



CLOSING THE GAP: ENHANCING THE CAF'S PREPAREDNESS FOR PRISONER OF WAR STATUS DETERMINATION TRIBUNALS

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CLOSING THE GAP: ENHANCING CANADIAN ARMED FORCES PREPAREDNESS FOR PRISONER OF WAR STATUS DETERMINATION TRIBUNALS

AIM

1. The aim of this paper is to identify a capability gap pertaining to Prisoner of War (PW) and Detainee Operations, and to recommend a resource neutral solution utilizing existing resources within the Office of the Judge Advocate General (OJAG) and the Canadian Forces Military Law Center (CFMLC) that can be implemented in the near term. This paper is not intended to provide a fulsome examination of the multitude legal issues related to PW/Detainee Operations, nor an exhaustive recitation of legal issues related to determining PW status. It is intended to generate discussion between the OJAG and the CFMLC regarding the development of course curriculum for the Legal Officer Intermediate Training (LOIT) course in preparing Legal Officers at the rank of Captain/Lieutenant (Navy) for promotion to Major/Lieutenant-Commander, and how that can be integrated into the provision of legal services at the operational level.

INTRODUCTION

2. This paper was written in satisfaction of the Joint Command and Staff Program course requirements. It was also written to highlight an often-overlooked aspect of PW/Detainee Operations that, if it occurs, is likely to generate significant public attention and quickly rise to the military and political strategic levels – the conduct of PW status determination tribunals (PWSDTs).

3. While there are numerous legal issues relating to PW and detainee operations, this service paper primarily focuses on PWSDTs. More specifically, this paper explores the OJAG's preparedness to conduct PWSDTs, identifies personnel challenges that need to be addressed, and recommends a potential course of action to resolve any deficiencies. This paper begins by arguing that PW and detainee operations are a strategic priority, and that the CAF is ill prepared to deal with significant number of PWs and detainees. Next, the paper explores the requirement at law to convene PWSDTs, the composition of the tribunal, and the OJAG efforts to prepare Legal Officers to run a PWSDTs. Then, this paper will explore the significant risk that the CAF is adopting in assuming that Canada will continue to transfer all PWs and Detainees to another state. This paper concludes by recommending amendments to the Legal Officers training plan for officers attending Legal Officer Intermediate Training, which is in the process of being developed, to be promoted to Major/Lieutenant-Commander.

DISCUSSION

4. During World War II, Canada held over 34,000 German PWs.¹ The first PWs were transferred to Canada from the British government following the Allied defeat of

¹ "Canada and the War: Life on the Homefront: Axis Prisoners in Canada," http://www.warmuseum.ca/cwm/exhibitions/newspapers/canadawar/prisoners_e.html

German forces in North Africa in 1942 and returned to Germany in 1945.² These large numbers of PWs were housed in numerous camps in remote location near the Rocky mountains or in northern camps in Ontario, Quebec and New Brunswick.³ Some PWs were so impressed the fairness of their treatment and the beauty of Canada that they immigrated to Canada following the war.⁴ This historical example demonstrates Canada's previous success in holding PWs over a protracted period of time. However, since World War II, the CAF has not dealt with large numbers of PWs. While the CAF has had contemporary experience in dealing with detainee operations during the Afghanistan campaign, the character of the conflict in Afghanistan was classified as a non-international armed conflict. This meant that detainees captured by the CAF during this conflict were not entitled to PW status.

5. While this is an important legal distinction, the CAF has adopted a policy of treating all detainees, regardless of whether they have PW status, to the same standard as a PW.⁵ This reflects the importance placed on the treatment of PWs and Detainees as a matter of significant public attention, that impacts the willingness of an adversary to fight and is, therefore, a strategic priority in any CAF operation. This was demonstrated by the widespread media coverage of and public interest in the Canadian involvement in allegations of mistreatment of detainees by the Government of Afghanistan. Notably, the Prime Minister was frequently called upon to respond to questions in Parliament regarding the status of detainees captured by the CAF in Afghanistan.⁶

² *ibid.* See also "Prisoner of War Camps in Canada," *Historica Canada*, <https://www.thecanadianencyclopedia.ca/en/article/prisoner-of-war-camps-in-canada>.

