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Albert J. Esgain

Waldemar A. Solf

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THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: ITS PRINCIPLES, INNOVATIONS, AND DEFICIENCIES

ALBERT J. ESGAIN* AND COLONEL WALDEMAR A. SOLF†

I. INTRODUCTION

It is the purpose of this study to consider some of the fundamental principles, major innovations, and deficiencies of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.¹ It is concerned particularly with the rights and obligations which the convention imposes on the signatory states and the individuals who are protected thereby, the measures which the convention provides for the enforcement of the obligations and the repression of war crimes, and the problems which have arisen incident to the interpretation of the convention. Space precludes a detailed consideration of many important technical areas which pertain to the maintenance and the internment of prisoners of war.

It is not surprising that the decade which witnessed Dachau, Auschwitz, the massive air bombardments of World War II, Hiroshima, and the trials of Axis war criminals produced the four Geneva Conventions of 1949.² These conventions which were the

* Special Consultant to the Judge Advocate General of the Army on Private International Law Matters and Chief, Opinions Branch, International Affairs Division, Office of the Judge Advocate General, Department of the Army.

† Staff Judge Advocate, Headquarters, Eighth United States Army.

The opinions expressed are those of the authors and do not purport to reflect the views of the Department of the Army or of any other Government agency.

¹ [1955] 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364 (effective Feb. 2, 1956) [hereinafter referred to and cited as the 1949 GPW Convention].

² 1949 GPW Convention; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, [1956] 6 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365 (effective Feb. 2, 1956) [hereinafter referred to and cited as the Civilian Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, [1955] 6 U.S.T. & O.I.A. 3115, T.I.A.S. No. 3362 (effective Feb. 2, 1956) [hereinafter referred to and cited as the GWS (Field) Convention]; and the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, [1955] 6 U.S.T. & O.I.A. 3217, T.I.A.S. No. 3363 (effective Feb. 2, 1956) [hereinafter referred to and cited as the GWS (Sea) Convention].

direct result of the traumatic experience of the least restrained and the most destructive of modern wars mark the high water mark of the humanitarian effort to control the treatment of war victims by law-making treaties. The conventions which constitute approximately two-thirds of the conventional law of war³ provide detailed, comprehensive, and paternalistic solutions to the problems of the past. However, it has been observed that while international law now provides adequate protection to prisoners of war, there is no effective means of controlling the manner by which injury may be inflicted upon belligerents.⁴

The concept that war is not a relationship between individuals, but a condition of animosity between states,⁵ gave rise during the 18th Century to the derived principle that prisoners of war are to be treated humanely and to be detained for no purpose other than to prevent them from rejoining the fight. This principle, which had become firmly established by the middle of the 19th Century, led to the development of detailed rules pertaining to prisoners.⁶ The first modern codification of the practice of nations with respect to prisoners of war was prepared in 1862 by Dr. Francis Lieber, a Professor of Political Science at Columbia University, and it was officially espoused by the Union during the Civil War.⁷

The humanitarian rules of war became the subject of numerous multilateral international conferences during the later part of the 19th Century and the first half of the 20th Century. The rules which resulted were the outgrowth of a mutual consensus that the plight of war victims should be ameliorated to the greatest extent compatible with the conditions which were inevitable in war. Thus the experience of past wars rather than broad political theory provided the basis for the present rules which pertain to prisoners of war.⁸

³ Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YB. INT'L L. 360 (1952).

⁴ *Id.* at 364.

⁵ ROUSSEAU, *DU CONTRACT SOCIAL ON PRINCIPLE DU DROIT POLOTIQUE*, bk. 1. 10 (1762); 2 VATTTEL, *LE DROIT DES GENS OU PRINCIPLE DE LA LOI NATURELLE* 107, 117-18 (Carnegie Institution trans. 1916).

⁶ See FLORY, *PRISONERS OF WAR* 16-21 (1942); Treaty of Amity and Commerce with Prussia, July 11, 1799, art. XXIV, 8 Stat. 162, T.S. No. 293; 2 MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776-1909*, at 1486 (1910).

⁷ Instructions for the Government of Armies of the United States in the Field, GEN. O. 100 (1863).

⁸ See FLORY, *op. cit. supra* note 6, at 160-61.

In 1874 the representatives of the European powers who had met at Brussels at the invitation of Russia drew up a "Project for an International Convention on the Laws and Customs of War" which contained provisions applicable to prisoners of war. Although the Brussels Declaration did not become effective, it formed the basis of the regulations annexed to Hague Convention No. II of 1899 relative to the Laws and Customs of War on Land.⁹ These regulations contained seventeen articles on the rights of prisoners of war. The Brussels Declaration also formed the basis of articles 4 to 20 of the regulations annexed to Hague Convention No. IV of 1907.¹⁰ The detailed provisions of these regulations with respect to the treatment of prisoners of war established the principle that their treatment and maintenance should be analogous to that provided the troops of the Detaining Power.¹¹

The effectiveness of the Hague Regulations in World War I was materially impaired by the general participation clause which made their provisions binding only between the signatories and inapplicable in the event that a non-contracting power became a belligerent.¹² The participation in World War I of Serbia and Montenegro, countries which had not ratified the 1907 Convention, was construed by the principal belligerents as rendering the Hague Regulations legally ineffective. In World War I Germany's disregard of many of the provisions of the Hague Regulations was predicated upon grounds of military necessity, and rationalized on the general participation clause.¹³ The Allied powers, however, regarded certain of the provisions of these regulations as declaratory of customary international law, and as such, binding upon the belligerents.¹⁴

At the request of the Tenth International Conference of the Red

⁹ See MALLOY, *op. cit. supra* note 6, at 2016-058 [effective Nov. 1, 1901].

¹⁰ Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex thereto Embodying Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague Regulations of 1907]. See FLORY, *op. cit. supra* note 6, at 21.

¹¹ 2 OPPENHEIM, INTERNATIONAL LAW 368 (7th ed. Lauterpacht, 1952).

¹² *Id.* at 234.

¹³ By 1916 special bilateral conventions and cartels had been concluded between Germany and the Allies. The last of these, between the United States and Germany, was signed on November 11, 1918, the day the armistice was signed. These bilateral conventions had considerable effect upon the development of the 1929 Geneva Convention. See FLORY, *op. cit. supra* note 6, at 22-23.

¹⁴ *Ibid.*; FLORY, *op. cit. supra* note 6, at 19-20; 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 438 (1943).

Cross in 1921, the International Committee of the Red Cross prepared a draft convention to correct the defects of Hague Convention No. IV which had been disclosed during World War I. This draft formed the basis of discussion for the Diplomatic Conference which met in Geneva in 1929.¹⁵ The treaty which resulted¹⁶ in many respects made, rather than declared, international law. Unlike the Hague Conventions, the 1929 Convention specified that its provisions were to be effective between the contracting parties¹⁷ even though the convention had not been ratified by all of the belligerents. The 1929 Convention specified (article 89) that it was to be complementary to Articles 4 to 20 of the Hague Regulations of 1907 and in fact covered the substance of these regulations except to the extent that they dealt with parole.

The conventional law relating to prisoners of war, as set forth in the 1929 Convention and portions of the Hague Regulations of 1907, bore the full thrust of World War II. In two main theaters, Eastern Europe and the Far East the conventional law was, for all practical purposes, disregarded. Neither Japan nor the Soviet Union had ratified the 1929 Convention.¹⁸

In September 1941, there was circulated within the German High Command (OKW), a draft decree which stated that the humanitarian rules relative to the treatment of prisoners of war would not be applied to Soviet prisoners of war because the USSR had not ratified the convention.¹⁹ In expressing his non-concurrence, Admiral Canaris, Chief of the German Secret Service, correctly pointed out that notwithstanding the fact that Russia was not a party to the convention, the customary principles of international

¹⁵ THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 5 (Pictet ed. 1960) [hereinafter cited as PICTET, COMMENTARY III, GPW CONVENTION].

¹⁶ Convention of July 27, 1929, Relative to Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846 [hereinafter referred to and cited as the 1929 GPW Convention].

¹⁷ Art. 82, 1929 GPW Convention. The failure of the Soviet Union to ratify the 1929 GPW Convention, however, was soon to show that more than a mere rejection of the general participation clause was required.

¹⁸ DRAPER, THE RED CROSS CONVENTIONS 23 (1958).

¹⁹ 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 232 (1947) [hereinafter cited as 1 TRIAL OF MAJOR WAR CRIMINALS]. It is to be observed that in June 1941, the USSR advised the principal neutral states that it would comply with the provisions of the 1929 GPW Convention with respect to German invaders provided Germany observed the convention with respect to the USSR. See DRAPER, *op cit. supra* note 18, at 50.

law as to treatment of prisoners of war nevertheless remained applicable.²⁰ In approving the decree Field Marshal Keitel wrote: "The objections arise from the military concept of chivalrous warfare. This war is the destruction of an ideology. Therefore, I approve and back the measure."²¹

The extent to which this decree was carried out was attested by Rosenberg, Reichs Minister for Eastern Territories, who reported to Keitel in February 1942 that:

The fate of the Soviet Prisoners of War is a . . . tragedy of the greatest extent A large part of them have starved or died because of the weather The camp commanders have forbidden the civilian population to put food at the disposal of prisoners and they have rather let them starve to death.

In many camps when prisoners of war could no longer keep up the march because of hunger and exhaustion, they were shot before the eyes of the horrified population

In Sachsenhausen alone, 60,000 Soviet prisoners of war died of hunger, neglect, torture, and shooting during the winter of 1941-42.²²

Although the maltreatment of prisoners taken on the western front never approached this magnitude, there were nevertheless many grave departures from minimum standards.²³ The gross maltreatment of prisoners of war constituted a major portion of the indictments of the Germans and Japanese who were accused before

²⁰ 1 TRIAL OF MAJOR WAR CRIMINALS 232. As to these principles he stated: "Since the 18th Century there have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoner of war from further participation in the war. The principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill and injure helpless people. . . . The decrees for the treatment of Soviet prisoners of war . . . are based on a fundamentally different viewpoint."

²¹ *Ibid.*

²² *Id.* at 231.

²³ *Id.* at 228-32. On October 18, 1942, OKW issued a decree that Allied commando units were to be slaughtered to the last man, whether or not armed, even if they attempted to surrender. In March 1944, a decree was promulgated which ordered the execution upon their recapture of escaped officers and noncommissioned officers. In March 1944, fifty RAF officers who had escaped were killed. On numerous instances Allied air crews were handed over to civilians for mob action.

the International Military Tribunals at Nurnberg and Tokyo and before the national war crimes tribunals of the Allied powers.

In other respects as well, World War II dramatically exposed the inadequacies of the conventional and customary rules to cope with the savagery which had been manifested during that war. Prisoner of war status had been denied members of the Axis armed forces who surrendered following the defeat of their State of Origin. Prisoners of war were not repatriated promptly and more than one million German and Japanese prisoners were still in Soviet hands²⁴ when the Diplomatic Conference met in 1949. Furthermore, the dearth of precedents for the trial of war criminals before international and national tribunals resulted in the application of *ad hoc* procedural rules which varied from state to state. The war crimes trials suffered as well from all the defects of hasty improvisation. The failure to apply the principles of assimilation in the procedures for war crimes trials resulted in severe criticism, in many respects justified, as to the manner in which the program had been conducted.²⁵

II. THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

The deficiencies disclosed by World War II and its aftermath caused the International Committee of the Red Cross to turn its attention to their correction. In April 1949, at the invitation of the Swiss government, delegates from fifty-nine states met at Geneva to consider drafts of four conventions for the protection of war victims.²⁶ By 1962, eighty-one states, including the United States and the USSR had ratified or acceded to these conventions.

Although there are several minor reservations to these conventions, there is only one of substantive importance to the Prisoner

²⁴ PICTET, COMMENTARY III, GPW CONVENTION 6.

²⁵ See text, VI PENAL AND DISCIPLINARY SANCTIONS, *B. Penal Sanctions, infra*.

²⁶ These drafts had been developed successively by the International Committee of the Red Cross, a Preliminary Conference of the National Red Cross Societies in 1946, A Conference of Government Experts in 1947, and the 17th International Red Cross Conference at Stockholm in 1948. PICTET, COMMENTARY III, GPW CONVENTION 6. The Task of the conference was to replace the 1929 Geneva Convention relative to Prisoners of War and to the Sick and Wounded in the Field, the 10th Hague Convention of 1907 relative to the Sick, Wounded, and Shipwrecked in Maritime Warfare, and to prepare a completely new convention for the protection of civilians. *Id.* at 7.

of War Convention—the Soviet Bloc reservation relative to the application of the convention to convicted war criminals.²⁷

Of particular significance are the series of articles common to all four of the conventions which relate to the applicability of the conventions, the rights and obligations of the parties and of the individuals protected thereunder, and the execution and enforcement of the conventions. Agreement as to these common articles, all fundamental in nature, was achieved only through compromise at the cost of clarity. Nevertheless, the adoption of these common articles without any substantial reservation represents a remarkable achievement.²⁸

The 1949 Geneva Prisoner of War Convention is significant in that it (a) provides a code of legal rules both fundamental and detailed for the protection of prisoners of war; (b) vests in prisoners of war the right to humane and decent treatment; (c) attempts to restrict abuses and infringements of humanitarian principles by imposing upon the parties the obligation to provide penal sanctions to those who commit grave breaches; (d) seeks to ensure that like abuses will not occur in the imposition of penal sanctions against offenders; (e) recognizes that prisoners of war owe no allegiance to the Detaining Power; (f) provides that both the legal status and the rights of prisoners of war are to be assimilated as closely as possible, to those of members of the Detaining Power's own armed forces; and (g) provides a comprehensive role for the Protecting Power, the International Committee of the Red Cross, and other relief organizations.

Before the convention could be ratified by more than a handful of states, serious defects which either had not been anticipated or had remained unresolved²⁹ were to be disclosed by the Korean con-

²⁷ Reservations, [1955] 6 U.S.T. & O.I.A. 3467, at 3508, T.I.A.S. No. 3364.

²⁸ The Common Articles, as they appear in the 1949 GPW Convention are: *Article 1*, The absolute and unilateral obligation to observe the convention in all circumstances; *Article 2*, The conflicts to which the conventions are applicable; *Article 3*, Minimum standards to be observed in civil wars and internal conflicts; *Article 5*, The duration of applicability; *Article 6*, Freedom of states to conclude special agreements, not in derogation of the rights conferred on individuals; *Article 7*, Prohibitions against the renunciation of rights by individuals; *Articles 8-11*, Functions and roles of the Protecting Power; *Article 127*, Duty to disseminate text; *Article 129*, Obligation to repress grave breaches; *Articles 103-108*, Duty to punish grave breaches; *Article 130*, A definition of grave breaches; and *Article 131*, Responsibility of states, apart from individual responsibility, for grave breaches.

²⁹ Although the parties to the Korean conflict had not ratified the con-

flict. The convention nevertheless, reflects a significant step forward in the development of rules of humanitarian practice in the treatment of prisoners of war. No international convention can be drafted so as to preclude those who are intent on violating its principles from rationalizing their breach on the basis of either real or fancied ambiguity, or on alleged exceptions to its general rules. Thus it was inevitable that there would be only partial compliance with the Geneva Prisoner of War Convention of 1949 during the Korean conflict as it occurred before the parties to the conflict had ratified the conventions and before necessary implementing machinery and procedures could be established. The convention did, nevertheless, establish broad guidelines and standards which were generally recognized by the parties to the conflict.

A. General Provisions

Article 1, common to all four of the Geneva Conventions of 1949, obligates the contracting parties "to respect and ensure respect for the present Conventions in all circumstances." The words "in all circumstances" made it clear that the obligations were to be undertaken unilaterally rather than reciprocally, and that their binding effect did not depend upon the extent to which the other parties to the convention respected their obligation thereunder.⁸⁰ The convention requires that in time of peace, all preparatory measures, including the enactment of legislation necessary to repress grave breaches, be taken⁸¹ and that the text of the convention be disseminated by means of educational programs in both the military and the civil community.⁸²

The terms of article 1 clearly indicate that the benefits and burdens of the convention are to apply equally to both the aggressor

vention, both sides announced their intention to apply its general principles. Neither side, however, appointed a Protecting Power. Due to the absence of such protection many of the principles of the convention were not fully observed. See PICTET, COMMENTARY III, GPW CONVENTION 119 n.1.

