Maltreatment of Prisoners of War In Vietnam

48 Boston University Law Review 323 (1968)*

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fter the adoption of the Southeast Asia (Gulf of Tonkin) Resolution by the Congress of the United States in August, 1964, there was a substantial increase in the American military presence in South Vietnam and consequent and parallel increases in the range and extent of belligerent activities. In accordance with its customary practice, the International Committee of the Red Cross (hereinafter referred to as the ICRC) thereupon addressed a letter to the several parties to the conflict, pointing out that they had all ratified or adhered to, and were bound by, the 1949 Geneva Conventions for the Protection of Victims of War. The ICRC reminded the parties of their specific obligations under the Conventions, and requested information as to the measures being taken by each of them to conform to the duties devolving upon them.

Replies were received from all of the parties concerned. The United States advised that it “has always abided by the humanitarian principles enunciated in the Geneva conventions and will continue to do so.” Specifically, it affirmed that it was “applying the provisions of the Geneva Conventions [in Vietnam] and we expect the other parties to the conflict to do likewise.” The Republic of Vietnam (hereinafter referred to as South Vietnam) assured the ICRC that it was “fully prepared to respect the provisions of the Geneva Conventions and to contribute actively to the efforts of the International Committee of the Red Cross to ensure their application.”

The reply received from the Democratic Republic of Vietnam (hereinafter referred to as North Vietnam) was the usual propaganda tirade which appears to be endemic in Communist documents, thus making it rather difficult to isolate any truly responsive portions. However, the letter did state that North Vietnam would “regard the pilots who have carried out pirate-raids, destroying the property and massacring the population of the Democratic Republic of Vietnam, as major [war] criminals caught in flagrante delicto and liable for judgment in accordance with the laws of the Democratic Republic of Vietnam, although captured pilots are well treated.” The National Liberation Front (hereinafter referred to as the NLF), the political arm of the Vietcong, flatly

refused to apply the Conventions, stating that it "was not bound by the international treaties to which others beside itself subscribed. . . . [T]he NLF, however, affirmed that the prisoners it held were humanely treated and that, above all, enemy wounded were collected and cared for."9

This article has well-defined limitations in scope. It will be concerned solely with some of the instances of maltreatment of prisoners of war which constitute violations of several of the more important humanitarian provisions of the 1949 Geneva Prisoner-of-War Convention, or of customary international law, which appear to have occurred during the course of the fighting in Vietnam.10 Unfortunately, the positions taken by North Vietnam and the NLF necessitate at least some discussion of the problems created by their attitude toward compliance with the humanitarian aspects of the law of war and by the question of the applicability of the Convention under the circumstances which exist in Vietnam.

I. Past Communist Practice With Respect to the Treatment of Prisoners of War

Inasmuch as the long list of States which have ratified or adhered to the 1949 Geneva Conventions11 contains all of the Communist countries, including the major sponsors of North Vietnam and the NLF, viz the USSR and the People's Republic of China, it is obvious that the refusal of North Vietnam and the NLF to consider themselves bound by even the limited humanitarian provisions enumerated in Article 3 of the Convention12 cannot be because these provisions are in any manner contrary to the Communist concept of the law of war.13 The only alternative is to assume that they consider that it is in their own self-interest not to be under any of the constraints imposed by a requirement to comply with these purely humanitarian aspects of the law of war. However, one engaged in armed hostilities, even as a rebel in a civil war, cannot thus divest himself of the requirement to comply with those portions of the law of war which constitute a part of the customary rules of international law recognized by all civilized nations—and, as we shall shortly see in more detail, the provisions of Article 3 of the Convention, for the most part, fall within this category.14

A. The USSR during World War II

During World War II, the USSR acknowledged that it was bound by the 1907 Hague Regulations15 and the 1929 Geneva Wounded-and-Sick Convention,16 and took the position that the provisions of these two agreements covered "all the main questions of captivity."17 Based upon this statement the ICRC assumed that there would be, among other things, exchanges of lists of prisoners of war and of mail and relief packages, and that its delegates would be
permitted and enabled to enter Russia and to inspect prisoner-of-war camps located in that country. This was also the assumption of the enemies of the USSR. Despite continuous efforts on the part of the ICRC, however, none of these things ever eventuated.\textsuperscript{18} One author ascribed this negative policy adopted by the USSR to the alleged “official Soviet position, that any soldier who fell into enemy hands was \textit{ipso facto} a traitor and deserved no protection from his government.”\textsuperscript{19}

\textbf{B. North Korea}

During the Korean hostilities the North Korean Government announced that its forces were “strictly abiding by principles of Geneva Conventions in respect to Prisoners of War”\textsuperscript{20} and in the lengthy dispute during the armistice negotiations regarding “forced repatriation” of prisoners of war, the North Korean and Chinese Communists relied very heavily on certain articles of the 1949 Convention.\textsuperscript{21} Despite this, only two lists of American prisoners of war, totalling just 110 names, were ever sent to the Central Tracing Agency of the ICRC in Geneva (in August and September 1950, shortly after hostilities began), death marches occurred, prisoners of war were inadequately fed, and mail was allowed only on an irregular basis (usually to serve some propaganda purpose). Repeated efforts, which continued even during the course of the armistice negotiations, were unsuccessful in obtaining permission for the ICRC to send a delegate into North Korea to inspect the prisoner-of-war camps located there.\textsuperscript{22}

\textbf{C. North Vietnam}

Now, in Vietnam, we have a third instance of a Communist regime (North Vietnam) which has agreed to be bound by a humanitarian war convention but which, when the conditions arise under which the convention is to be applied, declines to comply with its provisions. North Vietnam persists in refusing to provide the names of persons held as prisoners of war, refusing to permit correspondence between the prisoners of war and their families, and refusing to permit the neutral ICRC delegates to inspect the prisoner-of-war camps so as to be able to determine whether the prisoners of war are, in fact, receiving the humane treatment to which they are entitled and which that regime long ago committed itself to provide. Similarly, the NLF refuses to consider itself bound in any way, even by the limited provisions of Article 3 of the Convention.\textsuperscript{23}

It would seem, at this point, to be fairly well established that the Communist countries, while ready to become parties to humanitarian war conventions, are not ready to comply with their provisions, for they are either not concerned about obtaining reciprocal treatment for their captured personnel, or, possibly,
they may assume that by their present method they will still obtain humane treatment for Communist personnel without any need to reciprocate—which is what has actually occurred in both Korea and Vietnam. Unfortunately, the result of this procedure can only be that eventually the other side in international armed conflicts, and the established government in civil armed conflicts, will refuse to apply the Convention until confirmation of the fact that it is being applied by the Communist side. Although this procedure certainly would leave much to be desired from the immediate humanitarian point of view, it might, in the long run, prove to be more humanitarian to the greater number of persons. Of course, the argument would undoubtedly be made, in opposition to such a procedure, that the obligation to comply with the Convention does not depend upon reciprocity, but upon the undertaking made to all the other parties thereto, and also that the Convention creates individual rights which may not be withdrawn because of the failure of one side to comply. While this may well be true, it is unquestionably going to be increasingly difficult to persuade a country engaged in armed conflict with a Communist country, or an established government engaged in civil strife with a Communist uprising, that it must give Communist prisoners of war the benefits of the Convention while its own captured personnel do not even receive the minimum benefits of customary international law. They will undoubtedly tend to take the position that there must be a point at which the refusal of the Communist side to comply with the provisions of the Convention releases the other side from its obligations thereunder.

II. Does Article 2 of the 1949 Convention Apply in Vietnam?

Whether the fighting which is taking place in Vietnam constitutes an international armed conflict or a civil war has been the subject of considerable dispute. It is the official position of the United States that what is taking place in Vietnam is an international armed conflict. This position has received support from unofficial sources. Opponents of United States participation in the Vietnamese hostilities assert that it is a civil war. Before proceeding to a discussion of specific instances of the improper treatment of prisoners of war, let us examine the law applicable under the various possibilities.

The first paragraph of Article 2 of the 1949 Convention provides that:

[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. (Emphasis added).

The meaning of the quoted provisions is clear; and at no time since the drafting of the Convention in 1949 has any state indicated the existence of any question
with respect to that meaning. In fact, it is among those provisions of the Convention which have been given both uniform interpretation and general approval.\textsuperscript{30}

The only specific legal excuse ever advanced by North Vietnam for its insistence that the Convention is not applicable, and that persons captured by it are not entitled to the humanitarian protections afforded by the Convention, has been that there is no "declared war."\textsuperscript{31} It is surely beyond dispute that there is an "armed conflict" in Vietnam between two or more of the parties to the Convention. Under these circumstances, the fact that there has been no declaration of war, or that a state of war is not recognized as existing, is completely irrelevant to the requirement to apply the Convention. There is, then, no validity whatsoever to the sole legal reason put forward by North Vietnam to justify its refusal to apply the Convention by which it voluntarily elected to be bound a number of years before the armed conflict in Vietnam reached its present status.\textsuperscript{32} The wording used in drafting the first paragraph of Article 2 leaves no doubt that it was the intent of the Diplomatic Conference which approved it that the Convention be applicable in every instance of the use of armed force in international relations—and, beyond any shadow of doubt, this intent was attained. It appears equally clear that the refusal of North Vietnam to apply the Convention under the circumstances which exist in Vietnam—whether or not the United States is "waging a war of aggression,"\textsuperscript{33}—constitutes a blatant disregard of an international obligation, freely accepted.

III. Does Article 3 of the Convention Apply in Vietnam?

Article 3 of the Convention\textsuperscript{34} is sometimes referred to as a "convention in miniature,"\textsuperscript{35} or as a "mini-convention."\textsuperscript{36} The draftsmen attempted to include in a single article those basic humanitarian provisions which render prisoner-of-war status somewhat less horrendous than it inherently is—thus, in a relatively simple manner, calling to the attention of the participants in a non-international armed conflict the specific humanitarian rules which control their actions from the very outset.\textsuperscript{37} Unfortunately, even this mininum approach has frequently proven unsuccessful.\textsuperscript{38}

The idea of including in an international convention a provision regulating civil wars was extremely novel.\textsuperscript{39} While the ICRC had been aiming for such an extension of the Geneva-type Conventions for many years, it was not successful in this respect until the 1949 Diplomatic Conference.\textsuperscript{40} The main objection voiced during the discussions in committee and in the plenary sessions of the Diplomatic Conference was that under a number of the proposals the established government would seemingly be required to apply the Convention even in cases of brigandage.\textsuperscript{41} The other problem that had to be solved was the
determination as to which provisions of the Convention should in an appropriate case be applied.\textsuperscript{42} The compromise ultimately adopted left the term “armed conflict not of an international character” undefined—which, in effect, was a determination to make the term as broad and all-encompassing as possible. On the other hand, the minimum provisions which the parties to the armed conflict are obligated to apply are enumerated at length, rather than providing for the application of the entire Convention (as the working draft had done) or of all provisions falling within certain broad categories (as the USSR had proposed).\textsuperscript{43}

What is the effect of Article 3 of the Convention on the parties to an “armed conflict not of an international character?” As far as the established government is concerned, if it is a party to the Convention it is bound by the provisions of Article 3 just as much as it would be bound by all of the provisions of the Convention in an armed conflict of an international character.\textsuperscript{44} And the same is true of third states which intervene to support either side in a civil war.\textsuperscript{45}

