

CHAPTER VII

TERMINATION OF CAPTIVITY

A. INTRODUCTORY

As we have seen, the first paragraph of Article 5 provides that the Convention is applicable to all individuals coming within the ambit of Article 4 thereof, "from the time they fall into the power of the enemy and until their final release and repatriation."¹ Even if there is some doubt as to the right of a particular individual to prisoner-of-war status, the second paragraph of Article 5 provides that he is entitled to the protection of the Convention until a decision on his status is made by a competent tribunal.² To be in "the power of the enemy" (Article 5, paragraph one) or in "the hands of the enemy" (Article 5, paragraph two), an individual need not necessarily be in the custody of the enemy military forces. The airman in distress who parachutes to the earth in enemy territory is often originally taken into custody by the civilian authorities, or even by members of the civilian population.³ No matter how it occurs, and no matter whether the action is taken by military or civilian elements of the enemy Power, as soon as he is in enemy custody he becomes a prisoner of war and is entitled to all of the protection incident to that status.⁴

¹ See p. 68 *supra*, and notes I-262 and I-320. Of course, as will become apparent, captivity may also end in a number of ways other than by release and repatriation.

² See the discussion of Article 5 at pp. 55-60 *supra*.

³ During the period of United States involvement in the armed conflict in Vietnam (c. 1965-73), North Vietnamese propaganda attributed many incidents involving the taking into custody of downed airmen to members of the civilian population.

⁴ *U.S. Manual* para. 84b. Although writers sometimes refer exclusively to individuals falling into the power of enemy *military forces* (see pp. 34-36 *supra*; Werner, *Croix-Rouge* 281), this is probably because in the final analysis the military will take custody of all of them. Moreover, the position taken by the Japanese at the Ofuna Naval Interrogation Center during World War II that the captured naval personnel brought there for interrogation "were not as yet in any way considered prisoners of war" (*Schacht Statement* 1) violated the provisions of the 1929 Convention just as the position taken by the Chinese in Korea that the 1949 Convention was applicable "only after the prisoner [of war] had reached a stage of full repentance for his past crimes" (such as fighting against the Chinese) (U.K., *Treatment* 32) violated the provisions of the 1949 Convention. The practice of terming a captured individual a "detainee" until his true status is determined, as was done in South Vietnam (Ball, *POW Negotiations* 75) is only acceptable if the captured individual receives full prisoner-of-war treatment until the determination has been made in accordance with the provisions of Article 5.

The foregoing indicates generally when and how the status of prisoner of war comes into being. The question then arises, when and how does it cease to exist, when and how does it terminate? We shall find that the 1949 Convention contemplates the possibility that prisoner-of-war status may be terminated in a number of different ways, both during the continuance of hostilities and upon their cessation. In addition, we shall find that Detaining Powers have employed a number of subterfuges to terminate entitlement to prisoner-of-war status, or to avoid the requirement to terminate, not all of which have been successfully outlawed by the Convention.

B. TYPES OF LEGAL TERMINATION OF PRISONER-OF-WAR STATUS

1. Death

That the death of an individual while he is a prisoner of war will terminate that status would appear to be so obvious as to require no more than a mere mention. However, the draftsmen of the Convention considered it sufficiently important to devote a large part of three articles to the procedures to be followed when such an event occurs. Thus, upon the occurrence of the death of a prisoner of war there must be a medical examination to confirm the *fact* of death⁵ and, if necessary, to establish identity (Article 120, third paragraph); deceased prisoners of war are to be honorably buried, if possible according to the rites of their religion, in graves which are to be respected, maintained, and marked, and, again, if possible, all of those of the same Power of Origin are to be buried in the same place (Article 120, fourth paragraph); burial is to be in individual graves except for unavoidable circumstances, and cremation may be used only (1) for imperative reasons of hygiene, (2) for religious reasons, or (3) pursuant to the express request of the deceased prisoner of war; and the fact of cremation and the reason therefor must be stated in the death certificate (Article 120, fifth paragraph);⁶ and each Detaining Power must establish a graves registration service and transmit to the Power of Origin information concerning places of interment while responsibility for the care of the graves and the maintenance of records concerning any subsequent movements of the bodies is placed upon the Power controlling the territory in which the graves are located, if such Power is a Party to the Convention, and whether or not it was the Detaining Power at the time of death (Article 120, sixth paragraph). Moreover, death certificates, in the

⁵ Note that the medical examination is *not* for the purpose of determining the *cause* of death.

⁶ These provisions were incorporated into the Convention because of a justifiable fear that cremation might be used as a method of destroying evidence of crime. 1947 SAIN 4. See also I.M.T. 472.

form specified in Annex IVD, or certified lists of deceased prisoners of war, must be transmitted to the Prisoner of War Information Bureau (Article 120, second paragraph)⁷ and by it to the Power of Origin, through the Protecting Power, and to the Central Agency (Article 122, third paragraph).⁸

One of the several admonitory provisions of the 1949 Convention relates to this subject. The first paragraph of Article 121 provides that every death (or serious injury) of a prisoner of war "caused or suspected to have been caused by a sentry,⁹ another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power." The latter must both advise the Protecting Power of the fact of the inquiry and provide it with a copy of the report thereof, including copies of the statements of witnesses (Article 121, second paragraph); and if the inquiry indicates any illegal actions on the part of any person or persons, the Detaining Power is obligated to institute appropriate prosecutions (Article 121, last paragraph).¹⁰

2. Exchange

During the seventeenth century the exchange of prisoners of war became the major system of terminating prisoner-of-war status while hostilities continued.¹¹ This occurred when continental armies became national and professional and when obtaining the prompt release of captured military personnel became accepted as the responsibility of the sovereign, rather than of the captured individual. Exchange was man-for-man and grade-for-grade, with tables of "equivalent values," so that, at least in theory, exchanges would not result in any change

⁷ Concerning this Bureau, see pp. 154-157 *supra*. See also the fifth, seventh and ninth paragraphs of Article 122.

⁸ Concerning this Agency, see pp. 157-158 *supra*. Wills of deceased prisoners of war must also be transmitted to the Protecting Power, with a certified copy going to the Central Agency. See the first paragraph of Article 120 and pp. 186-187 *supra*.

⁹ See also Article 42 and the discussion thereof at p. 403 *infra*.

¹⁰ During World War II, 212 German and 39 Italian prisoners of war met violent or unnatural deaths while in custody in the United States. Rich, *Brief History* 514. These resulted from being shot by guards while attempting to escape, while engaged in altercations, or unjustifiably; from the execution of the sentences of prisoner-of-war "kangaroo courts", etc. *Ibid.*, 471 & 512; *U.S. v. Kaukoreit*. For the German procedure with respect to the shooting or serious injury of British, French, Belgian, and American prisoners of war (the directive was specifically made inapplicable to Poles, Serbs, and Russians), see *German Regulations*, No. 20, para. 224 and *ibid.*, No. 46, para. 840.

¹¹ It replaced ransom which had reached its peak during the era of chivalry but which had, for all practical purposes, completely disappeared by the end of the seventeenth century. One author asserts that "[f]aint though unmistakable traces of it survive even into Napoleon's war." Lewis, *Napoleon* 43. But see note I-21 *supra*. See also, *Levie, Armistice Agreement* 897. Perhaps it may be said to have reappeared momentarily as a result of the sequel to the Bay of Pigs episode.

in the relative military strengths of the opposing sides.¹² Exchange still existed as late as the American Civil War (1861–65),¹³ but it ceased to be a really effective procedure during that conflict.¹⁴ During the twentieth century exchange has practically disappeared as an institution of the law of war.¹⁵ It is not mentioned in any of the general conventions with which we are concerned, including the 1949 Convention.

3. Parole

Parole has been defined as “the promise of a prisoner of war to the detaining state that his conduct will conform to the prescriptions specified, given voluntarily in consideration of a grant of freedom of action.”¹⁶ In other words, the prisoner of war agrees to certain restrictions that are to govern his conduct in exchange for his release from confinement. The principle of parole has existed for many centuries.¹⁷ It was an accepted and important procedure as late as the nineteenth century.¹⁸ However, over the years it developed pri-

¹² Imbued, no doubt, with the *egalité* of the French Revolution, a Decree of 16 September 1792 of the French National Assembly (1 DeClercq, *Recueil des traités de la France* 219) provided that the rate of exchange should be man-for-man and grade-for-grade, and specifically prohibited any exchange of several subordinates for one person of higher rank. (This action apparently had little effect on general practice as a few years later Article First of the 1813 *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* contained a complete table of equivalent values, beginning with the valuation of an admiral or a commanding general at 60 men and ending with the valuation of a noncommissioned officer at 2 men.) When, for some reason, a formal exchange could not be made, a prisoner of war might even then be released and repatriated in a temporary parole status until his counterpart had been repatriated and the formal exchange had thus been completed. Lewis, *Napoleon* 45.

¹³ Article 1 of the so-called *Dix-Hill Cartel* (1862) was virtually identical with Article First of the 1813 *Cartel*, note 12 *supra*.

¹⁴ The occasional procedure mentioned in note 12 *supra* was substantially the system adopted as a general procedure in the *Dix-Hill Cartel*, note 13 *supra*. Lewis & Mewha 29–30; Murphy, *Repatriation* 2–3 (1971 Hearings at 479). The attempt to convert a procedure which worked adequately in occasional instances with respect to a specific prisoner of war into a general procedure applicable to all prisoners of war failed to accomplish the desired result, and its operation failed to satisfy either side.

¹⁵ *British Manual*, para. 249. One exchange of a highly limited character was attempted during World War II but did not actually take place. Lewis & Mewha 76–77. The release of four groups, each of three American servicemen, by the North Vietnamese during the period 1968–72 (Levie, *Repatriation* 702–03) followed by releases of North Vietnamese by the South Vietnamese were not exchanges but unilateral releases, *See* p. 147 *infra*.

¹⁶ Flory, *Prisoners of War* 119.

¹⁷ When the Roman General Marcus Atilius Regulus was paroled by the Carthaginians in 250 B.C. (Grady, *Evolution* 22–23), parole was already a well-established procedure in the law of international warfare.

¹⁸ Lewis, *Napoleon* 39–65, ascribes the breakdown of the system of parole to the Napoleonic wars (and to Napoleon).

marily into a method of permitting a prisoner of war more freedom within the territory of the Detaining Power, rather than as a method of terminating prisoner-of-war status.¹⁹ The *Cartel for the Exchange of Prisoners of War between Great Britain and the United States* (1813) provided for parole limited to a specified area (Article Fourth) or parole with return to the country of origin on condition of not serving in the military until exchanged (Article Fifth).²⁰ Few paroles were accorded under the latter provision. During the American Civil War an attempt was made to ensure major use of the principle of parole. The so-called Dix-Hill Cartel, an agreement entered into by the two sides on 22 July 1862,²¹ called for both sides to discharge all prisoners of war on parole within 10 days of their capture. Prisoners of war so paroled could not serve again until exchanged.²² As the exchange provision was not faithfully carried out by either side, the parole provision also failed of its purpose.²³ During the past century true parole, when used at all, has been employed in a sporadic, individual manner.²⁴

Articles 10, 11, and 12 of both the 1899 and 1907 Hague Regulations set forth detailed rules concerning parole. As the 1929 Convention made no reference whatsoever to the subject of parole, during World War II the 1907 Hague Regulations, or customary international law (which the 1907 Hague Regulations undoubtedly represented in this respect), applied.²⁵ During that conflict there were various uses made of the principle of parole, some improper and some proper. The Japanese required all captured Filipinos to sign a parole; and the United States recognized the parole by the Japanese in the Philippines

¹⁹ A French Imperial Decree of 4 August 1811 provided for the parole of officers in order to permit them to proceed, unescorted, to their assigned places of residence. Bulletin Officiel du Ministre de la Guerre, *Le droit des gens et les conventions internationales* 263. See also, Abell, *Prisoners of War in Britain, 1756-1815*, at 284-315. It thus came to resemble the "assigned residence" of the first paragraph of Article 13 of the 1907 *Hague Convention No. V*, now also found in Articles 41 and 78 of the Fourth (Civilian) Convention.