Other deficiencies disclosed by that conflict were: (1) A failure to provide for the participation in war of the United Nations and other multinational regional organizations as "Detaining Powers"; (2) An excessive rigidity in such paternalistic provisions as the "nonrenunciation of individual rights" which prolonged the conflict for that substantial period of time which was required to negotiate the issue of involuntary repatriation.

⁸⁰ PICTET, COMMENTARY III, GPW CONVENTION 18.

⁸¹ Arts. 127, 130, 1949 GPW Convention.

⁸² Art. 127, 1949 GPW Convention.

and the victim of aggression. An illegal war therefore was not to preclude the applicability of the conventions to war victims.³³

B. *Conflicts to Which Applicable*

Article 2 of the convention provides: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

This article resolved doubt as to the applicability of the convention to armed conflicts which are not considered by one or all of the belligerents as constituting a state of war.³⁴ After World War I numerous armed conflicts had occurred which were not considered by the belligerents as being wars and which thus enabled them to assert, under the language of existing conventions, that the provisions thereof were inapplicable.³⁵

Deliberations leading to the 1949 conventions did not contemplate or consider collective enforcement action by the United Nations and the formation of closely integrated regional coalitions such as NATO and the Warsaw Pact. Thus, the term "High Contracting Parties" used in the convention left in issue the question of

³³ See DRAPER, *THE RED CROSS CONVENTION* 79 (1958). See also 2 OPPENHEIM, *INTERNATIONAL LAW* 218 (7th ed. Lauterpacht 1952) where it is stated that although the unlawful belligerent may not have a right to exercise all the rights which traditional international law confers, he must, during the pendency of war, receive the mutual benefit of the humanitarian principles. There is, however, a segment of international legal thought which would make the rules of warfare applicable to aggressors only, and would permit the defenders to pick and choose among the rules. See *Report of Study of Legal Problems of the United Nations*, 1953 PROCEEDINGS OF THE AM. SOC'Y OF INT'L LAW 131-35 (1953). Compare Baxter, *The Role of Law in Modern War*, 1953 PROCEEDINGS OF THE AM. SOC'Y OF INT'L LAW 90 (1953).

³⁴ PICTET, *COMMENTARY III, GPW CONVENTION* 19; DRAPER, *op. cit. supra* note 33, at 10-11; 2 OPPENHEIM, *op. cit. supra* note 33, at 236. Article 2 of The Hague Convention of 1899 stated that the annexed regulations concerning the Laws and Customs of War on Land were applicable "in case of war." This definition was not repeated in either the Hague Convention IV of 1907 or in the 1929 Geneva Conventions. At the time it seemed redundant to include such a clause for the title and purpose of the conventions made it clear that they were intended for use in war time and the meaning of war did not seem to require definition. PICTET, *COMMENTARY III, GPW CONVENTION* 19.

³⁵ 2 OPPENHEIM, *op. cit. supra* note 33, at 293 n.1. In the Sino-Japanese conflict of 1937 when both belligerents desired a state of war, the 1929 GPW Convention was not legally applicable.

whether, and to what extent, the conventions were to have applicability to international and multi-national organizations.³⁶

Article 2³⁷ follows the precedent of Article 82 of the 1929 Convention and expressly excludes the general participation clause. It provides as well that the parties "shall be bound by the Convention in relation to a non-contracting power if the latter accepts and applies the provisions thereof." There was general agreement under this language that non-contracting parties were to be entitled to the benefits of the convention if they adhered to it. It was difficult, however, to achieve agreement as to the exact circumstances under which the contracting parties would be required to extend the benefits of the convention to non-contracting parties. The Canadian delegation to the conference proposed that the convention be binding only with respect to those non-contracting powers which complied with its provisions. The Belgian delegation proposed that it be binding only on those non-contracting powers which had received from a contracting party an invitation to accept the provisions of the convention and had in fact accepted such an invitation.³⁸ The text which was finally adopted was a compromise between the two proposals, one of which was considered to be too indefinite, the other too rigid. This compromise is troublesome in that it leaves to the discretion of the contracting party the determination of whether a non-contracting party has accepted the convention and, if it has, whether it is applying its provisions.³⁹

C. Conflicts Not of an International Character

Common article 3, undoubtedly inspired by the Spanish Civil War, establishes certain minimum standards which would regulate civil wars, insurrections, and other conflicts which are not of an international character.⁴⁰ With respect to such conflicts it is a "con-

³⁶ See text, III GENERAL PROTECTION OF PRISONERS OF WAR, 1. *Multi-Nation Commands*, *infra*.

³⁷ "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations."

³⁸ 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 108 (1949) [hereinafter cited as 2B FINAL RECORD].

³⁹ Since the provision involves the principle of reciprocity, it would appear that the failure of the non-contracting party to observe a particular article would legally exempt the adversary only from a like observance. See DRAPER, *op. cit. supra* note 33, at 11.

⁴⁰ There is a common assumption that such conflicts are characterized by a total lack of restraint and savagery. It is to be noted however that Lieber's enlightened code (Instructions for the Government of Armies of

vention in miniature." It is the only article applicable to such conflicts when the parties thereto fail to adopt all or part of the convention by special agreement. This article states that persons who do not participate in hostilities, including members of the armed forces who have laid down their arms, are in all circumstances to be treated humanely without adverse distinction based on considerations of race, color, religion or faith, sex, birth, wealth, or similar considerations. Specifically, the article prohibits

at any time and in any place whatsoever . . . (a) violence to life and person, in particular, murder . . . mutilation, cruel treatment and torture; (b) taking of hostages, (c) outrages upon personal dignity . . . (d) the passing of sentences and the carrying out of executions without previous judgment by a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples.

This article also encourages the parties to the conflict, by special agreements, to bring all or part of the other provisions of the convention into force. Finally, and indispensably, it provides that the application of its provisions "shall not affect the legal status of the Parties to the Conflict."

Article 3 postulates a substantial innovation in the law of war for it extends the principle of international control to insurrections and rebellions, matters which had theretofore been considered as being essentially domestic in character. It is not surprising, therefore, that it took twenty-five meetings to achieve agreement on this article.⁴¹ Its ultimate adoption and ratification without a single reservation is an affirmation in principle of the view that: "the observance of fundamental human rights has, insofar as it is the sub-

the United States in the Field, GEN. O. 100, War Dep't April 24, 1863) was inspired by the American Civil War. Furthermore, in the Swiss Sonderbund War of 1847, a civil war occasioned by religious beliefs, General Dufour, the federal commander, issued a series of rules for the army which demanded moderation and care for both prisoners and the wounded. His proclamation of November 7, 1847, materially assisted in the rapid healing of wounds of the conflict. His proclamation read: "Confederates, I place in your keeping the children, the women, the aged and the ministers of religion. He who raises a hand against an inoffensive person dishonors himself and tarnishes his flag. Prisoners and wounded, above all, are entitled to your respect and compassion the more so, because you have often been with them in the same camp." Cited by DRAPER, *op. cit. supra* note 33, at 3.

⁴¹ 2B FINAL RECORD 9-19, 40-48, 75-79, 82-84, 90, 93-95, 97-102; PICTET, COMMENTARY III, GPW CONVENTION 28-34.

ject matter of legal obligations, ceased to be one of exclusive domestic jurisdiction of States, and has become one of legitimate concern for the United Nations and its members."⁴²

Substantively, the obligations of the article are not revolutionary and as the International Committee of the Red Cross has pointed out,

It merely demands respect for certain rules, which are already recognized as essential in all civilized countries, and were embodied in the national legislation of the States in question, long before the Convention was signed. What Government would . . . claim before the world, in case of civil disturbance which could justly be described as mere banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners, and to take hostages?⁴³

Numerous troublesome problems, however, have arisen incident to its applicability,⁴⁴ the criteria which is to be used to distinguish an "internal conflict" from mere banditry,⁴⁵ and the possibility that

⁴² 1 OPPENHEIM, INTERNATIONAL LAW 740 (8th ed. Lauterpacht 1955).

⁴³ PICTET, COMMENTARY III, GPW CONVENTION 36.

⁴⁴ The entitlement of the United States military personnel captured in Laos and Vietnam to POW status is not clear. The United States military personnel are present in an advisory capacity only, pursuant to the request of the Royal Laotian Government and the Government of the Republic of Vietnam. The United States does not consider itself to be a party to either conflict. Although the rebels consider the conflict in Laos to be a domestic one, the Royal Laotian Government has publicly denounced an extensive and aggressive participation in the conflict by troops from the Democratic Republic of Vietnam. There is also substantial evidence that troops from the Democratic Republic of Vietnam are actively participating in the conflict in the Republic of Vietnam. All of the states which are alleged to be participating in the Laotian and Vietnamese conflicts, Laos, the Democratic Republic of Vietnam, the Republic of Vietnam, and the United States, are all signatories to the 1949 Geneva Conventions. Under these circumstances it would appear that legally the conflicts in both Laos and Vietnam are international rather than domestic conflicts. If considered to be an international conflict, then captured United States personnel, as persons accompanying the Royal Laotian Armed Forces and the forces of the Republic of Vietnam, would be entitled to prisoner of war status under either Article 4A(d) or 4A(4) of the 1949 GPW Convention. If the conflicts are viewed as being domestic in nature and absent an agreement between the contending parties to apply all of the provisions of the 1949 GPW Convention, captured United States military personnel would be entitled only to the protection specified in Article 3 (humane treatment) of the 1949 GPW Convention. See PICTET, COMMENTARY III, GPW CONVENTION 22-23; 2 OPPENHEIM, *op. cit. supra* note 33, at 209-12, 370-71.

⁴⁵ Neither France nor the United Kingdom considered article 3 to be

recognition of belligerency in an extensive civil war may be considered as invoking the entire convention.⁴⁶ As article 3 does not "affect the legal status of the Parties to the Conflict," recognition of belligerency is not to be implied by its application. The legitimate government therefore may continue to try and punish captured rebels but they must be accorded a fair trial. Absent such a saving clause, it is doubtful that any agreement thereon could have been achieved.

D. Categories of Persons Entitled to Prisoner of War Treatment

The 1949 Geneva Prisoner of War Convention vests specific inalienable rights and imposes particular immutable obligations upon the Detaining State, the State of Origin, and upon the prisoner of war himself.⁴⁷ An individual to be treated as a prisoner of war must not only have "fallen into the power of the enemy," but must be in one of the categories enumerated in article 4.⁴⁸ Persons who are not protected by the Geneva Prisoner of War Convention would, however, be entitled to the protection afforded either by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; or the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War.⁴⁹

applicable in Algeria, Malaya, Kenya, and Cyprus. See DRAPER, *op. cit. supra* note 33, at 14. For an extensive discussion of such criteria see PICTET, COMMENTARY III, GPW CONVENTION 35-38.

⁴⁶ In 2 OPPENHEIM, *op. cit. supra* note 33, at 370-72, the view is expressed that recognition of belligerency makes what would otherwise be an internal conflict, one of an international character. Cf. DRAPER, *op. cit. supra* note 33, at 16, who is of the opinion that this view is untenable in the light of the clause which encourages special agreements to invoke the other provisions of the convention.

⁴⁷ Arts. 6, 7, 1949 GPW Convention.

⁴⁸ Article 5, 1949 GPW Convention provides that the convention is to apply "from the time they have fallen into the power of the enemy until their final release and repatriation."

⁴⁹ 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 848 (1949) [hereinafter cited as 2A FINAL RECORD]; THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 50 (Pictet ed. 1958) [hereinafter cited as PICTET, COMMENTARY IV, CIVILIAN CONVENTION]. Although an individual who has taken part in hostilities but who is not entitled to prisoner of war status may be treated as a war criminal, he does not thereby lose his entitlement to the protection specified in Articles 64 to 66 and 71 to 75 of the Civilian Convention.

A significant amplification of the categories of persons entitled to prisoner of war status was effected by the 1949 Geneva Prisoner of War Convention. Article 4A(2), like Articles 1, 2, and 3 of the Hague Regulations of 1907, accords prisoner of war status to members of the armed forces and to members of volunteer corps and militia who (1) are commanded by a person responsible for their acts or omissions, (2) display a fixed distinctive emblem recognizable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws and customs of war.

Additionally, article 4 continues in effect the protection accorded by the 1929 GPW Convention to camp followers and to members of a *levée en masse*⁵⁰—i.e. those inhabitants of an unoccupied territory who on the approach of the enemy spontaneously take up arms to resist the invaders.

New categories protected by the 1949 GPW Convention include members of organized resistance movements, even those in occupied territory, if they meet the test established by article 4A(2). Superficially, it would appear that the inclusion of members of organized resistance movements in occupied territory within the categories of protected personnel is a substantial departure from pre-existing international law. On analysis, however, it becomes clear that as a practical matter the prerequisites that members of such movements, or partisans, bear distinctive insignia recognizable at a distance and that they carry arms openly, precludes its effective utilization. Only rarely will members of organized resistance movements in effectively controlled territories be able to comply with all of the conditions which are prerequisite to entitlement under the GPW Convention for to accomplish their mission they must work secretly, wear no uniforms, conceal their weapons, and withhold their identity prior to their strike.⁵¹ Members of organized resistance movements in occupied territory who do not qualify as prisoners of war are, however, entitled to the protection of the Civilians Convention.⁵²

⁵⁰ Art. 81, 1929 GPW Convention. See also Art. 2, Hague Regulations of 1907.

⁵¹ DRAPER, *op. cit. supra* note 33, at 52. See also PICTET, COMMENTARY III, GPW CONVENTION 52-61.

⁵² See note 50 *supra* and Arts. 64 to 75 of the Civilian Convention. Article 68 of the Civilian Convention provides in part that the death penalty may be adjudged only "where the person is guilty of espionage... serious sabotage against the military installations of the Occupying Power or of an intentional offence which caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began." The United States

It is to be noted in this connection that the Diplomatic Conference rejected a proposal which would have extended the provision of the *levée en masse* to uprisings in occupied territory⁵³ partly because of the special provisions for organized resistance movements.⁵⁴ It also rejected a proposal which would have extended the protection to individuals who, not being parties to a *levée en masse*, took up arms against an unlawful aggressor. The conference concluded that such individuals who were not a part of an organized resistance movement or of a *levée en masse*, should remain unprivileged belligerents. It was recognized that once an illegal war was commenced it must for all purposes be governed by the laws and customs of war. It was considered that any derogation from the rules of war for this purpose would lead to anarchy.⁵⁵

E. Period of Protection

Under article 5, the provisions of the GPW Convention are to apply to prisoners of war "from the time they have fallen into the hands of the enemy until their final release and repatriation."⁵⁶ Although this article was intended to remove any ambiguity as to the precise moment when an individual's status as a prisoner vested, the commencement of protection in fact depends upon the determination of two separate and distinct factors: the moment at which an enemy may no longer be lawfully attacked; and the moment at which the rights and obligations to which prisoners of war are entitled become vested.

Under the customary rules of war, protection from attack begins

and the United Kingdom have filed reservations, reserving the right to impose the death penalty without regard to whether it was authorized by law in force at the time the occupation began.

⁵³ "[A] *levée* does not cover the case of an uprising after the enemy has occupied the part of the national territory concerned. Thus, before an invader crosses the national frontier, the whole able-bodied population may constitute a *levée en masse*. After invasion and occupation no *levée en masse* can take place in the area occupied, but there may be a *levée en masse* in the areas forward of the enemy and not yet occupied." Thus after invasion, the provisions of the convention with respect to organized resistance movements take effect. DRAPER, *op. cit. supra* note 33, at 53.

⁵⁴ 2 OPPENHEIM, *op. cit. supra* note 33, at 372.

⁵⁵ Gutteridge, *The Geneva Convention of 1949*, 26 BRIT. YB. INT'L L. 294 (1949).

⁵⁶ This article provides further that "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 [of personnel] enumerated in Article 4, such persons shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal."

when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless.⁵⁷ These conditions will not always coincide in point of time with the actual assumption of physical custody by the captor state.⁵⁸ A soldier who has laid down his arms or whose command has been surrendered may no longer be attacked, but responsibility for his maintenance and treatment as a prisoner of war cannot be fixed on the captor state until it has assumed physical control. The Brussels Declaration of 1874 avoided a direct statement as to the precise moment at which prisonership commenced, but did so indirectly by defining prisoners of war as lawful and disarmed enemies. There was, however, no precise conventional rule which fixed the commencement of prisonership.⁵⁹ Article 1 of the 1929 Geneva PW Convention approached the matter obliquely. It states that the convention applies to the persons mentioned in Articles 1, 2, and 3 of the 1907 Hague Regulations "who are captured by the enemy." It thus recognizes that custody is a condition precedent to prisoner of war entitlement.

