate the sentence of the POW, even if the POW frequently attempts to escape.

POWs who aid or abet an escape or an attempt to escape are liable on this count to disciplinary punishment only.[69] Collective punishment of POWs for an escape attempt by other POWs is also prohibited.

11.3.5 Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels

International treaty law expressly prohibits internment of POWs other than on land, but does not address temporary detention on board vessels. U.S.

66. GC III, art. 92.
67. *Id.* art. 93.
68. *Id.*
69. *Id.*

policy permits temporary detention of POWs, civilian internees, and detained persons on naval vessels for operational or humanitarian needs as follows:

> 1. When picked up at sea, they may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.
>
> 2. They may be temporarily held on board naval vessels while being transported between land facilities.
>
> 3. They may be temporarily held on board naval vessels if such detention would appreciably improve their safety or health prospects.

Detention on board vessels must be temporary, limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land. Commanders should seek guidance from the chain of command regarding any temporary detention aboard a naval vessel. Use of immobilized vessels for temporary detention of POWs, civilian internees, or detained persons is not authorized without SECDEF approval.

Commentary

POWs may be interned only in premises located on land.[70] This rule is intended to ensure that POWs are interned in a relatively safe and healthy environment. For example, in prior conflicts, POWs interned on ships were not held in hygienic and humane conditions. Similarly, POWs held on ships faced increased risk from the dangers of war.[71]

Because the purpose of the rule is to provide for the detention of POWs in a relatively safe and healthy environment, confinement aboard ship for POWs captured at sea or pending the establishment of suitable facilities on land is nonetheless consistent with GC III if

70. *Id.* art. 22. *See, e.g.*, NEWPORT MANUAL, § 10.6.3.1.
71. *See* DOD LAW OF WAR MANUAL, § 9.11.3.1.

detention on a ship provides the most appropriate living conditions for POWs. For example, during Operation Iraqi Freedom,

> a U.S. naval vessel in the Persian Gulf served as a temporary detention facility for EPWs. EPW internment camps in Iraq were not yet ready for prisoners. Additionally, Kuwait refused to allow Coalition forces to build EPW camps in Kuwait and they would not allow Coalition forces to bring EPWs into Kuwait. The cavernous hold of USS DUBUQUE (LPD-8), an amphibious assault ship, was converted into a detention facility where prisoners were held and interrogated as EPWs until camps were operational on shore.[72]

U.S. policy provides that POWs "may be temporarily held on board naval vessels if such detention would appreciably improve the safety or health prospects" of such persons, but this "must be truly temporary, limited to the minimum period necessary to evacuate the [POW] from the combat zone or to avoid the significant harm the [POW] would face if detained on land."[73]

The 2004 UK Manual notes that in 1982, during the Falklands conflict, temporary internment on board ship for the purpose of evacuation from the combat zone was done "with the concurrence of the ICRC, because there was nowhere suitable to hold PW on the Falklands Islands and the intention was to repatriate them as quickly as possible."[74]

Thus, POWs may be detained temporarily on board a ship if operational or humanitarian needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.[75] For example, they may be temporarily detained on board naval vessels (a) while being transported between

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72. Gregory P. Noone et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL LAW REVIEW 1, 16 (2004).

73. Joint Chiefs of Staff, Memorandum: Policy Concerning Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels, ¶¶ 2a(3)–2b (Aug. 24, 1984).

74. 2004 UK MANUAL, ¶ 8.37.1 n.123.