²⁰ Article Sixth of the *Cartel* provided for punishment "according to the usages and customs observed in such cases" in the event of a violation of the parole.

²¹ See notes 13 and 14 *supra*.

²² The basic plan was that "each side, upon paroling prisoners [of war] of the other side, was authorized to discharge an equal number of its own officers and enlisted men from parole." Murphy, *Repatriation* 2-3.

²³ Lewis & Mewha 29-30.

²⁴ It was used to a limited extent during the Russo-Japanese War (1904-05). Takahashi, *Russo-Japanese War* 107.

²⁵ Article 89 of the 1929 Convention provided that the latter convention "shall be complementary to Chapter II" [Prisoners of War] of the appropriate Hague Regulations as between Parties thereto and Parties to the 1929 Convention.

of certain captured members of the United States armed forces.²⁶ The United States paroled Italian prisoners of war in place both in Sicily²⁷ and in the United States.²⁸ There was apparently, no other major parole program in Europe although the British did permit, and the Germans did accept from British officers exclusively, a pledge "not to flee."²⁹

When the 1949 Convention was in the process of evolution, it was determined that, unlike the 1929 Convention, it should be self-contained and that it should not be necessary to refer, either explicitly or implicitly, to the 1907 Hague Regulations.³⁰ Accordingly, with one notable exception and one unimportant one, the provisions concerning parole which had appeared in both the 1899 and the 1907 Hague Regulations were incorporated into the last two paragraphs of Article 21 of the 1949 Convention with only minor editing. Thus, the Convention now authorizes parole, either partial or full, if the laws of the Power of Origin allow it; prohibits compulsion to accept parole;³¹ requires the belligerents to exchange information concerning their domestic laws and regulations with respect to permitting their own nationals to accept parole; binds prisoners of war "who have given their promises in conformity with the laws and regulations so notified" to fulfill the conditions of the parole; and prohibits the Power of Origin from requiring or accepting from paroled prisoners of war any services which conflict with the terms of the parole which they have given. The unimportant omission from the 1907 Hague Regulations mentioned immediately above is the provision to the effect that the Detaining Power is under no obligation to grant parole at the request of a prisoner of war. This is so obvious that there was

²⁶ See note 37 *infra*. See also, U.S. Congress, *Hearings on H.R. 2208, Amending the Missing Persons Act to Provide Benefits to Certain Members of the Philippine Scouts*, before Subcomm. No. 1 of the House Comm. on Armed Services, 84th Cong., 2d sess., no. 105, at 8173-74; and JAGA 1946/9604, 28 October 1946.

²⁷ Lewis & Mewha 178-79.

²⁸ *Ibid.*, 93. This was after the new Italian Government had changed sides in 1943. From the very beginning of the confinement of Italian prisoners of war in the United States their American friends and relatives had attempted, but unsuccessfully, to have individual prisoners of war paroled in their custody. Rich, *Brief History* 507.

²⁹ *German Regulations*, No. 37, para. 691. The "pledge not to flee" was therein specifically stated not to be parole.

³⁰ 1947 GE Report 105 & 133-34. Nevertheless, as a matter of precaution, Article 135 makes the 1949 Convention "complementary to Chapter II of the Regulations annexed to the above-mentioned [1899 and 1907] Conventions of The Hague."

³¹ Flory, *Prisoners of War* 129. In addition to many cases in which the Japanese compelled captured Filipinos to accept parole against their will, the Japanese followed that procedure throughout Asia. *I.M.T.F.E.* 1084-86. See also note 37 *infra*.

certainly no need to include it in any convention.³²

The provisions requiring the exchange of information concerning domestic laws and regulations with respect to parole,³³ and authorizing a Detaining Power to grant parole only when this is permitted by the laws and regulations of the Power of Origin, was necessary because many Powers have laws and regulations prohibiting members of their armed forces from accepting parole.³⁴ However, even in those instances where parole is prohibited, there are frequently exceptions, such as to permit a prisoner of war to obtain necessary medical treatment not available at his prisoner-of-war camp; or to allow captured medical or legal personnel, or chaplains, to visit installations where their services are required; or to allow the prisoners' representatives to visit the subsidiary installations which they represent; or for purposes of exercise or recreation; or when the senior officer present authorizes it, etc.³⁵

If, having been officially advised that the laws and regulations of the Power of Origin do not permit the acceptance of parole by the members of its armed forces, a Detaining Power nevertheless paroled a prisoner of war, it would appear that the parole would be invalid and not binding either on the prisoner of war or on the Power of Origin;³⁶ any other interpretation would make the provision of the Convention for the exchange of information concerning laws and regulations meaningless; but if the laws and regulations of the Power of Origin permit the giving of parole and the prisoner of war enters

³² In 1942 Flory stated: "The detaining state is not obligated by customary international law to grant liberties on parole, and it is not required to accede to the request of a prisoner [of war] for freedom on parole." Flory, *Prisoners of War* 119-20 and sources cited therein.

³³ There was no provision for the reciprocal notification of domestic laws and regulations on parole under the 1907 Hague Regulations so that, under those Regulations, the Detaining Power could not be charged with knowledge of the applicable laws and regulations of the Power of Origin.

³⁴ See, e.g., *U.S. Manual*, para. 187a; Article III, *Code of Conduct*; *British Manual*, para. 243 & n.1, and para. 246 & n.1; Article 235 (2), *Code de justice militaire français*.

³⁵ *U.S. Manual*, para. 187b; *British Manual*, para. 246 n.1; Preux, *Homme de confiance* 471, n. It should be noted that the second paragraph of Article 21 contains a sentence recommending the parole of prisoners of war, "particularly in cases where this may contribute to the improvement of their state of health." This had not appeared in any previous convention. (Article III of the *Code of Conduct* is absolute in its prohibition against the giving of their parole by members of the United States armed forces and does not seem to authorize even the limited parole permitted under *U.S. Manual*, para. 187b, issued a year later.)

³⁶ While Flory, *Prisoners of War* 127, makes a contrary statement, his position was based on international law as it existed prior to the 1949 Convention. He speaks of the "moral obligation" of the Detaining Power not to offer parole to a prisoner of war when the law of his Power of Origin prohibits it; that obligation is now legal rather than moral. And see SPJGW 1945/2310. 2 March 1945.

into a valid undertaking and thereafter violates its conditions and again bears arms against the Detaining Power which released him on parole and again falls into the power of that Detaining Power or one of its allies, historically he was not only subject to judicial punishment but he was not entitled to prisoner-of-war status.³⁷ Both of these possibilities were specified in Article 12 of the 1907 Hague Regulations. They were omitted from the provisions dealing with parole which were transposed to the 1949 Convention—and constitute the notable exception referred to above. The recaptured parole violator may be tried for his breach of parole; but he is entitled to prisoner-of-war status,³⁸ including the trial protections afforded by Articles 82-108 if he is so tried.

Classically, it was held that the individual convicted of violation of parole could be sentenced to any punishment, including death.³⁹ Under the first paragraph of Article 87 of the 1949 Convention, authorized punishments are limited to the penalties provided for in respect of members of the armed forces of the Detaining Power "who have committed the same acts."⁴⁰ It is difficult to conceive that any State has laws punishing members of its own armed forces for the violation of a parole given as a prisoner of war, particularly when so many States have laws or regulations prohibiting members of their armed forces from giving or accepting parole when prisoners of war.⁴¹ Inevitably, some States are bound to find themselves altogether unable to punish prisoners of war captured while acting in violation of a valid parole;⁴² or will have to solve this problem by using an analogy of doubtful validity.⁴³

³⁷ Spaight, *Air Power* 392. However, it should be noted that the freeing of prisoners of war by the Detaining Power upon conditions that the prisoners of war are not given an opportunity to accept or reject is not binding on them as a parole. Flory, *Prisoners of War* 129; *Lieber Code*, Article 128. For an incident at Singapore involving the coercion of a promise not to escape from thousands of British and Australian prisoners of war by the Japanese during World War II, see Bergamini, *Japan's Imperial Conspiracy* 966. (This incident is also referred to at *I.M.T.F.E.* 1084.)

³⁸ Gutteridge, *The Geneva Conventions of 1949*, 26 *B.Y.I.L.* 294, 315; *U.S. Manual*, para. 185b.

³⁹ *Lieber Code*, Article 124(1); *Code de justice militaire français*, Article 235. See note 20 *supra*.

⁴⁰ See p. 322 *supra*.

⁴¹ See note 34 *supra*.

⁴² It is extremely doubtful that any belligerent will accept this alternative.

⁴³ The United States Army apparently intends to analogize the violation of parole by a prisoner of war to the violation of the parole granted to a member of its armed forces serving a sentence of imprisonment after conviction of the commission of a crime. *U.S. Manual*, para. 185b. This means that the maximum punishment will be confinement at hard labor for six months (*Manual for Courts-Martial*, para. 127c, Table of Maximum Punishments, Article 134; JAGW 1957/3367, 25 April 1957), scarcely a very severe penalty for an offense which previously could have resulted in the death penalty.

4. Escape

Since time immemorial individuals captured in war have attempted to escape from the custody of their captors and to return to the control of their own forces.⁴⁴ Man's nature has not changed, and escape is still very much present in the minds of most captives; in fact, many individuals and States consider it to be a duty.⁴⁵ The draftsmen of the 1949 Convention appreciated this phenomenon, and included within its provisions a number relating to escape and to attempted escape, some of which are merely edited versions of provisions of the 1929 Convention, but some of which are new, arising out of the experiences of World War II. These provisions fall into two categories: (1) those relating to successful escapes; and (2) those relating to unsuccessful attempts to escape.

As a preliminary to the discussion of these provisions, it must be borne in mind that while the possibility of escape is usually in the thoughts of every prisoner of war, so is the need to take all possible precautions to prevent escapes very much in the thoughts of officials of the Detaining Power.⁴⁶ The prisoners of war will, of course, be confined to prisoner-of-war enclosures which will be made as "escape-proof" as humanly possible and which will be under the watch of armed guards. Because of the frequently unjustifiable fatal use of arms against prisoners of war during World War II, a new provision has been included in the 1949 Convention as Article 42. It specifies that the use of weapons against prisoners of war, "especially against those who are escaping or attempting to escape," constitutes an extreme measure which must be preceded by appropriate warnings.⁴⁷ Should a guard unjustifiably shoot and kill or seriously wound a pris-

⁴⁴ See, e.g., Reid, *The Colditz Story* and *Men of Colditz*, relating the story of the many escapes and attempted escapes from an "escape-proof" German prisoner-of-war camp during World War II. For some data on prisoner-of-war escapes and attempted escapes in the United States during World War II, see Rich, *Brief History* 479; *PMG Review*, III at 221-22.

⁴⁵ Davis, *Prisoner of War* 538; *Code of Conduct*, Article III; Rich, *Brief History* 478; Lyons, *Code of Conduct* 76; Phillimore, *Suggestions* 30; Spaight, *Air Power* 369.

⁴⁶ Walzer, *Prisoners of War* 783.