In recognition of the meager facilities which are available for the processing of prisoners of war in maritime and aerial warfare, the 1929 Convention carefully provided that the convention applied:

to all persons belonging to the armed forces of belligerents who are captured by the enemy in the course of maritime or

⁵⁷ FLORY, PRISONERS OF WAR 39 (1942).

⁵⁸ The distinction between exemption from attack and prisoner of war status may be illustrated by the case of *United States v. Kaukoreit*, 59 Bd. of Rev. 7 (1946), 5 BULL. JAG (ARMY) 262 (1946). German military forces in Italy surrendered as of May 2, 1945. On May 6, 1945, before their unit had been taken into custody, the three accused murdered a fellow soldier. After they came under Allied control the accused were tried by a United States general court-martial for murder in violation of Article of War 92. The Board of Review held that the accused were not subject to military law under Article of War 2 until they became prisoners of war, and held that they did not become such prisoners until they were actually taken into Allied custody. Accordingly, they did not violate the Articles of War. Because the victim was also a member of the German forces, the offense was not a violation of the law of war. It was, however, held to be a violation of Italian law which the United States forces had a right to enforce in view of Italy's status as an occupied country. Even if Italian law could not be enforced with respect to German forces in Italy during hostilities (*e.g.*, *Coleman v. Tennessee*, 97 U.S. 509 (1878)), it became enforceable against them upon the unconditional surrender of the German forces on May 2, 1945.

⁵⁹ See FLORY, *op. cit. supra* note 57, at 39.

aerial warfare, subject to such exceptions (derogations) as the conditions of such capture render inevitable. Nevertheless, these exceptions shall not infringe the fundamental principles of the present Convention; they shall cease from the moment when the captured person shall have reached a prisoner of war camp.⁶⁰

Experience in World War II confirmed the fact that the conditions which necessitated exceptions to the full application of the convention in maritime and aerial warfare also existed in fluid combat situations.⁶¹ The International Committee of the Red Cross proposed that the exceptions which were specified in the 1929 Convention should be extended to all warlike operations. This proposal would have resulted in a waiver of technical provisions without any impairment of fundamental principles. The conference, however, feared that any express distinction between fundamental principles and technical provisions might lead to an interpretation that the latter provisions were in fact optional. Article 5 as finally enacted provides that the convention in its entirety "shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation."⁶²

Under this text it will be noted that a Detaining Power is now precluded from relaxing the standards fixed by the convention in the event the State of Origin capitulates unconditionally as did Germany in 1945.

Article 6 of the convention prohibited the parties to the conflict from alienating any of the rights which it confers upon a prisoner of war, and article 7 of the convention precludes the prisoner himself from renouncing the rights which the convention accords to him. The text of articles 5 and 7 considered together makes it clear that

⁶⁰ Art. 1(2), 1929 GPW Convention.

⁶¹ After the Dieppe landing in 1942, the Canadian forces handcuffed German prisoners for some hours in order to prevent escape. A waive of reprisals and counter-reprisals followed. On that occasion, the British government took the view that the convention was not applicable to captured personnel as long as they were still on the battlefield. PICTET, COMMENTARY III, GPW CONVENTION 73-74. There is considerable merit in the British position. If, in the tense circumstances which prevail in such fluid battle conditions as commando raids and airborne operations, the captors are denied the right to provide for their own security by handcuffing prisoners, there is great danger that the prisoner will be shot "while trying to escape" or "in self defense."

⁶² See PICTET, COMMENTARY III, GPW CONVENTION 74.

a prisoner of war is himself precluded from changing his status prior to the time of his final release and repatriation.⁶³

F. Entitlement of Deserters and Defectors to Prisoner of War Status

A question of significant importance, that of the entitlement of deserters and defectors to prisoner of war status, has arisen due to the imprecision of the language of Article 4 of the GPW Convention. As to military personnel article 4 provides that:

A. Prisoners of War, in the sense of the present Convention, are persons belonging to one of the following categories, *who have fallen into the power of the enemy*:

(1) Members of the armed forces of a Party to the Conflict, as well as members of the militias or volunteer corps forming a part of such forces.

The term "fallen into the power of the enemy" replaced the term "captured by the enemy" which had been used in the 1929 Convention.⁶⁴ It is clear from the *travaux préparatoires* that this new terminology was intended to be more comprehensive than that which had been utilized in the 1929 Convention. It was intended to encompass at least two additional classes of soldiers: those who are surrendered as a result of a national capitulation or armistice (referred to as "surrendered enemy personnel" during World War II),⁶⁵ and those who were present in the territory of the enemy at

⁶³ The provisions of the 1949 GPW Convention which preclude prisoners of war from voluntarily renouncing their rights have been construed as precluding them from renouncing their status as prisoners of war in order to return to a civilian status or to join the armed forces of the Detaining Power. U.S. DEP'T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE para. 49 (1956) [hereinafter cited as FM 27-10].

⁶⁴ Art. 1, 1929 GPW Convention.

⁶⁵ See 2A FINAL RECORD 237; PICTET, COMMENTARY III, GPW CONVENTION 50, 75-76. See also Pictet, *Les Conventions de Geneve*, 1 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONALE 79. At the conclusion of World War II, the German and Japanese troops which had been taken into Allied custody as a result of the mass capitulation of the Axis armed forces and the surrender of the Axis states, were not accorded prisoner of war status and were denominated as "surrendered enemy personnel." The Allies took the view that unconditional surrender gave them as Detaining Powers a free hand as to the treatment they could accord military personnel who had fallen into their hands following capitulation. Among the disadvantages suffered by such personnel was that their personal effects were impounded without a receipt, officers received no pay, and enlisted persons, although compelled to work, received no wages. In penal proceedings they were not entitled to the benefits of the 1929 GPW Convention.

the outbreak of hostilities.⁶⁶ Was it, however, intended to cover persons who deserted their armed forces prior to their capture or surrender, or persons who at the time of their capture or surrender expressed a desire to serve the Detaining Power. Neither the convention nor its *travaux préparatoires* refer expressly to such persons.

For the purpose of this study a deserter is defined as a soldier who voluntarily abandons his force to avoid combat or for some other purpose, but who, *at the time of his capture or surrender*, has neither the intent nor the desire to sever his allegiance to his country, to bear arms on behalf of the Detaining Power, or to otherwise actively assist the Detaining Power in its military operations. A defector is defined as a soldier who voluntarily abandons his forces either for the purpose of bearing arms on behalf of the Detaining Power or to otherwise participate in military operations of the Detaining Power, or who *at the time of his capture or surrender*, makes known his previously formulated and present intent to bear arms on behalf of the Detaining Power or otherwise actively to participate in the military operations of the Detaining Power.

The status which is to be accorded deserters and defectors is of particular importance for it will determine, among other matters, the type of employment which may be required of them, their possible utilization as combatants against their own or other countries, their entitlement to repatriation, and their eligibility to asylum as political refugees upon the conclusion of hostilities. The treatment of defectors is a matter of considerable significance because of the possibility that in future conflicts ideological and political considerations will occasion widespread defection. Under these circumstances states will be inclined to deny deserters and defectors prisoner of war status, particularly if such action will make available to them, but not the enemy, the services of a substantial number of enemy personnel.

The entitlement of deserters and defectors to prisoner of war status depends in large part upon the interpretation which is given to the words "fallen into the power of the enemy." Properly, these words must be interpreted in the light of the overall objectives of the conference, the intent of the conferees, the circumstances existing at the time of the negotiation of the convention, the evils which the conference intended to obviate and, if appropriate, the prevailing

⁶⁶ 2A FINAL RECORD 237.

practice of states with respect to the status of such persons prior to the 1949 GPW Convention.

If the GPW Convention is interpreted as being applicable to deserters and defectors, they being persons who have "fallen into the power of the enemy," they would, as prisoners of war, be ineligible for either voluntary or involuntary service as combatants. They would also be exempt from forced labor with respect to those categories of work which are proscribed by Articles 50 and 52 of the GPW Convention.⁶⁷ If the GPW Convention is interpreted as being inapplicable to them their status would, in almost all circumstances, be that of protected persons under the provisions of Article 4 of the Civilians Convention.⁶⁸ This article provides:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals

⁶⁷ For the text of Articles 50 and 52, 1949 GPW Convention, see note 122 *infra*.

⁶⁸ It has been said that Article 4 of the Civilian Convention confirms a general principle that "Every person in enemy hands must have some status under international law: he is either a prisoner of war, and, as such, covered by the Third Convention [GPW], a civilian covered by the Fourth Convention [Civilian Convention], or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view." PICTET, COMMENTARY IV, CIVILIAN CONVENTION 51.

Although the issues of entitlement to prisoner of war status and repatriation are separate and distinct ones, it is to be noted that generally protected persons enjoy the same rights to repatriation under the Civilians Convention as that enjoyed by prisoners of war under the GPW Convention. It is to be noted as well that as a matter of practice states have generally granted asylum to deserters and defectors, as they have to prisoners of war—particularly when the provisions of an armistice agreement or those of a treaty of peace failed to immunize them from punishment by their state of origin for their desertion or defection. See Schapiro, *The Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310 (1952).

has normal diplomatic representation in the State in whose hands they are.

....

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.⁶⁹

The Civilian Convention specifies, as does the GPW Convention, that special agreements may not adversely affect the situation of protected persons, nor restrict their rights under the convention,⁷⁰ and that such persons may not under any circumstance "renounce in part or in entirety the rights secured to them by the Convention."⁷¹ Although this convention expressly prohibits an occupying power from compelling a protected person to serve in its armed or auxiliary forces,⁷² it permits a protected person voluntarily to enlist in the enemy's armed forces.⁷³

Article 4 of the GPW Convention is susceptible to at least three interpretations with respect to the categories of military personnel who are entitled to prisoner of war status.⁷⁴ First, *all* military personnel who are in the custody of the enemy. Second, all military

⁶⁹ The protection provided by the Civilian Convention commences with the outset of the conflict or occupation. See Art. 6, Civilian Convention. Generally, in the territory of the parties to the conflict its application terminates upon the close of military operations and, in the case of occupied territory, one year after the general close of military operations. The occupying power, however, is bound for the duration of the occupation, to the extent that it exercises the functions of government in such territories, by the provisions of Articles 1 to 12, 27, 29 to 34, 47, 49, 51 to 53, 59, 61 to 77, and 143 of the Civilian Convention. See Art. 6, Civilian Convention.

⁷⁰ Art. 7, Civilian Convention.

⁷¹ Art. 8, Civilian Convention.

⁷² Art. 51, Civilian Convention. Article 147, Civilian Convention, states that a breach of this obligation constitutes a grave breach of the convention.

⁷³ Such enlistments, however, may not be the result of pressure or propaganda. Art. 7, 1949 GPW Convention. Under Articles 5 and 7 of the 1949 GPW Convention, prisoners of war are denied the right to voluntarily enlist in the enemy's armed forces.

⁷⁴ See Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 1961 MILITARY L. REV. 15, 36.

personnel in the custody of a capturing force *except* deserters and defectors. Third, all military personnel in the custody of a capturing force—irrespective of the manner by which custody is effected—except those who advise the Detaining Power at the time they are taken into custody of their intent and desire to serve in the armed forces of the Detaining Power or to participate in activities which will foster the war effort of the Detaining Power.

States in determining which of these interpretations they are to adopt will be confronted with considerations of serious import. If deserters and defectors are to be considered as excluded from prisoner of war status, an unscrupulous belligerent may assert, contrary to fact, that large numbers of prisoners who have passed into their custody are deserters or defectors and, as such, not entitled to prisoner of war status.⁷⁵ Proof to the contrary in time of combat would be difficult, particularly if a full and immediate investigation of such cases is infeasible or is not permitted.

States which in good faith adopt a policy which deny prisoner of war status to persons who are in fact deserters and defectors run the danger that under the guise of a similar policy an enemy state may attempt to justify its illegal conduct by the simple expedient of classifying any and all prisoners as deserters and defectors. On the other hand should states adopt the policy of according deserters and defectors POW status they would thereby deprive themselves of valuable military resources and other important advantages.

As indicated, neither the text of the GPW Convention nor its *travaux préparatoires* reflect the specific intent of the conferees as to the entitlement of deserters and defectors to the protection of the GPW Convention.⁷⁶ However, the *travaux préparatoires* are clear that the words "fall into the power of the enemy" were not intended to be identical in their effect to the words "captured by the enemy"⁷⁷

⁷⁵ An interpretation which would exclude from prisoner of war status all military personnel in the custody of a Detaining Power who voluntarily sever their allegiance to their country and who assist the Detaining Power in its war effort, is considered to be unsupportable under the provisions of Articles 5 and 7 of the 1949 GPW Convention and the intent and objectives of this convention.

⁷⁶ See GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* 103 (1956) which is of the view that deserters were deliberately omitted from the categories of persons who are to be entitled to prisoner of war status under Article 4 of the 1949 GPW Convention and that as such they constitute a special category of persons.

⁷⁷ See Clause, *supra* note 74, at 31; Gutteridge, *The Geneva Convention of 1949*, 26 *BRIT. YB. INT'L L.* 294, 312-13 (1949); Yingling & Ginnane, *The Geneva Convention of 1949*, 46 *AM. J. INT'L L.* 393, 401 (1952).

as used in the 1929 Convention. Further, the words "fall into the power of the enemy" were not intended to encompass only those whose surrender or capture was involuntary.⁷⁸

As a practical matter soldiers who desert in order to avoid the conflict, but who are captured, do in fact fall involuntarily into the hands of the enemy just as much as do other prisoners who are captured or are surrendered.⁷⁹ Logically, there is no reason why those who desert to avoid the conflict and who fall into the hands of the enemy either voluntarily or involuntarily should be denied POW status while captured or surrendered defectors⁸⁰ are vested with such a status. It is clear that it was not intended that the convention would be used as a means of punishing deserters and defectors by denying them POW status.⁸¹ On the contrary it was the objective of the convention to serve the cause of humanity and to insure by its provisions the general well-being of all prisoners. The inclusion of deserters and defectors as persons entitled to POW status would not be inconsistent with this objective and would perhaps best insure that the rights visualized for prisoners of war would neither be frustrated by contrivance nor be voluntarily alienated by the prisoners of war themselves. Furthermore, an interpretation which accords to deserters and defectors POW status would leave no gap under which an unscrupulous Detaining Power could, under the guise of compliance with the convention, deny to any captured or surrendered military personnel in its hands prisoner of war status on the basis of its unfounded assertion that they were in fact deserters or defectors.⁸²

⁷⁸ 2A FINAL RECORD 237; PICTET, COMMENTARY III, GPW CONVENTION 50; Schapiro, *The Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310, 323 (1952).

⁷⁹ Schapiro, *supra* note 78, at 323 states that "a soldier who surrenders is just as much 'captured' as any other prisoner...."

⁸⁰ Those who as of the time of their surrender or capture express their previously formulated intent to defect, they having been incapable theretofore of effectuating this intent because of their inability to free themselves from the physical control of their forces.

⁸¹ It may be noted in this connection that deserters and defectors are not considered by the nations from whose forces they desert or defect as having lost, because of their conduct, their status as members of their armed forces, and that nations have uniformly held conduct of this nature to be punishable under their domestic law as military offenses. Clause, *supra* note 74, at 30. In any event, national legislation concerned with the punishment of these offenses is conclusive neither as to their continued military status nor as to their entitlement to prisoner of war status while they are in the hands of a Detaining Power under either the 1949 GPW Convention or the Civilian Convention.