The foregoing has caused comparatively few legal problems.\textsuperscript{46} Where problems arise, however, is with respect to the obligation of the insurgents. How, it will be asked, can the action of the established government in becoming a party to the Convention, an action perhaps taken many years before the rebellion was even contemplated, now be held to bind the insurgents?\textsuperscript{47} This is the position taken by the NLF.\textsuperscript{48} While it may have some minimum legal basis—this is the most that can be said for it—there are a number of valid legal theories under which a finding that the insurgents are bound by the provisions of Article 3 can be fully justified.\textsuperscript{49}

While Soviet legal writers do not specifically state that insurgents\textsuperscript{50} are bound by the provisions of Article 3, that is certainly the only logical conclusion which can be drawn from their writings. Thus, their widely distributed textbook states:

[T]he Soviet delegation secured the [1949 Diplomatic] Conference’s recognition of a number of important humane clauses which were included in the new Conventions. For example, the obligatory character of the application during armed conflicts which are not of an international character of such principles as the humane treatment of persons not taking a direct part in military operations or who have ceased to take part in these operations as a result of sickness, illness or captivity, was recognized . . . \textsuperscript{51}

It has been said that the established government cannot be prejudiced by applying Article 3, “for no Government can possibly claim that it is entitled to make use of torture and other inhuman acts prohibited by the Convention as a means of combating its enemies.”\textsuperscript{52} It would certainly seem that this argument is equally applicable to the insurgent party, for how can armed conflict be conducted with different rules controlling the actions of the two contending sides?\textsuperscript{53}
Finally, there is much merit in a further statement made in the official ICRC interpretation of Article 3 of the Convention to the effect that:

If an insurgent party applies Article 3, so much the better for the victims of the conflict. No one will complain. If it does not apply it, it will prove that those who regard its actions as mere acts of anarchy or brigandage are right . . . .

Certainly, any insurgent force or alleged “national liberation movement” which does not comply with the provisions of Article 3 requiring humane treatment, and prohibiting violence, murder, torture and maltreatment of prisoners of war falls within the category of brigands and terrorists.

What if, despite the foregoing, insurgents take the position that they are not bound by the provisions of Article 3, and this position gains acceptance? Except for the rare case such as Algeria, where the insurgents themselves sought application of the Convention, Article 3 will become a dead letter. Unusual, indeed, would be the government willing to grant captured insurgents the benefits flowing from Article 3 while knowing that its own personnel, when captured, are tortured, otherwise maltreated and slaughtered. Although the requirement for granting these benefits to captured insurgents is stated to be absolute, and not to be dependent upon reciprocity, once again it will be extremely difficult to convince any government and its people that such a unilateral compliance should be expected of them.

We may then be in a position in which there is no applicable international legislation governing the actions of the insurgents and we would, therefore, have need to resort to the customary law of war. What are the customary rules accepted by the civilized nations of the world? Are they binding upon insurgents?

IV. The Pertinent Customary Law of War

In the opinion rendered by the Nuremberg International Military Tribunal (hereinafter referred to as IMT), which all Communist nations seemingly regard as a revelation second only to those of Marx, Engels and Lenin (and, it is to be assumed, of Mao in China), it is stated that by 1939 the 1907 Hague Regulations were “declaratory of the laws and customs of war.” It is also there confirmed that an individual is not held as a prisoner of war for purposes of revenge or punishment, but merely to prevent him from further participation in the conflict and that he is, therefore, a helpless person whom it is contrary to military tradition to kill or injure. One of the subsequent Nuremberg Military Tribunals, in deciding The High Command Case correctly construed the IMT opinion as holding that by 1939 both the 1907 Hague Regulations and the 1929 Geneva Prisoner-of-War Convention “were binding insofar as they were in substance an expression of international law as accepted by the civilized nations
of the world." Every military force engaged in armed conflict, whether or not internationt in character, and whether representing an old or a new state, an established government or an insurgent party, is bound to comply with these established rules of the "civilized nations of the world." Failure to do so places that military force, and the political organization which it represents and from which it takes its orders and policies, in direct violation of the foregoing principles enunciated at Nuremberg.

The Tribunal in The High Command Case did not limit itself to the general statement that the 1907 Hague Regulations and the 1929 Geneva Prisoner-of-War Convention now represented customary law. Inasmuch as there were obviously provision in those two Conventions dealing with details which could not be construed as customary law, the Tribunal assumed the task of designating exactly which provisions of the two agreements did fall within that category. It proceeded to review the specific provisions of each of the two Conventions and found that those provisions requiring humane treatment of prisoners of war, and those protecting them from acts of violence, insults, public curiosity, corporal punishment and acts of cruelty, were "an expression of the accepted views of civilized nations." Of course, the Tribunal in The High Command Case was concerned only with those aspects of the law accepted by civilized nations of the world under which violations had been proven in the case before it. Its list is not, therefore, all-inclusive. Some writers have extended it to include the four groupings listed in Article 3 of the Convention, probably on the extremely plausible theory that in rejecting both the ICRC and USSR proposals the Diplomatic Conference had selected for inclusion in Article 3 (to be binding on both sides in a civil war) only those humanitarian principles which already had received demonstrable acceptance by the civilized nations of the world. It also appears that both the Tribunals and the writers have definite ideas with respect to the imposition upon prisoners of war of vicarious punishment in the form of reprisals.

Do these customary rules of warfare apply to insurgents? There seems little doubt that they do, even though the rules have so frequently been honored only in the breach. The Soviet textbook states that "the laws and customs of war apply not only to armies in the strict sense of the word, but also to levies, voluntary detachments, organised resistance movements and partisans." Under existing circumstances, where every insurgent movement other than one which is avowedly anti-Communist immediately becomes a "national liberation movement" enjoying full Communist support, further citation of authority would appear to be redundant.

From the foregoing, it may be properly concluded that apart from any international legislation represented by the Hague or Geneva or other
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Conventions, minimum customary law requires that prisoners of war be treated humanely; forbids the use against them of all forms of violence including corporal punishment, torture, cruelty and killing; and protects them from insults and public curiosity. With this in mind, we may now proceed to an examination of the incidents reported to have occurred or to have been threatened in Vietnam, applying the provisions of the Convention generally, those of Article 3, or customary international law where appropriate.

V. Charges Made Against the United States

It has already been pointed out that the United States responded promptly to the ICRC letter concerning the application of the Geneva Conventions in Vietnam and committed itself to apply the 1949 Convention. This commitment was thereafter adopted by the various nations which have furnished military forces to support South Vietnam and it has been reiterated on several appropriate occasions. Although, strangely enough, no report has been found of a Vietcong or North Vietnamese charge of improper treatment of their captured personnel by United States military forces in Vietnam, there has been one charge of improper action in this respect made in the United States.

As early as 1964, when American personnel were serving in Vietnam solely as advisers to South Vietnamese military units, reports began to reach the United States of the maltreatment of Vietcong prisoners of war by members of the South Vietnamese combat forces. American photographers and newsmen were present during these episodes and, presumably, American military personnel were also present. Photographs of this nature continued to appear in the American press from time to time during 1965 and occasionally, although much more rarely, during subsequent years. In a few instances American personnel were pictured standing by while the maltreatment of the prisoners of war occurred. These incidents apparently took place either at the scene of the fighting or during evacuation from it.

Humanitarian reaction to these clear indications of violations of the Convention quickly appeared in the United States. The legal problem presented by these incidents, in view of the nature of the United States position in Vietnam, is whether the United States had a duty or was in a position to do more than remonstrate with the South Vietnamese authorities.

There is no provision in the Convention making a contracting party responsible for violations committed by one of its allies against prisoners of war captured and held by that ally. A search of the Final Record of the 1949 Diplomatic Conference which drafted the Convention has failed to bring to light even a suggestion to this effect made by any delegation. The reasons for this lacuna are obvious. To have included such a provision would have created vicarious responsibility for a situation which, in the great majority of cases, could
not be remedied by the state so held responsible. Moreover, no state would willingly accept a responsibility which could well bring it into sharp conflict with one or several of its allies during the course of a life-or-death struggle.

There was, then, no legal duty imposed upon the United States by the 1949 Convention to ensure that South Vietnamese troops did not maltreat personnel captured by them. Of course, it is equally clear that the United States (and every other contracting party) is under a moral obligation to exert all its influence to bring about full compliance with the relevant provisions of the Convention by any other party engaged in armed conflict.

When units of the United States armed forces were committed to combat a new situation arose, because, unlike the earlier period just mentioned, the United States itself then began to take prisoners of war. These prisoners were turned over to the South Vietnamese for detention in prisoner-of-war camps. At first, the transfer of custody was made in the field immediately upon capture. But apparently because most of the incidents of maltreatment occurred at this time and in this area, in mid-1966 the United States changed its procedure. Thereafter, prisoners of war captured by United States units were evacuated to divisional headquarters and from there directly to the rear-area prisoner-of-war camps maintained by the South Vietnamese. The United States Commander-in-Chief in Vietnam has stated categorically that "these prisoners are not being mistreated. They are handled in accordance with the provisions of the Geneva Conventions." There is no evidence to indicate that his statement is not correct, nor have any claims been made which contradict it.

Of course, even after prisoners of war captured by United States forces reach the camps and are turned over to the custody of the South Vietnamese, the United States remains under a contingent responsibility for their humane treatment in accordance with the provisions of the Convention.

VI. Charges Made Against South Vietnam

There appears to be little doubt that at least well into 1966 South Vietnamese combat troops regularly maltreated captured enemy personnel by using threats, torture, and other acts of violence in order to obtain intelligence information. These acts were and remain direct violations of the law of war, whether considered from the point of view of the entire Convention, Article 3, or customary international law. The combined pressure of the ICRC and the United States (and, perhaps, of other allied countries) has apparently gradually made itself felt, at least at the official level. The Government of South Vietnam has complied with the Convention by a liberal interpretation of the provisions of Article 4 defining the categories of persons entitled to prisoner-of-war status, by supplying lists of persons detained as prisoners of war to the Central Tracing Agency of the ICRC, by disseminating to its troops information concerning
the duties imposed upon captors by the Convention and by other methods of instruction of its troops, and by permitting unlimited inspection visits to the prisoner-of-war camps by delegates of the ICRC. The fact that reports of further instances of maltreatment of prisoners of war by South Vietnamese combat troops have become more sporadic probably indicates that the campaign of education has had some degree of success. However, it may also mean that South Vietnamese combat commanders have been able to conceal most of such incidents from those who might report them.

To summarize: while the South Vietnamese Government has now substantially complied with the obligations which the Convention imposes upon it, during the course of a period extending over several years there was apparently an officially countenanced practice of the use of torture on newly-captured prisoners of war by South Vietnamese combat troops for the purpose of extracting information from them. The South Vietnamese Government appears now to accept the fact that such conduct constituted a direct and major violation of the Convention and, therefore, in 1966 instituted a campaign of education which seems to have been at least partially successful in putting an end to this grossly illegal practice. However, instances of maltreatment of newly-captured prisoners of war by South Vietnamese combat troops continue to be reported. The individuals responsible for such incidents, both soldiers who commit the actual violence and commanders who permit and even encourage these acts, are guilty of violations of the Convention and of the customary law of war.