⁴⁷ This provision is substantially a codification of prior customary international law. See the *Drierwalde Case* at 86; and the *Trial of Richard Bruns*. See also *POW Circular No. 1*, para. 113. But see *German Regulations*, No. 29, para. 462, which admonished German prisoner-of-war guards that "it is better to fire too soon than too late"; and *ibid.*, No. 32, para. 504, which stated that no warning shots were required and that should a prisoner-of-war guard find it necessary to use weapons, "they must be fired with the intent to hit." See also *I.M.T.* 472. For a directive implementing Article 42, see U.S. Army Regs. 633-50, para. 93. For a discussion of the application of Article 42 in cases of prisoner-of-war mutinies, see pp. 316-317 *supra*.

oner of war, he would be chargeable with a violation of Article 130.⁴⁸

The Convention now lists three situations in which an escape is deemed to have been successful. These three situations, set forth in the first paragraph of Article 91, are as follows:

a. When the escapee has succeeded in rejoining his own armed forces or the armed forces of an ally of his Power of Origin;

b. When the escapee has succeeded in leaving territory which is under the control of the Detaining Power or of an ally of the Detaining Power;⁴⁹ and

c. When the escapee has succeeded in reaching a ship flying the flag of his own Power of Origin, or of an ally, in the territorial waters, but not under the control, of the Detaining Power.⁵⁰

The common thread in these three situations is that the prisoner of war is no longer within the power, or in territory under the control, of the Detaining Power.⁵¹ If he has reached the armed forces of his own Power of Origin or of an ally, or the territory of his own Power of Origin or of an ally, or enemy territory occupied by friendly troops, or a vessel flying the flag of his own Power of Origin or of an ally, he will once more come under the control of his own armed forces and no international legal problems arise. However, if his successful

⁴⁸ See pp. 353-355 and 360-361 *supra*. Moreover, the Detaining Power is obligated to investigate and report on such incidents and, if appropriate, to institute prosecutions. See the discussion of Article 121 at p. 397 *supra*. There is no evidence that India complied with these requirements when a number of Pakistani prisoners of war were shot and killed by guards in 1972. ICRC *Annual Report*, 1972 at 48-49; *ibid.*, 1973 at 20. Benjamin, *Tension Rising in Indian POW Camps*, *Washington Post*, 23 December 1972 at A16, cols. 1-4.

⁴⁹ In other words, if he has reached territory under friendly or neutral control. The 1947 Conference of Government Experts had recommended that this type of successful escape be defined as occurring "on reaching neutral or non-belligerent territory, or territory not occupied, but under the authority of their own country or of an ally." 1947 GE Report 211. (The meaning of the term "territory not occupied" is not exactly clear. Suppose that the escapee reached enemy territory occupied by the armed forces of his Power of Origin or an ally; that would certainly constitute a successful escape.)

⁵⁰ The 1947 Conference of Government Experts had recommended a provision specifying as a successful escape the reaching of the high seas, followed by the provision set forth in the text. *Ibid.*, 212. The ICRC dropped the high-seas provisions when it prepared the Stockholm draft, stating that it was unnecessary, as the situation was covered by the successful escape defined in "b" in the text hereof. *Draft Revised Conventions* 109. However, Pictet, *Commentary* 447 n.2, gives a different reason for the change.

⁵¹ He might still be within the territory of the Detaining Power—but in territory occupied by his Power of Origin or an ally. See note 49 *supra*. In Flory, *Prisoners of War* 157, the statement is made that an escaping prisoner of war remains such "until he is no longer on the territory controlled by the detaining state although this doctrine is not universally recognized or approved." The provisions of the first paragraph of Article 91 should remove the uncertainty mentioned by Flory.

escape is based upon his reaching neutral or nonbelligerent territory (even if the nonbelligerent favors the fortunes of the former Detaining Power), the status of the successful escapee is then governed by the first paragraph of Article 13 of the Fifth Hague Convention of 1907.⁵² He must be left at liberty and he may return to his Power of Origin or to an ally if this is physically possible.⁵³ If he remains in the asylum States, he may be given an assigned place of residence;⁵⁴ but that State may not prevent him from leaving its territory whenever he decides to do so.⁵⁵

The reaction of the Detaining Power to prisoner-of-war escapes and attempted escapes is the subject matter of quite a few limitations. With respect to successful escapes, the 1949 Convention contains two provisions, both of which are edited versions of comparable provisions of the 1929 Convention. The second paragraph of Article 91 provides that a prisoner of war who has made a successful escape, as defined in the first paragraph of that Article, and who is thereafter recaptured, may not be punished for his prior act of escape.⁵⁶ And the last paragraph of Article 93 limits the punishment which may be imposed on other prisoners of war who assisted the success-

⁵² See pp. 68-70 *supra*. See generally Wilson, *Escaped Prisoners of War in Neutral Jurisdiction*, 35 *A.J.I.L.* 519. A neutral State may, of course, deny the escaped prisoner of war entrance to its territory. Sauser-Hall, *Des belligérents internés* 108; Castrén 467; but see Montaudon, *Des internés* 43. While this is undoubtedly within its sovereign prerogative, it would be unusual for a State to take such action during the course of hostilities, although not so after their termination. See note I-265 *supra*.

⁵³ 1 *ICRC Report* 564; Sauser-Hall, *Des belligérents internés* 106. In Flory, *Vers une nouvelle conception* 61, the author seems to have completely confused successful escapees who enter neutral territory, whose status is governed by the first paragraph of Article 13 of the 1907 *Hague Convention No. V*, with still uncaptured members of a belligerent armed force who seek asylum in neutral territory in order to avoid capture, a situation governed by the first paragraph of Article 11 of that 1907 Convention.

⁵⁴ 1 *ICRC Report* 564; Martin, Note 66 & 68; Mason, *Prisoners of War* 434-37.

⁵⁵ Sauser-Hall, *Des belligérents internés* 263; Martin, Note 66; Mason, *Prisoners of War* 434-37.

⁵⁶ See note 62 *infra*. A similar provision had appeared in the second paragraph of Article 50 of the 1929 Convention and, prior to that, in the third paragraph of Article 8 of the 1907 Hague Regulations. (Article 31 of those Regulations had a similar "home-free" provision with respect to spies.) See also *Lieber Code*, Article 78. In Miller, *The Law of War* 247-48, Professor Cohen states that "[t]he Chinese probably regard the Convention's provisions restricting punishment for escape as bizarre and based on a 'sporting' view of escape," and that "[t]hey should not find it easy to understand why Article 91 prohibits them from punishing a prisoner of war for the escape if he is recaptured after making good his escape." Grady, *Evolution* 182, takes a position somewhat similar to that ascribed to the Chinese.

ful escapee to that of a disciplinary nature.⁵⁷ With respect to prisoner-of-war escape attempts which prove unsuccessful, the limitations on the reaction of the Detaining Power are more numerous. The recalcitrant prisoner of war may be given only disciplinary punishment,⁵⁸ even if he is a recidivist (Article 92, first paragraph);⁵⁹ if he is beyond the confines of the prisoner-of-war camp when he is recaptured, he must be returned immediately to military custody (Article 92, second paragraph);⁶⁰ his Power of Origin must be notified of his recapture, through the Information Bureaux and the Central Agency, if it has been notified of his escape (Article 94); the fact of the attempted escape may not be considered an aggravating circumstance if the unsuccessful escapee is tried for an offense committed during his attempt to escape (Article 93, first paragraph); offenses not involving violence against life or limb committed during the course and in furtherance of the attempt to escape⁶¹ may subject the prisoner of war to disciplinary punishment only (Article 93, sec-

⁵⁷ This was formerly contained in the second paragraph of Article 51 of the 1929 Convention. It had no counterpart in the 1907 Hague Regulations. Concerning "disciplinary punishment," see pp. 324-330 *supra*. It should be borne in mind that the protection afforded to aiders and abettors under the last paragraph of Article 93 is applicable to prisoners of war only. Other persons, such as nationals of the Detaining Power, or of the Power of Origin who are in the territory of the Detaining Power, who assist a prisoner of war to escape or to attempt to escape, are subject to the laws of the territorial sovereign. See, e.g., Prisoners of war or enemy aliens, 18 U.S.C. §757.

⁵⁸ This was the policy adopted in many of the various bilateral agreements entered into during World War I. See, e.g., §16(a), *Agreement between Great Britain and Germany* (July 1917); Article XVIII(a), *Agreement between the British and Turkish Governments* (December 1917); and Article 83, *Agreement between the United States of America and Germany* (November 1918). It was thereafter included in the first paragraph of Article 50 of the 1929 Convention.

⁵⁹ The unsuccessful prisoner-of-war escapee may, under the last paragraph of Article 92, be subjected to "special surveillance." However, the "special surveillance" must not be of such a character as to (1) affect his health; (2) remove him from a prisoner-of-war camp; or (3) suppress any of his rights under the Convention. In direct violation of both the first and last paragraphs of Article 92, in Korea the Chinese imposed lengthy sentences to solitary confinement as a punishment for attempted escapes. Miller, *The Law of War* 248. The Japanese had acted even more savagely during World War II. *I.M.T.F.E.* 1084 & 1091; Bergamini, *Japan's Imperial Conspiracy* 966 & 969.

⁶⁰ During World War II unsuccessful escapees in Germany were frequently turned over to the Gestapo or sent to concentration camps. See *The Stalag Luft III Case*. See also *I.M.T.* 472.

⁶¹ This provision is designed to ensure a reversal of the policy followed in many countries during World War II of holding prisoners of war criminally responsible for even nonviolent crimes committed during, and to facilitate, an escape attempt (Canada: *Rex v. Kaehler and Stolski*; *Rex v. Schindler*; *Rex v. Brosig* (contra, *Rex v. Krebs*); United States: *U.S. v. Farina*; *PMG Review*, III at 224; see also SPJGW 1944/139, 31 January 1944; Germany: *German Regulations*, No. 23, para. 308.) Article 93, second paragraph, specifically exempts the escaping prisoner of

ond paragraph) ;⁶² and other prisoners of war who assisted the unsuccessful escapee may, as in the case where they assisted a successful escapee, be given disciplinary punishment only (Article 93, third paragraph).⁶³

From the foregoing it is fairly obvious that in drafting the Convention in 1949, the members of the Diplomatic Conference had little doubt but that attempts by prisoners of war to escape, some of which would be successful and some of which would be unsuccessful, would occur in any armed conflict in which States party to the Convention might thereafter be involved.

5. Repatriation or Accommodation in a Neutral Country During the Course of Hostilities

a. WOUNDED AND SICK PRISONERS OF WAR

(1) Repatriation

The basic policy concerning the repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities is set forth in the first paragraph of Article 109 which provides, in peremptory terms, that "Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war." Unfortunately, as we shall see, belligerents in World War II did not regard a very similar provision of the 1929 Convention as being peremptory in character, and there is no reason to believe that the participants in the 1949 Diplomatic Conference desired or intended that the quoted provision should really be considered as mandatory—despite the appearance of its wording.

war from criminal liability for nonviolent offenses "such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, [or] the wearing of civilian clothes" committed solely in furtherance of the attempt to escape. See Rich, *Brief History* 466. (The quoted list is exemplary only, and does not purport to be all-inclusive.)

⁶² If an escaping prisoner of war steals a vehicle in order to facilitate his escape and is recaptured before effectuating the escape, under the second paragraph of Article 93 he is subject to disciplinary punishment only. If his escape is successful but he subsequently again becomes a prisoner of war, the provisions of the second paragraph of Article 91 would be applicable to his case and he would not be subject to any punishment. If an escaping prisoner of war kills a guard in the course of his escape and is recaptured before effectuating the escape, the second paragraph of Article 93 offers him no protection and the Detaining Power may try him for the homicide. See Spaight, *Air Power* 368-69. If his escape is successful but he subsequently again becomes a prisoner of war, the provision of the second paragraph of Article 91 that he "shall not be liable to any punishment in respect of [his] previous escape" (emphasis added), would seem to protect him even from a homicide prosecution. But see Pictet, *Commentary* 454.

⁶³ In Article 77, second paragraph, of the *Lieber Code*, it was provided that participants in a conspiracy for a "united or general escape" could be punished with death. The last paragraph of Article 93 draws no distinction between single escapes and mass escapes.