75. DOD LAW OF WAR MANUAL, § 9.10.4.

> land facilities; or (b) if such action would appreciably improve their safety or health prospects, such as avoidance of exposure to severe environmental or combat conditions, or improved access to medical care for those requiring it. Such limited detention does not violate the requirement for the internment of POWs on land.
>
> Ships may also be used to transport POWs or for screening. For example, during the Second World War:
>
> > The total number of enemy prisoners of war interned within the United States was 435,788. Included were 378,898 Germans, 51,455 Italians, and 5,435 Japanese. The number of prisoners of war in the United States was somewhat negligible prior to January 1943. It increased rapidly beginning with May of that year, largely as a result of the success of the African campaign. The increase continued irregularly but speedily until it reached its peak shortly after the surrender of Germany, when the influx of prisoners of war from Europe ceased.[76]

11.4 UNPRIVILEGED BELLIGERENTS

Unprivileged belligerents (see 5.4.1.2) do not have a right to engage in hostilities and do not receive combatant immunity for their hostile acts. They are not entitled to POW status if detained. Any person detained by the United States is entitled to humane treatment as a matter of law and U.S. policy. See 11.2.

Because unprivileged belligerents do not have combatant immunity, they may be prosecuted for their hostile actions. Prosecution is not required, and unprivileged belligerents may be detained until the cessation of hostilities without being prosecuted for their acts. If prosecuted and convicted, unprivileged belligerents may be detained for the duration of their sentence, even if it extends beyond the cessation of hostilities. Even if their criminal sentence has been served, but hostilities have not ceased, they may be held until the cessation of hostilities. Regardless of the fact that hostilities have not ceased or the full sentence has not been served, a detaining State may release

76. Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA LAW REVIEW 51, 59 (1946).

an unprivileged belligerent at any time. For example, a detaining State may decide to end detention before the cessation of hostilities if it determines the detained unprivileged belligerent no longer poses a threat.

Commentary

According to the DoD Law of War Manual, the category of unprivileged belligerent may be understood as an implicit consequence of creating the classes of lawful combatants and peaceful civilians.[77] The concept of unprivileged belligerency—that is, the set of legal liabilities associated with unprivileged belligerents—may be understood in opposition to the rights, duties, and liabilities of lawful combatants and peaceful civilians. Unprivileged belligerents include lawful combatants who have forfeited the privileges of combatant status by engaging in spying or sabotage and private persons who have forfeited one or more of the protections of civilian status by engaging in hostilities.

Unprivileged belligerents have certain rights, duties, and liabilities. In general, unprivileged belligerents lack the distinct privileges afforded to combatants and civilians and are subject to the liabilities of both classes. Unprivileged belligerents generally may be made the object of attack by enemy combatants. They must, however, be afforded fundamental guarantees of humane treatment if *hors de combat*.

Although unprivileged belligerents have not been recognized and protected in treaty law to the same extent as peaceful civilians and lawful combatants, basic guarantees of humane treatment in customary international law (i.e., elementary considerations of humanity) protect unprivileged belligerents. See the commentary accompanying § 11.2 above. Moreover, some treaty protections apply to certain unprivileged belligerents.[78] In some cases, U.S. practice has, as a matter of domestic law or policy, afforded unprivileged belligerents more favorable treatment than they would be entitled to receive under international law. For example, in *Boumediene v. Bush*, the U.S. Supreme Court afforded the constitutional privilege of habeas corpus to aliens

77. DOD LAW OF WAR MANUAL, § 431; 10 U.S.C. § 948a.
78. GC III, art. 3; GC IV, art. 5.

detained as unprivileged belligerents at Guantanamo.[79] Nonetheless, U.S. practice has also recognized that unprivileged belligerents should not be afforded the distinct privileges to which lawful combatants and peaceful civilians are entitled under the law of war.

Unprivileged belligerents are liable to capture and detention, like lawful combatants. Although they are not entitled to the privileges of POW status, unprivileged belligerents, like all other detained persons, must be treated humanely. In particular, they, like all other detainees, must receive, at a minimum, the fundamental guarantees of humane treatment described in Common Article 3 of the 1949 Geneva Conventions. In addition, the United States has explicitly supported, out of a sense of legal obligation, the fundamental guarantees reflected in Article 75 of AP I as minimum standards for the humane treatment of all persons detained during international armed conflict. See the commentary accompanying § 11.1 above.