VII. Charges Made Against North Vietnam

A. Parading Prisoners of War

With respect to the North Vietnamese treatment of American prisoners of war we have only the information which they have seen fit to disclose. However, even this limited source of information has revealed one major violation of the Convention and the threat of what was asserted to be another. While this latter was apparently prevented by an unprecedented mobilization of world opinion by the United States, it will be discussed below in section VII B.

On July 6, 1966, presumably to whip up local support for the trial of captured American pilots as “war criminals,” the North Vietnamese authorities caused these men, handcuffed in pairs, to be paraded through the crowd-lined streets of Hanoi. Word of the incident was broadcast by Radio Hanoi and press releases and photographs were issued by the official North Vietnamese press agency.

The United States Government immediately charged that this constituted a violation of the Convention. The ICRC clearly was of the same opinion, for on July 14, 1966, it drew the attention of the North Vietnamese Government
to the fact that the Convention specifically prohibited the subjection of prisoners of war to public curiosity.\textsuperscript{97} The North Vietnamese did not deny the occurrence of the incident; they merely called attention to their previous communications concerning the nonapplicability of the Convention.\textsuperscript{98}

In May, 1967, Agence France Presse (the French news agency) reported from Hanoi that three captured American pilots, one of whom was apparently suffering from an injury, "were paraded through angry, shouting crowds" on the streets of Hanoi and were later "put on display" at the International Press Club in Hanoi.\textsuperscript{99} Once again the United States Government immediately charged that this constituted a "flagrant violation" of the Convention and stated that it was sending a protest to North Vietnam through the ICRC.\textsuperscript{100}

Over a century ago Francis Lieber's first codification of the customary law of war included a statement to the effect that prisoners of war were not to be subjected to any "indignity."\textsuperscript{101} The 1929 Geneva Prisoner-of-War Convention,\textsuperscript{102} the predecessor of the Convention with which we are here concerned, had (in its Article 2) a prohibition against subjecting prisoners of war to "insults and public curiosity." In interpreting this provision in the course of World War II, the Judge Advocate General of the Army said: "The 'public curiosity' against which Article 2 ... protects them is the curious and perhaps scornful gaze of the crowd ...."\textsuperscript{103} During World War II a group of American prisoners of war was marched through the streets of Rome by the Nazis as a propaganda measure. After the war the Nazi commander responsible for the march was tried and convicted of the war crime of failing to protect prisoners of war in his custody from insults and public curiosity.\textsuperscript{104} The International Military Tribunal for the Far East, the Pacific counterpart of the International Military Tribunal of Nuremberg fame, included in its opinion a heading entitled "Prisoners of War Humiliated" and listed thereunder various episodes in which prisoners of war had been marched down city streets and exhibited to jeering crowds, specifically labeling such treatment as a violation of the law of war.\textsuperscript{105} It has already been noted that the Military Tribunal which heard The High Command Case at Nuremberg found that the protection of prisoners of war from insults and public curiosity was a part of the customary law of war recognized by civilized nations.\textsuperscript{106}

Both Articles 3 and 13 of the Convention contain provisions which prohibit the exhibiting of prisoners of war by parading them through city streets; and it would appear that this rule has most probably attained the status of being part of the customary law of war.\textsuperscript{107} It follows that the actions of North Vietnamese authorities on the two occasions mentioned (and on other less well publicized occasions) were violations of the Convention and of the customary law of war.
B. War Crimes Trials

It will be recalled that in answering the letter from the ICRC in August, 1965, North Vietnam referred to captured American pilots as "major [war] criminals caught in flagrante delicto and liable for judgment in accordance with the laws of the Democratic Republic of Vietnam." Many statements of similar import were subsequently made by the North Vietnamese. By mid-July, 1966, press dispatches from Communist newsmen in Hanoi were mentioning that trials were definitely planned and tension began to build in the United States. It was then that the United States mounted a diplomatic offensive which resulted in the intervention of personages from around the world, including those who sided with the United States position in Vietnam, those who opposed it, and those who were neutral. On July 23, 1966, the North Vietnamese Government announced the appointment of a committee "to investigate United States 'war crimes'" and then, on that same day, North Vietnam President Ho Chi Minh took advantage of a cabled inquiry from the Columbia Broadcasting System to state that there was "no trial in view" for the American pilots. A few days later Ho was quoted as saying that the "main criminals" were not captured pilots, "but the persons who sent them there—Johnson, Rusk, McNamara—these are the ones who should be brought to trial." For ten days in July, 1966, there was excitement and debate on this subject throughout the world, with claims, counterclaims, and citation of legal authorities and purported legal authorities for and against the trial.

Actually, the statement and allegations made by the North Vietnamese in their August 31, 1965, letter to the ICRC and frequently thereafter pose two interwoven questions concerning the captured American pilots: (1) are they entitled to the status of prisoners of war? and (2) do the North Vietnamese have the right to try them for alleged war crimes? It will be appropriate to discuss these two questions in the order stated.

The captured pilots are all members of the United States Navy and Air Force. They were captured when forced to eject from their planes while flying combat missions over North Vietnam. They were wearing American flight uniforms when captured and made no attempt to hide their identity. (Of course, this series of statements includes a number of assumptions—but they all appear to be reasonable ones and there is no indication that any one of them is really disputed.) These facts being accepted, the American pilots are entitled prima facie to prisoner-of-war status under the 1907 Hague Regulations, the 1929 Geneva Prisoner of-War Convention, and the 1949 Geneva Prisoner-of-War Convention. In fact, it would be difficult to imagine a more clear-cut case of entitlement to such status.
The North Vietnamese apparently do not contest the facts stated and assumed above, but they attempt to avoid the conclusion which necessarily flows from these facts by asserting that the Convention does not apply to "war criminals." The syllogism would be: war criminals are not entitled to the protection of the Convention; American pilots are war criminals; therefore, American pilots are not entitled to the protection of the Convention. Both the major and the minor premises of that syllogism are incorrect. The North Vietnamese position therefore necessitates a brief review of the events preceding and following the approval of Article 85 of the Convention by the 1949 Diplomatic Conference.

When the war in the Pacific ended in 1945, General Yamashita, who had commanded the unsuccessful Japanese defense of the Philippine Islands, was charged with a number of war crimes and was brought to trial before an American Military Commission in Manila. His counsel contended that he was entitled to all of the trial protections contained in the 1929 Prisoner-of-War Convention. These protections were denied to him and on appeal to the United States Supreme Court (after his conviction and death sentence) the denial was affirmed on the ground that the trial protections contained in that Convention applied only to trials for post-capture—not pre-capture—offenses.

In the preparatory work which preceded the 1949 Diplomatic Conference, the ICRC convened a group of "Government Experts" who recommended, as one variation from the 1929 Convention, a provision that prisoners of war prosecuted for pre-capture offenses should enjoy the benefits of the Convention until convicted after a regular trial. When this was submitted to the XVIIth International Red Cross Conference at Stockholm in 1948, where the final draft which was to be the working draft for the 1949 Diplomatic Conference was prepared, it was decided to change the provision drafted by the Government Experts so that prisoners of war would continue to benefit by the provisions of the Convention even after conviction of a pre-capture offense.

At the Diplomatic Conference, the USSR proposed an amendment to the draft provision under which once a prisoner of war had been convicted of a war crime (apparently this meant a conventional war crime) or a crime against humanity, he could be treated as an ordinary criminal. This was, in effect, a return to the recommendation made by the Government Experts. General Slavin, chief delegate of the USSR, stated to the committee charged with the preparation of the Prisoner-of-War Convention, that the USSR proposal applied only to prisoners of war who had been convicted. The committee's report to the Plenary Meeting called attention to the difference of approach represented by the Stockholm draft and the USSR proposal, and stated that the great majority of the committee considered that even after a prisoner of war had been convicted of a pre-capture violation of the laws and customs of war, he
should continue to enjoy the protection of the Convention. The Diplomatic Conference rejected the Soviet proposal and approved the Stockholm draft provision.

The effect of Article 85 of the Convention was, then, to change the rule expounded in Yamashita and other similar cases. Now a prisoner of war retains the benefits of the Convention from the moment of capture to the moment of release and repatriation. If, while in captivity, he is tried and convicted of a pre-capture violation of the law of war he is entitled to all the judicial safeguards of the Convention.

The USSR and all of the other Communist countries, both those present at the Diplomatic Conference in Geneva and those which subsequently adhered to the Convention, have made reservations to Article 85. This fact caused some concern to the United States Senate when it was asked to give its advice and consent to the ratification of the Convention by the President. In its report to the Senate the Committee on Foreign Relations said:

[In the light of the practice adopted by Communist forces in Korea of calling prisoners of war “war criminals,” there is the possibility that the Soviet bloc might adopt the general attitude of regarding a significant number of the forces opposing them as ipso facto war criminals, not entitled to the usual guaranties provided for prisoners of war. As indicated above, however, the Soviet reservation expressly deprives prisoners of war of the protection of the convention only after conviction in accordance with the convention.]

When North Vietnam advised the Swiss Government of its adherence to the four 1949 Geneva Conventions in June 1957, the communication included a reservation to Article 85 reading as follows:

The Democratic Republic of Vietnam declares that prisoners of war prosecuted for and convicted of war crimes or crimes against humanity, in accordance with the principles laid down by the Nuremberg Court of Justice shall not benefit from the present Convention, as specified in Article 85.

Having made this reservation, it must be assumed that the North Vietnamese authorities fully understood its meaning—and it is difficult to find any real ambiguity in it so far as the present problem is concerned. The American pilots have not been “prosecuted and convicted.” Under Article 85 of the Convention and the North Vietnamese reservation to it, they are entitled to the benefits of the Convention until prosecution and conviction for war crimes or crimes against humanity have occurred. The North Vietnamese contention that the American pilots are “war criminals” and not entitled to the protection of the Convention is, therefore, without merit. It is, in and of itself, a major
violation of the Convention to arbitrarily deny prisoner-of-war status to individuals entitled to that status. If the North Vietnamese desire to comply with the international commitment which they have made by voluntarily adhering to the Convention, they are under an obligation to recognize that American pilots captured while flying combat missions over North Vietnam are entitled to the status of prisoners of war and to the protections provided by the Convention which flow from that status.

The first question posed above, are American pilots entitled to the status of prisoners of war, must be answered in the affirmative. This leads us to the second question, do the North Vietnamese have the right to try them for alleged war crimes?

In the discussions which took place in connection with the drafting of Article 85, it was at no time suggested by any delegation that prisoner-of-war status should protect an individual from prosecution for an alleged pre-capture offense which constituted a violation of the law of war. In fact, all of the parties who engaged in the discussion apparently assumed that this was the rule. As we have just seen, the only dispute on this subject concerned the regime under which the detaining power would be entitled to place the individual after his trial and conviction for a pre-capture offense. Under the circumstances, there seems to be little doubt that the second question posed, do the North Vietnamese have the right to try the American pilots for war crimes alleged to have been committed prior to capture, should also be answered in the affirmative.

However, this answer requires amplification, because standing alone it is subject to misconstruction. In the first place, the right to try a prisoner of war for an offense which he is alleged to have committed prior to capture does not mean that there is a right to treat him prior to trial and conviction in the manner in which he might be treated after trial and conviction. (This, of course, is inherent in the discussion and resolution of the first question on this subject discussed immediately above.) In other words, a prisoner of war retains the status of prisoner of war, and all the protections incident thereto, at least until he has been finally convicted.