⁸² See 2B FINAL RECORD 17-18. In opposing the attempt of the French

One authority who considers that the 1949 GPW Convention entitles deserters and defectors to POW status has stated that: "A member of the armed forces of the enemy who comes into the hands of a detaining power, from whatsoever motive and by whatever means, must be held as a prisoner of war and cannot leave his status as such, because he is powerless to surrender it."⁸³

During the second meeting of the GPW drafting committee at Geneva, Mr. Wilhelm, a member of the legal staff of the International Red Cross, explained to the conferees that the conference of government experts held at Geneva in 1947, had approved the suggestion "that the words 'fallen into the enemy hands' had a wider significance than the word 'captured' which appeared in the 1929 convention, the first expression also covering the case of soldiers who had surrendered without resistance or who had been in enemy territory at the outbreak of hostilities"⁸⁴ In a later article in which he amplified his views as to the entitlement of deserters and defectors to prisoner of war status he stated:

In effect we have seen that it [GPW Convention] must in accordance with Article 4A be applicable to military personnel who fall into the power of the enemy. *The term 'fall' shows clearly that it applies to military personnel who pass into the power of the enemy not by their own volition but because of a force exterior to themselves, because they are forced to do so.* This conclusion is applicable to military personnel captured during combat as well as to those who surrender or capitulate, it being impossible for them to continue the fight.

and British delegates to modify the text of article 7 so that POWs would be permitted to enlist in the armed forces of a Detaining Power, the Norwegian representative observed that it would be very difficult to prove that coercion or pressure had been used to obtain from a prisoner his renunciation of rights under the convention as the Detaining Power could always assert that it had been freely obtained and, for that matter, could also obtain, with little difficulty a confirmation of that assertion from the prisoner himself. This same possibility would exist if the convention were interpreted as denying deserters and defectors prisoner of war treatment.

⁸³ Letter from Professor R. R. Baxter to J. W. Brabner-Smith, Esq. dated October 20, 1958 commenting upon a study prepared by the addressee on the "extent to which friendly personnel of an enemy nation, including surrendered military personnel, can legitimately be employed to assist the war effort of a nation as combatants, guerillas, or otherwise." In this letter he recognizes that his view on this matter is contrary to that expressed by Wilhelm and Draper. (File JAGW 1958/7580, Oct. 31, 1958, Office of The Judge Advocate General of the Army.)

⁸⁴ 2A FINAL RECORD 237.

This reasoning based on the letter to the convention itself, corresponds to that which flows from its general economy or its spirit, it is established essentially to protect the combatants who, *even upon falling into the hands of the enemy, maintain the sentiment of remaining faithful to the army that they have served, and not those who, like deserters, decide to abandon the fight and their country . . .* Many of its [GPW] articles such as the disposition concerning the communication of names, to repatriation, to financial resources, to the protecting power clearly imply a certain continuity of fidelity between the prisoner and his country of origin; it is difficult to visualize how all of these clauses could be applied to those who wish to sever their allegiance . . .⁸⁵

Although this statement can be read as denying prisoner of war status to deserters, and to those captured or surrendered personnel who as of the time of their surrender or capture do not desire to remain faithful to their country, Wilhelm concludes that the term deserter "must be reserved for those military personnel who place themselves voluntarily under the power of the enemy and who from the very beginning, have clearly manifested their intention to sever their allegiance with the country under which they have served."⁸⁶ Such deserters (defectors) in his opinion, need not be accorded prisoner of war status under the convention.⁸⁷ This view which places all deserters and some defectors in a prisoner of war status finds no express support in the *travaux préparatoires*.

There is no sound reason why a defector who had perfected his escape from his own forces should be allowed to serve the Detaining Power, while a person who intended to defect, but who was unable to effectuate this intent prior to the time of his surrender or capture should be denied this right.

⁸⁵ Wilhelm, *Peut-on Modifier le Statut des Prisonniers de Guerre?* 1953 REVUE INTERNATIONALE DE LA CROIX ROUGE 681. (Emphasis added.)

⁸⁶ *Id.* at 683.

⁸⁷ It is evident that the category of personnel which he describes are defectors, and not deserters who merely leave their duties intending to remain away permanently or indefinitely and who have no intention of severing their allegiance to their country or of cooperating with the Detaining Power. Mr. Wilhelm's view that those provisions of the convention which refer to "the communication of names, to repatriation, to financial resources to the protecting power" imply "a certain continuity of fidelity between the prisoner and his country of origin," finds no support in either law or practice. There is no international law of desertion and national laws do not generally deprive deserters or defectors of their nationality.

It is Mr. Draper's view that:

Those who desert their own forces and give themselves up to the enemy as defectors do not, it is thought, 'fall into the power of the enemy' for they have voluntarily put themselves into his power, and have not been captured. The important consequence may follow that such defectors, not being entitled to prisoner of war status, are not entitled to the rights conferred by this [Prisoner of War] Convention and may therefore volunteer to do propaganda work, broadcasting, television performances, etc., without there being any question of renouncing their rights under the convention.⁸⁸

It appears that Draper uses the word "defectors" to describe prisoners who for any reason disassociate themselves from their forces and give themselves up to the enemy. Under this view it would appear that no deserter or defector would be entitled to POW treatment.

It is likely that had the GPW conferees been required to provide expressly for the status of deserters and defectors they would have supported the view that all deserters but no defectors were covered by Article 4A of the GPW Convention.⁸⁹ This view reflects the treatment accorded these categories of personnel under customary international law.⁹⁰

Since the 1949 GPW Convention is subject to several interpretations on the issue of the entitlement of deserters and defectors to POW status, action should be taken now by the signatories to clarify this matter.^{90a} The Swiss Federal Council could be requested to

⁸⁸ DRAPER, *THE RED CROSS CONVENTION* 53-54 (1958). (Emphasis added.)

⁸⁹ It is doubtful that the signatory states would have agreed to consider defectors as covered by the 1949 GPW Convention and thereby deny themselves of the services of defectors. Since the convention is unclear on the matter of deserters and defectors, resort to customary international law must be had to resolve this issue. Under customary international law deserters and defectors were not entitled to POW treatment as a matter of law although the Detaining Power could, if it desired, accord them this status. Furthermore, those who were accorded this status could renounce it. See Clause, *supra* note 74, at 37.

⁹⁰ As a practical matter a Detaining Power would derive little advantage from an improper classification of prisoners of war as defectors. Deserters whom the Detaining Power forced into combat could not be relied upon. Under an improper classification as deserter, POWs could, however, be required to do certain work which prisoners of war may not be required to perform.

^{90a} The United States position on this matter is not clear. FM 27-10

ascertain the position of all signatories on this issue. Should such an inquiry disclose a wide divergence of opinion, the settlement of the issue should be sought by a multilateral treaty. Should its settlement by means of a multilateral treaty be impossible, states, on the commencement of hostilities, should seek an agreement on this matter as well as on the measures which are to be utilized to insure the fulfillment of the obligations thereunder.

G. Special Agreements

Article 83 of the 1929 GPW Convention reserved to the parties the right to make special agreements in accordance with the practices established during World War I. It was contemplated that such agreements would provide benefits greater than those provided under the convention.

During World War II, however, the Vichy government entered into agreements with Germany which authorized the latter to use in German war industries French prisoners who consented to this type of employment. The agreements also allowed the prisoners to change their status to that of civilians.⁹¹ This practice resulted in French prisoners being treated as slave laborers and often their exposure to allied war raids. The U.S. Military Tribunals in the trials of Krupp,⁹² Milch,⁹³ and Flick,⁹⁴ rejected the validity of the Vichy agreements as being contrary to the spirit of the 1929 Convention and the illegal use of prisoners of war constituted one of the counts on which Krupp and Flick were convicted. In an effort to prevent recurrence of these abuses, Article 6 of the 1949 GPW Convention provides that "no special agreement shall adversely affect the situation of prisoners of war . . . nor restrict the rights which it confers upon them."

makes no reference to deserters or defectors or to their entitlement to prisoner of war treatment. Paragraph 70 of this manual states: "The enumeration of persons [those set forth in Article 4 of the 1949 GPW Convention] entitled to be treated as prisoners of war is not exhaustive and does not preclude affording prisoner of war status to persons who would otherwise be subject to less favorable treatment."

⁹¹ PICTET, COMMENTARY III, GPW CONVENTION 84.

⁹² The Krupp Case, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 29, 1374, 1495 (1950).

⁹³ The Milch Case, 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 360-61, 779-80 (1950).

⁹⁴ The Flick Case, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 13, 1198, 1202 (1950).

H. Non-Renunciation of Rights

As a complement to article 1 (Application in All Circumstances), article 5 (Duration of Application), and article 6 (Prohibition of Agreements in Derogation of the Convention), article 7 specifies that "Prisoners of War may in no circumstances renounce in part or in entirety the rights secured to them by the . . . Convention." Thus, neither the State of Origin, nor the prisoner himself, nor the concurrence of both, can alter the prisoner's status or result in a waiver of his rights, until his "final release and repatriation."

It is not surprising that article 7 encountered considerable opposition⁹⁵ for some conferees consider that the right to a "freedom of choice" was a fundamental right of man.⁹⁶ Despite arguments to the contrary,⁹⁷ the conference was persuaded that in time of war, prisoners of war do not in fact have the mental freedom to make a free choice. Duress could be so subtle as to be incapable of proof. The conferees concluded that the general benefits to be obtained by the flat prohibition outweighed the hardships that could result from denying the prisoner freedom of choice as to his status.⁹⁸ Broadly speaking, article 7 is significant for it recognizes protected persons as subjects of international law with direct rights and obligations thereunder.⁹⁹

I. Function of the Protecting Power

A Protecting Power is a neutral state which is entrusted by a belligerent with the protection of its interests and those of its nationals who are in the power of a third state.¹⁰⁰ The safeguards of

⁹⁵ 2B FINAL RECORD 17, 18, 56, 110.

⁹⁶ See PICTET, COMMENTARY III, GPW CONVENTION 88.

⁹⁷ The British delegate commented acidly, "The Convention is particularly intended to give prisoners of war the greatest possible freedom. It seems strange for a humanitarian conference to have inserted an article stipulating that in no circumstances a prisoner of war may be allowed to make a free choice." The French delegate recalled that the Czechoslovak National Army was formed from among Austro-Hungarian prisoners of war held by the Allies during World War I. 2B FINAL RECORD 17. See also BENES, MY WAR MEMOIRS 180-218 (1928).

⁹⁸ See PICTET, COMMENTARY III, GPW CONVENTION 89-90. Within two years article 7 was to haunt the delegate from the free world in connection with communist insistence that a prisoner himself cannot waive his right to repatriation under article 118.

⁹⁹ Arts. 129, 130, 1949 GPW Convention.

¹⁰⁰ The concept of Protecting Power originated in the 16th century when only the principal sovereigns maintained embassies. These sovereigns claimed the right to take under the protection of their embassies foreign nationals of like culture, who were without national representation of their

the convention would be illusory if it were not for the functions which it vests in the Protecting Power. Thirty articles impose functions on the Protecting Power. These functions include among other matters, the transmission of correspondence and information,¹⁰¹ the inspection of facilities,¹⁰² the supervision of the distribution of relief,¹⁰³ and the representation of prisoners in judicial proceedings.¹⁰⁴ Articles 8 to 11 are the basic articles. Article 8 states that the "Conventions shall be applied with the cooperation and under the scrutiny of the Protecting Power whose duty it is to safeguard the interests of the parties to the conflict." It was also recognized that no neutrals might be available in future wars. Accordingly, article 10 authorizes the parties, by agreement, to entrust such functions to an organization "which offers all guarantees of impartiality and efficacy." A resolution proposing the establishment of such an organization, however, was not adopted by the Diplomatic Conference.¹⁰⁵

Article 10 also provides, that whenever prisoners cease to benefit from the activities of a Protecting Power, or of an organization, the Detaining Power must request a neutral state or an organization to assume the function. Should such a request prove fruitless, the Detaining Power must request the International Committee of the Red Cross or some similar body to assume the role.¹⁰⁶

One of the reasons for the failure of a Protecting Power is the lack of a staff and the expenses involved. The convention makes no

own. By the end of the 19th century, it became customary for states at war to request a neutral to act as Protecting Power with particular reference to the custody of the diplomatic and consular premises. During World War I, the role of the Protecting Power was expanded to safeguard the interest of prisoners of war in conjunction with the International Committee of the Red Cross. In recognition of this experience, Article 86 of the 1929 GPW convention provided a legal basis for the function of the Protecting Power, and vested the representative of Protecting Powers with unrestricted access to protected prisoners of war. During World War II, the burden of acting as Protecting Powers was borne principally by Sweden and Switzerland, which represented virtually all belligerents. At one time Switzerland was Protecting Power for thirty-five belligerent countries. PICTET, COMMENTARY III, GPW CONVENTION 93-95.

¹⁰¹ Arts. 12, 23, 62, 63, 66, 69, 77, 120, 122, and 128, 1949 GPW Convention.

¹⁰² Arts. 56, 78, 79, 96, and 126, 1949 GPW Convention.

¹⁰³ Arts. 73, 1949 GPW Convention.

¹⁰⁴ Arts. 100-05, 107, 1949 GPW Convention.

¹⁰⁵ DRAPER, *op. cit. supra* note 88, at 55-56.

¹⁰⁶ The Soviet Union and its satellites made a reservation to this provision, declaring that they would not recognize the validity of a request by the Detaining Power to a neutral state or humanitarian organization unless the consent of the State of Origin is obtained.

provision for reimbursement, leaving the matter to agreement between the states concerned.¹⁰⁷

Only inchoate provisions have been made for the contingency of an absence of qualified neutrals. The failure to implement the provisions for the establishment of an international organization to assume the many important functions of the Protecting Power may leave future war victims in the position similar to that in which prisoners of war found themselves during the Korean conflict when no Protecting Power functioned as such.

III. GENERAL PROTECTION OF PRISONERS OF WAR

A. Humanitarian Principles

Articles 12 to 16 reaffirm the basic principle that prisoners of war are in the hands of the Detaining Power and not in those of the individuals or units which capture them; that they must at all times be treated humanely; that their honor and their person must be respected; that they must be provided maintenance free of charge; and that subject to considerations of age, sex, rank, and health, they must be treated alike without adverse distinctions based on race, nationality, religion, or political belief. Only article 12 which deals with the responsibility of the Detaining Power for the treatment of prisoners will be discussed in detail.

B. Responsibility for Treatment

Article 12 places on the captor state the ultimate responsibility for the proper treatment of prisoners of war. To this end a transfer of prisoners of war to other powers may only be made subject to the conditions that the transferee power be a contracting party and that the Detaining Power satisfy itself that the transferee is able and willing to apply the convention. If the transferee fails in any important respect, the captor state is obligated to take steps to correct the deficiency or demand return of the prisoners.¹⁰⁸

Article 12 presents difficult problems when applied to hostilities

¹⁰⁷ DRAPER, *op. cit. supra* note 88, at 56.

¹⁰⁸ Article 2, 1929 GPW Convention, similarly fixed responsibility for the treatment of prisoners of war on the "hostile government," but it was not clear whether responsibility could be transferred to a new Detaining Power. During World War I the United States took the position that if its prisoners were sent to an ally, the United States would not be relieved of the treaty obligation which it had assumed toward the State of Origin. See FLORY, PRISONERS OF WAR 45 (1942); U.S. WAR DEF'T DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 1912-1931, at 1101-102.

which are conducted by multi-national commands or by international forces directly responsible to the United Nations. It is unfortunate that the conference did not foresee that modern command organizations would differ materially from the traditional national forces of prior wars.

1. *Multi-national commands.* When forces consist of different national contingents operating under a unified international command (e.g., NATO) a prisoner may pass through numerous national hands before he arrives at a permanent internment camp. In the abstract it is possible to fix responsibility in the captor state, but in actual practice such fixing of responsibility may be both unrealistic and impractical.¹⁰⁹ It would appear more reasonable to fix responsibility on the multi-national organization, but being neither a "State" nor a "Detaining Power" it is ineligible under the convention to become a transferee. The authoritative Commentary of the International Committee of the Red Cross in this respect flatly states:

A Unified Command which has authority over the armed forces of several countries cannot in this case take over the responsibility incumbent upon States; otherwise the proper application of the Convention which are...indissolubly linked to a structure composed of States would be endangered.¹¹⁰

2. *United Nations Enforcement Action.* Operations by forces directly responsible to the United Nations presents an even more

¹⁰⁹ DRAPER, *op. cit. supra* note 88, at 57-58. If a Luxemburg company, operating as part of a French division assigned to a U.S. Army Corps captures a prisoner, who is evacuated through normal channels to a Spanish internment camp, how realistic is it to hold Luxemburg responsible for the treatment of the prisoner from the time of his capture until his final release and repatriation?