Unprivileged belligerents who are detained to prevent their further participation in hostilities generally must be released when hostilities have ended unless there is another legal basis for their detention. DoD practice has been to periodically review the detention of all persons not afforded POW status or treatment.[80]

Although international law affords lawful combatants a privilege or immunity from prosecution, unprivileged belligerents lack such protection.[81] Enemy States may punish unprivileged belligerents for engaging in hostilities if they are convicted after a fair trial. For example, Article 30 of the Hague Regulations provides that "[a] spy taken in the act shall not be punished without previous trial."

11.5 NONCOMBATANTS

Noncombatants are medical personnel or chaplains in the armed forces who do not take a direct part in hostilities. Because they do not take a direct part in hostilities, noncombatants receive special protections under the law of armed conflict. Medical personnel and chaplains falling into enemy hands do

79. Boumediene v. Bush, 553 U.S. 723 (2008).
80. DOD LAW OF WAR MANUAL, § 4.19.3.
81. *Id.* § 4.17.5.

not become POWs. They are given a special status as retained persons, and unless their retention by the enemy is required to provide for the medical or religious needs of POWs, medical personnel and chaplains must be repatriated at the earliest opportunity.

Commentary

See DoD Law of War Manual, §§ 4.9 and 7.9.

If military medical and religious personnel fall into the enemy's power during international armed conflict, they are held not as POWs but as retained personnel.[82] They may be retained only insofar as the health, spiritual needs, and number of POWs require.[83] The classes of personnel that may be retained include military medical and religious personnel, such as medical personnel exclusively engaged in medical duties; administrative staff exclusively engaged in support to medical units; chaplains attached to the armed forces; and authorized staff of voluntary aid societies.[84] They should present their identity cards to demonstrate their status as retained personnel.

Although they are not held as POWs, military medical and religious personnel receive, at a minimum, the protections of POW status. In addition, retained personnel shall be granted all facilities necessary to provide for the medical care of, and religious ministration to, POWs. For example, retained personnel may not be compelled to do work other than their medical or religious duties. Retained personnel, through their senior officer in each camp, have the right to deal with the competent authorities of the camp on all questions relating to their duties.[85]

From the outbreak of hostilities, parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to the number of POWs and the distribution of these medical and religious personnel in the camps.[86] If they are

82. *Id.* § 4.10.2.
83. GC I, art. 28.
84. DOD LAW OF WAR MANUAL, § 7.9.1.3.
85. GC I, art. 28; GC III, art. 33.
86. GC I, art. 31.

> not needed to care for, or minister to, POWs, and if military requirements permit, retained personnel should be returned to the forces to which they belong so that they may continue to care for, or minister to, members of their armed forces. The parties to the conflict would establish special agreements to develop the procedures for repatriation.[87]

11.6 CIVILIANS

In international armed conflict and any occupation that follows, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 governs the treatment of civilians. Enemy civilians falling under the control of the armed forces may be interned if security considerations make it absolutely necessary to do so. Civilians sentenced for offenses committed in occupied territory may be ordered into internment in lieu of punishment. Civilians of an enemy State must not be interned as hostages. Interned persons must not be removed from the occupied territory in which they reside, except as their own security or imperative military considerations may require. All interned persons must be treated humanely (see 11.2) and must not be subjected to reprisal action or collective punishment.

War correspondents, supply contractors, members of organizations responsible for the welfare of service members, and other persons who accompany the armed forces, although civilians, may be accredited by the armed forces that they accompany. While such persons are not combatants and may not be individually targeted, their close proximity to combatants means they may be incidentally killed or injured during a lawful attack on a military objective. They are entitled to POW status upon capture provided they have been properly accredited by the armed forces they accompany. Possession of a Geneva Conventions identification card by a civilian accompanying an armed force provides evidence of accreditation by the armed forces of the State issuing the card. Service as a civilian mariner in the crew of an auxiliary vessel or warship is evidence of accreditation by the armed forces of that State, even if the civilian mariner is not in possession of a Geneva Conventions identification card.