In the second place, while it appears that the North Vietnamese charge against the American pilots is that they have been guilty of bombing nonmilitary targets, such as civilian residential areas, at this stage in the development of the law of war, there may be considerable doubt expressed as to whether even "target-area" bombing, a much more indiscriminate and inhumane act than that apparently charged against the American airmen, is a violation of international law. During World War II both sides engaged in this type of warfare. No one who lived through that period or has read its history could have forgotten the German bombing of such targets as Warsaw, London, Coventry and Rotterdam, and the Allied bombing of Berlin, Essen, Cologne and Tokyo. No political
leader, no military commander, and no airman was ever convicted of any alleged war crime arising out of these activities. One will look in vain in the opinions of the IMT or of the IMTFE for any reference to such activities as constituting a war crime. For more than ten years the ICRC has been endeavoring, so far with not even a modicum of success, to evolve a convention which would protect the civilian populations in time of war and which would be acceptable to the governments. This proposed Convention, in its Article 10, specifically forbids target-area bombing. The fact that it is considered necessary to include such a prohibition in a new draft international convention on the law of war would seem to indicate rather conclusively that no such prohibition is presently included therein. And, as has been stated, if target-area bombing is not definitely outlawed, then certainly the lesser charge which appears to have been levied against the American pilots does not come within a prohibited category.

In the third place, we have moved far along the road from the era of vicarious punishment to a point where individuals are punished only for their own acts. While evidence, such as "confessions," might be available to the North Vietnamese with respect to some of the airmen, what of the others? Why is the charge of being a war criminal leveled against every captured American airman held by the North Vietnamese? Certainly, there is no evidence available to them that every captured American airman participated in bombing or other attacks on purely civilian targets. Some of the airmen were probably shot down on their first missions before they could drop a bomb. Some were probably flying in unarmed reconnaissance planes, perhaps as photographers. Some were probably flying fighter protection armed only with air-to-air weapons. These, and probably many others, are within categories against whom no legitimate war-crimes charge can be laid, even assuming that it can against the others.

Finally, there arises the problem of whether prisoners of war accused of pre-capture war crimes can be or should be tried during the course of hostilities. On this subject the author has previously said:

While there was never any concrete proposal made at the Diplomatic Conference that trials of prisoners of war for pre-capture offenses should be postponed until the cessation of hostilities, the matter was the subject of inconclusive discussion during the debate on Article 85, two delegates (Lamarle of France and Slavin of the U.S.S.R.) expressing the opinion that such trials should not be put off until the close of hostilities, and one delegate (Gardner of the United Kingdom) expressing the opposite view. The International Committee of the Red Cross has long taken the position that, if such a trial is conducted during the course of hostilities, an accused does not have a fair opportunity to produce all of the evidence which might be available to disprove or lessen his responsibility.

As we have already seen, a number of prisoners of war were tried for alleged pre-capture offenses during the course of World War II. The patent unfairness of
these trials glaringly reveals the danger of trials for pre-capture offenses conducted during the course of the war.\textsuperscript{142}

To summarize: captured American airmen are entitled to the status of prisoners of war until such time as they have been prosecuted \textit{and} convicted of pre-capture violations of the law of war; while they may legally be tried during the course of hostilities, there are serious practical objections to such a procedure; and, if they are tried, they must be afforded all of the judicial safeguards contained in the Convention.

\textbf{VIII. Charges Made Against the Vietcong}

Very little information is available as to how many prisoners of war, American or South Vietnamese, are held by the Vietcong; even less is known as to how they are being treated. However, there is reason to know that they do hold some American prisoners of war—and that there have been at least two identical instances of major violations of the law of war in the treatment of prisoners by the Vietcong.

As we have seen, despite Vietcong insistence to the contrary, the generally accepted position appears to be that insurgents such as the Vietcong are bound by the provisions of Article 3 of the Convention,\textsuperscript{143} and that, in any event, they are at a minimum bound by the customary law of war.\textsuperscript{144} Specifically, it appears to be well established that customary international law prohibits the use of violence and acts of cruelty against prisoners of war and, in all probability, also prohibits making them the objects of reprisals.\textsuperscript{145}

On April 9, 1965, a Vietcong terrorist was tried, convicted and sentenced to death by a South Vietnamese court. At that time the Vietcong announced that if the sentence of execution was carried out, Gustav C. Hertz, a kidnapped civilian American aid officer, would be shot.\textsuperscript{146} The terrorist was apparently not executed. Whether or not the threat against Hertz was the reason for the clemency shown the terrorist has not been disclosed.

On June 22, 1965, another Vietcong terrorist was executed by a South Vietnamese firing squad in Saigon after he had been tried, convicted and sentenced for acts of terrorism by a South Vietnamese special military court.\textsuperscript{147} Three days later both Radio Hanoi and the Liberation Radio announced that an American soldier held as a prisoner of war by the Vietcong (Sergeant Harold G. Bennett) had been executed in reprisal for the execution of the Vietcong terrorist.\textsuperscript{148} The United States labeled the act as “murder”; and a statement released by the Department of State said that “people around the world cannot help but be appalled and revolted by this show of wanton inhumanity.”\textsuperscript{149}

On September 22, 1965, three more Vietcong terrorists were executed in Da Nang after a trial, conviction and death sentence by a South Vietnamese court.
Four days later, on September 26, the Liberation Radio announced that the Vietcong had retaliated by the executions of two American prisoners of war, Captain Humbert R. Versace [Versace] and Sergeant Kenneth M. Roraback.\textsuperscript{150} Once again the United States labeled these reprisal executions as “murder” and as violations of the Convention.\textsuperscript{151} It filed a protest with the ICRC which was transmitted to and rejected by the NLF.\textsuperscript{152}

A “reprisal” is defined as an otherwise illegal act committed by one side in an armed conflict in order to put pressure on the other side to compel it to abandon a course of illegal acts which it has been committing and to comply with the law of war.\textsuperscript{153} For a reprisal (a normally illegal act) to be legal there are three requirements: the act of the state against which it is directed must have been illegal; it must not be directed against an individual who, by the law of war, is specifically protected against reprisals or against acts of the nature that the contemplated reprisal will take; and it must be directed against the state which first violated the law of war.

Were the alleged acts of reprisal of the Vietcong mentioned above valid applications of the rules governing reprisals? The first requirement for a valid reprisal is that the act or acts against which it is directed have been illegal. The acts against which these reprisals were directed were the June 22 and September 22, 1965, executions of the Vietcong terrorists. Were those executions illegal? According to the newspaper accounts, in each instance the individuals had been tried, convicted and sentenced by a South Vietnamese court in accordance with the law of South Vietnam.\textsuperscript{154} While the National Liberation Front called the June 22 execution “[a] crime of bloodthirsty men”\textsuperscript{155} and presumably feels the same about the September 22 execution, it has never indicated in what way the executions constituted a crime—other than the implication that it is a crime to try, convict and execute a Vietcong apprehended in the course of committing what was probably a Vietcong approved and ordered act of terrorism.

The reprisals, then, failed to meet the first requirement for a valid reprisal, that it be called forth by an illegal act by the other side. Now let us examine the second requirement for a reprisal to be valid under the law of war—that it not be directed against a specifically protected person. Shortly after the Second Hague Peace Conference of 1907 the German War Office issued a War Book which escaped general attention until some years later. During the course of World War I, it became well known and widely condemned because of its emphasis on the the principle of military necessity and its disregard for the customary and conventional law of war. Concerning reprisals against prisoners of war the War Book said:

As regards the admissibility of reprisals, it is to be remarked that these are objected to by numerous teachers of international law on grounds of humanity.
To make this a matter of principle and apply it to every case, exhibits however, "a misconception due to intelligible but exaggerated and unjustifiable feelings of humanity, of the significance, the seriousness and the right of war. It must not be overlooked that here also the necessity of war, and the safety of the State are the first consideration, and not regard for the unconditional freedom of prisoners from molestation."

That prisoners should only be killed in the event of extreme necessity, and that only the duty of self-preservation and the security of one's own State can justify a proceeding of this kind is today universally admitted.\textsuperscript{156}

Thus, even a directive which was subjected to almost universal condemnation limited reprisals against prisoners of war to cases of "extreme necessity," self-preservation, and the security of the State.

World War I so vividly demonstrated the inhumanity of reprisals against helpless prisoners of war that restrictions on the use of this procedure were incorporated into a number of agreements reached by the belligerents for the protection of prisoners of war during the course of those hostilities.\textsuperscript{157} A specific provision completely prohibiting reprisals against prisoners of war was thereafter included in the 1929 Convention.\textsuperscript{158}

Writing in 1942, an American scholar stated that "it seems reasonable to assume that reprisals, with prisoners of war as the objects, are permissible within limits in customary international law."\textsuperscript{159} A few years later the legality of reprisals against civilian hostages was considered at great length in The Hostage Case, a decision by one of the Nuremberg Military Tribunals. The Tribunal said:

It is a fundamental rule of justice that the lives of persons may not be arbitrarily taken. A fair trial before a judicial body affords the surest protection against arbitrary, vindictive, or whimsical application of the right to shoot human beings in reprisal. It is a rule of international law, based on these fundamental concepts of justice and the rights of individuals, that the lives of persons may not be taken in reprisal in the absence of a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action. . . . We have no hesitancy in holding that the killing of members of the population in reprisal without judicial sanction is itself unlawful.\textsuperscript{160}

Inasmuch as members of the general public had not then been recognized as specially protected persons, it would appear that, a fortiori, everything the Tribunal said about the protections to which civilians were entitled would apply to prisoners of war.

In considering the opinion quoted above, another Nuremberg Military Tribunal, which would probably not have permitted reprisal executions under any circumstances, stated in its opinion in The High Command Case:
In the Southeast Case [Hostage Case], United States v. Wilhelm List, et al., (Case No. 7), the Tribunal had occasion to consider at considerable length the law relating to hostages and reprisals. It was therein held that under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all preconditions and as a last desperate remedy hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial preconditions apply to so-called "reprisal prisoners." If so inhumane a measure as the killing of innocent persons for offenses of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance with all requirements would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all the mentioned prerequisites still would be murder.

. . . In the instance of so-called hostage taking and killing, and the so-called reprisal killings with which we have to deal in this case, the safeguards and preconditions required to be observed by the Southeast judgment were not even attempted to be met or even suggested as necessary. Killings without compliance with such preconditions are merely terror murders. If the law is in fact that hostage and reprisal killings are never permissible at all, then also the so-called hostage and reprisal killings in this case are merely terror murders. 161

And in reviewing the overall war crimes program which followed World War II and the law which evolved from it, the United Nations War Crimes Commission, in publications issued in 1947 and in 1949, stated without equivocation that the killing of prisoners of war without due cause violated both customary and conventional international law. 162

Undeniably, then, there are compelling arguments to support the position that reprisals against prisoners of war are prohibited by customary international law. But even if one is unwilling to accept these arguments, certainly customary international law does specifically prohibit all acts of cruelty and violence against prisoners of war 163—who are, therefore, protected persons in so far as this type of treatment is concerned. And with equal certainty it can be stated that in all civilized countries killing is an act both of cruelty and of violence. Hence, killing a prisoner of war as a reprisal constitutes cruelty and violence against a person who is protected from such treatment by customary international law. The reprisals, then, also failed to meet the second requirement for a valid reprisal, that they not be directed against a protected person.