¹¹⁰ PICTET, COMMENTARY III, GPW CONVENTION 132. Baxter, *Constitutional Forms and Some Legal Problems of International Commands*, 29 BRIT. YB. INT'L L. 325 (1952) suggests two solutions: (1) A special agreement concluded in advance, whereby certain powers should be designated in advance to be responsible for the treatment accorded to prisoners of war; or, (2) Modification of the convention to substitute fixed standards in lieu of those applicable under the national law of the Detaining Power, coupled with a recognition that a multi-national organization or its military command might itself become a party to the convention. The ICRC Commentary, although recognizing the importance of the problem rejects the first suggestion with a doctrinaire expression of horror—it contravenes the responsibility of the captor state; it shrugs off the second solution as calling for an international codification of penal laws which might be difficult to obtain. PICTET, COMMENTARY III, GPW CONVENTION 133-34.

troublesome problem than that presented by modern coalition organization. For the latter there may be a juridical, although impractical, solution. For the former there is a vacuum in the state of the law. As to this situation the International Committee of the Red Cross has stated that it is inconceivable that the United Nations would not comply with the letter of the Convention.¹¹¹ Although this may be true so far as the humanitarian treatment of prisoners is concerned, it overlooks the fact that the Detaining Power may be required of necessity to exercise penal sanctions to safeguard prisoners of war against violence from their fellow prisoners. Since the provisions regarding penal and judicial sanctions are inextricably tied to the national law of the Detaining Power, their imposition by a United Nations command is made impossible.¹¹² It is essential that a practical solution be found to this problem. The most feasible would be a designation, from among those contributing forces either to a multi-national command or to the United Nations, of the power most capable of supporting prisoners of war in any combat zone as the responsible Detaining Power.¹¹³

In a recent memorandum, the International Committee of the Red Cross advised the governments of states which are both parties to the Geneva Convention and members of the United Nations, that the United Nations had assured the International Red Cross that it would respect "the principles" of the Geneva Conventions and that

¹¹¹ PICTET, COMMENTARY III, GPW CONVENTION 133-34. See Moritz, *The Common Application of the Laws of War Within the NATO-Forces*, 1961 MILITARY L. REV. 5-11, 19. The U.N. forces in the Congo have nevertheless acted as a Detaining Power without there being any objection voiced.

¹¹² During the Korean conflict, the United Nations command held a substantial number of prisoners of war who had committed murder of their fellows while in captivity. These prisoners were never brought to trial; although they were guarded by United States personnel, they were considered to be in the power of the United Nations command. The United Nations is not a Detaining Power within the meaning of the convention; neither is it possible for it to become a party by accession; nor is it a power within the meaning of article 2. As long as the fiction that these prisoners were held by the United Nations command was maintained, they could not be brought to trial. DRAPER, *op. cit. supra* note 88, at 69; Moritz, *supra* note 111, at 7-8. The United Nations has transferred prisoners in its custody who have committed war crimes to their national governments for punishment.

¹¹³ Multi-national and international commands are a fact of the modern world scene and the anachronism of the Geneva Conventions will not compel a return to former practices.

"instructions to that effect had been given to the troops placed under its command."¹¹⁴

The memorandum notes that since the United Nations Organization is not a party to the Geneva Conventions, each state bound by the Geneva Conventions, "is personally responsible for the application of these conventions, when supplying a contingent to the United Nations." This memorandum in some respects creates, rather than resolves, problems which arise from the fact that the United Nations organization is not a party to the conventions. The text of the memorandum makes clear that all conflicts in which United Nations troops participate are conflicts of an international character and that each individual state which has made its national forces available to the United Nations for this purpose is itself a belligerent and a party to the conflict.¹¹⁵ It would appear from this memorandum, however, that the United Nations intends to issue instructions to its forces which will require them to comply only with the general principles of the conventions. If this is a correct statement of the situation, such instructions, if complied with, would result in a breach of the convention by certain states contributing forces to the United Nations. A breach would result if a military contingent of a state which is a signatory to the Geneva Conventions should fail to comply with all of the provisions of the conventions in a United Nations action against another signatory state. If on the other hand the military contingent of a state which is not a signatory to the convention is participating in a United Nations action against a state which is a signatory the former would not be legally bound to comply with any of the provisions of the convention absent an agreement between the non-signatories and the signatory. Under these circumstances the commitment made by the United Nations does not insure full compliance by United Nations troops with all of the provisions of the conventions nor uniform conduct of United Nations troops with respect to prisoners of war and protected persons.

C. *Labor of Prisoners of War*

Although the detaining state has many obligations to prisoners

¹¹⁴ Memorandum from the International Committee of the Red Cross to Governments of states party to the Geneva Conventions and members of the United Nations organization, *Application and Dissemination of the Geneva Conventions of 1949*, November 10, 1961.

¹¹⁵ 2 OPPENHEIM, *INTERNATIONAL LAW* 649-50 (7th ed. Lauterpacht 1952). See also Lalive, *International Organization and Neutrality*, 24 BRIT. YB. INT'L L. 80-81 (1947).

of war, it also has rights with respect to them. Customary international law permits a Detaining Power, subject to certain limitations, to utilize prisoner of war labor. While recognizing that such labor may make a substantial contribution to the economic resources of the Detaining Power, and thus contribute to its overall war effort, modern writers stress the humanitarian benefit of work as an antidote for the boredom of captivity.¹¹⁶

Customary restrictions which found expression in the Hague Regulations, and Article 27 of the 1929 Convention, exempted officers from the requirement of work, proscribed humiliating tasks, and directed that work be allotted in accordance with aptitude, physical fitness, age, and sex.¹¹⁷

It was a general principle, recognized as early as the 18th Century, that prisoners of war could not be required to perform work which was directly harmful to the State of Origin.¹¹⁸ Although the distinction between military labor and other economically productive labor may have had economic logic in the 18th Century, modern conditions of total war have virtually eliminated the basis for the distinction. Nevertheless, the distinction is still recognized¹¹⁹ and psychological and emotional factors make the distinction sufficiently real to justify it. The 1929 conference recognized that the provisions of Article 6 of the Hague Regulations of 1907 which limited prisoner of war labor to work that "had no connection with the operations of the war," would, if literally construed, preclude the employment of prisoners of war in any economically productive manner.¹²⁰ In an effort to be more explicit it added to the general restriction, an explicit prohibition against the employment of prisoners of war in the "manufacture or transportation of arms or munitions of any kind, or in transport of material destined for the combat units."¹²¹

There was still some doubt as to the exact meaning of the general restrictions as found in the 1929 Convention. The 1949 conference resolved this doubt by an enumeration of the classes of

¹¹⁶ FLORY, PRISONERS OF WAR 71 (1942); PICTET, COMMENTARY III, GPW CONVENTION 259.

¹¹⁷ FLORY, *op. cit. supra* note 116, at 71.

¹¹⁸ In 1777 the Continental Congress ordered an investigation of reports that American prisoners had been ordered to work on British fortifications, indicating that reprisals would be taken if the reports were confirmed. *Id.* at 74.

¹¹⁹ Art. 6, Hague Regulations of 1907. Art. 31, 1929 GPW Convention.

¹²⁰ PICTET, COMMENTARY III, GPW CONVENTION.

¹²¹ Art. 21, 1929 GPW Convention.

work permitted.¹²² It is to be noted, however, that this article does not preclude prisoners of war from volunteering for work or the Detaining Power from utilizing prisoners of war who volunteer for work¹²³ in industries which are not proscribed by article 50.

Articles 51 and 53 establish labor standards and accord prisoners the benefits of national labor laws, except those pertaining to wages.¹²⁴ Article 52 prohibits the employment of a prisoner on labor which is unhealthy or dangerous "unless he be a volunteer"; and there is a flat prohibition against labor "which would be looked upon as humiliating for members of the Detaining Power's own forces."¹²⁵

VI. PENAL AND DISCIPLINARY SANCTIONS

A. *The Principle of Limited Assimilation*

The Hague Regulations of 1907 enunciated the principle of assimilation by providing that prisoners of war were to be subject to the same penal and disciplinary laws as members of the armed forces

¹²² Article 50, 1949 GPW Convention provides: "Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes: (a) agriculture; (b) industries connected with the production or the extraction of raw materials, and manufacturing industries; public works and building operations which have no military character or purpose; (c) transport and handling of stores which are not military in character or purpose; (d) commercial business, and arts and crafts; (e) domestic service; (f) public utility services having no military character or purpose."

Article 52, 1949 GPW Convention provides: "Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature. No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces. The removal of mines or similar devices shall be considered as dangerous labour."

¹²³ Cf. Article 31, 1929 GPW Convention which categorically forbade the employment of prisoners of war in the manufacture or transport of munitions. Violations of the prohibition formed one of the bases for the conviction of Krupp, Milch, and Flick. See notes 92, 93, and 94, *supra*.

¹²⁴ Working pay, according to Article 62, 1949 GPW Convention, must be a "fair working rate of pay" not less than .25 Swiss francs for a full day.

¹²⁵ Article 52, 1949 GPW Convention, classifies the removal of mines and similar devices as dangerous work, thus permitting prisoners of war to volunteer for such tasks. This rule had its genesis in World War II when French public opinion compelled the use of German prisoners of war in the removal of some 100,000 mines in violation of the prohibition contained in Article 32, 1929 GPW Convention. During the conference it was felt to be more humane to permit skilled prisoners of war to volunteer for mine removal than to risk the lives of unskilled civilians. Of course, the requirement for prompt evacuation (Article 19, 1949 GPW Convention) precludes the use of prisoners of war for mine removal in the combat zone. ПИРЕТ, COMMENTARY III, GPW CONVENTION 277, 280.

of the Detaining Power except for escapees who were subject to disciplinary punishment only.¹²⁶ World War I experience had shown that strict assimilation was subject to serious abuses. Military codes are designed to enforce the discipline, loyalty, and unity of the armed forces and they punish severely offenses which tend to undermine these qualities. Prisoners of war, however, owe no loyalty to the Detaining Power and it was unreasonable, therefore, that they should be held accountable to the same standard of conduct as were members of the Detaining Power's armed forces.¹²⁷ Accordingly, both Article 45 of the 1929 GPW Convention and Article 82 of the 1949 GPW Convention provide that certain offenses which would be subject to severe punishment if committed by troops of the Detaining Power are, when committed by prisoners of war, to be considered as disciplinary infractions only.¹²⁸ As a result of these articles prisoners of war benefit both from the safeguards enjoyed by personnel of the Detaining Power and from the additional safeguards provided by the convention.¹²⁹

B. Disciplinary Sanctions

The maximum disciplinary punishment authorized by articles 89 and 90 for prisoners of war are: (1) a fine of fifty per cent of advanced pay and working pay for thirty days; (2) discontinuance of privileges over and above treatment provided by the convention for thirty days; (3) fatigue duties for two hours daily for thirty days; and (4) confinement for thirty days. The disparity between the disciplinary punishment permitted by the convention and that permitted under the national disciplinary codes of the various signatories¹³⁰ raises the

¹²⁶ Art. 8, Hague Regulations of 1907.

¹²⁷ FLORY, *op. cit.* *supra* note 116, at 90; PICTET, COMMENTARY, GPW CONVENTION 406-07.

¹²⁸ Article 83, 1949 GPW Convention encourages the use of disciplinary rather than judicial sanctions "whenever possible." Unsuccessful escape is punishable by disciplinary punishment only, but the escapee may be subject to "special surveillance." A successful escape is not punishable at all. (Arts. 90-92.) Moreover, offenses committed with the sole intention of facilitating escape, and which do not entail violence of life and limb, may be punished as disciplinary infractions only. (Art. 93.)

¹²⁹ Article 82, 1949 GPW Convention, also provides that acts of prisoners denounced by the law of the Detaining Power which would not be punishable if done by the forces of the Detaining Power shall entail disciplinary punishment only. It appears that during World War II some states legislated against relations between prisoners of war and local women, measures obviously intended to bolster the morale of troops abroad. PICTET, COMMENTARY III, GPW CONVENTION 409.

¹³⁰ Under Article 15 of the United States Uniform Code of Military

question as to whether disciplinary punishments which exceed those prescribed by the national codes may under the provisions of article 87 of the convention be imposed upon a prisoner of war. Article 87 provides: "Prisoners . . . may not be *sentenced by the military authorities and courts of the Detaining Power* to any penalties except those provided in respect to members of the armed forces of said Power who have committed the same act."¹³¹

A literal construction of article 87 would preclude a prisoner from being punished more severely than he could be punished under the disciplinary law of the Detaining Power. This construction is not supported by the International Committee of the Red Cross in its commentary which states that, "Article 89 establishes a disciplinary code in miniature" which in this regard replaces the legislation of the Detaining Power.¹³²

C. Penal Sanction

With respect to pre-capture offenses (violations of the law of war committed prior to capture), articles 85 and 102 provide significant departures from the practice followed by the Allies after World War II. It is remarkable that less than four years after the World War II war crimes trials had begun, the principal Allies were willing to agree that the manner in which they had conducted these trials would in the future constitute a grave breach of international law.¹³³

Article 63 of the 1929 Convention provided: "[A] sentence will only be pronounced on a prisoner of war by the same tribunal and in accordance with the same procedures as in the case of persons belonging to the armed forces of the Detaining Powers." Moreover, under United States municipal law in effect during World War II, prisoners of war were expressly made subject to court-martial jurisdiction by

Justice (10 U.S.C. § 815) prior to February 1, 1963, the disciplinary punishment which could have been imposed upon military personnel was less severe than that authorized by the convention. However, the recent amendment to the UCMJ, effective February 1, 1963, makes punishment at least comparable in severity. 10 U.S.C.A. § 815 (Supp. 1962). In this connection it must be remembered that future amendments may revise the problem. This problem may also exist with respect to other nations.

¹³¹ The word "sentenced" as used in this article applies to disciplinary sanctions as well as to punishment imposed by courts. This interpretation is supported by the fact that it refers to punishments (sentences) imposed both by the "military authorities" and by the "courts of the Detaining Power." It is clear from article 88 that for the purposes of the convention disciplinary punishments are "sentences."

¹³² PICTET, COMMENTARY III, GPW CONVENTION 439-40.

¹³³ Art. 130, 1949 GPW Convention.

the provisions of Article of War 12¹³⁴ and, as such, were subject to trial and punishment by court-martial for violations of all articles of war except those which, because of their nature, could not apply to captured enemy personnel—*e.g.*, desertion, misbehavior before the enemy and relieving, corresponding with or aiding the enemy.¹³⁵ Furthermore, many of the procedural safeguards which had been incorporated into military law since 1863 had been made specifically applicable by the Articles of War to military commissions which exercised jurisdiction under the law of war.^{135a} Nevertheless, in 1945, General Yamashita, Commander of the Japanese Forces in the Philippines, was convicted in the Philippines under orders which authorized the Commission to consider depositions, affidavits, hearsay, and other evidence which was not admissible either in a court-martial or a military commission under the Articles of War and the Manual for Courts-Martial, 1928.¹³⁶ On appeal from the denial by the Philippine Supreme Court of Yamashita's petition for a writ of habeas corpus, the Supreme Court of the United States rejected the applicability of both the Articles of War and the Geneva Convention of 1929¹³⁷ holding that they were intended to apply only to offenses which were committed by prisoners of war *subsequent* to their capture.¹³⁸ The correctness of the Court's decision on this issue is debatable.¹³⁹

¹³⁴ 41 Stat. 787.

¹³⁵ 41 Stat. 787, Articles of War 58, 75, 81.

^{135a} 41 Stat. 787, Articles of War 24, 25, 38. Traditionally military commissions had operated without statutory authorization as common-law war courts not subject to the procedural rules applicable to courts-martial.

¹³⁶ The regulations governing the trial of war criminals promulgated by General MacArthur's headquarters provided generally for the admission of all evidence that would have "probative value in the mind of a reasonable man," and then set out evidence specifically admissible including depositions not taken in accord with Article 25 of the Articles of War. See Transcript of Record, pp. 18-20, *In re Yamashita*, 327 U.S. 1 (1946).

¹³⁷ *In re Yamashita*, *supra* note 136.