³ *ibid* (Canada and the War).

⁴ *Supra* note 2.

⁵ B-GG-005-027/AF-023, Code of Conduct for CF Personnel (Feb 2007), at 15. Rule 6 states "Treat all detained persons humanely in accordance with the standard set by the third Geneva Convention. Any form of abuse, including torture, is prohibited." Additionally, para 1 states "Rule #6 deals with the treatment of anyone detained by CF personnel in the course of an operation. At the tactical level, the legal status of those who are detained does not matter."

⁶ Murray Brewster, "Opposition Turns Up Heat on Tories; Assault: Afghan Abuse Controversy Dominates Question Period," *Telegraph-Journal*. <https://www.proquest.com/newspapers/opposition-turns-up-heat-on-tories-assault-afghan/docview/423337409/se-2?accountid=9867>

6. More recently, the full-scale Russian invasion of Ukraine in February 2022 demonstrates that international armed conflict between states remains a realistic possibility. In that same vein, the Russian invasion of Ukraine highlights the strategic importance of complying with the law of armed conflict (LOAC), particularly as it pertains to the treatment and handling of PWs. In March 2022, videos were released showing Russian PWs that had been captured by the Ukrainians being provided with cellphones to call their family to inform them of their capture.⁷ While this prompted criticism of Ukraine for failing to adhere to the prohibition against using PWs for public curiosity,⁸ it garnered international media attention and publicly demonstrated the fair treatment of captured Russian personnel in the custody of Ukraine. Moreover, the Russian “sham trials” of PWs provided a contemporary example of the importance of PW status determinations, and the international condemnation highlights the risk of failing to adequately adhere to the LOAC.⁹

7. From a Canadian perspective, the war in Ukraine highlights that international armed conflict between states that results in PWs remains a distinct challenge that the CAF must be prepared to meet. The CAF is clearly tasked to respond to this threat in Canadian national defence policy *Strong, Secured, Engaged*. Specifically, the CAF is directed to prepare to “detect, deter and defend against threats to or attacks on Canada” and “lead and/or contribute to forces to NATO and coalition efforts to deter and defeat adversaries, including terrorists, to support global stability.”¹⁰ As such, the Government

⁷ "Captured Russian Troops Call Home while Filmed by Ukrainian Officials, Raising Geneva Convention Questions," <https://www.military.com/daily-news/2022/03/01/captured-russian-troops-call-home-while-filmed-ukrainian-officials-raising-geneva-convention.html>.

⁸ "Russia/Ukraine: Prisoners of War must be Protected from Public Curiosity Under Geneva Convention," accessed 13 February, 2024, <https://www.amnesty.org/en/latest/news/2022/03/russia-ukraine-prisoners-of-war-must-be-protected-from-public-curiosity-under-geneva-convention/>.

⁹ "Ukraine: Russian Sham Trials of Prisoners of War in Mariupol 'Illegal and Unacceptable'," accessed 13 February, 2024, <https://www.amnesty.org/en/latest/news/2022/08/ukraine-russian-sham-trials-of-prisoners-of-war-in-mariupol-illegal-and-unacceptable/>.

¹⁰ "Strong, Secure, Engaged: Canada's Defence Policy," accessed Sep 24, 2023, <https://www.canada.ca/en/departement-national-defence/corporate/reports-publications/canada-defence-policy.html>. at 106.

of Canada inherently recognizes that it may call upon the CAF, at any time, to engage in an armed conflict with another state. This, in turn, imposes certain legal obligations on Canada and the CAF to properly handle those people captured during the conduct of hostilities.