The third requirement for a legal reprisal under international law is that it be directed against the state which had first violated the law of war. 164 The "crime" charged by the NLF as the basis for the reprisal was, beyond dispute, an act of the South Vietnamese authorities, and not of the American authorities. The alleged acts of terrorism were committed within the territorial jurisdiction of South Vietnam, the culprits were tried by South Vietnamese courts which reached the decisions finding guilt and ordered the death sentence imposed, and
the executions were carried out by the South Vietnamese authorities. If reprisals were justified, and no ground for them has so far come to light, under the law of war they should have been directed against the state which had by its alleged illegal conduct created the need for and the right to take reprisals. This was obviously not done—and the reason why it was not done is equally obvious.

To summarize: to be authorized by international law, reprisals, which are otherwise illegal acts, must meet certain specific conditions. The undisputed facts clearly disclose that the Vietcong had no legal justification for taking reprisals and, moreover, that the reprisals were taken against prisoners of war who were protected persons under customary international law and against whom reprisals, especially of a cruel or violent character, were specifically prohibited both by international legislation binding upon the Vietcong and by customary international law. Under these circumstances, the reprisals taken against the American prisoners of war were nothing less than murder and constituted war crimes for which, pursuant to the Nuremberg principles upon which the Communists so heavily rely, those who ordered the executions and those who carried them out are all subject to penal sanctions.

IX. Conclusion

A number of conclusions have been reached in the course of this discussion.

To recapitulate:

1. There is no legal justification for the position taken by the North Vietnamese that they are not bound by the 1949 Geneva Prisoner-of-War Convention. At the very least, they are bound by the provisions of Article 3 thereof.

2. While there is some legal basis for the position taken by the NLF that it is not even bound by the provisions of Article 3 of the Convention, on balance the decision probably should be that it is so bound. In any event, it is bound by the customary law of war.

3. A state which is a party to hostilities is not legally responsible when an ally violates the provisions of the Convention, but it is morally bound to attempt to persuade its ally to conform to the obligations accepted by adhering to the Convention. It does have a contingent responsibility for the proper treatment of prisoners of war captured by its armed forces and turned over to the custody of an ally for detention.

4. Torture or other maltreatment of prisoners of war in order to obtain intelligence information from them, or for any other reason, or for no reason, constitutes a serious violation of the Convention.

5. Parading prisoners of war before a hostile populace constitutes a violation of the prohibition, contained in conventional and customary international law,
against subjecting them to insults, public curiosity and humiliating and degrading conduct.

6. Even under a reservation to Article 85 of the Convention, such as that made by North Vietnam, it is a serious violation of the Convention to deny captured enemy personnel prisoner-of-war status on the ground that they are war criminals prior to their prosecution and conviction of a pre-capture war crime by a trial court in which they have been accorded all of the required judicial safeguards.

7. There is no legal impediment to the trial of a prisoner of war for an alleged pre-capture war crime while hostilities are still being conducted. However, as noted immediately above, such a prisoner of war continues to be entitled to all of the protection of the Convention, including the judicial safeguards therein contained.

8. Reprisals against prisoners of war are prohibited by the Convention and, probably, by customary international law. In any event, a reprisal which includes a corporal act, such as killing, against a prisoner of war is prohibited by Article 3 of the Convention and by customary international law, both of which prohibit cruelty and acts of violence against prisoners of war.

And finally, although the application of the Convention is presumably not dependent upon reciprocity, persistent and regular refusal by the Communist nations to be bound by it during actual cases of armed conflict in which they are involved may compel other countries to give second thoughts to the doctrine which requires compliance without reciprocal compliance.

Notes

2. The International Committee of the Red Cross is a century-old humanitarian organization composed entirely of Swiss citizens which maintains a strictly neutral status in all armed conflicts, offering its services equally to both sides. Since 1864 it has been the motivating force behind the series of humanitarian "Geneva" Conventions. Its status and activities in wartime are officially recognized and formalized in the 1949 Geneva Conventions, note 4 infra.
3. This letter, dated June 11, 1965, was sent to the governments of the United States, the Republic of Vietnam (hereinafter referred to as South Vietnam), and the Democratic Republic of Vietnam (hereinafter referred to as North Vietnam). The ICRC stated therein that it would "endeavor to deliver it also to the National Liberation Front." 60 Am. J. Int'l L 92 (1966), 4 Int'l Legal Mat. 1171 (1965).
5. Concerning the Prisoner-of-War Convention, the ICRC letter, supra note 3, said: "In particular the life of any combatant taken prisoner, wearing uniform or bearing an emblem clearly indicating his
membership in the armed forces, shall be spared, he shall be treated humanely as a prisoner of war, lists of
combatants taken prisoner shall be communicated without delay to the International Committee of the Red
Cross (Central Information Agency), and the delegates of the ICRC shall be authorized to visit prison
s. 31, 1968.

promises have not been fully carried out.

9. 5 Int'l Rev. of the Red Cross 636 (1965). The final assertion was undoubtedly included because of
the charge frequently advanced by American combat troops that the Vietcong made a practice of shooting

We will not be concerned with violations of the technical provisions of the Convention; nor will
we be concerned with the violations of a number of the more important humanitarian provisions of the
Convention which have undoubtedly occurred, but as to which there is a paucity of acceptable facts presently
available.

11. The Republic of Malawi adhered to the four 1949 Geneva Conventions on Jan. 5, 1968, becoming
the 117th Party to those Conventions. Letter to the author from the Swiss Federal Political Department, Jan.
31, 1968.

12. See note 34 infra.

13. For arguments supporting this position, see the remarks of General Nikolai Slavin, chief of the Soviet
delegation at the 1949 Diplomatic Conference which drafted the Conventions. Final Record of the Diplomatic


15. Regulations attached to Hague Conventions No. IV of 1907 Concerning the Laws and Customs of

16. 1929 Geneva Convention for the Amelioration of the Condition of Wounded and Sick of Armies

17. 1 Report of the International Committee of the Red Cross on its Activities during the Second World
War 412 (1948) [hereinafter referred to as ICRC Report]. To the same effect see Trainin, Hitlerite
Responsibility under Criminal Law 40 (1945).


19. Dallin, German Rule in Russia 420 (1957). A rumor to this general effect caused the German Embassy
in Ankara, where the negotiations were being carried on, to raise the question with the ICRC delegate. ICRC
Report 415. Many persons continue to believe that most of the Soviet soldiers who were repatriated to Russia
from prisoner-of-war camps at the end of World War II were either executed or were sent to Siberia and that
the knowledge of the fate which awaited them was the cause of the wave of suicides which occurred in the
camps after the fall of Germany. Some sought and obtained asylum in Switzerland. Castren, The Present Law of
War and Neutrality 165 (1954).


22. British Ministry of Defence, Treatment of British Prisoners of War in Korea 3-34 (1955); Vatcher,

23. See text in connection with notes 8 and 9 supra.

24. Although not engaged in armed conflict with a Communist opponent, the French indirectly followed
this course of action during the civil war in Algeria with the result that the Provisional Government of the
Algerian Republic, the political arm of the rebellion, not only committed itself to apply the 1949 Geneva
Conventions, but considered it appropriate to actively seek French compliance. Algerian Office, White
Paper cites (at 13) a newspaper article by Professor Roger Finto, of the Faculty of Law of the University of
Paris, giving as one reason for the French reluctance to apply the Conventions "the absence of reciprocity in
respect to the humanitarian rules."

25. This argument is particularly applicable to Article 3 dealing with armed conflict not of an international
character, note 34 infra, inasmuch as a proposed provision requiring reciprocity, which had been included in
the working draft, was intentionally deleted by the 1949 Diplomatic Conference. Castren, Civil War 86 (1966);
Coursier, L'Evolution du Droit International Humain, 99 Hague Recueil des Cours 357, 395 (1960); Pinto,
Les Règles du Droit International Concernant la Guerre Civile, 114 Hague Recueil des Cours 451, 530
(1965).
26. Under the third paragraph of Article 2, parties to the Convention are not bound with respect to another party to the conflict which is not a party to the Convention unless "the latter accepts and applies the provisions thereof." Under these circumstances it is somewhat difficult to accept the contention that a party to the Convention is absolutely bound when the other party to the conflict is a party to the Convention, even though the other party patently flaunts it and does not even purport to apply its provisions. Such a construction merely encourages adherences by states which have no intention of ever complying with the Convention. Is this, perhaps, what has occurred?

At the Hearings held to determine whether the Senate should give its advice and consent to the ratification of the 1949 Conventions by the President, the then General Counsel of the Department of Defense, Wilbur M. Brucker, testified: "Should war come and our enemy should not comply with the conventions, once we both had ratified—what then would be our course of conduct? The answer to this is that to a considerable extent the United States would probably go on acting as it had before, for, as I pointed out earlier, the treaties are very largely a restatement of how we act in war anyway.

"If our enemy showed by the most flagrant and general disregard for the treaties, that it had in fact thrown off their restraints altogether, it would then rest with us to reconsider what our position might be." Hearings on the Geneva Conventions for the Protection of War Victims Before the Senate Comm. on Foreign Relations, 84th Cong., 1st Sess., at 11 (1955).

27. Meeker, The Legality of U.S. Participation in the Defense of Viet-Nam, 54 Dep't State Bull. 474, 477 (1966). In a speech delivered to the Foreign Policy Association on Nov. 14, 1967, Secretary of State Rusk ridiculed those who take the position that the fighting in Vietnam is "just a civil war." 57 Dep't State Bull. 735, 740 (1967). Of course, his argument was based largely upon the ground that North Vietnamese Army units had been committed to the fighting in South Vietnam; while those who argue that it is a civil war draw the opposite conclusion from this same fact! Secretary Rusk does strengthen his argument by pointing to the post-World War II problem of the bifurcated States which appear in each instance to have become two separate sovereignties: Germany, Korea, and Vietnam.


29. Fried (ed.), Vietnam and International Law 63 (1967); Falk, International Law and the United States Role in the Viet-Nam War, 75 Yale L.J. 1122, 1127 and passim (1966); Standard, United States Intervention in Vietnam is not Legal, 52 A.B.A.J. 627, 630 (1966); Wright, Legal Aspects of the Viet-Nam Situation, 60 Am. J. Intl L. 750, 756 (1966). Standard appears to argue from a conclusion already reached when, after pointing out the State Department position, he says: "It is hardly open to dispute that the present conflict in South Vietnam is essentially a civil war." Certainly, Meese. Rusk and Meeker (the latter the Legal Adviser of the Department of State) would dispute it! And Kutner, supra note 28, just as easily reaches the opposite conclusion, stating: "Considering Communism's commitment to the success of all wars of 'national liberation' and the participation of United States military on a large, escalating scale, it would be unrealistic to consider the conflict as purely domestic." The dispute on this question clearly indicates the correctness of the statements that "the dividing line between international and internal war is often exceedingly tenuous" (Greenspan, International Law and Its Protection for Participants in Unconventional Warfare, 341 Annals 30, 31 (1962)) and that "all international war is, to some extent, civil war, and all civil war, international war." Pinto, supra note 25, at 455 (translation mine).