¹³⁸ The Court considered the convention inapplicable on the ground that in context it was apparent that article 63 of the convention was intended to apply to crimes committed by enemy military personnel only after they became prisoners of war. *Id.* at 20-23. See Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833, 866-82 (1946) who agrees with this position. As to the inapplicability of the Articles of War to trial of enemy combatants by military commissions, the Court said that the jurisdiction of military commissions as it had existed under the common-law of war was expressly saved by Article 15 of the Articles of War in all cases except those involving the trial of a person "subject to military law" and that Article 2 of the Articles of War did not include enemy combatants. 327 U.S. at 18-20.

¹³⁹ Article of War 2 does not specify that prisoners of war are "subject

This rationale of the *Yamashita* case became a precedent for war crimes trials conducted by allied national war crimes tribunals. Pleas of the accused and requests by the International Committee of the Red Cross for compliance with the provisions of the 1929 Geneva Convention were rejected in all reported cases except one which was tried in France in 1950.¹⁴⁰ Generally this rejection rested on an assertion that under established principles of customary law those who violated the laws of war could not avail themselves of the protection which they afford, and that the 1929 Convention, which made no mention of precapture offenses, was not intended to modify customary rules.¹⁴¹ Logically, this is a refutation of the presumption of innocence. It is the equivalent of holding that those who violate the state criminal law may not avail themselves of the procedural safeguard which that law provides for the protection of the accused.

Article 85 of the 1949 Convention effects a deliberate reversal of this practice. It provides: "Prisoners of war, prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." Among these benefits is article 102, which provides:

A prisoner of war 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, furthermore, the provisions of the present chapter have been observed.

to military law." Article of War 12, however, expressly makes prisoners of war subject to court-martial jurisdiction. Furthermore, Article of War 2 does not preclude the applicability to prisoners of war of those articles of war which by their express language are applicable to all persons who appear before or are tried by military courts or commissions. Article 25 allows the reading of depositions in evidence under prescribed conditions, "before any military court or commission in any case not capital." The exception made in capital cases is specified as being for the benefit of the defendant. See *In re Yamashita*, 327 U.S. 41, 61-72 (Rutledge, J., dissenting).

It is certainly arguable that Article 63 of the Geneva Convention of 1929 was intended to include enemy combatants interned under article 9 for crimes committed before their surrender, and *Yamashita* was interned under article 9. Article 63 is a part of § V ("Prisoner's Regulations with the Authorities") of Title III ("Captivity"). Title III regulates the conduct and activities of a prisoner of war while in captivity and there is language in many of the articles of § V which would support a construction that their provisions are applicable to war crimes as well as to other offenses. *Id.* at 74 n.37. Cf. Fairman, *supra* note 138, at 871-73. See also Note, 44 MICH. L. REV. 855 (1946).

¹⁴⁰ PICTET, COMMENTARY III, GPW CONVENTION 413.

¹⁴¹ *Id.* at 414.

Although some ambiguity is injected by the phrase, "prosecuted under the laws of the Detaining Power,"¹⁴² the proceedings of the Diplomatic Conference make it clear that a reversal of the *Yamashita* doctrine was intended.¹⁴³ The delegates were unanimous in the view that prisoners of war tried for war crimes should have the benefits of the convention until their guilt has been proven. The Soviet Bloc, however, objected to the entitlement of prisoners of war to these benefits after conviction and interposed a reservation to that effect.¹⁴⁴

The convention not only precludes a Detaining Power from trying prisoners by special *ad hoc* national tribunals, but precludes, for all practical purposes, their trial by International Military Tribunals. As it is improbable that the military law of the Detaining Power will authorize foreign officers to sit in judgment of its own military personnel, the creation of international tribunals of mixed compositions will in most cases be impossible. Even if the tribunal were to be composed entirely of personnel of one power, convened on the authority of the Unified Commander of an International Command as in *Hirota v. McArthur*,¹⁴⁵ and *Flick v. Johnson*,¹⁴⁶ the requirement of articles 85 and 102 could not be met.¹⁴⁷ Insistence that these trials be held by the regular national military tribunals provides a certain standard of justice and procedure and insures familiarity of the court with its well-established tradition and procedures. This minimizes the danger that the courts will deprive the accused of rights because of ignorance.¹⁴⁸

¹⁴² In reviewing a World War II case to which the 1949 Convention was obviously not applicable, the Italian Supreme Military Tribunal construed this term as excluding violations of the law of war. *Id.* at 426. This construction is obviously strained for it is difficult to envision possible pre-capture offenses which violate the law of the Detaining Power (*Coleman v. Tennessee*, 97 U.S. 509 (1878)) and which do not violate international law.

¹⁴³ 2A FINAL RECORD 389-90, 559; PICTET, COMMENTARY III, GPW CONVENTION 413 n.1.

¹⁴⁴ PICTET, COMMENTARY III, GPW CONVENTION 423-24. In response to a request for a clarification of its reservation the Soviet Union advised the Swiss government that the reservation applies only after "the sentence becomes legally enforceable." After the sentence has been served, the benefits of the convention would be resumed.

¹⁴⁵ 338 U.S. 197 (1949).

¹⁴⁶ 174 F.2d. 983 (D.C. Cir.), *cert. denied*, 338 U.S. 879 (1949), *rehearing denied*, 338 U.S. 940 (1950).

¹⁴⁷ Baxter, *The Role of Law in Modern War*, 1953 PROCEEDINGS OF THE AM. SOC'Y OF INT'L LAW 352.

¹⁴⁸ One of the principle defects of the United States war crime trials was

In addition to the requirement that prisoners of war be accorded all procedural safeguards established by the Detaining Power's military law, there is an additional requirement that there be an adherence to certain minimum standards of due process which may be greater than those provided by the law of the Detaining Power. In this respect, the convention forbids double prosecution for the same act,¹⁴⁹ and prohibits *ex post facto* trials¹⁵⁰ and compulsory self incrimination.¹⁵¹ It further provides for a right to qualified counsel,¹⁵² the right of appeal,¹⁵³ the right to a speedy trial, an ample opportunity to prepare the defense,¹⁵⁴ and for compulsory attendance of witnesses.¹⁵⁵ Before sentence is adjudged the court must be instructed that the prisoner of war, not being a national of the Detaining Power, is not bound to it by any duty of allegiance. Additionally, the court must be instructed that it is not bound to prescribe any minimum or mandatory penalty which may exist under the law of the Detaining Power.¹⁵⁶

D. Grave Breaches and Other than Grave Breaches of the Convention

The GPW Convention, as does each of the other three Geneva Conventions of 1949, imposes upon the signatories the obligation (1) to "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention," as defined in each convention; (2) "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and . . . bring such persons, regardless of their nationality, before its own courts" or if it prefers and in accordance with its own legislation "hand such persons over for trial to another High Contracting Party concerned," providing such party "has made out a *prima facie* case"; (3) "to take measures necessary for the sup-

the use of evidence admissible under the Civil Law. Anglo-Saxon lawyers who had not been trained in the evaluation of such evidence lost all restraint when released from the limitation of the common-law exclusionary rules of evidence.

¹⁴⁹ Art. 86, 1949 GPW Convention.

¹⁵⁰ Art. 99, 1949 GPW Convention.

¹⁵¹ *Ibid.*

¹⁵² Arts. 99, 105, 1949 GPW Convention.

¹⁵³ Art. 106, 1949 GPW Convention.

¹⁵⁴ Art. 103, 1949 GPW Convention.

¹⁵⁵ Art. 105, 1949 GPW Convention.

¹⁵⁶ Arts. 87, 100, 1949 GPW Convention.

pression of all acts contrary to the provisions of the present Convention other than grave breaches . . ." and (4) to try those accused of breaches of the convention in its regular national courts under judicial safeguards "which shall not be less favourable than those provided by Article 105 and those following of the present Convention." If the accused is a prisoner of war the judicial safeguards may not be less favorable than those found in articles 84 to 88 and 99 to 108 of the convention.¹⁵⁷

Article 130 of the 1949 GPW Convention defines grave breaches as:

[T]hose involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the right to a fair and regular trial as prescribed in this Convention.

It is to be noted that all of the grave breaches of the 1949 GPW Convention, except that of wilfully depriving a prisoner of war of the right to a fair and regular trial, were even prior to the GPW Convention of 1949 offenses against the law of war. However, neither customary nor conventional international law provided sanctions for these offenses.¹⁵⁸

Breaches of the GPW Convention which are other than grave breaches although not itemized include all other violations of, or failure to comply with, the provisions of the convention, some minor in nature,¹⁵⁹ and others of a very serious nature.¹⁶⁰

¹⁵⁷ Art. 129, 1949 GPW Convention; Art. 146, Civilian Convention; Art. 49, GWS (Field) Convention; Art. 50, GWS (Sea) Convention. The specific judicial rights granted to prisoners of war are contained in Articles 84-88 and 99-108 of the 1949 GPW Convention. Prisoners of war whether tried for pre or post capture offenses are entitled by article 85 of the 1949 GPW Convention to all of the judicial safeguards mentioned in this convention.

¹⁵⁸ Wilful killing was proscribed by customary international law and Article 23(c) of the regulations annexed to the Hague Conventions of 1899 and 1907. Inhumane treatment was proscribed by customary international law, Article 4 of the regulations annexed to the Hague Convention of 1907, and the 1929 GPW Convention. Compelling a prisoner to serve in the forces of a hostile power was proscribed by Article 23 of Hague Regulations of 1907.

¹⁵⁹ Such as failure to quarter prisoners of war under conditions as favor-

The provisions of the GPW Convention which require the signatories to enact legislation punishing grave breaches and to take measures necessary to suppress other violations of the convention, were enacted to insure that violators of the convention would not remain unpunished and that they would be deprived of the sanctuaries which they had previously been able to find in certain neutral countries.¹⁶¹ Although punishment for breaches of customary and conventional international law was not unprecedented at the end of World War II,¹⁶² the instances in which the personnel of the victorious powers had been tried were very rare indeed.¹⁶³

The provisions of the GPW Convention and those of the other Geneva Conventions of 1949 are a part of the laws and customs of war, the violations of which are commonly referred to as "war crimes." Thus, the "grave breaches" which are enumerated in the GPW Convention and the other three Geneva Conventions are "war crimes"¹⁶⁴ which the signatories of the conventions are obligated to try regardless of the nationality of the perpetrator of such crimes. It is clear that it was the intent of the conventions that all signatory states would be obligated to enact penal legislation which would extend to all persons and to all grave breaches no matter where

able as those for the forces of the Detaining Power who are billeted in the same area. Art. 25, 1949 GPW Convention.

¹⁶⁰ Such as the exposing of prisoners of war unnecessarily to danger while they are awaiting evacuation from a combat zone (art. 19) or the sending of prisoners of war to, or detaining them in, areas where they may be exposed to the fire of the combat zone (art. 23).

¹⁶¹ 2B FINAL RECORD 85, 114-18. THE GENEVA CONVENTION OF 12 AUGUST 1949, COMMENTARY I, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 357-60 (Pictet ed. 1952) [hereinafter cited as PICTET, COMMENTARY I, FIELD CONVENTION]; PICTET, COMMENTARY III, GPW CONVENTION 619; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 587, 590.

¹⁶² *The Trial of Henry Wirz*, H.R. Doc. No. 23, 40th Cong., 2d Sess. 805 (1867). The Dreierwalde Case, 1 LAW REP. OF TRIALS OF WAR CRIMINALS 81, 86 (1947); The Doster Case, *id.* at 22; The Essen Lynching Case, *id.* at 88; The Abbaye Ardennes Case, *id.* at 97.

¹⁶³ 2B FINAL RECORD 85, 114. PICTET, COMMENTARY I, FIELD CONVENTION 352-53, 365; PICTET, COMMENTARY III, GPW CONVENTION 618, 621 n.1; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 590 n.1.

¹⁶⁴ PICTET, COMMENTARY I, FIELD CONVENTION 351; PICTET COMMENTARY III, GPW CONVENTION 617; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 583; DRAPER, THE RED CROSS CONVENTION 20 (1958); 2 OFFENHEIM, INTERNATIONAL LAW 395, 566, 567 n.2. (7th ed. Lauterpacht, 1955); Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. YB. INT'L L. 294, 305 (1949); Yingling & Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 427 n.112 (1952).

committed.¹⁶⁵ Thus, the convention adopts the principle of universal jurisdiction over war crimes¹⁶⁶ which, together with its other provisions if they are complied with, would rectify most of the serious deficiencies which the conduct of the national war crimes programs subsequent to World War II had disclosed.¹⁶⁷

The Geneva Conventions also provided that each party "shall take measures necessary for the suppression of non-grave breaches." It is arguable that since this language does not oblige the enactment of effective penal sanctions for the suppression of non-grave breaches, a state could properly discharge its obligations thereunder by means other than legislative sanctions—*e.g.*, by administrative measures. Because of this ambiguity, some authorities have viewed non-grave breaches as being too trivial to warrant punishment. Such an interpretation, it is believed, would negate the purpose of the conventions, for many types of culpable misconduct deserving of severe punishment constitute offenses which are cognizable only under the "non-grave breaches" portion of the Geneva Convention. Under this view in contrast to the effective universal sanctions applicable to any person who commits grave breaches, only ineffectual sanctions

¹⁶⁵ Although the convention (art. 129) does not so expressly provide it is clear from the *travaux préparatoires* that it was intended that the legislation which the parties were to enact making punishable grave breaches of the convention would extend even to grave breaches committed during a conflict to which they were not parties. See DRAPER, *op. cit. supra* note 164, at 21; 2B FINAL RECORD 116; Gutteridge, *supra* note 164, at 294, 305; PICTET, COMMENTARY I, FIELD CONVENTION 365-66; PICTET COMMENTARY III, GPW CONVENTION 623; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 583-84, 587, 592, 601-02; Yingling & Ginnane, *supra* note 164, at 393, 426. See also § 1(1), Geneva Conventions Act, 1957, 5 & 6 Eliz. 2, c. 52, set forth in DRAPER, *op. cit. supra* note 164, at 119-24.

¹⁶⁶ Lauterpacht, *The Problems of the Revision of the Laws of War*, 30 BRIT. YB. INT'L L. 362 (1952). The convention fails to specify the period of time during which perpetrators of grave breaches may be brought to trial. Some authorities have expressed the view that under customary international law a peace treaty terminates jurisdiction over war crimes absent a provision of the treaty to the contrary. 2 OPPENHEIM, *op. cit. supra* note 164, at 611-12. It is possible therefore that some signatory states may interpret their obligation to punish war criminals as terminating upon the conclusion of a peace treaty. Under this view a signatory state which is not also a signatory to the peace treaty would be under no obligation to prosecute war criminals even though the peace treaty retained for the signatories thereof the subsequent right to try grave and non-grave breaches of the convention.

¹⁶⁷ DRAPER, *op. cit. supra* note 164, at 22-23. In the opinion of many scholars the convention would have been vastly more effective had it contained a criminal code concerned with war crimes which was specific and clear. See FEILCHENFELD, PRISONERS OF WAR 89-91 (1948). Such a criminal code was considered by the convention but it was not adopted.

limited in their application by restrictive concepts of national jurisdiction would apply to perpetrators of non-grave breaches. An examination of the reports of the war crimes trials after World War II discloses that numerous accused were tried and convicted for the following serious offenses which, if committed now, would be non-grave breaches under the 1949 GPW Convention: (a) the use of prisoners of war for prohibited classes of work, such as the construction of fortifications on the front lines;¹⁶⁸ (b) the compulsory use of prisoners for unloading arms and ammunition from military aircraft;¹⁶⁹ (c) the compulsory employment of prisoners in the production of armament;¹⁷⁰ (d) the compulsory employment of prisoners in unhealthy conditions;¹⁷¹ (e) the utilization of unsanitary or inadequate housing facilities for prisoners;¹⁷² (f) the giving of false information to the Protecting Powers concerning the conditions of prisoners of war;¹⁷³ (g) exposing prisoners to public humiliation;¹⁷⁴ (h) abandoning responsibility for the protection of prisoners by transferring them to unauthorized civilian organizations;¹⁷⁵ and (i) the infringement of the religious rights of prisoners.¹⁷⁶

These and many other non-grave breaches would remain unpunished under the Geneva Conventions should there be no legislative provision for universal criminal jurisdiction over such offenses.

¹⁶⁸ *In re Manstein*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, Case No. 192, at 516-18 (1949).

¹⁶⁹ *In re Student*, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 118 (1948).

¹⁷⁰ *In re Roehling*, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1061 (1951); *United States v. Krupp*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1197, 1395 (1950).