87. *Id.* art. 28; GC III, art. 33.

Commentary

Like combatants, members of the civilian population also have certain rights, duties, and liabilities under the law of war. Civilians may not be made the object of attack. If detained, civilians are entitled to humane treatment and various additional protections. Civilians lack the combatant's privilege and may be punished by an enemy State after a fair trial for engaging in hostilities against it.[88]

In general, civilians may be subject to non-violent measures justified by military necessity, such as searches, or temporary detention. Belligerents or occupying powers may take necessary security measures concerning civilians, including internment or assigned residence for imperative security reasons. Enemy civilians who are interned during international armed conflict or occupation generally are classified as "protected persons" under GC IV and receive a variety of protections.

Unlike combatants, civilians lack the combatant's privilege excepting them from the domestic law of the enemy State. After a fair trial, civilians who engage in hostilities may be punished by an opposing State. A State that is an occupying power has additional authorities over enemy civilians that extend beyond the ability to punish their unauthorized participation in hostilities.[89]

The parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.[90] For example, in a belligerent's home territory, measures of control are usually taken with respect to, at the very least, persons known to be active or reserve members of a hostile army, persons who would be liable to service in the enemy forces, and persons who it is expected would furnish information or other aid to a hostile State. These measures may include, for example, requiring protected persons (1) to register with and report periodically to the police authorities; (2) to carry identity cards or special papers; (3) to refrain from carrying weapons; (4) to refrain from changing their place of

88. DOD LAW OF WAR MANUAL, § 4.8.
89. *Id.* § 4.8.4.
90. GC IV, art. 27.

residence without permission; (5) to refrain from accessing certain areas; (6) to have an assigned residence; and (7) to be interned.[91]

The parties to the conflict shall not intern protected persons except in accordance with the provisions of Articles 41, 42, 43, 68, and 78 of GC IV.[92] In some respects, the principles underlying the internment of protected persons are similar to those underlying the internment of POWs. For example, the internment of protected persons is non-punitive, the detaining power is responsible for the treatment of internees in its custody, and humane treatment is required. However, GC IV recognizes that the internment of protected persons differs in character from that of POWs by requiring the separation of internees from POWs.[93] Protected persons interned for security reasons have not, in theory, participated in hostilities. Thus, their internment shall cease when the reasons that have necessitated it have ceased, which may occur before the end of the conflict. In practice, however, internment for security reasons may involve persons who have participated in hostilities, and the continued detention of such persons for the duration of the conflict may be justified to prevent their further participation in the conflict. On the other hand, internees are not members of the armed forces and, thus, in certain respects, have not earned the special privileges that POWs have earned. For example, although internees receive allowances, they do not receive specified pay advances like POWs. Similarly, internees who have successfully escaped do not benefit from the immunity from punishment applicable to POWs who have successfully escaped.[94]

GC III affords POW status to persons accompanying the force if they fall into the hands of the enemy during international armed conflict. Persons authorized to accompany the armed forces under Article 4(A)(4) include employees of the DoD, employees of other government agencies sent to support the armed forces, and other authorized persons working on government contracts to support the

91. GC IV COMMENTARY, at 207.
92. GC IV, art. 79.
93. *Id.* art. 84.
94. DOD LAW OF WAR MANUAL, § 10.9.1.

armed forces. DoD practice has been to permit a broad range of civilians to be authorized to accompany U.S. forces.[95]

For the purposes of detention, persons authorized to accompany the armed forces are treated like combatants. These persons may be detained by the enemy and are entitled to POW status during international armed conflict. Article 4(A)(4) of GC III defines "[p]risoners of war, in the sense of the present Convention," to include persons who have fallen into the power of the enemy and "who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany." Article 81 of the 1929 Convention Relative to the Treatment of Prisoners of War provides:

> Persons who follow the armed forces without directly belonging thereto, such as correspondents, newspaper reporters, sutlers, or contractors, who fall into the hands of the enemy, and whom the latter think fit to detain, shall be entitled to be treated as prisoners of war, provided they are in possession of an authorization from the military authorities of the armed forces which they were following.[96]

Article 13 of the Hague Regulations provides:

> Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

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95. *Id.* § 4.15.2.

96. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

11.7 PERSONNEL HORS DE COMBAT

Combatants who have been rendered incapable of combat (*hors de combat*) by wounds, sickness, shipwreck, surrender, or capture are entitled to special protections including assistance and medical attention, if necessary. Parties to the conflict must, after each engagement and without delay, take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm, and ensure their care. When circumstances permit, a cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care. Wounded and sick personnel falling into enemy hands must be treated humanely and cared for without adverse distinction along with the enemy's own casualties. Priority in order of treatment may only be determined according to medical considerations. The physical and mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may the wounded and sick be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards. See 5.4.2.

A similar duty extends to shipwrecked persons, whether military or civilian. Shipwrecked persons include those in peril at sea or in other waters as a result of the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft. It is immaterial whether the peril was the result of enemy action or nonmilitary causes. Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.

The status of persons detained—combatant, unprivileged belligerent, noncombatant, or civilian—does not change as a result of becoming incapacitated by wounds, sickness, shipwreck, or surrender. The decision to continue detention of persons *hors de combat* and the status of such detainees will be determined by their prior classification.

Commentary

At all times, and particularly after an engagement, parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick on land, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the

dead and prevent their being despoiled.[97] GC IV provides for the obligation to search for, collect, protect, and care for civilians who are wounded, sick, shipwrecked, and dead.[98]

After each engagement, parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded, sick, and shipwrecked at sea, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.[99] The obligation in GC II to search for and collect certain persons is written differently from the comparable obligation in GC I. Instead of a general obligation in Article 15 of GC I to take measures "at all times," the obligation in Article 18 of GC II to search for and collect the wounded, sick, and shipwrecked applies only "after each engagement."

If practicable, affirmative measures (including, in some cases, the use of force) must be taken to protect the wounded, sick, and shipwrecked from pillage or ill-treatment by any person, whether military or civilian, seeking to harm them.[100]

Various measures may be taken to fulfill the obligation to search for, collect, and protect the wounded, sick, and shipwrecked. Military forces may directly engage in these activities. In addition to searching for, collecting, and protecting the wounded, sick, and shipwrecked directly, commanders may take other measures to fulfill this obligation. For example, commanders may request the help of civilian volunteers. As another example, if a warship cannot collect the shipwrecked after an engagement, it might be able to alert a hospital ship in the vicinity or provide the shipwrecked with a lifeboat.[101]

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to allow the removal, exchange, and transport of the wounded left on the battlefield.[102]

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97. DOD LAW OF WAR MANUAL, § 7.4.
98. GC IV, art. 16.
99. GC II, art. 18.
100. GC I COMMENTARY, at 152.
101. GC II COMMENTARY, at 131.
102. GC I, art. 15.