30. See Stone, Legal Controls of International Conflict 313 n.85 (Rev. ed. 1959), where the following appears: "1. Art. 2 para. 1, of the revised Prisoners of War Convention, 1949, declaring its provisions applicable not only to declared war but also to 'any armed conflict... even if a state of war is not recognized' by a belligerent Contracting Party, is a welcome recognition of the need to place the point beyond doubt."

And in Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War 22-23 (1960) [hereinafter referred to as Commentary], it is stated: "By its general character, this paragraph deprives belligerents, in advance, of the pretext they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of de facto hostilities is sufficient. "... Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war." And, finally, in Institute of Law, Academy of Sciences of the USSR, International Law 420
Levie on the Law of War

(120) [Levie on Law of War, ca. 1960] [hereinafter referred to as Soviet International Law], this statement is made: “The absence of a formal declaration of war does not deprive hostilities which have in fact begun, of the character of war from the point of view of the need to observe its laws and customs. The Geneva Conventions of 1949 require that their signatories apply these Conventions, which are a component part of the laws and customs of war, in the event of a declaration of war or in any armed conflict, even if one of the parties to the conflict does not recognize the existence of a state of war.”

31. A news article from Cairo which appeared in the N.Y. Times, Feb. 12, 1966 at 12, col. 3, stated: “The sources quoted the [North Vietnamese] Ambassador as having rejected the American contention that United States airmen captured in attacks on North Vietnam should be treated as prisoners of war under the terms of the Geneva conventions. He was reported to have told influential Egyptians that this was impossible “because this is a case where no war has been declared” by either country.

32. It will have been noted that the Convention provision quoted in the text states that the Convention is applicable in an armed conflict between two or more High Contracting Parties even if a state of war is not recognized by one of them. In Vietnam a state of war, in the legal sense, is not recognized by any of the parties involved. 52 Dept’ State Bull. 403 (1965). Does this remove the armed conflict in Vietnam from the reach of Article 2? To answer this question in the affirmative would seem to be directly contrary to the intent of the Article and to the object and purpose of the Convention. The ICRC states that it does not avoid Article 2. Pictet, supra note 30, at 23. Lauterpacht believed that it was the intention of the draftsmen to make the Convention applicable even if a state of war was not recognized by “one or both of them.” 2 Lauterpacht’s Oppenheim, International Law 369 n.6 (7th ed. 1952).

33. One of the major purposes of the provision was to preclude a State from indulging in the excuses put forward by Japan during the China Incident and by Nazi Germany during World War II as a basis for not applying earlier humanitarian conventions: that there had been no declaration of war, that legally a state of war did not exist, that the existence of a state of war was not recognized, that the armed conflict was only a “police action,” etc. See the Judgment of the International Military Tribunal for the Far East 1008-09 (mimeo. 1949) [hereinafter referred to as IMTFE Judgment].

34. Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

35. Statement of Mr. Morosov (USSR), Final Record, supra note 13, Vol. IIIB, at 325-26; Pictet, Commentary, supra note 30, at 34.


37. “[F]uture generations may consider it a sad commentary on our times that the nations of the world thought it necessary in these conventions to provide that in case of an internal conflict, murderer, mutilation,


40. Pictet, Commentary, supra note 30, at 28-34.

41. Id. at 32. During the debate General Slavin (USSR) made the following statement: “[T]he United Kingdom Delegation had alluded to the fact that colonial and civil wars were not regulated by international law, and therefore that decisions in this respect would be out of place in the text of the Conventions. This theory was not convincing, since though the jurists themselves were divided in opinion on this point, some were of the view that civil war was regulated by international law. Since the creation of the Organization of the United Nations this question seemed settled. Article 2 of the Charter provided that Member States must ensure peace and world security... Colonial and civil wars therefore come within the purview of international law.” Final Record, supra note 13, Vol. IIIB, at 14.

42. The Stockholm (wocking) draft would have made the entire Convention applicable. Id., Vol. I, at 73. The provisions of the draft article proposed by the USSR would have obligated each party to an armed conflict not of an international character to implement all of the provisions of the Convention which guarantee “humane treatment of prisoners of war” and “the application of all established rules for the treatment of prisoners of war.” Id., Vol. III, Annex 15, at 28.

43. In construing the provision which was adopted, Pictet, Commentary, supra note 30, at 42, states: “In the case of armed conflict not of an international character... the Parties to the conflict are legally only bound to observe Article 3, and may ignore all the other Articles...”


45. Pinto, supra note 25, at 529. Pinto says: “When the parties to the civil war receive foreign assistance, the assistance States have a strict obligation to comply with and to require compliance with Article 3... Thus the United States and the Democratic Republic of Vietnam are equally responsible for the application of Article 3 in the civil war on the territory of South Vietnam.” (Translation mine).

46. Of course, established governments have not infrequently failed to comply with their obligations under Article 3—but this was not necessarily because they considered Article 3 invalid per se. See note 24 supra. As a matter of fact, when the French finally agreed to permit the ICRC to function in Algeria, it was specifically stated that this action was taken “in accordance with Article 3 of the Geneva Conventions.” LeClercq, L’Application du Statut du Prisonnier de Guerre depuis la Convention de Genève de 1949, in 43 Revue de Droit International et de Droit Comparé 35, 45 (1966).

47. In Yingling & Ginnane, supra note 37, at 396, the authors, both lawyer-members of the United States delegation to the 1949 Diplomatic Conventions, said: “Inssofar as Article 3 purports to bind the insurgent party to the conflict to apply its provisions, its legal efficacy may be doubted.”

48. See text in connection with note 9 supra.

49. For a discussion of the several theories which have been advanced for holding a rebel organization bound by the provisions of Article 3, even though it had never itself agreed to be bound, see Note, The Geneva Convention and the Treatment of Prisoners of War in Vietnam, 80 Harv. L. Rev. 851, 856-58 (1967). See also Lauterpacht, The Limits of the Operation of the Law of War, 30 Brit. Y.B. Int'l L. 206, 213 (1953), where that noted authority said: “The effect of these provisions [relating to armed conflict not of an international character] is to subject the parties to a civil war—including the party which is not a recognised belligerent—to important restraints of the law of war...”

50. The correct jargon, of course, would be “national liberation movements.”

51. Soviet International Law, supra note 30, at 410; and see the further quotation from this textbook in note 69 infra.

52. Pictet, Commentary, supra note 30, at 38 (emphasis in original). He also states: “What Government would dare to claim before the world... that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals.” Id. at 36-37. Unfortunately, experience shows that some governments do just what is described, but without any such bald admission.

53. Several years ago the suggestion was made that in any armed conflict in which United Nations forces were involved, they should not be bound by the law of war, but their opponent should be. The reaction to
this proposal was violent and caustic, and properly so. See Bothe, Le Droit de la Guerre et les Nations Unies (1967).

54. Pictet, Commentary, supra note 30, at 37-38. Of course, if they are mere brigands, they are not entitled to the protection of the Convention.

55. It is essential to bear in mind that the last paragraph of Article 3 specifies that the fact that a party complies with the provisions of the Article "shall not affect the legal status of the Parties to the conflict." This provision was obviously included in order to permit the established government to comply with Article 3 without recognizing the existence of a state of belligerency with the insurgents. Paradoxically, in Algeria it was the insurgents themselves who called attention to this provision of the Article. Algerian Office White Paper, supra note 24, at 17-18.


57. See note 15 supra.


59. Id. at 61-62. In speaking of Nazi violations of the law of war, the IMT said (at 57): "Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. . . ."

60. United States v. von Leeb et al., 10 Trials of War Criminals Before the Nuremberg Military Tribunals 1 (1948) [hereinafter cited as Trials]. This opinion carries over into Vol. 11 of the series.


63. Note, The Geneva Convention and the Treatment of Prisoners of War in Vietnam, 80 Harv. L. Rev. 851, 858 (1967). A well known French expert in this field has said: "These obligations [enumerated in Article 3] correspond to those which the domestic public law of civilized States recognizes, even in cases of insurrection, riot or civil war. . . . The summary execution of prisoners is prohibited." Pinto, supra note 25, at 532 (translation mine).

64. United States v. von Leeb et al., 10 Trials 1 at 11 Trials 553-38. But see Draper, supra note 56, at 90, where he states: "Undoubtedly, the prohibition of murder, mutilation or torture is absorbed in the customary prohibitions of the law of war. On the other hand the taking of hostages, outrages upon personal dignity, the passing of sentences by irregular tribunals, unfairly conducted, are not yet prohibited by the customary law of war. . . ."

65. See note 34 supra.

66. See text in connection with notes 42 and 43 supra.


68. See text in connection with notes 156-163 infra.

69. Soviet International Law, supra note 30, at 423. Elsewhere (at 407) the statement is made that "the laws and customs of war must be observed in any armed conflict.

70. It is not unusual to find, after hostilities have ended, that many incidents (or at least many of the more gory details thereof) which have been reported during the course of hostilities, were basically figments of the imagination: perhaps a minor incident which has been built up out of all proportion to the actual facts by the addition of horrendous details, perhaps an entirely imaginary incident conceived by a public relations officer or a reporter when headline news was lacking. However, the major violations to be discussed herein are in the nature of admissions against interest: actions constituting, or allegedly constituting, violations by the United States and the South Vietnamese, reported by the American news media, and actions constituting, or allegedly constituting, violations by the North Vietnamese and the Vietcong, reported by Radio Hanoi and the Liberation Radio, or by other sources in Hanoi. (As the alleged violation mentioned in note 9 supra does not meet this criterion, it will not be discussed. It is, however, one of the most heinous violations not only of the Convention, but also of the customary law of war).

71. See text in connection with note 6 supra.

72. Joint Communique of the Honolulu Conference, Feb. 8, 1966, at 54 Dep't State Bull. 304, 305 (1966); Joint Communique of the Manila Summit Conference, Oct. 25, 1966, at 55 Dep't State Bull. 730, 731 (1966); Text of Communique of the Washington Meeting, April 21, 1967, at 56 Dep't State Bull. 747, 749 (1967). The nations involved in the latter two meetings were Australia, New Zealand, the Philippines, South Korea, South Vietnam, Thailand, and the United States.

73. That incidents of maltreatment of prisoners of war by American personnel have occurred is beyond dispute. There will never be a war fought in which there are not, at the very least, isolated instances of maltreatment of prisoners of war on both sides. The general moral environment in which the individual soldiers
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have been raised may be judged, and the training which they have received while in military service may be measured, by the frequency with which such incidents occur. While Clergy and Laymen Concerned About Vietnam in their book, In the Name of America (issued in February, 1968 after this article had been substantially completed), allocates a chapter of 45 pages to the reprinting of published items about the maltreatment of prisoners of war, there is only an occasional, and frequently misleading, indication (usually based on hearsay) of such misconduct by American troops. The weakness of the "evidence" quoted to support the organization's thesis of misconduct is, in itself, extremely persuasive of the inaccuracy of the conclusion reached by one of the commentators (at 23) that "these combat practices are so widespread in their occurrence as to suggest that their systematic commission is a direct result of decisions reached at the highest levels of civilian and military command." When Ambassador Harriman sent the ICRC a Department of Defense report on the methods used by the several military services of the United States to disseminate information concerning the requirements of the Conventions, the ICRC President replied: "We are convinced that in the context of the war in Vietnam the U.S. Forces are devoting a major effort to the spread of knowledge on the Geneva Conventions." Letter from Samuel A. Gonard to W. Averell Harriman, January 5, 1968, on file in the Department of State.