The 1907 Hague Regulations contained no provisions covering the subject of the repatriation of seriously wounded or seriously sick prisoners of war during the course of the hostilities. When, during World War I, the several belligerents were ultimately convinced that such repatriation, or, alternatively, internment in a neutral country, would be in the best interests of all concerned, it was necessary for them to develop the appropriate procedures and to include them in agreements entered into for that purpose. The procedure so adopted was generally to list the specific physical and mental conditions which would warrant repatriation or internment in a neutral country.⁶⁴ The practice was thereafter included in the first paragraph of Article 68 of the 1929 Convention. Under its provisions belligerents were "required" to repatriate "seriously ill or seriously wounded" prisoners of war as soon as they were in a condition to travel and regardless of "rank and numbers."⁶⁵ Article 68, in its second paragraph, provided that the Parties should enter into agreements covering the conditions that would warrant repatriation and those that would warrant internment in a neutral country. Thus, although the first paragraph of Article 68, dealing with repatriation, appeared to be self-executing, the succeeding paragraph of that Article made it quite clear that accords between the belligerents were necessary in order to implement even the provision for repatriation.⁶⁶ While the second paragraph of Article 68 also provided for the use of the Model Agreement annexed to the 1929 Convention until such an accord had been successfully negotiated, it is scarcely surprising that in no instance was this automatic procedure followed during World War II. However, many of the belligerents did reach mutual agreements to apply the provisions of the Model Agreement, and a number of exchanges of seriously sick and seriously injured prisoners of war were effected.⁶⁷

⁶⁴ Murphy, Repatriation 7. See, e.g., the *Agreement between the British and German Governments concerning Combatant Prisoners of War and Civilians* (July 1918).

⁶⁵ The first negotiations during World War II between Great Britain and Germany for an agreement to implement the first two paragraphs of Article 68 of the 1929 Convention collapsed when, because the figures favored the British, the Germans demanded that the exchange be on a head-for-head basis. 1 ICRC Report 374-75; Maughan, *Tobruk* 771. As a result, no medical repatriations between Great Britain and Germany took place until October 1943, more than four years after the initiation of hostilities. *Ibid.*, 801; Janner, *Puissance protectrice* 58-59.

⁶⁶ Meitani, Régime 191. While there would be considerably less delay if the repatriations were conducted on a unilateral basis, this is probably not feasible, not only because of the logistics problems, but also because of situations such as arose in Vietnam when South Vietnam attempted to repatriate some seriously wounded and seriously sick prisoners of war and North Vietnam refused to accept them. See p. 410 *infra*.

⁶⁷ See note 65 *supra*; 1 ICRC Report 373-93; 1942 *Exchange of Notes between the United States and Germany*; 1942 *Agreement between the United States and*

With this fairly successful experience of World War II fresh in their minds, the draftsmen of the 1949 Convention continued the relevant provisions of the 1929 Convention, somewhat edited and somewhat amplified, but no more mandatory, in the 1949 Convention. As quoted at the beginning of this section, under the first paragraph of Article 109 the Parties are once again "bound" to repatriate seriously wounded⁶⁸ and seriously sick prisoners of war, regardless of number or rank, as soon as they are able to travel.⁶⁹ Repatriation is to be in accordance with the provisions of the first paragraph of Article 110, which lists the three categories of seriously wounded and seriously sick prisoners of war who are to be repatriated.⁷⁰

Subsequent to 1949 a number of occasions arose warranting the implementation of the provisions of the first paragraph of Article 109. In February 1953 the United Nations Command in Korea proposed the exchange of seriously wounded and seriously sick prisoners of war pursuant to that Article, a proposal which the North Koreans and Chinese Communists accepted.⁷¹ During April and May 1953,

Italy; Rubli, Repatriation 623-24; Murphy, Repatriation 12-14, 1971 Hearings 482-83; Maughan, *Tobruk* 805-08; Stuart, Special War Problems Division, 11 *Dept. State Bull.* 63, 73; Tollefson, Enemy Prisoners of War 74, nn.26 & 27; *PMG Review*, III, at 109. However, Japan adamantly refused to participate in a program of medical repatriation. Janner, *Puissance protectrice* 59.

⁶⁸ The French versions of both Conventions (1929 and 1949) use the term "*grands blessés*." While some of the English versions of the first paragraph of Article 68 of the 1929 Convention used the term "seriously injured," that of the first paragraph of Article 109 of the 1949 Convention uses the term "seriously wounded." This change in the first paragraph of Draft Article 100 (now Article 109) originated in the Drafting Committee of the 1949 Diplomatic Conference, 2B *Final Record* 182. "Injured" was probably a better choice of words as a wound is certainly an injury, but an injury is not necessarily a wound; and Article 114 specifies that prisoners of war who suffer non-self-inflicted *injuries* (perhaps in an industrial accident suffered while working as a prisoner of war) fall within the group of those eligible for medical repatriation (or accommodation in a neutral country).

⁶⁹ While the last paragraph of Article 68 of the 1929 Convention referred to agreements for "direct repatriation," as well as for accommodation in a neutral country, the second paragraph of Article 109 refers only to the latter type of agreement with respect to sick and wounded prisoners of war. Belligerents would, however, be authorized to enter into an agreement for direct repatriation, in implementation of the first paragraph of Article 109, pursuant to the provisions of the first paragraph of Article 6, as such an agreement would, in the vast majority of cases, not "adversely affect the situation of the prisoner of war," nor would it in any way restrict the rights which the Convention confers upon them. *But see* note 77 *infra*.

⁷⁰ Article 110, first paragraph, lists broad classifications while Part IA of Annex I, the Model Agreement, goes into the specifics. (One of the specifics is that the prognosis is against recovery within a period of one year.)

⁷¹ *Notes on Exchange of Wounded Prisoners [of War] in Korea*, 22 February 1953 & 28 March 1953. These notes resulted in the *Agreement on Repatriation of Sick and Wounded Prisoners [of War]* 11 April 1953, known as "Little Switch."

some 6,640 North Korean and Chinese prisoners of war who had been found to be seriously wounded or seriously sick within the meaning of those terms as used in the Convention were exchanged for 684 members of the armed forces composing the United Nations Command.⁷² During the 1956 Middle East conflict, Israel repatriated a number of seriously wounded Egyptian prisoners of war in the course of the hostilities.⁷³ During the 1962 Sino-Indian conflict, the People's Republic of China repatriated a number of seriously wounded or seriously sick Indian prisoners of war.⁷⁴ And, finally, in 1970, during the hostilities in Vietnam, the General Assembly of the United Nations adopted a resolution urging compliance with the provisions of the first paragraph of Article 109.⁷⁵ The South Vietnamese had already identified over 800 North Vietnamese prisoners of war who fell within the provisions of the lead paragraphs of Articles 109 and 110 and Annex I.⁷⁶ Despite the fact that the South Vietnamese authorities must have known that many of these men did not desire repatriation, in April 1971 those authorities unilaterally announced a proposed repatriation of 660 seriously wounded and seriously sick prisoners of war held by them. The offer was accepted by the North Vietnamese. When interviewed by the representatives of the ICRC in South Vietnam, all but 13 of the prisoners of war exercised their right to decline repatriation during hostilities.⁷⁷ On 2 June 1971 the 13 were taken by ship to a point off the coast of North Vietnam, but by that time the North Vietnamese had broadcast a statement rejecting their repatriation.⁷⁸

It is obvious that the repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities is now well established in the law of war and is generally acceptable to

⁷² U.S., MP Board, Korea, 11, at 424. See also Rubli, Repatriation 624.

⁷³ For some instances of individual unilateral repatriations, see ICRC *Annual Report*, 1971, at 40-42.

⁷⁴ Miller, *The Law of War* 249.

⁷⁵ U.N., G.A. Res. 2676, 9 December 1970, 25 U.N. GAOR Supp. 28 at 77, U.N. Doc. A/8028 (1971).

⁷⁶ *Vietnam, Article-by-Article Review*, Article 109.

⁷⁷ The last paragraph of Article 109 prohibits the involuntary repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities. (This should not be confused with the problem of voluntary versus involuntary repatriation after the cessation of hostilities as some writers have done. See, e.g., Rabli, Repatriation 628. With respect to this problem in connection with post-hostilities repatriation, see pp. 421-426 *infra*.)

⁷⁸ ICRC *Annual Report*, 1971, at 30-32; Sullivan, Prisoners of War in Indochina 305. Murphy, Repatriation 23-24. From the sequence of events, there seems little doubt but that this whole affair was a not very successful propaganda ploy by the South Vietnamese.

States.⁷⁹ The opposing belligerents can, by agreement, establish any administrative procedures that they may desire. However, as we have just seen, experience indicates that they will most probably agree to avail themselves of the procedures established by the Convention and its Annexes.⁸⁰ This means that prisoners of war who are found to be within the categories enumerated in the first paragraph of Article 110 and to have any of the specific conditions listed in Annex I, Part IA, will be entitled to repatriation. The determination of eligibility in each individual case may be made in either of two ways. The second paragraph of Article 112 provides for the repatriation of prisoners of war who are determined by the medical authorities of the Detaining Power to be manifestly seriously wounded or seriously sick within the meaning of those terms as used in the Convention. Such individuals will be repatriated without further administrative proceedings. But this will affect only a relatively small percentage of the prisoners of war who are believed by the retained medical personnel, by the prisoners' representative, or by the prisoners of war themselves to be entitled to medical repatriation. With regard to these, the determination of entitlement to repatriation will be made by Mixed Medical Commissions. These Commissions, the existence of which is recognized in last paragraph of Article 110 and the first paragraph of Article 112, are established in accordance with, and function under, Annex II to the Convention. They consist of three medically qualified persons, of whom one is appointed by the Detaining Power and the other two (who must be nationals of neutral States) are "appointed by the International Committee of the Red Cross, acting in agreement with the Protecting Power, at the request of the Detaining Power."⁸¹ They function by majority vote,⁸² and their decisions must be carried out by the Detaining Power within three months of the receipt by it of notice thereof.⁸³

⁷⁹ This type of repatriation is, on the whole, in the self-interest of the Detaining Power whom it relieves of a major logistics problem, transferring it to the enemy, the Power of Origin of the repatriated prisoners of war. Those prisoners of war who fall within the ambit of the first paragraph of Article 110 and Annex I, Part IA, will add little, if anything, to the warmaking potential of the Power of Origin and will considerably increase its medical requirements. Nevertheless, it must be assumed that, in practically every case, a Power of Origin will be willing to have, and be desirous of having, repatriated the seriously wounded and seriously sick members of its armed forces, who had been captured by the enemy.

⁸⁰ The last paragraph of Article 110 provides that, absent an agreement between the Parties, the provisions of Annexes I and II will govern.

⁸¹ Annex II, Article 2.

⁸² *Ibid.*, Article 10.

⁸³ *Ibid.*, Article 12. A form of "Repatriation Certificate" to be issued to prisoners of war found by the Mixed Medical Commissions to be repatriable is set forth in Annex IVE of the Convention.

There are several methods specified in the 1949 Convention by which a prisoner of war may be entitled to appear before a Mixed Commission for a physical evaluation to determine whether he falls within one of the repatriable categories listed in the first paragraph of Article 109 as amplified in Annex I, Part IA. The first paragraph of Article 113 provides that designations for appearances before Mixed Medical Commissions may be made by (1) retained medical personnel who are nationals of the Power of Origin of the prisoner of war or of an ally of that Power; (2) by the prisoners' representative; or (3) by the Power of Origin itself or by an organization recognized by it and giving assistance to prisoners of war.⁸⁴ Moreover, the second paragraph of Article 113 authorizes any prisoner of war who considers himself medically entitled to repatriation and who has not been proposed by any of the foregoing authorities to present himself on his own initiative to the Mixed Medical Commission.⁸⁵

The Convention includes a number of miscellaneous provisions relating to medical repatriations during the course of hostilities. Some of these have been mentioned in passing but warrant repetition. Thus, the last paragraph of Article 109 provides that this type of repatriation must be completely voluntary, that no "sick or injured"⁸⁶ prisoner of war may be repatriated during the course of hostilities against his will;⁸⁷ the last paragraph of Article 113 entitles the prisoner of war being examined by a Mixed Medical Commission to have the support of the presence of a retained medical man of his own nationality as well as of the prisoners' representative;⁸⁸ Article 114 specifies that a prisoner of war who sustains a nonself-inflicted injury in an accident is eligible for medical repatriation;⁸⁹ the first paragraph of

⁸⁴ This provision is based upon Article 70 of the 1929 Convention as edited by the ICRC (Revised Draft Conventions 92-93) and by the 1949 Diplomatic Conference (2B *Final Record* 182). Nowhere in the legislative history, nor in the Convention, is there indication as to whether the organization referred to is that mentioned in the third paragraph of Article 10, or the first paragraph of 125 or elsewhere. See pp. 312-314 *supra*.