¹⁷¹ *United States v. Weizsaecker*, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 436-67 (1951).

¹⁷² *In re Natomi Sueo*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, Case No. 96 (1947); *In re Kellinger*, 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 67 (1948).

¹⁷³ *United States v. Weizsaecker*, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 436-67 (1951).

¹⁷⁴ *In re Hirota*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, Case No. 118, at 356, 371 (1948).

¹⁷⁵ *In re von Falkenhofst*, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 18 (1949); *United States v. Von Leeb*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 492 (1951).

¹⁷⁶ *In re Tanaka Chuichi*, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 62 (1949).

To date only a very few states have enacted legislation of the nature envisaged by the conventions.¹⁷⁷

The United States has not enacted implementing legislation. Presumably, it has taken the position that existing United States military law, the United States Penal Code, and state criminal law are sufficiently comprehensive to fulfill its treaty obligations.¹⁷⁸ Insofar as enforcement by federal and state courts is concerned, the applicable criminal statutes for such offenses as murder and other unlawful homicide as well as other offenses against the person of protected individuals, are limited to offenses committed within the territorial jurisdiction of the United States.¹⁷⁹ These statutes by themselves would not provide the jurisdiction which the Geneva Conventions require. The universal jurisdiction contemplated by the conventions is not self-executing under United States law. Treaties which require legislative enactment to make their provisions effective are considered by United States courts as being enforceable only after the enactment of the requisite legislation.¹⁸⁰

¹⁷⁷ See PICTET, COMMENTARY III, GPW CONVENTION 629 for the type of legislation required for compliance with the provisions of Article 129 of the 1949 GPW Convention. As far as can be determined, only eight signatory states, the Netherlands, Switzerland, Yugoslavia, Czechoslovakia, Belgium, Ethiopia, Thailand, and the United Kingdom, have enacted legislation of the nature intended by the convention. A few states (*e.g.*, the United States) have considered their legislation to be adequate to fulfill their obligations under the convention. For comments on the legislation of the Netherlands, Switzerland, and Yugoslavia see PICTET, COMMENTARY III, GPW CONVENTION 621 n.1; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 591 n.1. For the text of the Yugoslavian legislation see 46 AM. J. INT'L L. 36, 40-42 (Supp. 1952). For the text of the legislation of the United Kingdom and a criticism thereof see DRAPER, *op. cit. supra* note 164, at 119-24. See also Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 AM. J. INT'L L. 433, 455 n.90 (1962).

¹⁷⁸ During the Hearings before the Committee on Foreign Relations on the Geneva Conventions for the Protection of War Victims (U.S. Senate, 84th Cong., 1st Sess., June 3, 1955) it was asserted that as to grave breaches, "it would be difficult to find any of these acts which, if committed in the United States are not already violations of the Domestic law of the United States." *Id.* at 24. These hearings contain a letter from the Department of Justice stating that no new legislation need be enacted to provide effective penal sanctions for offenses designated as grave breaches under the 1949 GPW Convention. *Id.* at 58. It is obvious that these conclusions completely disregarded or reflect an ignorance of the universal jurisdiction espoused by the convention to which the United States was a signatory. See FM 27-10, pars. 506-07.

¹⁷⁹ *United States v. Bowman*, 260 U.S. 94, 97-102 (1922). See also *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Flores*, 289 U.S. 137 (1933); *United States v. Rodgers*, 150 U.S. 249 (1893); *In re Ross*, 140 U.S. 453 (1891); *The Nanking*, 292 Fed. 642 (1st Cir. 1900).

¹⁸⁰ *United States v. Percheman*, 7 Pet. (32 U.S.) 51, 89 (1833); *Foster*

The Uniform Code of Military Justice, however, provides a means for the repression of war crimes irrespective of the situs of the crime or the status of the offender. Article 18 of this code provides in relevant part: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." Thus under the provisions of Article 18 of the Uniform Code of Military Justice,¹⁸¹ the law of war is incorporated into United States military law and, as such, general courts-martial would appear to have jurisdiction over all grave and non-grave breaches of the conventions and over all alleged violators thereof, regardless of their nationality or status.¹⁸²

Under United States jurisprudential law, however, the jurisdiction of United States Military Commissions over war crimes has been limited generally to times of war¹⁸³ and, as a matter of practice, limited as well to enemy nationals and persons who have assumed enemy character.¹⁸⁴ It is not beyond the realm of possi-

v. Nielsen, 2 Pet. (27 U.S.) 253, 314 (1829); Dickenson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT'L L. 444 (1926); 2 HYDE, INTERNATIONAL LAW 1462 (2d ed. 1945). This principle is also observed by the courts with respect to portions of treaties in force and calling for legislation without which the courts find it impossible to lend judicial aid.

¹⁸¹ 10 U.S.C. § 818 (1959).

¹⁸² See CM 302791 Kaukoreit, 5 BULL. JAG (ARMY) 262 (1946); CM 31830 Yabusaki, 6 BULL. JAG (ARMY) 117 (1947); CM 337089 Aikins, 9 BULL. JAG (ARMY) 71 (1950). The recent decisions of the United States Supreme Court striking the jurisdiction of courts-martial over civilians (*Kinsella v. United States ex rel Singleton*, 361 U.S. 234 (1960); *McElroy v. United States ex rel Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960)) are limited to a declaration that Article 2(11) of the Uniform Code of Military Justice (10 U.S.C. §§ 801-935 (1958)) which purports to vest in courts-martial jurisdiction over civilian camp followers outside the United States in time of peace, is unconstitutional. The Court was careful to distinguish the cases at issue which involved legislation enacted under the power of Congress to regulate the land and naval forces from legislation enacted under the war powers. *Reid v. Covert*, 354 U.S. 1, 33 (1957). The exercise of court-martial jurisdiction over civilians in time of peace has no legislative sanction prior to 1916. On the other hand military jurisdiction under the laws of war ante-date the U.S. Constitution. *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Ex parte Quirin*, 317 U.S. 1, 41 (1942); *District of Columbia v. Colts*, 282 U.S. 62 (1930). Thus the portions of the UCMJ which confer jurisdiction over civilians in time of war and over persons who are triable under the laws of war rests on a much firmer constitutional basis than did Article 2(11) of the Uniform Code of Military Justice.

¹⁸³ *In re Yamashita*, 327 U.S. 1, 12-13 (1946).

¹⁸⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 768-87 (1949); *In re Yamashita*, *supra* note 183, at 7-12, 20-21; *Ex parte Quirin*, 317 U.S. 1, 26-29, 37-39, 44-47 (1942); *District of Columbia v. Colts*, 282 U.S. 62 (1930).

bility, therefore, that under the language of article 18 which extends the jurisdiction of general courts-martial to "persons . . . subject to trial by a military tribunal," United States courts may by interpretation limit jurisdiction of general courts-martial over war crimes to that traditionally exercised by United States Military Commissions.¹⁸⁵ Furthermore, even though there is no statutory restriction to the universal application of general court-martial jurisdiction under the law of war, Field Manual 27-10 prescribes policy limitations thereon.¹⁸⁶ It states:

The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law.

This policy discourages the use of the only present legal means available to the United States for the universal repression of grave breaches. Insofar as persons who, except for the provisions of article 18, would not be subject to the Uniform Code of Military Justice there exists no United States legislation which would subject them to punishment for war crimes committed by them outside the territorial jurisdiction of the United States. Moreover, civilian criminal codes are not sufficiently comprehensive to reach all significant violations of the law of war even if committed within the United States. Although "wilful killing," "torture," or "inhuman treatment" might be punishable by analogy to such offenses as unlawful homicides and aggravated assaults, it is doubtful that "compelling a prisoner of war to serve in the forces of the hostile Power,"

See also Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 843-46 (1948); Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 U. PA. L. REV. 119 (1943); Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 277 (1945); Note, *Federal Military Commissions: Procedure and "Wartime Basis" of Jurisdiction*, 56 HARV. L. REV. 631 (1943).

¹⁸⁵ Reid v. Covert, 354 U.S. 1, 6-11 (1957); *Ex parte Quirin*, *supra* note 184, at 30; *In re Yamashita*, 327 U.S. 1, 20-25 (1946).

¹⁸⁶ FM 27-10, para. 507.

or "wilfully depriving a prisoner of war of the right of fair and regular trial" is punishable under state or federal penal laws.

With respect to the military law of the United States as expressed in the Uniform Code of Military Justice, most violations of the law of war would be chargeable as violations of that code.¹⁸⁷ Nevertheless, the principal of assimilation dictated by article 102 of the 1949 GPW Convention would not be respected if only enemy nationals are prosecuted under the law of war, while persons subject to United States municipal military law are prosecuted under one of the punitive articles of the Uniform Code of Military Justice. Although the court and trial procedure may be similar, substantial differences could exist with respect to the sentence adjudged. Thus, cruelty and maltreatment of protected persons is a grave breach under the 1949 GPW Convention for which there is no limitation as to the punishment which may be imposed. However, the maximum authorized punishment under the Uniform Code of Military Justice for cruelty, maltreatment, or oppression of a person subject to the order of the offender is only dishonorable discharge, total forfeiture of pay and allowances, and confinement at hard labor for one year.¹⁸⁸ Compliance with the mandate of the convention to provide effective penal sanctions for the repression of grave breaches requires, therefore, that the policy declarations contained in Field Manuals 27-10 be thoroughly reconsidered.

Sole recourse to general courts-martial for trial of grave and non-grave breaches of the convention does not provide a complete solution or one which is entirely satisfactory. Trial of other than United States military personnel, particularly United States civilians, by general courts-martial in time of peace either in the United

¹⁸⁷ See Uniform Code of Military Justice, Art. 80 (10 U.S.C. § 880) (attempts); Art. 81 (10 U.S.C. § 881) (conspiracy); Art. 92 (10 U.S.C. § 892) (failure to obey orders and regulations); Art. 93 (10 U.S.C. § 893) (cruelty and maltreatment); Art. 97 (10 U.S.C. § 897) (unlawful detention); Art. 98 (10 U.S.C. § 898) (noncompliance with procedural rules); Art. 102 (10 U.S.C. § 902) (forcing a safeguard); Art. 103 (10 U.S.C. § 903) (captured or abandoned property); Art. 105 (10 U.S.C. § 905) (misconduct as a prisoner); Art. 118 (10 U.S.C. § 918) (murder); Art. 119 (10 U.S.C. § 919) (manslaughter); Art. 120 (10 U.S.C. § 920) (rape); Art. 121 (10 U.S.C. § 921) (larceny); Art. 122 (10 U.S.C. § 922) (Robbery); Art. 124 (10 U.S.C. § 924) (maiming); Art. 126 (10 U.S.C. § 926) (arson); Art. 128 (10 U.S.C. § 928) (assault); and Art. 134 (10 U.S.C. § 934 (general article)).

¹⁸⁸ MANUAL FOR COURTS-MARTIAL, 1951, para. 127(c). As a practical matter the table of maximum punishments of this manual for offenses which constitute war crimes should be applied to enemy nationals.

States or elsewhere for grave or other than grave breaches may not be acceptable to the American society. Furthermore, the jurisdiction of a military tribunal in time of peace over United States nationals and others in the United States for grave and non-grave breaches committed either in the United States or abroad would raise serious constitutional issues.¹⁸⁹ There are no compelling reasons why jurisdiction over such breaches of the convention should be triable only by general courts-martial or why United States nationals and others who are accused of such offenses and who are present in the United States should not be accorded a trial before a federal court, including indictment by grand jury, trial by jury, and trial before a judge with life tenure.

It would appear that the United States could best insure the full discharge of its obligations under the conventions by the enactment of legislation under which federal district courts would have jurisdiction to try any person who commits, no matter where, any of the acts or omissions which are proscribed by the laws of war and as defined by the law of nations.¹⁹⁰

The principle of universality of jurisdiction over grave breaches is restricted by the inadequacies of existing extradition practices and

¹⁸⁹ See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 121-22 (1867).

¹⁹⁰ Congressional enactment of definitive implementing penal legislation vesting in federal courts jurisdiction over all violations of the conventions, and preempting this field insofar as state courts are concerned, would best insure uniformity in prosecution, punishment, and punishment policies, and provide the best means under which the United States could fully discharge its obligation under the conventions. PICTET, COMMENTARY IV, CIVILIAN CONVENTION at 601-02 states that under the Civilian Convention many states will be required to "enact penal laws applicable to all offenders, whatever their nationality and whatever the place where the offense has been committed," and that it is "desirable that this legislation be in the form of special law, defining the breaches and providing an adequate penalty for each" and should it prove to be "impossible to enact special legislation, it will be necessary to resort to a simpler system which would include as a minimum: (a) special clauses classing as offenses with a definite penalty attached to each: torture, inhuman treatment; causing great suffering; destruction and appropriation of property not justified by military necessity; compelling a protected person to serve in the forces of a hostile power; wilfully depriving a protected person of the rights to a fair and regular trial; unlawful deportation or transfer; (b) a general clause providing that other breaches of the convention will be punishable by an average sentence, for example, imprisonment from five to ten years, insofar as they do not constitute offenses or crimes to which more severe penalties are attached in the ordinary or military penal codes. This general clause should also provide that minor offenses can be dealt with through disciplinary measures."

the dearth of extradition treaties. It is to be noted that article 129 of the convention imposes no obligation on states to enact extradition legislation or to extradite war criminals even when they are unwilling or unable to bring them to trial for their offenses. The existing legislation or the policy of many countries does not authorize the delivery of their own nationals to another power.¹⁹¹

As a practical matter, although the conventions provide a framework which is adequate to correct most of the deficiencies of the World War II war crimes programs, and provides a means for insuring that war criminals will not escape punishment, only good faith on the part of belligerents can insure the repression of grave breaches on an impartial and universal basis. Fear of retaliation, and the difficulty of obtaining evidence from the State of Origin with respect to precapture offenses has restrained belligerents from conducting war crimes trials during hostilities. Under the circumstances the tendency has been for the victor to try the vanquished only.¹⁹²

The perpetuation of this practice would inevitably cast suspicion as to the impartiality of war crimes trials. Deep seated passions which characterize national attitudes against enemies labelled as war criminals tend to taint the essential fairness and impartiality of such trials. Procedural safeguards provided by law making treaties may go far to create the appearance of a fair trial, but the essential characteristics of a fair trial—an impartial tribunal—cannot be assumed with confidence when the victor sits in judgment over the vanquished, in an emotionally charged post-war environment. On the other hand the reluctance of national courts to punish their own nationals¹⁹³ who have committed war crimes pursuant to superior orders precludes a policy whereby victor and vanquished alike punish their own war criminals. The principal of universal jurisdiction embraced by the 1949 Geneva Convention provides a means for overcoming these deficiencies by authorizing a transfer of jurisdiction to neutrals. Such a solution, however, may not be politically feasible, for neutrals may be reluctant to assume such an obligation. Nevertheless, because the present conventions, for all practical pur-

¹⁹¹ DRAPER, *op. cit. supra* note 164, at 22.

¹⁹² *Id.* at 23. No war crimes trials were held by the United Nation forces after the Korean conflict which ended in a stalemate.

¹⁹³ The United States in practice normally punishes as war crimes only those which are committed by enemy nationals or by persons serving the enemy. FM 27-10, paras. 505(e), 507(b).

poses, preclude the establishment of international tribunals, the present search for a solution to this problem must be limited to the use of national tribunals.

Perhaps when the rule of law in international relations has become more firmly established and the International Court of Justice has achieved even greater status and prestige, it may be feasible to consider an international code of criminal law and procedure and to establish international criminal courts with jurisdiction to impose penal sanctions for violations of the law of nations.¹⁹⁴

VI. TERMINATION OF CAPTIVITY

A. *Termination During Hostilities*

Article 10 of the Hague Regulations of 1907 made provisions for the release of prisoners of war on parole, if such release was also authorized by the law of the prisoner's State of Origin. For this purpose each party to the conflict was required to notify the other if its laws permitted its nationals to accept liberty on parole. Article 11 of the regulations placed an obligation, both on the released prisoner and on his State of Origin, if it permitted parole, to honor the conditions of the parole. Article 12 provided that parole violators, when recaptured, forfeited their right to prisoner of war treatment. The 1929 Convention made no mention of parole, probably because the granting of parole was rare during World War I. The Hague Regulations on this matter, therefore, remained in force.¹⁹⁵

Article 21 of the 1949 GPW Convention restates the substance of Articles 10 and 11 of the Hague Regulations of 1907. It does not, however, provide for the forfeiture of prisoner of war status for those who violate their parole.¹⁹⁶ This omission provides a ground for argument that Article 12 of the Hague Regulations is still in effect, or that the custom of which it is declaratory remains unaffected. The International Committee of the Red Cross has taken the view that a parole violation is a "precapture offense" and that the violator if recaptured, retains the benefits of the convention.¹⁹⁷ Field Manual 27-10 states that prisoners of war may be tried for a violation of parole under the provisions of Article 134

¹⁹⁴ See 2 OPPENHEIM, INTERNATIONAL LAW 584-89 (7th ed. Lauterpacht 1952).