The Law

8. Canada is a party to the Geneva Conventions. This is reflected in the incorporation of the Geneva Conventions into Canadian federal law, via the *Geneva Conventions Act*.¹¹ Geneva Convention III (“GCIII”) relates to the treatment of PWs, and is located at Schedule 3 of the *Geneva Conventions Act*. Article 4 of GCIII articulates who is entitled to PW status. It includes, but is not limited to, “members of the armed forces of a Party to the conflict”;¹² members of militias, volunteer corps, and organized armed resistance movements;¹³ and, civilians accompanying the force.¹⁴

9. Article 5 of GCIII provides that the provisions of the Geneva Conventions apply to persons identified in Article 4 “from the time they fall into the power of the enemy and until their final release and repatriation.” Importantly, Article 5 also states

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 the present Convention until such time as their status has been determined by a *competent tribunal*. [italics added]¹⁵

10. In Canada, the constitution of a competent tribunal to determine the entitlement of any person captured by the CAF to PW status is set out in the *Prisoner-of-War Status Determination Regulations* (“the *Regulations*”).¹⁶ The *Regulations* identifies the Minister of National Defence, the Chief of the Defence Staff (CDS), as well as officers commanding a command, formation, and any other authority appointed or prescribed by the CDS as the authorities that may establish a Tribunal.¹⁷ The *Regulations* also define “tribunal” as “a prisoner-of-war status tribunal established pursuant to section 4.”¹⁸ Critically, section 4 of the *Regulations* provides that a tribunal “consists of one officer of

¹¹ *Geneva Conventions Act*, R.S.C., 1985, c.G-3, <https://laws-lois.justice.gc.ca/eng/acts/G-3/page-1.html>.

¹² *Geneva Conventions Act*, R.S.C., 1985, c.G-3, Schedule III (Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; “Geneva Convention III”), Article 4(1).

¹³ *Geneva Conventions Act*, R.S.C., 1985, c.G-3, Schedule III (Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; “Geneva Convention III”), Article 4(2).

¹⁴ *Geneva Conventions Act*, R.S.C., 1985, c.G-3, Schedule III (Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; “Geneva Convention III”), Article 4(4).

¹⁵ *Geneva Conventions Act*, R.S.C., 1985, c.G-3, Schedule III (Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; “Geneva Convention III”), Article 5.

¹⁶ *Prisoner-of-War Status Determination Regulations*. SOR/91-134, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-91-134/FullText.html> at v. Also located at QR&O Vol IV, Appendix 1.5.

¹⁷ *ibid*, s. 3.

¹⁸ *ibid*, s. 2.

the Legal Branch of the [CAF] who shall be appointed, with the concurrence of the [JAG], by the authority who established the tribunal.”¹⁹

Problem Definition

11. Canada plans to deploy the CAF as part of a coalition (such as NORAD, NATO, and the UN).²⁰ However, Canada’s contribution to any coalition risks placing its handling of PWs on the horns of a dilemma. The Joint Doctrine Manual related to PW handling articulates this challenge succinctly, and states:

[t]he nature of Canadian involvement may be such that the [CAF] will simply not have the resources in theatre for CF personnel to set up PW status determination tribunals or establish PW camps.²¹

Essentially, the CAF is faced with limited resources that may be outmatched when confronted with large numbers of PWs/detainees in an international armed conflict.

12. To address this dilemma, CAF doctrine expressly contemplates transferring of PWs and detainees to other states party to the Geneva Conventions or to the host nation.²² While this strategy allows Canada to address the practical resource challenges associated a relatively small forces dealing with the significant resource demands of PW/Detainee operations, it is premised on the assumption that the CAF can reliably transfer the PWs/Detainees to another state. Yet, this option is not always a viable option. Transfer may be impractical for operational reasons and could be prohibited for legal reasons – such as the prohibition against transfer where Canada is aware of a substantial risk of torture.²³

13. Unfortunately, this example became reality during the Afghanistan campaign.

Canada originally transferred detainees to the USA. However, Canada determined that it could not transfer detainees to the United States following the allegations of “torture and ill-treatment at US military detention sites in Afghanistan”.²⁴ Accordingly, in 2005,

¹⁹ *ibid*, s.4.

²⁰ *Supra* note 10.