74. A series of photographs and extracts from news stories recording maltreatment of prisoners of war by the South Vietnamese which had appeared in a number of respected American publications were collected and published in a brochure entitled What are we tied to in Vietnam? by Massachusetts Political Action for Peace, Cambridge, Mass. (1964).


76. Id. Dec. 30, 1965, at 1A. Photographs indicating kind and generous treatment by American personnel have also appeared (id. Mar. 5, 1966, at 2A, Mar. 6, 1966 at 12A), but these are suspect as they are self-serving and could easily have been posed for an enterprising photographer.

77. The brochure referred to in note 74 supra is a good example of this reaction.

78. A letter to the editor of the N.Y. Times from the Chairman of the University Committee on Problems of War and Peace at the University of Pennsylvania said: "Responsible American journalists have frequently reported the torture of Vietcong prisoners by their South Vietnamese capros. Because of these reports W. W. Rostow, chairman of the foreign policy research division of our State Department, was asked . . . . 'why does the United States not abide by the Red Cross Convention in the treatment of Vietcong prisoners?' His reply was that the United States does not take prisoners in Vietnam, and that we were merely advisers to the South Vietnamese Government, which bore the responsibility for dealing with prisoners. Because of this immoral apathy, and narrow legalistic position taken by our State Department, neither the United States nor the South Vietnamese, nor the Vietcong, nor the North Vietnamese are committed to adhere to any of the sanctions established by international law for the protection of war prisoners." N.Y. Times, June 30, 1965, at 36, col. 5. The writer of the letter cited in both his assumptions and his conclusions, but he certainly raised the moral issue.

79. This problem did arise in one context at the Diplomatic Conference—in connection with Article 12, which concerns custody of prisoners of war transferred from one ally to another. Under Article 12 the transferring state retains some residual power with respect to prisoners of war it transfers, because it can request return of the prisoners to its custody where the transferee state is guilty of violating the Convention in their regard. Article 12 requires that this procedure be followed where the Protecting Power finds violations of the Convention and the Detaining Power does not correct them. The Communist countries have all reserved ad hoc to this Article, insisting that the capturing power remain fully responsible for any maltreatment suffered by prisoners of war at the hands of the transferee Detaining Power. See, for example, the USSR reservation made at the time of signing (75 U.N.T.S. 135, 460) and maintained at the time of ratification (191 U.N.T.S. 367).

80. "The major United States effort, besides setting up its own procedures, has been to persuade the South Vietnamese to go along. [South Vietnamese] Government officials, once openly hostile to the convention, now grudgingly accept the American position. Much remains to be done, however, to persuade the average South Vietnamese soldier to stop using torture. Each soldier will soon be shown a training film prepared with American help. Most have already received booklets outlining the proper treatment of prisoners." N.Y. Times, July 1, 1966, at 6, col. 3. See also Pinto supra note 45.

81. "United States officials are quietly putting into effect an important change in their handling of prisoners of war. Vietcong and North Vietnamese fighters captured on the battlefield will no longer be turned over to the South Vietnamese Army immediately after the fighting has died down. Instead, they will be sent to American divisional headquarters and kept in American hands until they can be transferred to new Vietnamese prisoner-of-war compounds . . . . The system has been adopted to enable the United States to meet its responsibilities under Article 12 of the Geneva Convention of 1949 governing the treatment of prisoners of war. The article requires the country turning prisoners over to another country to guarantee their

82. S.S Dep't State Bull. 336, 338 (1966).

83. As stated in note 73 supra, there have without doubt been some acts of maltreatment of prisoners of war by American personnel. Thus, it was reported that in the trial by court-martial of Captain Howard B. Levy there was defense testimony that American Special Forces ("Green Beret") personnel maintained a "permissive policy toward the torture of Vietcong prisoners by the South Vietnamese" and that a bounty of $10 was paid to the Montagnards for every right ear brought in. N.Y. Times, May 25, 1967, at 2, col. 3. In view of the hearsay nature of the testimony, and the partisan context in which it was given, it does not fall within the criteria adopted for this article. For another incident of alleged maltreatment see St. Louis Post-Dispatch, Feb. 9, 1968, at 1B, col. 1.

84. See note 79 supra. The United States has officially acknowledged its contingent responsibility. Dep't State Vietnam Information Note, No. 9, Prisoners of War, Aug. 1967, at 3. It maintains small detachments of American military police at each South Vietnamese prisoner-of-war camp, apparently to ensure that its responsibility is being met.

85. See text in connection with note 74-76 supra. When the ICRC considered that there was sufficient evidence to warrant raising the issue with the South Vietnamese authorities, the latter responded by notifying the ICRC "that it would not tolerate the torture of Vietcong prisoners held by the South Vietnamese." ICRC, The International Committee and the Vietnam Conflict, 6 Int'l Rev. of the Red Cross 399, 405 (1966) [hereinafter referred to as ICRC, Vietnam]. It does not appear that there was a denial of maltreatment by the South Vietnamese; rather there was a defense of tu quoque aimed at the Vietcong and the North Vietnamese. Whatever the merit of the cross-complaint, it is no excuse for violating the Convention.

86. For the categories of persons being given prisoner-of-war status, see para. 4, United States Military Assistance Command, Directive No. 20-5, Sept. 21, 1966.

87. E.g., 7 Int'l Rev. of the Red Cross 189 (1966).

88. 6 id. 141 (1966); 7 id. 188 (1967). See also note 80 supra.

89. 5 id. 300, 470, and 481 (1965); 6 id. 98, 405, 542, and 597 (1966); 7 id. 125 126, 188, 189, and 246 (1967). For a report of an unofficial and unauthorized visit by an American newsmen to Pleiku, one of the largest prisoner-of-war camps maintained by the South Vietnamese, see Gershen, A Close-Up Look at Enemy Prisoners, Parade, Dec. 10, 1967, at 10. These ICRC inspection visits to the camps which have uniformly included private and unsupervised consultations with selected prisoners of war designated by the ICRC delegate, do not appear to have brought to light any instances of major violations of the Convention once that captured personnel had reached the camps.

90. Wyant, Barbarity in Vietnam Shocks U.S., St. Louis Post-Dispatch, Feb. 9, 1968, at 1B, col. 1. The televising of the shooting of a just-captured Vietnamese by the head of the South Vietnamese National Police during the attack on Saigon early in 1968 served to highlight this problem.

91. The sources of this information have included broadcasts over Radio Hanoi, information released by the official North Vietnamese press agency, and an occasional dispatch from foreign reporters based in Hanoi. Information in depth, the complete accuracy of which is questionable, has been disseminated through the medium of newsmen from other Communist countries. East German journalists and photographers were the source of the material used in the article, U.S. Prisoners of War in North Vietnam, Life, Oct. 20, 1967, at 21-33. These East German sources likewise provided the motion picture material purchased and televised by NBC late in 1967. Information concerning the treatment of South Vietnamese prisoners of war by the North Vietnamese is of insufficient reliability for discussion.

92. See text in connection with notes 109-115 infra.


95. Id. July 8, 1966, at 3.

96. Id. at 3, col. 1.

97. ICRC, Vietnam, supra note 85, at 404. Art. 13 of the Convention requires the protection of prisoners of war "against insults and public curiosity." Para. 1 (c) of Art. 3, quoted at note 34 supra, prohibits "outrages against personal dignity, in particular, humiliating and degrading treatment."

98. For the first of these communications, see text in connection with note 8 supra. The new reply also stated that "the policy of the Government of the DR VN [Democratic Republic of Vietnam] as regards enemy captured in time of war is a humane policy." (Emphasis added). The ambiguous italicized words could be interpreted as meaning "we have a policy of being humane to prisoners of war captured during a war, but this is not a war and, therefore, there is no obligation on our part to be humane?"

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100. 56 Dep't State Bull. 825 (1967).
101.  Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100, Apr. 23, 1863, Art. 75.
102. See note 61 supra.
103. 2 Bull. JAG 299 (1943).
105. IMTFE Judgment, supra note 33, at 1092-95 and 1030-31.
106. See text in connection with note 64 supra.
107. As we have seen, in so far as North Vietnam is concerned there are strong arguments for the position that the entire Convention is applicable and, that at a minimum, Article 3 of the Convention (note 34 supra) is certainly applicable despite the untenable position to the contrary taken by North Vietnam. It is therefore, not even necessary to find that this particular humanitarian rule has attained the status of being a part of the customary law of war in order to find that it is binding on North Vietnam.
108. It has been mentioned that in the parade conducted on July 6, 1966, the prisoners were handcuffed in pairs. During the World War II commando raid on Dieppe the mancblang of German prisoners of war by Canadian troops was itself challenged by the German Government as a violation of the law of war and resulted in a series of reprisals and counter-reprisals. For differing versions of this affair see British War Office, The Law of War on Land (Part III of the Manual of Military Law) 53 n.2(a) (1958); Castren, The Present Law of War, 30,1965, at 1, col. 6 and at 3, col. 3; id. Feb. 12, 1966, at 12, col. 3; id. July 13, 1966, at 1, col. 7 and at 5, col. 1. An ICRC report stated: "The [North Vietnamese] Red Cross and the authorities of the DRVN have made known to the ICRC that the captured American pilots are treated humanely, but that they cannot, however, be considered as prisoners of war. The DRVN Government is in fact of the opinion that the bombing attacks constitute crimes for which these prisoners will have to answer before the courts and that the Third Geneva Convention (prisoners of war) is consequently not applicable to them...." ICRC, Vietnam, supra note 85, at 403.
110. N.Y. Times, Sept. 30, 1965, at 1, col. 6 and at 3, col. 3; id. Feb. 12, 1966, at 12, col. 3; id. July 13, 1966, at 1, col. 7 and at 5, col. 1. An ICRC report stated: "The [North Vietnamese] Red Cross and the authorities of the DRVN have made known to the ICRC that the captured American pilots are treated humanely, but that they cannot, however, be considered as prisoners of war. The DRVN Government is in fact of the opinion that the bombing attacks constitute crimes for which these prisoners will have to answer before the courts and that the Third Geneva Convention (prisoners of war) is consequently not applicable to them...." ICRC, Vietnam, supra note 85, at 403.
112. Between July 15 and July 25, 1966, the newspapers in the United States carried several stories on this subject every day. Questions were asked of the President and statements were made which indicated that any trials, convictions, and executions would be followed in short order by severe retaliatory action by the United States. Id. July 19, 1966, at 3, col. 3; id. July 21, at 14, col. 2.
113. Neutrals who sought to dissuade the North Vietnamese from their proposed course of action included U Thong, the Secretary General of the United Nations (id. July 17, 1966, at 8, col. 3), the Pope (id. July 21, 1966, at 1, col. 9), and the ICRC (id. July 23, 1966, at 2, col. 6). Americans opposed to the war in Vietnam who interceded with the North Vietnamese included Norman Thomas, The National Committee for a Sane Nuclear Policy (id. July 20, 1966, at 1, col. 8) and the so-called Senate "doves," spearheaded by Senator Frank Church of Idaho (id. July 16 1966, at 1, col. 1 and at 3, col. 2). Many competent observers of the international scene consider that this latter appeal was probably the most effective on Communist pragmatism.
114. Id. July 24, 1966, at 1, col. 1.
117. Supra note 15, Art. 1.
118. Supra note 61, Art. 1.
119. Supra note 4, Art. 4.
120. N.Y. Times, May 9, 1967, at 15, col. 1. This is also the only logical interpretation which can be placed on the letter of Aug. 31, 1965, from the North Vietnamese Government to the ICRC, note 8 supra. See also the ICRC report quoted in note 110 supra.
121. Article 85 of the Convention reads as follows: "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."
122. Matter of Yamashita, 327 U.S. 1, 21, 22, 24 (1946). This position was adopted generally by war crimes tribunals and national courts after World War II. 4 War Crimes Rep. 78 (1948). At least one noted Soviet legal writer took the same position, stating: "On account of these inhuman crimes committed by him, Ritz ceased to be a soldier even before he was seized by units of the Red Army, and consequently did not become a war prisoner when he was seized. . . ." Trainin, Hitlerite Responsibility under Criminal Law 88 (1945).
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124. The proposal stated: "Prisoners of war convicted of war crimes and crimes against humanity under the legislation of the Detaining Power, and in conformity with the principles of the Nuremberg Trial, shall be treated in the same way as persons serving a sentence for a criminal offence in the territory of the Detaining Power." Id. at 319.