⁸⁵ If he does so, he "shall be examined only after those" officially proposed. Article 113, second paragraph. In other words, he goes to the end of the line.

⁸⁶ The Drafting Committee of the 1949 Diplomatic Conference failed to make the language of this provision of the third paragraph of Draft Article 100 (now the last paragraph of Article 109) coincide with the language of the first paragraph of Draft Articles 100 (now Article 109) and 103 (now Article 113) when the latter were changed. See 2B *Final Record* 182, and note 68 *supra*.

⁸⁷ See note 77 *supra*. A proposal made by the United Kingdom to send such prisoners of war to internment in a neutral country was rejected by Committee II of the 1949 Diplomatic Conference. 2A *Final Record* 291, 373, & 391.

⁸⁸ The prisoners' representative will, of course, also be of the same nationality as the prisoner of war. See pp. 298-199 *supra*.

⁸⁹ See note 68 *supra*.

Article 115 removes the prior imposition of disciplinary punishment⁹⁰ as a basis for denying medical repatriation, while its second paragraph makes a prisoner of war against whom a judicial prosecution⁹¹ is pending, or against whom a conviction in such a proceeding has been obtained, ineligible for repatriation until the completion of the proceedings and the sentence, if any, except with the consent of the Detaining Power; and Article 117 prohibits the employment "on active military service" of any repatriated "person."⁹²

Repatriation of seriously wounded and seriously sick prisoners of war during the course of hostilities, despite all the problems which it presents and creates, is a humanitarian procedure of incalculable benefit to the prisoner of war so repatriated without adversely affecting the Detaining Power that permits his repatriation. It has operated with some difficulty, but, on the whole, successfully, and should unquestionably be resorted to by the belligerents in any future international armed conflict.

(2) Accommodation in a Neutral Country

During World War I some belligerents were reluctant to repatriate even seriously sick and seriously injured prisoners of war lest this increase the warmaking potential of the enemy.⁹³ As a result, in addition to the repatriation of such prisoners of war, another humanitarian procedure evolved during the course of that conflict—the accommodation (internment) in a neutral country of prisoners of war who, although not so seriously sick or seriously injured as to be totally incapacitated and, therefore, repatriable, were still so nearly within that category, and had been prisoners of war for such long periods,⁹⁴ as to warrant some special consideration. The solution reached consisted of trilateral agreements under which a neutral Power agreed to accommodate them within its territory for the duration of the hos-

⁹⁰ Concerning disciplinary punishment, see pp. 324–330 *supra*.

⁹¹ Concerning judicial prosecution and punishment, see pp. 330–342 *supra*. The last paragraph of Article 115 requires each Detaining Power to advise the Power of Origin of the names of prisoners of war selected for medical repatriation who are so detained.

⁹² The physical position of this provision in the Convention makes it obvious that it relates only to repatriations under Articles 109–16. See *U.S. Manual*, para. 196(b). The precise perimeters of the provision are far from clear. See *Levie, Repatriation* 695 n.12 and 705–06; *Diplomatic Conference Documents, Memorandum by Finland, Document No. 9 at 3*; *Prugh, Code of Conduct* 704–05; *ICRC, Information Note No. 4 at 6–13*.

⁹³ In *Lindsay, Swiss Internment* 3, the following appears: "The fear expressed by France [in February 1915] that under the system of exchange wounded soldiers would be returned to Germany who could still be of military service [an amputee could work in a depot, thus relieving an able-bodied soldier], was common to other belligerents."

⁹⁴ Many prisoners of war wounded and captured early in World War I developed a "barbed-wire" psychosis that was disabling in and of itself. *Flory, Prisoners of War* 97.

ilities so as to enable them to have medical treatment and surroundings that would contribute to the improvement of their physical and mental conditions and that, understandably, would rarely be available to them in a prisoner-of-war camp or hospital.⁹⁵

Many thousands of prisoners of war on both sides were satisfactorily accommodated in neutral countries during World War I pursuant to agreements of this nature.⁹⁶ Based upon this experience, specific provisions covering the accommodation (internment) of seriously sick and seriously injured prisoners of war in neutral countries during the continuation of hostilities were included in Articles 68–73 of the 1929 Convention.⁹⁷ Much of what has been said with respect to the procedure for the selection of seriously sick and seriously injured prisoners of war for repatriation was to be equally applicable to their selection for accommodation in a neutral country. The Mixed Medical Commissions were to operate in the same manner; and the prisoners of war examined by them would, in appropriate cases, be selected either for repatriation (if they were found to be within Part IA or IIA of the Model Agreement annexed to the 1929 Convention) or for accommodation in a neutral country (if they were found to be within Part IB or IIB of the Model Agreement).

Despite this historical background, the accommodation of seriously sick or seriously injured prisoners of war in neutral countries did not occur at all during World War II. A general ICRC proposal for such a procedure, based upon Switzerland's declared willingness to accept such prisoners of war for medical internment, was originally accepted by the British, French, and German Governments; but be-

⁹⁵ The suggestion for accommodation (internment) in a neutral country was originally made by the Swiss Federal Council. It was elaborated upon by the Pope in 1916 and was accepted by the belligerents, and was thereafter implemented by France, Germany, and Great Britain. Lindsay, *Swiss Internment* 2–7. Subsequently, the Netherlands agreed to serve as a place of accommodation for the prisoners of war selected by Germany and Great Britain for such purpose. *Agreement between Great Britain and Germany* (2 July 1917).

⁹⁶ See note 95 *supra*. One potential problem raised by Switzerland concerned the possibility of the escape to their own countries of prisoners of war accommodated in that neutral country. This was solved by including in the agreements a provision that each belligerent would send back to Switzerland any members of its armed forces who escaped from internment in that country. Lindsay, *Swiss Internment* 5; Hauser, *L'internement en Suisse des prisonniers de guerre malades ou blessés* 514–15.

⁹⁷ The matter is also governed by Article 14 of the Fifth Hague Convention of 1907. It must be borne in mind that the provisions referred to in the text and in this note relate only to prisoners of war who arrive in the neutral country as a result of an agreement between the belligerents and the neutral country. They do not apply to prisoners of war brought into neutral territory by enemy troops seeking transit through or refuge in the neutral country (*ibid.*, second paragraph of Article 13; Castrén 468) or who have escaped from enemy custody and entered the neutral territory of their own volition during the course of their escape (see pp. 404–405. *supra*).

fore it was implemented the German Government proposed to France and Great Britain that prisoners of war found to be medically entitled to accommodation in a neutral country be repatriated instead. This proposal was accepted and repatriation, rather than accommodation in a neutral country, was the procedure followed by those countries throughout World War II.⁹⁸ The Mixed Medical Commissions functioned in the prescribed manner,⁹⁹ but all prisoners of war found to be seriously sick or seriously injured within the scope of the Model Agreement were repatriated.

Notwithstanding the decision of the belligerents of World War II not to avail themselves of the provisions of the 1929 Convention relating to the accommodation of seriously sick and seriously injured prisoners of war in a neutral country during the course of hostilities, the draftsmen of the 1949 Convention deemed it advisable to continue to provide for such a procedure. The second paragraph of Article 109 affirmatively establishes the procedure; the second paragraph of Article 110 enumerates the general categories of prisoners of war eligible for such accommodation in a neutral country, and Part IB of the Model Agreement annexed to the 1949 Convention lists the specific conditions that fall within those categories; Article 111 encourages the Detaining Power and the Power of Origin, and a neutral Power acceptable to both of them, to enter into an agreement covering the subject; while the administrative procedures already mentioned in the discussion of the selection of seriously wounded and seriously sick prisoners of war for repatriation¹⁰⁰ are equally applicable in the selection of seriously wounded and seriously sick prisoners of war for accommodation in a neutral country. There is, moreover, as there was in the 1929 Convention, a provision for the repatriation, upon the occurrence of specified medical eventualities, of prisoners of war previously accommodated in a neutral country.¹⁰¹

In the few instances since 1949 in which these provisions of the 1949 Convention have been relevant, the belligerents concerned have once again repatriated seriously wounded and seriously sick prisoners of war, apparently without giving much consideration to the possi-

⁹⁸ 1 ICRC Report 382-85. When the United States became a belligerent in World War II it, too, expressed a preference for the repatriation, rather than internment in a neutral country, of prisoners of war whose physical or mental condition brought them within category "B" of the Model Agreement attached to the 1929 Convention. *Ibid.*, 385; Rich, Brief History 503-04.

⁹⁹ See, e.g., *ibid.*, 500-01; *German Regulations*, No. 28, para. 415; *ibid.*, No. 34, para 624; Hoole, *And Still We Conquer* 51.

¹⁰⁰ See pp. 410-413 *supra*.

¹⁰¹ See Article 110, third paragraph. For some reason it was not considered necessary in either 1929 or 1949 to include in the convention being drafted a specific provision for the repatriation of the interned prisoners of war upon the cessation of active hostilities.

bility of accommodation in a neutral country.¹⁰² Should the belligerents in any future international armed conflict again elect to repatriate all seriously wounded and seriously sick prisoners of war falling within the purview of both the first and second paragraphs of Article 110 and of both Parts IA and IB of the Model Agreement, there certainly could not be any objection to such a decision.¹⁰³ Inasmuch as the reasons for reaching that decision during World War II¹⁰⁴ will always be present in any international armed conflict, it is highly likely that the belligerents will continue to opt for repatriation for those prisoners of war who are technically eligible only for accommodation in a neutral country. Nevertheless, it was appropriate to include the provisions in the Convention, as there may well be a return to the position taken during World War I that even a completely disabled prisoner of war may, if repatriated, contribute to the enemy's warmaking potential.¹⁰⁵

b. OTHER PRISONERS OF WAR

Article 72 of the 1929 Convention provided that belligerents "may conclude agreements" for the repatriation or hospitalization in a neutral country of prisoners of war who, although able-bodied, "have undergone a long period of captivity."¹⁰⁶ It does not appear that any belligerents availed themselves of this provision during World War II.¹⁰⁷ Nevertheless, once again the draftsmen of the 1949 Convention elected to include a potentially humanitarian provision in the new

¹⁰² See, e.g., ICRC *Annual Report*, 1972 at 51 (India-Pakistan); *ibid.*, 1973 at 5-6 (Egypt-Israel) and 20-21 (India-Pakistan).

¹⁰³ This procedure was unquestionably fully acceptable to the prisoners of war concerned during World War II, would normally be acceptable to any prisoner of war offered the choice between repatriation and internment in a neutral country, and would not be in violation of the first paragraph of Article 6 of the 1949 Convention. However, it must include compliance with the provision of the last paragraph of Article 109. See note 77 *supra*.

¹⁰⁴ The reasons given by Germany for making its proposal, early in World War II, to substitute repatriation for internment in a neutral country (see pp. 414-415 *supra*), were that it was preferable for the disabled prisoners of war to be treated in their own country; and that it would save the Power of Origin a heavy charge on its available foreign exchange. 1 ICRC *Report* 383. (Article 116 provides that the Power of Origin must bear all of the expenses of repatriation of prisoners of war "or of transporting them to a neutral country." Presumably, this includes the expenses of maintaining them, usually in a hospital, in the neutral country.)

¹⁰⁵ See note 93 *supra*.

¹⁰⁶ There is no indication as to what is considered to be "a long period of captivity." One author believes that a prisoner of war should be repatriated under this provision after 18 months of captivity. Havens, *Release and Repatriation of Vietnam Prisoners*, 57 *A.B.A.J.* 41, 44. During World War II and the hostilities in Vietnam, some individuals were prisoners of war for periods in excess of 5 years.