²¹ B-GJ-005-110/FP-020, *Prisoner of War Handling, Detainees and Interrogation & Tactical Questioning in International Operations*, (2004) at 1-7.

²² *ibid*.

²³ "Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment," accessed Feb 18, 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>. at Art. 3. Canada ratified the Convention Against Torture in 1987; see *Sixth Report of Canada: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Aug 2004-Dec 2007)* https://www.canada.ca/content/dam/pch/documents/services/canada-united-nations-system/reports-united-nations-treaties/conv_torture_cruel_6_rep-conv_torture_cruel_6_rep-eng.pdf.

²⁴ "Amnesty International Canada and British Columbia Civil Liberties Association V. Canada (Afghan Detainees Case)," accessed Feb 18, 2024, <https://www.amnesty.ca/legal-brief/amnesty-international-canada-and-british-columbia-civil-liberties-association-v-canada/>.

Canada began transferring detainees to the Government of Afghanistan. The 2005 Arrangement between Canada and Afghanistan included commitments by the Government of Afghanistan to treat all detainees humanely.²⁵ Yet, allegations of abuse, mistreatment, and torture by the Government of Afghanistan resulted in widespread national media attention in Canada. Notably, in response to these allegations, the Military Policy Complaints Commission conducted a public interest hearing concerning the alleged failure of MPs to investigate the transfer of Afghan detainees to a substantial risk of torture. While the scope of this public interest hearing is broader than the topic of this Service Paper, the hearings constituted a multiyear strategic challenge. Thus, Canada's experience in Afghanistan suggests that a plan to transfer PWs/detainees is unlikely to alleviate the strategic risk.

14. In sum, the CAF's plan to deal with PWs/detainees in a future conflict is based on an assumption that may be less reliable in our increasingly uncertain world defined by "continued state competition, contest, confrontation, and conflict."²⁶ While adversaries may primarily seek to compete below the threshold of armed conflict, as noted by Prof. Rebecca Jensen, the international armed conflict in Ukraine

demonstrates all forms of warfare of the 20th Century, in one place, at one time. For instances, we see a return to trench warfare, advance to contact, call for mass fires, IEDs, and drones.²⁷

15. Accordingly, the CAF may find itself confronting PWs again. Leaving the many practical challenges of housing, securing, and administering PWs for further study, this paper examines the narrower question of whether the OJAG prepared to conduct a PWSDT. Specifically, is it prepared to designate an officer of the Legal Branch to the tribunal, in periods of crisis with multitudes of competing priorities, and shortly after the capture of enemy forces? Unfortunately, the answer to many of these questions is no.

Proposed Solution

16. To better prepare its members to conduct a PWSDT, the OJAG should update the Military Employment Structure (MES) Study to add the PWSDT to the work requirement table. In 2022, the Legal Officer Occupational Analysis Feasibility Report was tabled after a detailed study of the current occupation specifications.²⁸ The MES team compiled a comprehensive list of all potential jobs and tasks assigned to a legal

²⁵ Marco Sassòli and Marie-Louise Tougas, "International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan," *McGill Law Journal* 56, no. 4 (2011), 959-1010.

²⁶ Canada. Department of National Defence. *Pan-Domain Force Employment Concept: Prevailing in an Uncertain World*. Ottawa: CJOC, 2023, <https://mars.cfc.forces.gc.ca/CFCLearn/mod/folder/view.php?id=7378>

²⁷ email Dr. Rebecca Jensen (CFC), 13 2011hrs Feb 24

²⁸ 5555-00204 (DPGR 2TL), JAGNet #494400, 22 Apr 22.

officer from the rank of Captain/Lieutenant (Navy) to Colonel/Captain (Navy).²⁹ “Implementation of the report’s recommendations is expected to drive important changes in future legal officer training, employment, and career progression.”³⁰

17. Regrettably, the task to conduct a PWSDT was omitted from the otherwise comprehensive Work Requirement Table.³¹ Unfortunately, this omission suggests a general view within the OJAG that PWSDT are a very low priority. With the greatest respect to the hard work, diligence, and thoroughness to the author and contributors of the MES, I suggest that this is an issue that merits greater concern and increased attention - before the moment of crisis. Accordingly, I recommend that this task be added to the MES Work Requirements Table.