125. Id. at 321. In a statement made to the Plenary Meeting, General Skylarof, another Soviet delegate, said that under the Soviet proposal prisoners of war guilty of war crimes or crimes against humanity, "since their guilt has been established and they have been sentenced by a regular court," should no longer enjoy the benefits of the Convention. Id. at 303 (emphasis added).

126. Id. Vol. IIA, at 570-71. In supporting the Soviet proposal in the discussion at the Plenary Meeting, the delegate from Czechoslovakia pointed out that "it concerns those prisoners of war who have been convicted" (id. Vol. IIB, at 305) and the Bulgarian delegate stated that "it is assumed that sentence has already been pronounced" and that "we are dealing with war criminals convicted as such." (id. at 307).

127. Id. at 311. The Soviet proposal was rejected by a vote of 8-23-7. The only change made by the Diplomatic Conference in the Stockholm (working) draft was the substitution of the word "retain" for the word "enjoy" in the English version.

128. Yingling & Ginnane, supra note 37, at 410; Public Prosecutor v. O'ie Hee Koi et al., [1968] 2 W.L.R. 715, 727.


The IMTFE reviewed and condemned, by implication, the Japanese trials and executions of American airmen. IMTFE, Report, supra note 5, at 1024-31. In its "Notes on the Case," dealing with United Nations War Crimes Commission, the delegate from Czechoslovakia pointed out that "it concerns those prisoners of war who have been convicted" (id. Vol. IIB, at 305) and the Bulgarian delegate stated that "it is assumed that sentence has already been pronounced" and that "we are dealing with war criminals convicted as such." (id. at 307).

130. Id. at 311. The Soviet proposal was rejected by a vote of 8-23-7. The only change made by the Diplomatic Conference in the Stockholm (working) draft was the substitution of the word "retain" for the word "enjoy" in the English version.


132. The original adherence, including the reservations, was in the Vietnamese language. It was accompanied by a French translation. Letter to the author from the Swiss Federal Political Department, Jan. 31, 1968. The French translation includes the words "poursuivis et condamnées"—"prosecuted and convicted." 274 U.N.T.S. 340 (emphasis added).

133. It has been suggested, for example, that the "and" in the words "prosecuted for and convicted of" might have been intended to be read disjunctively. Note, The Geneva Convention and the Treatment of Prisoners of War in Vietnam, supra note 63, at 882. Under this interpretation it is said that a prisoner of war could be deprived of the benefits of the Convention by the mere filing of a charge against him alleging a war crime or a crime against humanity. But "et" is not given a disjunctive intention in French, and if "et" or "and" were to be construed disjunctively this would mean that a prisoner of war prosecuted but not convicted (prosecuted and acquitted) could still be denied the benefits of the Convention because one of the two alternatives possible under the disjunctive construction would have been met—he would have been prosecuted. This obviously does not make sense.

134. The argument might be made that absent the Convention we are relegated to customary international law—and that this is what the courts applied in Matter of Yamashita, 327 U.S. 1, and other similar cases. But
as we have already seen in so far as North Vietnam is concerned, it is undeniable that the Convention is applicable (see text in connection with notes 27-33 supra) and, that in any event at a minimum, Article 3 is applicable (see text in connection with notes 34-45 supra). Para. 1(d) of Art. 3 (note 34 supra) specifies the protections to be accorded persons charged with offenses.

135. See Dept's Memorandum to the International Committee of the Red Cross, Entitlement of American Military Personnel Held by North Viet Nam to Treatment as Prisoners of War, etc., July 13, 1966. Charges that the use of napalm bombs is a violation of the law of war have also been heard with some frequency. An Indian scholar has said, in this regard: "[D]uring the Second World War and during the hostilities in Korea the use of flame-throwers and of napalm and incendiary bombs appear to have been regarded as legal." Singh, Nuclear Weapons and International Law 151 (1959). While the question may not be free from doubt, it is certainly sufficiently controversial to preclude unilateral decision by the North Vietnamese with respect thereto.

136. During the course of the July, 1966, excitement Senator Thomas J. Dodd of Connecticut, who had been a member of the prosecution at Nuremberg, issued a statement in which he pointed out: "No Luftwaffe pilot, or Luftwaffe commander for example, was brought to trial because of his participation in the bombing of London despite the fact that London bombings were directed primarily at the civilian population..." 112 Cong. Rec. 16, 224 (daily ed., July 25, 1966).

137. After several years of preparatory drafting by the ICRC, the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War were published and distributed in 1956 so that they could be discussed and acted upon at the XIXth International Red Cross Conference in New Delhi in 1957. They were discussed at New Delhi, and they have been the subject of much discussion since then, but their status as an unofficial proposal has not changed.

138. The commentary to Art. 10 states, in part: "It was... to prevent target area bombing from being accepted as a regular practice, or even condoned, that the ICRC felt it desirable to insert the relevant rule in Article 10 and thus to lay emphasis on the prohibition of indiscriminate bombing." Id. at 91.

139. One expert in this field takes the rather paradoxical position that target-area bombing was legal during World War II, and so remains, but that indiscriminate bombing is a violation of the law of air warfare. Spaight, Air Power and War Rights 271, 272, and 277 (3d ed. 1947).

140. It has been intimated that the North Vietnamese take the position that as the United States is guilty of making "aggressive war," the airmen are all guilty of crimes against peace. This is the category of war crime specified in Article 6(a) of the London Charter of the International Military Tribunal, which reads: "Crimes against peace: Namely, planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Nazi Conspiracy and Aggression: Opinion and Judgment 3 (1947).

Article 5(a) of the IMTFE differs only in minor respects. IMTFE Judgment, supra note 33, Annex 5-A, at 21. Apart from the trials of the major Nazi leaders by the IMT and by some of the Nuremberg Military Tribunals and of the major Japanese leaders by the IMTFE, no one has ever been tried for this war crime which, obviously, can only be committed by those who have the power to make war, and not by those who do the fighting. In United States v. von Leeb et al., 10 Trials 1, at 11 Trials 489 (1948), the Military Tribunal said: "If an officer... of the armed forces does not participate in the preparation planning, initiating or waging of aggressive war on a policy level his war activities do not fall under the definition of Crimes against Peace. It is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of Crimes against Peace." This is the real meaning of the announcement by Ho Chi Minh that no trials of American airmen were then contemplated, but that Rusk, McNamara and Johnson were in a different category. See text in connection with note 116 supra.

141. One American sailor, Apprentice Seaman Douglas Hegdahl, who fell overboard from his ship and some hours later was rescued by North Vietnamese fishermen and made a prisoner of war, is apparently receiving exactly the same treatment as the alleged war criminals—no mail, no relief packages, no visits by the ICRC, etc.

142. Leive, supra note 131, at 461-62. A footnote to the last sentence quoted points out that when trials are postponed until after the cessation of hostilities the deterrent effect of widespread publicity is lost. Id. at 462 n.65.

143. See text in connection with notes 47-56 supra. Certainly, the 59 nations which drafted and signed the Convention and the 117 which have ratified or adhered to it had no qualms about the validity of Article 3. Only Portugal made a reservation to that Article at the time of signing, but its reservation did not question the validity of Article 3 and was not maintained on ratification.

144. See text in connection with notes 57-70 supra.

145. See text in connection with notes 64-68 supra, and 156-163 infra.

147. Id. at 1, col. 7. He had been apprehended in Saigon while attaching a fuse to a bomb which was to have exploded five minutes later.
149. 53 Dep't State Bull. 55 (1965). The statement also said that "these Communist threats to intimidate, of course, will not succeed." Subsequent events have revealed that this portion of the statement was incorrect!
151. 53 Dep't State Bull. 635 (1965).
152. ICRC, Vietnam, supra note 85, at 411. Despite the American statement concerning no intimidation, supra note 149, no Vietcong terrorist has been executed since September, 1965, and when three Vietcong terrorists were convicted and sentenced to be executed on November 17, 1967, they were given a last minute reprieve by South Vietnamese Premier Nguyen Can Loc. N.Y. Times, Nov. 17, 1967.
153. 2 Lauterpacht's Oppenheim, International Law 561 (7th ed. 1952). An example of a legitimate act of reprisal is given in United States Army Field Manual 27-10, The Law of Land Warfare 177 (1956), where it is stated: "For example the employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy."
154. N.Y. Times, June 22, 1965, at 6, col. 1; and id., Sept. 28, 1965, at 1, col. 1. It should be borne in mind that at no time have the Vietcong or the NLF ever contended that the executed Americans had committed any act warranting execution or that their executions were pursuant to the sentence of a court.
156. Morgan, The German War Book 74 (1915).
158. Supra note 61, Article 2. It is repeated in Article 13 of the 1949 Convention.
159. Flory, Prisoners of War 44 (1942).
160. United States v. List et al., 11 Trials 757, 1252-53 (1948). This case is sometimes referred to as The Southeast Case.
162. Notes on The Dreierwalde Case, 1 War Crimes Rep. 86 (1947); Digest of Laws and Cases, 15 War Crimes Rep. 99 (1949). In the former the statement is made that "the killing of prisoners of war constituted a war crime under the customary International Law even before the promulgation and ratification of the Conventions of 1907 [ Hague] and 1929 [Geneva]." (Emphasis added).
163. See text in connection with note 64 supra.
164. "According to the existing international law, reprisals against an ally of an enemy-state for acts of the enemy-state are not permissible as they are not directed against the state responsible for the act. Reprisals, therefore, may, according to the existing rules of the laws of war, only be employed against the responsible state." Moritz, The Common Application of the Laws of War Within the NATO-Forces, 13 Mil. L. Rev. 1 (July 1961). To the same general effect, see United States v. List et al. (The Hostage Case), 11 Trials 1270 (1948).