¹⁰⁷ Murphy, *Prisoners of War 15* (1971 Hearings at 483) says the belligerents "could not agree on the question of [the repatriation of] prisoners [of war] who had been subject to a long period of captivity."

agreement, despite the fact that its predecessor had remained unused during what was probably the longest international armed conflict of the past century.¹⁰⁸ The final sentence of the second paragraph of Article 109 of the 1949 Convention is almost identical with Article 72 of the 1929 Convention.¹⁰⁹

During the course of the hostilities in Vietnam, on one occasion the Vietcong unilaterally released three American servicemen for repatriation (in 1967) and the North Vietnamese did the same thing on four separate occasions (twice in 1968, once in 1969, and once in 1972).¹¹⁰ These releases did not purport to have been accomplished pursuant to the second paragraph of Article 109, nor were they, as most of the men released had been prisoners of war for comparatively short periods of time and there were many others who were not released even though they had been in custody for periods up to several years longer than the individuals who were released.¹¹¹

It appears rather unlikely that the provisions of the second paragraph of Article 109 for the repatriation of able-bodied, longtime prisoners of war will be implemented during any future international armed conflict¹¹²—but it was proper to include such a provision in the Convention so that it will be available as a basis for a proposal to the belligerents by the Protecting Power or the ICRC should the occasion arise.

6. Repatriation after the Cessation of Active Hostilities

It is obvious that the various types of legal termination of prisoner-of-war status during the course of hostilities discussed above will normally account for a very small percentage of the prisoners of war in enemy custody. The great majority of prisoners of war

¹⁰⁸ World War II may be said to have lasted just over 6 years: from the German attack on Poland on 1 September 1939 to the surrender of Japan on 2 September 1945. Liddell Hart, *History of the Second World War* 698.

¹⁰⁹ The 1929 provision refers to "direct repatriation or hospitalization in a neutral country," while the second paragraph of Article 109 provides for "direct repatriation or internment in a neutral country." (Emphasis added.) The latter provision seems more appropriate as the individuals concerned are, by definition, "able-bodied," and may not necessarily be hospitalized.

¹¹⁰ See Levie, Repatriation 702–03.

¹¹¹ *Ibid.*, 703 n.50.

¹¹² While the physical position of Article 117 in the Convention appears to make it applicable to able-bodied prisoners of war repatriated under the second paragraph of Article 109 (see note 92 *supra*), it is extremely doubtful that prohibiting such prisoners of war from being "employed on active military service" would alone suffice to convince belligerents that the relative warmaking potential of the two sides would not be affected by such repatriations, even if they were on a man-for-man basis. Thus, in the early years of the American Civil War (1861–1865) the equal exchange of able-bodied prisoners of war favored the Union, while later in that conflict, as relative manpower availability changed, it favored the Confederacy. Lewis & Mewha 30.

have always remained in that status until at least the cessation of active hostilities.¹¹³

Article 20 of the 1907 Hague Regulations provided that prisoner-of-war repatriation should be accomplished as quickly as possible "after the conclusion of peace."¹¹⁴ The 1929 Convention purported to make a basic change in the policy in this regard contained in its predecessors. Article 75 thereof stated that an armistice agreement must, in principle, contain provisions with respect to the repatriation of prisoners of war; that if for some reason the Parties had been unable to include such provisions in the armistice agreement, they should conclude a separate agreement on the subject as soon as possible; and that, in any event, repatriation of prisoners of war should be accomplished with the least possible delay after the conclusion of peace. This meant, in effect, that prisoners of war could still be legally held in custody by the Detaining Powers for several years after the de facto end of the war.¹¹⁵ Because this happened so generally at the end of World War II,¹¹⁶ as early as the 1947 Conference of

¹¹³ By "active hostilities" is meant the "shooting war." Peace, in the legal sense, may still be months or years away.

¹¹⁴ The official French version of Article 20 of the 1899 Hague Regulations was identical.

¹¹⁵ The *Treaty of Peace with Japan* did not become effective until 1 May 1952. Under the two sets of Hague Regulations and the 1929 Convention, Japanese prisoners of war might legally have been held at least until that date, even though hostilities ended on 2 September 1945.

¹¹⁶ See generally 1 ICRC Report 394-402. The United States did not complete the repatriation of German prisoners of war until July 1946. While transportation problems did cause some delay, probably more relevant was the continued need for prisoner-of-war labor. Lewis & Mewha 172-73; Tollefson, *Enemy Prisoners of War* 74. The United Kingdom completed its repatriation program in July 1948. *The Times* (London), 13 July 1948 at 3, col. 3. In January 1947 France was still detaining 630,000 German prisoners of war, making use of them in the reconstruction effort. Documentation Française at 2. The Soviet Union admitted in 1950 that it still held 12,000 German prisoners of war and in 1955, 10 years after the end of hostilities, it finally entered into an agreement with the Federal Republic of Germany for the repatriation of the 9,000 admittedly still being held, allegedly as convicted war criminals. Miller, *The Law of War* 230; Reiners, *Soviet Indoctrination* 43. See also note VI-36 *supra*. It has been stated that the Soviet Union only released prisoners of war detained by it after the termination of hostilities when such releases would have a maximum propaganda impact as, for example, at the time of the negotiations for treaties with Austria, Germany, and Japan. Vizzard, *Policy* 355. (One German soldier who became a prisoner of war of the Russians on 11 May 1945, after Germany's surrender, was not released until 26 August 1949. Anon., *POW in Russia* 1. He stated that the MVD "determined the political reliability of the POW and selected people for return to Germany." *Ibid.* at 2.) In December 1950 the General Assembly of the United Nations adopted a resolution calling for the prompt "unrestricted opportunity of repatriation." U.N. G.A. Res. 427, 14 December 1950, 5 U.N. GAOR, Supp. 20 at 45, U.N. Doc. A/1775 (1950). While it did not mention the Soviet Union, it was directed against that country's policy of holding prisoners of war indefinitely as slave labor. See Byrnes, A

Government Experts the proposal was made that the new convention being drafted provide for repatriation as soon as possible after the close of hostilities.¹¹⁷ This suggestion was adopted and amplified by the subsequent preliminary conferences and the 1949 Diplomatic Conference and is now contained in the first paragraph of Article 118 which states: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Moreover, the second paragraph of Article 118 requires each belligerent to act unilaterally to repatriate the prisoners of war held by it in the event that the agreement for the cessation of hostilities fails to deal with the subject, or in the event that there is no such agreement;¹¹⁸ the third paragraph of Article 118 requires that the prisoners of war be advised of the plan adopted for repatriation; and the last paragraph of Article 118 provides a partial formula for the apportionment of the costs of repatriation.¹¹⁹

The first paragraph of Article 119 makes applicable to the process of post hostilities repatriation the rules found in Articles 46–48 dealing with transfers between prisoner-of-war camps.¹²⁰ The subject of the disposition of the personal property of prisoners of war is dealt with at some length. Thus, the second paragraph of Article 119 requires that the property impounded at the time when the prisoner of war was captured,¹²¹ and any foreign currency taken from him that had not subsequently been converted,¹²² be returned to him prior to repatriation; and that any such items not so returned be sent to the Information Bureau for forwarding to the Power of Origin.¹²³

Review of the Problem of Missing Prisoners of War, 29 *Dept. State Bull.* 898. (The General Assembly also adopted a resolution directed against the failure of several Communist countries to repatriate Greek prisoners of war after the unsuccessful Communist attempt to take over that country had ended in October 1949. G.A. Res. 382, 1 December 1950, 5 U.N. GAOR, Supp. 20, at 14, U.N. Doc. A/1775 (1950).)

¹¹⁷ 1947 GE Report 243.

¹¹⁸ Thus, in November 1972, Pakistan unilaterally announced that it would repatriate all Indian prisoners of war held by it as an aftermath of the December 1971 Indo-Pakistani hostilities. *New York Times*, 28 November 1972, at 1, col. 2. (India responded by agreeing to repatriate all of the Pakistani prisoners of war captured by her on the western front during those hostilities, and the announced unilateral exchange actually became an exchange that took place on 1 December 1972. ICRC *Annual Report*, 1972 at 50).

¹¹⁹ If the Detaining Power and the Power of Origin are contiguous, the Detaining Power pays the costs to its border and the Power of Origin pays from there; if they are not contiguous, the Detaining Power pays the costs to its border (or to its port nearest to the territory of the Power of Origin) and the Parties are to agree between themselves as to how the other costs are to be apportioned—with the proviso that the reaching of such an agreement is not to delay the repatriation.

¹²⁰ For a discussion of those rules, see pp. 187–194 *supra*. Certain portions of the fifth and ninth paragraphs of Article 122 are also applicable to repatriations.

¹²¹ See pp. 110–113 *supra*.

¹²² See pp. 113–117 *supra*. Concerning credit balances, see pp. 210–211 *supra*.

¹²³ See the discussion of the last paragraph of Article 122 at p. 157 *supra*.

The third paragraph of Article 119 authorizes each prisoner of war being repatriated to take with him his personal effects and any correspondence and parcels that he has received, limited to what he can carry, but with a maximum of 25 kilograms (about 55 pounds);¹²⁴ while the fourth paragraph of Article 119 provides that the Detaining Power shall take charge of the personal effects that the prisoner of war is unable to carry and shall forward them as soon as an agreement on the subject has been reached with the Power of Origin.¹²⁵ Finally, the fifth paragraph of Article 119 is similar to the second paragraph of Article 115¹²⁶ in that it permits a Detaining Power to detain a prisoner of war against whom "criminal proceedings for an indictable offense"¹²⁷ are pending, or against whom a conviction in such proceedings has already been obtained, until the completion of the proceedings and the sentence, if any;¹²⁸ and the penultimate paragraph of Article 119 requires the Detaining Power to inform the Power of Origin of the identity of prisoners of war so detained.¹²⁹

"Active hostilities" may, of course, come to a halt either as a result of the surrender of a defeated belligerent to a victorious one,¹³⁰ or

¹²⁴ This provision is almost identical with that of the second paragraph of Article 48. See p. 193 *supra*. For a detailed account of the procedure followed by the United States after World War II, see Rich, Brief History 494-96.

¹²⁵ This provision may be compared with that of the third paragraph of Article 48.

¹²⁶ See p. 413 *supra*.

¹²⁷ The second paragraph of Article 115 uses the term "judicial prosecution." While the two terms are probably synonymous, it would have been better draftsmanship to use identical terms in these two articles, as they deal with identical problems.

¹²⁸ This was the justification advanced by the Soviet Union for the fact that it still detained 12,000 German prisoners of war in 1950, five years after the end of World War II. Miller, *The Law of War* 230. See note 116 *supra*. Some armistice agreements have specifically called for the repatriation of these individuals at the same time as the other prisoners of war are repatriated. See, e.g., Article IX of the 1949 Israeli-Egyptian Armistice Agreement and Article VI(2) of the 1949 Israeli-Lebanese Armistice Agreement. The 1953 Korean Armistice Agreement contained no specific provision in this regard, and the Chinese at one time indicated that they contemplated denying repatriation to United Nations Command personnel who had been convicted of crimes. (For the probable type of crime, see note VI-36 *supra*.) They dropped this position when advised that the United Nations Command would act in like fashion (Miller, *The Law of War* 248-49), and all prisoners of war who desired repatriation were repatriated.

¹²⁹ The seventh paragraph of Article 119 provides for the establishment of commissions to search for individuals who are missing in action and of whom no trace has been found. Such commissions are frequently concerned in the parallel task of locating and identifying the bodies of deceased members of the armed forces. See Articles 33 and 34 of the 1977 Protocol I.