18. There are two related issues pertaining to the conduct of a PWSDT: first, selection and appointment of the tribunal; and second, the rank, qualifications, training, and experience necessary to be appointed. Each will be addressed in turn.

19. Firstly, by a plain reading of s. 4 of the *Regulations* suggests a broad pool of potential officers. In expressly stating “an officer of the Legal Branch” the Government of Canada has decided to expand the pool of officer beyond those legal officers posted to the OJAG. Notably, this term includes Military Judges. While the authority and JAG may decide to select a MJ to ensure judicial independence of the tribunal, this is not strictly required in the provisions of the *Regulations*. As such, they could equally select the deployed LEGAD(s) on the particular Op or another legal officer from the OJAG. The lack of policy in this space allows the JAG, CDS, and Minister to maintain strategic flexibility. However, in the absence of a clear decision, the OJAG should proceed on the assumption that a legal officer, other than a Military Judge, may be selected.

20. This brings me to the second issue – the rank, qualifications, training, and experience of the officer appointed to the tribunal. The *Regulations* do not stipulate any minimum requirements. Accordingly, the JAG, CDS, and Minister have discretion in this space. However, recognizing that a deployed LEGAD may suddenly find themselves being tasked to conduct a PWSDT, I recommend that the Legal Branch incorporate PWSDT training into the LOIT course currently under development. Specifically, to include a PWSDT issues as a writing assignment or an exercise scenario. The advantage of this course is that it simultaneously tests the candidate’s knowledge of an area of LOAC that Canada has limited practical experience over the past several decades, while also developing their ability to make decisions (regrettably something that Legal Officers have fewer opportunities to practice compared to junior officers in other trades). Similarly, the legal research and written materials from the early iterations of LOIT can

²⁹ JAGNet #494433, Military Employment Structure Study – Phase 2 – Work Requirements Table – Legal Officer – Option 1.

³⁰ "Judge Advocate General Annual Report 2021-2022," accessed Feb 18, 2024, <https://www.canada.ca/content/dam/dnd-mdn/documents/legal-juridique/reports-rapports/jag/jag-annual-report-2021-22-20230621-opt.pdf>

³¹ *Supra* note 29.

be compiled by the OJAG to advance a draft JAG Policy Directive regarding PWSDTs. To that end, the materials can be compiled to provide a “best practices” guide on the OJAG’s Legal Knowledge Management portal.

21. Finally, with the limited personnel in the OJAG combined with the overwhelming requests for legal services, a compelling argument may be made that the OJAG simply does not have the time nor resources to dedicate to this low-likelihood task. However, the CAF routinely trains and equips for low-likelihood events with high strategic consequences, such as CBRNE attacks. Thankfully, preparing Legal Officers to conduct PWSDTs can be implemented into legal officer courses that are currently under development and would be a revenue neutral solution.

CONCLUSION

22. The CAF has adopted mitigation strategy of transferring PW/detainees to other states. However, with increased international competition between states and the sudden reappearance of international armed conflict between Russia and Ukraine, it is worth revisiting this strategy to determine if it remains valid. Regardless of the outcome of that analysis and whether there will be a shift in doctrine, Canada has a legal requirement to conduct a status determination tribunal if the CAF finds itself in an international armed conflict, and holding someone in custody where it is unclear whether they are entitled to PW status. The OJAG should take steps now to train Legal Officers to address this operational requirement. In doing so, the JAG preserves the strategic decision space to select the appropriate officer of the Legal Branch, can incrementally advance a low-likelihood and high-consequence legal issue, and can better prepare Legal Officers for the challenges they may face when deployed on operations.

RECOMMENDATIONS

1. Add the conduct of PWSDTs to the MES Work Requirements Table.
2. Add PWSDT to the curriculum of LOIT, currently under development.

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