¹⁹⁵ 2 WHEATON, INTERNATIONAL LAW 185 (7th ed. Keith 1949).

¹⁹⁶ Gutteridge, *supra* note 164, at 349.

¹⁹⁷ PICTET, COMMENTARY III, GPW CONVENTION 181.

of the Uniform Code of Military Justice.¹⁹⁸ The maximum punishment may not exceed confinement at hard labor for six months for this offense.¹⁹⁹ The laws and regulations of most nations either discourage or forbid their nationals to accept parole.²⁰⁰

B. Direct Repatriation and Accommodation in a Neutral Country

The purpose of detaining prisoners of war is to prevent their further employment by the enemy. It has long been recognized that the detention of seriously sick and wounded prisoners, whose chances of full recovery are slight, would not further this purpose and that such prisoners should be repatriated or transferred to a neutral country for internment. Both the 1929 GPW Convention (article 68) and the 1949 GPW Convention (article 190) require the repatriation of such persons except those who object (article 109).

C. Release and Repatriation at the Close of Hostilities

The mutual repatriation of prisoners of war at the conclusion of war is an established principle of the customary law of war which found expression in the Hague Regulations of 1907. Article 20 of these regulations states that repatriation should be carried out as quickly as possible after the conclusion of peace. Treaties of peace, however, are rarely concluded immediately upon the cessation of actual hostilities. Because the Treaty of Versailles did not enter into force until January 15, 1920, the repatriation of German prisoners was delayed for fourteen months.²⁰¹ In an effort to prevent recurrence of delay in repatriation, Article 75 of the 1929 GPW Convention required, if possible, that repatriation take place immediately upon the conclusion of an armistice agreement. As to Germany, World War II ended with her unconditional surrender, not with an armistice or a peace treaty. Thus the elimination of the German state in this manner thwarted the normal operation of the convention with the result that the release and repatriation of German prisoners

¹⁹⁸ FM 27-10, para. 72.

¹⁹⁹ MANUAL FOR COURTS-MARTIAL, 1951, para. 127(c).

²⁰⁰ See FLORY, PRISONERS OF WAR 119 (1942); Manes, *Barbed Wire Command*, 1960 MILITARY L. REV. 9. The United States Code of Conduct, for example, imposes a duty upon an American prisoner of war to attempt escape, and as a corollary, it forbids them to accept release on parole. The United States Fighting Man's Code 42 (DOD) Pamph. 8-1 1955).

²⁰¹ Immediate and unconditional release and repatriation of Allied prisoners of war was one of the stipulations of the Armistice of November 11, 1918. Wheaton, *op. cit. supra* note 195, at 189.

of war was long delayed. When the Diplomatic Conference met in Geneva in 1949²⁰² the USSR still held numerous German and Japanese prisoners of war.

Article 118 of the 1949 GPW Convention corrects this situation. It provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The obligation to repatriate, furthermore, is made unilateral so that its implementation will not be frustrated by the necessity of obtaining the consent of both parties.²⁰³

Although no express provision was made for prisoners of war who did not desire repatriation, it would be inaccurate to say that this contingency was not considered.²⁰⁴ It is to be noted in this connection that the principle of involuntary repatriation has not in practice been fully recognized.²⁰⁵ During the Korean Armistice negotiations, over 22,000 North Koreans and Chinese held by the United Nations Command expressed their desire to renounce their

²⁰² PICTET, COMMENTARY III, GPW CONVENTION 541-43.

²⁰³ *Ibid.*

²⁰⁴ At the Conference of Government Experts in 1945, the International Committee of the Red Cross invited attention to the fact that ideological differences resulted in unwillingness to be repatriated which had led to many suicides after World War II. Because they anticipated difficulty in obtaining asylum due to the strict immigration laws of some countries, the 1948 Conference elected not to recommend any special provisions for those unwilling to be repatriated. *Ibid.* At the Diplomatic Conference, the Austrian delegation proposed an amendment barring involuntary repatriation and authorizing the transfer of prisoners to any country willing to receive them. The Austrians pointed out that as a consequence of modern war, political, economic, and social changes in the home territory are frequently so great that prisoners may no longer wish to return home. The Soviet delegation opposed the Austrian suggestion because prisoners might not be able to express themselves with complete freedom. The United States delegation concurred in this view and the Austrian proposal was rejected. See 2A FINAL RECORD 324, 426.

²⁰⁵ For an excellent historical study of the practices of nations with regard to the repatriation of defectors and deserters from the enemy see Schapiro, *The Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310-24 (1952). Detaining Powers considered that repatriation without a guarantee of amnesty would be both a breach of faith to the targets of their psychological warfare as well as bad policy, since it would discourage desertion to the particular Detaining Power in future wars.

Ideological motivations for eschewing involuntary repatriation are found in the treaties ending the several Russo-Turkish wars of the 18th and 19th century. Russia insisted on exceptions to the repatriation clauses with respect to those Turks who had embraced the Christian faith, and reciprocally, of those Christians who had embraced the Moslem faith.

Although the Hague Regulations of 1907 were silent on the issue of the disposition of deserters—because of his continued status as a member of the armed forces of the State of Origin, a prisoner of war who resists

right to be repatriated. The provisions of articles 7 and 118,²⁰⁶ (non-renunciation of rights) provided the Communist bloc with a plausible basis for its insistence that all prisoners were to be repatriated, by force if necessary.

The Communists viewed the wording of article 118(1), as being categorical and argued that this view found support in the fact that the 1949 Diplomatic Conference had rejected an Austrian proposal which would have given an option to prisoners in this respect.²⁰⁷ They contended as well that under article 7 prisoners were precluded from waiving any of their rights under the convention, including the right to repatriation. Furthermore, they construed article 109 which permitted a seriously sick or wounded prisoner to refuse repatriation during hostilities as impliedly denying to him such an option after the conclusion of hostilities.²⁰⁸

The United Nations Command countered this argument by reference to the general humanitarian purposes of the convention, particularly the protection of war victims. It was felt that forcible repatriation of a prisoner of war who, because of fear of punishment or because of ideological or other reasons, had freely rejected repatriation, would be incompatible with the spirit of the convention; that since prisoners of war had the right of option as to specific matters under the convention a further extension by analogy of such a right with respect to repatriation under article 118 was not excluded and therefore permissible; that it was incongruous to construe article 7 as prohibiting a prisoner from renouncing his "right" to be forcibly repatriated; and, finally, that the convention had not abolished the right of a state under customary international law to grant asylum at its option to particular categories of prisoners of war.²⁰⁹ As one authority aptly put it, this construction of the convention with respect

repatriation is in fact a deserter—the Versailles Treaty provided that the Allies might exclude from repatriation, those who did not desire it, with a further stipulation for amnesty for those whom the Allies chose not to grant asylum. The repatriation treaty of April 19, 1920 between Germany and Russia provided: "Prisoners of War and interned civilians of both sides are to be repatriated in all cases where they themselves desire it."

²⁰⁶ Article 7, 1949 GPW Convention provides in pertinent part that "prisoners of War may in no circumstances renounce in part or in entirety the rights secured to them by the present convention...."

²⁰⁷ PICTET, COMMENTARY III, GPW CONVENTION 543.

²⁰⁸ *Ibid.*; Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT'L L. 414, 426-39 (1953); Schapiro, *supra* note 205, at 323.

²⁰⁹ PICTET, COMMENTARY III, GPW CONVENTION 543.

to the repatriation of prisoners of war rests on conventional and customary international law and conforms as well to the logical and moral postulate of the human right of individual freedom, limited only by the duty of its exercise within bona fide limits.²¹⁰

The position of the United Nations Command and the United States that no prisoner of war would "be repatriated by force" or "be coerced or intimidated in any way" eventually prevailed.²¹¹ On December 3, 1952 the General Assembly of the United Nations took the position "that force shall not be used against prisoners of war to prevent or effect their return to their homeland. . . ."²¹² To effectuate this position the United Nations resorted to a procedure under which those who did not desire to be repatriated were placed in the temporary custody of neutral powers, the NNRC, for resettlement or relocation to the extent possible, in accordance with their wishes.²¹³

In view of the ultimate acquiescence of the Communist bloc in the principle of the United Nations resolution of December 3, 1952 it would appear that articles 7 and 118 may not be interpreted as requiring forcible repatriation, and that a Detaining Power may, if it desires, grant asylum to prisoners of war who do not wish to be repatriated.²¹⁴

²¹⁰ See Mayda, *supra* note 208, at 427; Schapiro, *supra* note 205, at 323; U.S. DEPT STATE MEMORANDUM, *Legal Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War*, pt. IV (Oct. 24, 1952).

²¹¹ Mayda, *supra* note 208, at 435. See *Proposals in First Committee for Breaking Armistice Deadlock*, 13 U.N. BULL. 426 (1952) for a full review of the position of the United Nations and the Communist bloc countries.

²¹² U.N. Doc. No. A/Res.18/VII (1952). The text of this United Nations General Assembly Resolution is set forth in 27 DEPT STATE BULL. 702 (1952). The resolution "affirms that the release and repatriation of Prisoners of War shall be effected in accordance with the 'Geneva Convention relative to the treatment of Prisoners of War,' dated Twelfth August 1949, the well-established principles and practice of International Law and the relevant provisions of the Draft Armistice Agreement; Affirms that force shall not be used against Prisoners of War to prevent or effect their return to their homelands, and that they shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of the Convention. . . ."

²¹³ Arts. II, IV, VII, and VIII of the Agreement Between The Commander-in-Chief, United Nations Command, On The One Hand, And The Supreme Commander Of The Korean People's Army and the Commander Of The Chinese People's Volunteers, On The Other Hand, Concerning A Military Armistice In Korea, signed July 27, 1953. The text of this agreement appears in 29 DEPT STATE BULL. 137 (1953).

²¹⁴ See Baxter, *Asylum to Prisoners of War*, 30 BRIT. YB. INT'L L. 489 (1953).

The doctrine supported by the United Nations Command and the United States at the conclusion of the Korean conflict that prisoners of war were not to be forcibly repatriated should not be construed as an unqualified principle. If taken literally it would require a Detaining Power to grant asylum, within its own territory if necessary, to any and all prisoners of war who for any reason did not desire to be repatriated. Such a result was not intended. The doctrine of non-forcible repatriation properly interpreted means simply that no prisoner of war who seeks asylum on certain proper grounds will be forcibly repatriated.²¹⁵

It is doubtful that this doctrine would have been applied in its broad sense as it was after the Korean conflict, had the many thousands of prisoners of war been physically present in the United States or in a country other than Korea at the end of the conflict. Vital economic considerations, the need for stringent adherence to immigration policies, and the infacility of relocating prisoners of war in other countries prevents, as a practical matter, a literal application of the doctrine of non-forcible repatriation. Properly construed it visualizes a proper application of the principle of asylum under all the facts and circumstances.²¹⁶

There can be little doubt that Detaining Powers will in the future forcibly repatriate many prisoners of war. Asylum in the future should be granted as it has in the past only to prisoners of war who seek asylum on bona fide political grounds and to those who have upon promise of asylum voluntarily deserted their forces in order to assist the Detaining Power in its war efforts. Whether other categories of prisoners, including ordinary deserters who do not desire to be repatriated because they fear punishment for their desertion, are to be granted asylum should be determined in large part

²¹⁵ See Schapiro, *supra* note 205, at 310-24.

²¹⁶ In this respect it is to be noted that as of 1960 the NNRC still had under its control some eighty-eight ex-North Korean prisoners of war who had refused repatriation and who the NNRC had not been able to resettle, and for whom the United States was still paying, as it had since 1953, one-half of the expenses which had been incurred by the Indian government for their maintenance. Memorandum from the Indian Embassy, Washington, D.C., to the Dep't of State, dated Aug. 25, 1959, submitting a claim for the maintenance of these prisoners of war. The United States obligation in this respect arises under the commitments made by the United Nations under the "Terms of Reference for NNRC" pursuant to which one-half of the costs necessary to accomplish the resettlement of the prisoners of war would be borne by the parties to the Korean conflict. In 1960 the United States share amounted to 1,111,400 Indian rupies. The KPA/CPV in 1960 paid a similar amount to the Indian government.

on the extent of the commitment made to them by the Detaining Power in its effort to induce deserters and the extent to which the provisions of an armistice agreement or of a treaty effectively immunize them from punishment for their desertion.

VII. CONCLUSION

The 1949 Geneva Prisoner of War Convention represents a noteworthy humanitarian contribution to the law of war. The convention has not only rejected the general participation clause of prior conventions but has provided as well for the applicability of the convention to all international armed conflicts on a unilateral basis between states which are signatories to the convention, and on a reciprocal basis with respect to relations between signatory and non-signatory states. It has by its prescription of minimum standards relative to conflicts not of an international character indicated the interest in and the obligations of the community of nations with respect to a matter which is essentially domestic in nature. It reflects in this respect the interdependence of nations and the concern of the world in domestic conflicts. The convention, subject to certain conditions precedent, also recognizes the role of organized resistance movements in the fluid nature of modern war. By fixing prisoner of war status in an almost immutable mold, the convention protects prisoners against special agreements which might be concluded between the Detaining Power and the State of Origin in derogation of the rights which the convention vests in them. The convention in effect places them in a status comparable to that accorded infants and incompetent persons under domestic law; they being unable to bargain away their own status or rights for either good or bad considerations.

The convention by clarifying the categories of work which may be demanded of prisoners, and by permitting them to volunteer for certain types of work, has removed ambiguities which had theretofore been troublesome. By the same token it provides in this respect a measure of flexibility in an otherwise rigid code.

The elaborate judicial safeguards established by the convention and their applicability to precapture offenses represent important humanitarian advances in the law of war. Perhaps the most significant accomplishments of the convention are reflected in its provisions which codify substantive prohibitions against grave breaches; fix

national and individual responsibility for such breaches; embrace the principle of universal jurisdiction for the trial of such breaches; and imposes a clear and stringent duty to suppress them. By these provisions the convention has swept away the doubts which existed during World War II as to what acts or omissions were punishable as war crimes and the manner in which such crimes were to be adjudicated.

The convention, however, is not free from defect. In some respects it is too definitive and paternalistic. The marked rigidity which pervades many of its provisions may lead to their disregard as unrealistic or impractical and may subject the convention as a whole to a process of erosion. A failure to provide for exceptions to some of the technical requirements as to internment while prisoners are still on the battlefield impose what appear to be impossible standards on the captors.

It may also be that the convention's failure to recognize the role which closely integrated international and multi-national commands will play in future conflicts may frustrate many of its provisions. Furthermore, the reliance which the convention places on the role of the Protecting Power may also seriously impair the effectiveness of the convention should there be no qualified neutrals. The provision for the establishment of a substitute international body which could operate in lieu of a Protecting Power has not yet been implemented and, in fact, may never be implemented if there are no neutral states from which such a body could draw its personnel and on whose territory it could maintain its offices.

The ambiguity of the convention as to the entitlement of deserters and defectors to POW status and the serious repercussions which may be occasioned thereby is also a defect of the convention as is its failure to obligate the signatory states to enact legislation making other than grave breaches of the convention punishable offenses under the principles of universal jurisdiction.

The convention is also defective in that it fails to obligate the signatories to extradite, under appropriate safeguards, war criminals whom they are unwilling or unable to prosecute due to their failure to enact legislation of the nature mandated by the convention.

These and other defects, however, must not obscure the real achievements of the convention. These technical defects do not diminish from the resolution of the community of nations to render

impossible in the future, the sordid tragedy that beset millions of prisoners in the past. The very fact that a consensus in the achievement of the humanitarian goals was reached in 1949, will facilitate efforts which should be undertaken now to correct the defects which have been recently brought to light.