> Such arrangements may take the form of or include a protected or neutral zone. Likewise, local arrangements may be concluded between parties to the conflict for the removal or exchange of wounded and sick by land or sea from a besieged or encircled area, or for the passage of medical and religious personnel and equipment on their way to that area. For example, parties to a conflict may agree to a temporary cease-fire to permit evacuation of the wounded from the fighting area.
>
> The obligations to search for, collect, and take affirmative steps to protect the wounded, sick, and shipwrecked are subject to practical limitations.[103] Military commanders are to judge what is possible and to what extent they can commit their personnel to these duties.[104] In some cases, commanders might designate specific units or personnel to engage in such missions. For example, personnel performing rescue and recovery missions need not place their lives at undue risk to search for, collect, or protect the wounded, sick, shipwrecked, or dead (e.g., recovery of a body from a minefield, or entry into a disabled enemy armored vehicle that might contain unexploded ordnance or other hazards). Similarly, a commander of a naval ship need not increase the risk to their vessel from threats (e.g., by slowing their transit or by placing their ship dead in the water) to recover shipwrecked enemy military personnel from a sunken vessel or crashed aircraft.
>
> Similarly, the requirements of ongoing military operations may render rescue efforts impractical. For example, during a fast-tempo operation (offensive or defensive), it might not be possible to devote resources to the search and collection of the wounded, sick, and shipwrecked. In other cases, the rescue of enemy personnel may exceed the abilities of the force and its medical personnel. For example, a small patrol operating behind enemy lines or a submarine may not be capable of receiving and caring for large numbers of injured personnel. Thus:

103. DOD LAW OF WAR MANUAL, § 7.4.4.
104. GC I COMMENTARY, at 151.

> Of course, one cannot always require certain fighting ships, such as fast torpedo-boats and submarines, to collect in all circumstances the crews of ships which they have sunk, for they will often have inadequate equipment and insufficient accommodation. Submarines stay at sea for a long time and sometimes they neither wish nor are able to put in at a port where they could land the persons whom they have collected. Generally speaking, one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by doing so, he would expose his vessel to attack.[105]

The wounded, sick, and shipwrecked who are protected by GC I and GC II shall be treated humanely and cared for by the party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.[106] They shall not willfully be left without medical assistance. The obligation to care for enemy combatants who are wounded and sick is a longstanding law of war obligation. The obligation to provide medical care incorporates practical considerations; whether resources may be committed to medical care may depend on military necessity, such as the requirements of the mission or the immediate tactical situation. For example, Article 79 of the Lieber Code provides: "Every captured wounded enemy shall be medically treated, according to the ability of the medical staff." Article 6 of the Convention for the Amelioration of the Wounded in Armies in the Field provides: "Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong."[107]

Only urgent medical reasons will authorize priority in the order of treatment.[108] For example, in addressing an influx of wounded that includes friends and enemies, doctors should attend to those patients for whom delay might be fatal or, at any rate, prejudicial, proceeding

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105. GC II COMMENTARY, at 131.

106. GC I, art. 12; GC II, art. 12. *See also* DOD LAW OF WAR MANUAL, § 7.5.

107. Convention for the Amelioration of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 944.

108. GC I, art. 12; GC II, art. 12.

afterwards to those whose condition is not such as to necessitate immediate attention.[109] The wounded, sick, and shipwrecked, and other POWs, may be ordered to receive medical treatment or care that is warranted by their medical condition. Because POWs are subject to the laws, regulations, and orders in force in the armed forces of the detaining power, POWs may be ordered to receive medical treatment just as detaining power military personnel may be ordered to do so. However, the wounded, sick, and shipwrecked, and other POWs, may not be subjected to medical or biological experiments, even if detaining power military personnel could be ordered to be subjected to such procedures. See the commentary accompanying § 11.3.1 above.

11.8 QUESTIONING AND INTERROGATION OF DETAINED PERSONS

Commanders may order the tactical questioning of detained persons. Tactical questioning is defined in DODD 3115.09 as the field-expedient, initial, direct questioning for information of immediate tactical value of a captured or detained person at or near the point of capture and before the individual is placed in a detention facility. Tactical questioning is not an interrogation, but a timely and expedient method of questioning by a noninterrogator seeking information of immediate value. It may be conducted by any DOD personnel trained in accordance with DODD 3115.09, Subparagraph 4.1. Anyone conducting tactical questioning must ensure all detained persons receive humane treatment. If the detained person is entitled to POW status additional restrictions on questioning apply. See 11.9.