¹³⁰ This is how the Franco-Prussian War (1870-71), World War I (1914-18), the French participation in World War II (1939-40), the Italian participation in World War II (1940-43), and World War II itself (1939-45) terminated.

as a result of an agreement between the belligerents while they each continue to field a viable armed force,¹³¹ even though one side may have a decided advantage at the time. Where the agreement terminating hostilities has been between two undefeated nations, it has usually provided for the repatriation of the prisoners of war held by each side.¹³² Where the hostilities have come to an end because of the defeat of one side and the victory of the other, the agreement terminating hostilities has frequently provided only for the immediate release of the prisoners of war held by the defeated side, leaving the release of the prisoners of war held by the victor for some future decision.¹³³ It was this latter situation against which the first paragraph of Article 118 was primarily directed.

Two major problems have arisen with respect to the proper interpretation of this paragraph of Article 118, quoted in full earlier in this section. The first arose in the course of the negotiation of the 1953 Korean Armistice Agreement and involved the question of the right of a prisoner of war to refuse repatriation and to request asylum either in the territory of the Detaining Power or elsewhere. It arose during the early part of 1952, and was directly responsible for increasing the time span of the hostilities in Korea by an additional year.¹³⁴ The background of the controversy, the arguments advanced, and the solution reached are exceedingly important and warrant discussion in some depth.

Historically, prisoners of war who would understandably be reluctant to accept repatriation, such as deserters, were not repatriated upon the termination of hostilities unless the agreement between the late belligerents specifically so provided;¹³⁵ and when it did so, it usually included an amnesty.¹³⁶ The older treaties of the modern era did not speak of the repatriation of prisoners of war—they provided

¹³¹ This is how the hostilities in Korea (1950–53) and United States participation in Vietnam (c. 1965–73) terminated.

¹³² See, e.g., Article 10 of the 1944 *Armistice Agreement between the Soviet Union and Finland*; Article 51 of the 1953 Korean Armistice Agreement; and Article 8(a) of the 1973 *Agreement on Ending the War and Restoring the Peace in Vietnam* and Article 1 of the 1973 *Protocol Concerning the Return of Captured Military Personnel*. See generally Levie, *Armistice Agreement* 897–99.

¹³³ See, e.g., the 1940 Franco-German Armistice Agreement, the 1943 *Armistice Agreement with Italy*, and the 1945 Hungarian Armistice Agreement. (The latter, executed on 20 January 1945, called for the immediate return of all prisoners of war held by Hungary. The *Treaty of Peace with Hungary*, executed more than two years later, on 10 February 1947, called for the repatriation of Hungarian prisoners of war. See also note 115 *supra*.)

¹³⁴ Had it not been for the dispute over the question of voluntary versus involuntary repatriation, the armistice which brought the hostilities in Korea to an end would probably have been signed in June or July 1952, instead of July 1953.

¹³⁵ Grotius, *War and Peace*, Book III, Ch. I, sec. 22, n.3. See the discussion of the problem of the disposition of deserters and defectors at pp. 76–81 *supra*.

¹³⁶ Schapiro, *Repatriation* 321.

that the prisoners of war should be "set free," or "set at liberty," or merely "released."¹³⁷ Treaties of a later period entered into between Russia and Turkey permitted prisoners of war who had changed their religion to refuse repatriation.¹³⁸ The German-Russian agreement supplementary to the 1918 Treaty of Brest-Litovsk, the treaty that ended Russian participation in World War I, was but the first of approximately 20 treaties entered into by the new Soviet Russia between 1918 and 1921 containing provisions under which the individual prisoner of war had the privilege of deciding whether or not he would accept repatriation.¹³⁹ And the Treaty of Versailles, ending World War I, contained a similar provision.¹⁴⁰

The practice followed during and after World War II changed somewhat,¹⁴¹ although there appears to have been general acceptance of the principle that a prisoner of war could not be repatriated against

¹³⁷ See, e.g., Article CX of the *Treaty of Peace between France and Her Allies and the Holy Roman Empire and Its Allies*, Münster, Westphalia, 24 October 1648.

¹³⁸ Tuck, Retention 16-17. See, e.g., the *Treaty of Kuçuk Kainardji* (1774) and the Treaty of Adrianople (1829).

¹³⁹ Tuck, Retention 32. Many of these treaties are cited and quoted in Acheson, *The Prisoner Question* 747-49. Article 17(1) of the German-Russian Supplement to the 1918 *Treaty of Brest-Litovsk* typically provided that:

The prisoners of war of both parties shall be set at liberty to return home, in so far as they do not desire, with the consent of the state which took them prisoner, to remain within its boundaries, or leave for another country.

See also, Article 1 of the 1920 German-Russian Agreement with regard to the Mutual Repatriation of Prisoners of War. These Soviet treaties were with countries of all political spectra, and former allies as well as former enemies. In 1935, one student of Soviet-established policies characterized such treaties as being in conformity with the generally accepted rule that repatriation of a prisoner of war requires his free will, or consent. Taracouzio, *Soviet Union* 111-13. See also Ginsburgs, *Refugees* 344 & 359. The calls for surrender issued by the Russians to the Germans during World War II uniformly promised to give the members of the enemy armed forces the choice after hostilities ended between returning to their homeland or to any other country to which they might desire to go. Statement of General William K. Harrison, 27 *Dept. State Bull.* 172 (1952).

¹⁴⁰ Article 220 of the Treaty of Versailles (1919) provided that prisoners of war "who do not desire to be repatriated may be excluded from repatriation."

¹⁴¹ The 1945 United States-Soviet (Yalta) Agreement Relating to Prisoners of War provided, in Article 1, that citizens of the two countries would be maintained separately from enemy prisoners of war "until they have been handed over to the Soviet or United States authorities, as the case may be." This and similar agreements entered into during and immediately after World War II resulted in the wave of suicides by members of the Soviet armed forces who had been captured by the Germans, had subsequently fallen into the hands of the Western allies of the Soviet Union, and did not desire to be repatriated to Russia, being fully aware of the fate that awaited them in the Soviet Union. See note I-141 *supra*; 1947 GE Report 245; Shub, *The Choice*, *passim*; Epstein, *Operation Keelhaul*, *passim*; Bethell, *The Last Secret*, *passim*.

his will.¹⁴² At the 1947 Conference of Government Experts the ICRC called attention to this problem. Because of the difficulties involved in making exceptions to the general rule of repatriation and in finding asylum in the face of ever more strict immigration laws, the Government Experts "decided to maintain the general principle of repatriation of all PW nationals of a given country to that country."¹⁴³ Thereafter, at the 1949 Diplomatic Conference the representative of Austria proposed an amendment to the Stockholm draft of the relevant article. The amendment read, in part:

Prisoners of war, however, shall be entitled to apply for their transfer to any other country which is ready to accept them.¹⁴⁴

This proposal was opposed by the Soviet representative because "it could be used to the detriment of the prisoners [of war] themselves and their country"; and the United States representative agreed with this argument.¹⁴⁵ At a subsequent meeting the Austrian representative stated that "prisoners of war must have the option of not returning to their country if they so desire."¹⁴⁶ The Soviet representative disagreed because of his stated fear that the proposal "might give rise to the exercise of undue influence on the part of the Detaining Power"—and once again the United States representative concurred with him.¹⁴⁷ The Austrian proposal was ultimately rejected by a "large majority,"¹⁴⁸ and the first paragraph of Article 118 was adopted with the language indicated above.

¹⁴² On a number of occasions the ICRC raised "the principle which it has at all times maintained, that no person may be repatriated against his will, if he should have any valid objection." 1 ICRC *Report* 560. There is no indication that any government ever challenged the ICRC's basic contention. In all probability, however, the Soviet Union would not have been among the nations with which the point was raised. (For a post-World War II indication of the continued validity of the principle that an individual should not be returned to his homeland against his will, see Article 33 of the 1951 *Convention Relating to the Status of Refugees*. This provision is incorporated by reference into the 1967 Protocol on the same subject.)

¹⁴³ 1947 GE Report 245.

¹⁴⁴ 2A *Final Record* 324. A United Kingdom objection based on cost to the Detaining Power was eliminated by an additional provision. *Ibid.*, 462.

¹⁴⁵ *Ibid.*, 324.

¹⁴⁶ *Ibid.*, 462.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* One author aptly states that "[i]n concentrating on the individual prisoner's right to be repatriated, his right *not* to be repatriated was largely ignored." (Emphasis in original.) Lundin, Repatriation 561. Others argue that the Austrian proposal was rejected only because of the desire not to include in the Convention any provision derogating from the general principle of entitlement to repatriation (Gutteridge, Repatriation 213) or because of the difficulty of finding an asylum country (Rockwell, Right of Nonrepatriation 368 n.38) and emphasize that because a proposal is rejected by an international conference does not mean that its opposite is approved. *Ibid.*

The interpretation to be given to the wording of the first paragraph of Article 118—"shall be released and repatriated"—was soon put to the test in the Korean armistice negotiations where the dispute over "voluntary versus involuntary" and "forcible versus non-forcible" repatriation occupied the center of the stage for a considerable period of time.¹⁴⁹ That dispute has been the subject of a great volume of legal literature¹⁵⁰ and it is not proposed to do more than to restate it briefly here. Suffice it to say that the major arguments advanced in support of involuntary, forcible repatriation were (1) the legislative history mentioned above; (2) the specific language of the first paragraph of Article 118 ("shall be released and repatriated"); (3) the provision of the first paragraph of Article 6 prohibiting any agreement between the belligerents that adversely affects or restricts the rights conferred on prisoners of war by the Convention; and (4) the provision of Article 7 prohibiting a prisoner of war from renouncing any rights granted by the Convention. The major arguments advanced in favor of voluntary, nonforcible repatriation were (1) the 1949 Convention was intended to protect individuals, not States, and forced repatriation would derogate from this intent; (2) permitting a voluntary decision of the individual prisoner of war, under proper safeguards, for or against repatriation is not a restriction of the rights secured by the Convention, contrary to Article 6, but rather is a guarantee that such rights will be meaningful; (3) Article 7 was included in the Convention in order to protect a prisoner of war from being coerced into giving up his rights under the Convention while being detained in custody, not to preclude a properly supervised decision against repatriation at the time of release from custody; and (4) Article 118, while assuring the prisoner of war of a right to repatriation, does not impose upon him an irrevocable obligation to accept repatriation.¹⁵¹ It is probable that the weight of the legal

¹⁴⁹ See note 134 *supra*.

¹⁵⁰ A sampling of the better known of the many articles written on the subject would include: Gutteridge, *The Repatriation of Prisoners of War*, 2 *Int'l. & Comp. L.Q.* 207; Charvat & Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 *Yale L.J.* 39; Lundin, *Repatriation of Prisoners of War: the Legal and Political Aspects*, 39 *A.B.A.J.* 559; and Mayda, *The Korean Repatriation Problem and International Law*, 47 *A.J.I.L.* 414. Two valuable studies of the subject, written *ex post facto*, may be found in Ball, *Prisoner of War Negotiations: the Korean Experience and Lesson*, *N.W.C. Rev.* September 1968 at 54; and Rockwell, *The Right of Nonrepatriation of Prisoners of War Captured by the United States*, 83 *Yale L.J.* 358.

¹⁵¹ See U.S. Department of State, *Legal Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War*; United Kingdom, Foreign Office, *Korea No. 1 (1953)*, Cmd. 8793 at 11-13. It should be remarked that the fact that the third paragraph of Article 109 gives the disabled prisoner of war an option to accept or refuse repatriation during the course of hostilities (see note 77 *supra*), while the first paragraph of Article 118 contains no comparable provision, did not escape comment.

arguments on one side or the other was not decisive in the reaching of the ultimate decision.¹⁵²

In December 1950 the General Assembly of the United Nations had adopted two resolutions concerning the repatriation of prisoners of war, one relating to the Greeks captured during the unsuccessful Communist attempt to take over that country (1946–49) and the second relating to World War II prisoners of war still in custody. The first of those resolutions recommended the repatriation of all prisoners of war “who express the wish to be repatriated,” while the second stated that the prisoners of war should be given “an unrestricted opportunity for repatriation.”¹⁵³ Now, with the Korean dispute, the General Assembly was called upon once again to express itself on the question of prisoner-of-war repatriation. On 3 December 1952 it adopted a resolution which affirmed “that force shall not be used against prisoners of war to prevent or effect their return to their homelands.”¹⁵⁴ The dispute was eventually resolved by a complicated arrangement¹⁵⁵ under which individual prisoners of war were interviewed in neutralized territory under the auspices of representatives of neutral States, in order to ensure the voluntariness of each decision against repatriation and to permit representatives of their homeland to attempt to dissuade those who elected not to return.¹⁵⁶ With respect to this solution President Eisenhower said:

The armistice in Korea, moreover, inaugurated a new principle of freedom—that prisoners of war are entitled to choose the side

However, it does not appear that any of the disputants thought it helpful to refer to the first paragraph of Article 66 which uses the phrase “the release of a prisoner of war or his repatriation.” (Emphasis added.)