If questioning beyond tactical questioning is necessary, it is considered interrogation and must only be conducted by DOD-certified personnel who have received specific training in interrogation techniques. Masters-at-arms or other security personnel must not actively participate in interrogations, as their function is limited to security, custody, and control of the detainees. Interrogators may conduct debriefs of the masters-at-arms or other security personnel regarding the detainees for whom they are responsible. If interrogation is necessary, in addition to securing the services of certified interrogators, reference should be made to the following:

109. GC I COMMENTARY, at 140.

1. Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949

2. DODD 3115.09

3. JP 2-01.2, Counterintelligence and Human Intelligence in Joint Operations

4. FM 2-22.3.

Commentary

On the interrogation of POWs, see § 11.9 below.

The law of war does not prohibit the interrogation of detainees, but interrogation must be conducted in accordance with the requirements for humane treatment.[110] Interrogation must be carried out in a manner consistent with the requirements for humane treatment, including the prohibitions against torture, cruelty, degrading treatment, and acts or threats of violence. No physical or moral coercion shall be exercised against protected persons to obtain information from them or third parties. In addition to the legal prohibitions on torture or other illegal methods of interrogation, practical considerations have also strongly counseled against such methods:

> Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.
>
> Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also

110. DOD LAW OF WAR MANUAL, § 8.4.

> may place US and allied personnel in enemy hands at a greater risk of abuse by their captors.[111]

11.9 QUESTIONING OF PRISONERS OF WAR

Detainees entitled to protections set forth in the GPW may not be denied rights or have rights withheld in order to obtain information. Interrogators may offer incentives exceeding basic amenities in exchange for cooperation. Prisoners of war are only required to provide name, rank, serial number (if applicable), and date of birth. Failure to provide these items does not result in any loss of protections from inhumane or degrading treatment. A POW who refuses to provide such information shall be regarded as having the lowest rank of that force, and shall be treated accordingly. Prisoners of war who refuse to answer questions may not be threatened, insulted, or exposed to unpleasant or disparate treatment.

Commentary

> See DoD Law of War Manual, § 9.8.[112]
>
> Every POW, when questioned, is bound to give only their surname, first names and rank, date of birth, and army, regimental, personal, or serial number, or, failing this, equivalent information.[113] If POWs willfully infringe this rule, they may render themselves liable to a restriction of the privileges accorded to their rank or status. However, POWs who refuse to provide this information may not be coerced or exposed to any unpleasant or disadvantageous treatment for failing to respond.
>
> Interrogation must be carried out in a manner consistent with the requirements for humane treatment, including the prohibition against acts of violence or intimidation and insults. No physical or mental torture, or any other form of coercion, may be inflicted on POWs to secure information of any kind. POWs who refuse to answer may not be threatened, insulted, or exposed to unpleasant or

111. FM 34-52, Intelligence Interrogation, 1–8 (Sept. 28, 1992).
112. *See also* DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning (Oct. 11, 2012).
113. GC III, art. 17.

disadvantageous treatment.[114] Prohibited means include imposing inhumane conditions, denying medical treatment, or using mind-altering chemicals.[115] The U.S. position is that "the suggested use of a chemical 'truth serum' during the questioning of prisoners of war would be in violation of the obligations of the United States under the Geneva Convention Relative to the Treatment of Prisoners of War."[116]

U.S. law and policy impose additional requirements on the interrogation of POWs. No person in the custody or under the effective control of the DoD or under detention in a DoD facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.[117]

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114. *Id.*

115. *See* Trial of Erich Killinger (The Dulag Luft Case), 3 LRTWC 67 (1948).

116. U.S. Army, Office of the Judge Advocate General, JAGW 1961/1157, Memorandum: Use of "Truth Serum" in Questioning Prisoners of War (June 21, 1961), *reprinted in Documents on Prisoners of War*, 60 INTERNATIONAL LAW STUDIES 708, 709 (1979).

117. Pub. L. No. 109-163, § 1402(a), 10 U.S.C. § 801 note (2006); FM 2-22.3, Human Intelligence Collector Operations (Sept. 6, 2006).