¹⁵² One author, writing before an agreement was reached, said: “Public opinion in the free world is convinced that the majority in the United Nations which opposes the repatriation of prisoners of war by force is morally right, but the same public opinion is less certain of the validity of the legal case for such opposition.” Gutteridge, *Repatriation* 207.

¹⁵³ See note 116 *supra*.

¹⁵⁴ G.A. Res. 610; 3 December 1952, 7 U.N. GAOR, Supp. 20 at 3, U.N. Doc. A/2361 (1952). The vote was 54–5–1.

¹⁵⁵ The *Agreement on Prisoners of War in Korea*, signed 8 June 1953, amplifies and implements the prisoner-of-war repatriation provisions of the 1953 Korean Armistice Agreement itself. Neither the prisoner-of-war agreement, nor the results of its implementation, can really be called “face-saving” for the North Koreans and Chinese Communists.

¹⁵⁶ Because of the methods adopted by the Communist interrogators and the anti-Communist prisoners of war, only a comparatively small percentage of the North Korean and Chinese prisoners of war who had previously declared themselves against repatriation were actually interviewed—and thousands of them refused repatriation. One British and 18 American prisoners of war held by the Communists refused repatriation at the time. The number of South Koreans who elected to remain in North Korea is impossible to determine with any degree of exactitude.

to which they wish to be released. In its impact on history, that one principle may weigh more than any battle of our time.¹⁵⁷

Needless to say, the Communists felt otherwise.¹⁵⁸ It remains to be seen whether the decision reached in Korea will be accepted as the established rule of international law and as the proper application of the first paragraph of Article 118 of the Convention.¹⁵⁹

The second major problem of interpretation that has arisen with respect to the first paragraph of Article 118 concerns the words "without delay after the cessation of active hostilities." The question to be solved is the method of determining that there has been a "cessation of active hostilities" within the meaning of the Article.

The Indo-Pakistani armed conflict that began early in December 1971, when India invaded what was then East Pakistan, ended on 16 December 1971 when the Pakistani commander in chief signed what amounted to an unconditional surrender of all Pakistani armed forces in East Pakistan.¹⁶⁰ On 21 December 1971 the Security Council of the United Nations noted that "a cease fire and a cessation of hostilities prevail" between India and Pakistan.¹⁶¹ Nevertheless, in

¹⁵⁷ Eisenhower, "Address at the Columbia University National Bicentennial Dinner," *Public Papers of the Presidents of the United States: Dwight D. Eisenhower—1954* at 521-22. The Senate Foreign Relations Committee concurred in the position taken by the United Nations Command and in the solution reached. 1955 *Senate Report* 24. The ICRC, which had supported voluntary repatriation during World War II (see note 142 *supra*), continues to take that position. Pictet, *Commentary* 541-49. For the principles to be derived from the agreement reached, see Stone, *Legal Controls* 664. See also, Baxter, *Asylum* 495.

¹⁵⁸ Hess, Post-Korea 53. As the Soviet Union, for ideological reasons, was compelled to support the North Korean and Chinese position condemning voluntary repatriation and demanding forcible repatriation [see Vyshinsky, 7 U.N. GAOR, 1st Comm. 37, 89 (1952)], it may be said that it has reversed the position which it had espoused in the vast majority of treaties on the subject entered into by it after World War I and the actions taken by it during World War II. Ginsburgs, *Refugees* 361. See note 139 *supra*. But see Miller, *The Law of War* 230.

¹⁵⁹ The problem did not arise in the Sino-Indian hostilities (1962-63). Miller, *The Law of War* 250. While the People's Republic of China did accept voluntary repatriation for civilians, they probably did so because of the textual differences between the Third and Fourth Conventions. Cohen & Leng, *Sino-Indian Dispute* 310-11. The problem did not arise in any of the Middle East armed conflicts (1956, 1967, 1973), nor in the Indo-Pakistani armed conflict (1971). Among the Paris agreements on Vietnam, the 1973 *Agreement on Ending the War and Restoring the Peace in Vietnam* and the 1973 *Protocol Concerning the Return of Captured Military Personnel* both called for the return of all captured military personnel. The absence of a dispute on this subject probably resulted from the fact that the South Vietnamese had already released all personnel in their custody who had indicated an unwillingness to accept repatriation. Rockwell, *The Right of Nonrepatriation* 366 n.31.

¹⁶⁰ *New York Times*, 17 December 1971 at 1, cols. 5-6.

¹⁶¹ S.C. Res. 307, 21 December 1971, 26 SCOR, *Resolutions and Decisions of the Security Council 1971* at 11, U.N. Doc. S/INF/27 (1972) [reprinted in 66 A.J.I.L. 710 and 11 I.L.M. 125 (1972)].

the months that followed, India refused to repatriate the more than 90,000 Pakistanis whom she held as prisoners of war, one reason given being that, although there has been a cessation of active hostilities, the event that under Article 118 calls for the repatriation of prisoners of war "without delay," the possibility of a renewal of hostilities could not be excluded.¹⁶² There is certainly merit to this contention, and it is doubtful that any student of the law of armed conflict would contend that the Pakistanis who had been taken into custody on and shortly after 16 December 1971 should have been released and repatriated without delay immediately after the 21 December 1971 determination of the Security Council that there had been a cessation of hostilities. But month followed month without a resumption of hostilities, the Parties reached a partial political agreement in July 1972,¹⁶³ and still India refused to comply with the first paragraph of Article 118.¹⁶⁴ It is clear that, however justified India may have been originally in delaying repatriation, the justification was valid only until she was assured that there was actually a "cessation of active hostilities"—something that must have been completely clear within 30 or 60 days after the surrender. There can be little question but that India delayed the release and repatriation of the Pakistani prisoners of war not because she was afraid that hostilities might be resumed, but because she was using the prisoners of war as hostages in an attempt to force Pakistan to accept the secession of East Pakistan and to recognize it as the new independent People's Republic of Bangladesh.¹⁶⁵

The question that arises out of this incident is when has there been a "cessation of active hostilities" within the meaning of Article 118 so that the repatriation of prisoners of war must begin in order to comply with the requirement of being "without delay"? Lauterpacht interpreted "cessation of active hostilities" to mean "a cessation of hostilities as the result of total surrender or of such circumstances or conditions of an armistice as render it out of the question for the

¹⁶² Letter, No. GEN/103/4/72 dated 4 September 1972, from the Indian Permanent Representative at the United Nations Office in Geneva to the Secretary-General of the International Commission of Jurists. (Original on file in the office of the Secretary-General, International Commission of Jurists, Geneva.)

¹⁶³ The *Simla Agreement* of 3 July 1972.

¹⁶⁴ Repatriation did not begin until late 1973 (after the signing of the *Delhi Agreement* of 28 August 1973), almost two years after the cessation of active hostilities. It was not completed until the spring of 1974.

¹⁶⁵ *New York Times*, 19 March 1972 at 1, cols. 6-7. Writing in 1963, long before the dispute arose, an Indian author said that a "[n]umber of phoney [*sic*] reasons are given by the detaining power to justify his illegal detention of prisoners [of war]." Hingorani, *Prisoners of War* 208. The applicability of that statement to the Indian action concerning the Pakistani prisoners of war after the December 1971 armed conflict is patent.

defeated party to resume hostilities."¹⁶⁶ As noted above, there is considerable merit to this position— but, unfortunately, it does not help in the search for an overall answer to the basic question propounded.¹⁶⁷ Probably, the most generally acceptable answer would be a variable one: (1) when there is a victorious side and a defeated side, the repatriation of prisoners of war held by *both* sides should take place without delay upon the cessation of active hostilities;¹⁶⁸ (2) even if there is a victor and a vanquished, and an armistice with a cessation of hostilities between them, the process of repatriation of the prisoners of war held by the victor should not normally be instituted if overall hostilities continue;¹⁶⁹ (3) if there are two undefeated belligerents when active hostilities cease, the repatriation of the prisoners of war held by both sides should take place without delay;¹⁷⁰ and (4) in the unusual case where one side fears the possibility of a resumption of hostilities, the decision as to the validity of the basis for such fear, and the decision as to whether the process of repatriation should begin, should be made, not unilaterally by an interested party as India did, but by some neutral agency such as the Protecting Powers.¹⁷¹

¹⁶⁶ Lauterpacht-Oppenheim 613. It was chiefly upon this statement that India relied for its two-year delay in repatriating the Pakistani prisoners of war. Letter, note 162 *supra*.

¹⁶⁷ A French scholar has taken the position that once there is a cessation of active hostilities, as there was in the Indo-Pakistani armed conflict, the only permissible delay in the repatriation of prisoners of war is that necessary to organize the logistics of the repatriation. Bretton, *De quelques problèmes du droit de la guerre dans le conflit indo-pakistanaï*, 18 *Annuaire français de droit international* 201. It would appear that this goes too far in the other direction.

¹⁶⁸ This was probably the situation which was primarily in the minds of the draftsmen of the first paragraph of Article 118 who, in 1947, 1948, and 1949, were witnesses to the continued detention by the victors of prisoners of war, mostly German and Japanese, taken in a war that had ended in May and September 1945 respectively. See note 116 *supra*. Article 85(4) (b) of the 1977 Protocol I makes "unjustifiable delay in the repatriation of prisoners of war or civilians" a grave breach of the Protocol. Presumably, this refers to repatriation after the cessation of active hostilities.

¹⁶⁹ During World War II the Germans released many French prisoners of war in France. Some were subsequently taken back into custody but were then frequently denied prisoner-of-war status; and some of those released who were caught while attempting to reach England in order to rejoin the fighting received severe penalties, although as prisoners of war attempted escape should have brought only minor disciplinary punishment. See p. 406 *supra*. However, in a situation such as occurred when Germany surrendered in May 1945, while Japan continued to fight, no reason can be perceived for delaying repatriation of the prisoners of war of the defeated nation, as their ability to aid the remaining belligerent is minimal.

¹⁷⁰ In this situation there is normally no problem, as a provision for the repatriation of prisoners of war by both sides will undoubtedly be included in any agreement for the cessation of hostilities.

¹⁷¹ While it could be assumed that Protecting Powers would act humanely, it could also be assumed that they could be depended upon not to act precipitously as

It is fairly evident that, for one reason or another, victorious belligerents will continue to be reluctant to begin the repatriation of prisoners of war promptly upon the cessation of active hostilities. The reason for this reluctance might well be a fear, valid or invalid, of the possibility of the resumption of hostilities; it might also be based upon a desire to extort political or other concessions from the defeated State; or upon the desire to continue to have the prisoner-of-war labor available for reconstruction or other purposes. Here again is an area where the other Parties to the Convention can (and should) perform a valuable humanitarian service by inducing compliance with the provisions of the first paragraph of Article 118 by reluctant victors.

they would certainly not want to embroil themselves by calling for repatriation only to see a subsequent resumption of hostilities. Of course, the international commission suggested by this author (*see* pp. 19-22) could exercise this function as well as the others proposed for it. Once again, it is believed that this function should not be assigned to a political organ such as the Security Council of the United Nations. (The 21 December 1971 resolution of the Security Council, cited above at p. 426, was so cited as some evidence of the cessation of hostilities, not as being conclusive thereof.)